Paolo Fois


The present article starts from the observation of an aspect generally neglected by the doctrine which characterizes the TEEC of 1957, clearly aimed at ‘harmonization’ (or ‘approximation’) of the domestic laws of the Member States, and not at their ‘unification’. In fact, the TEEC, with reference to the substantive law, considers the harmonization process as a result of the use of an act, the directive, which provides for an obligation of result, while in the case of the rules of private international law the reduction of differences between the national laws is promoted through international conventions instead of Community acts.

A controversial practice that emerged in the mid-‘60s led to a shift away from the choices contained in TEEC, with a late and however partial change of its rules in this regard. This was made possible, for the rules of substantive law, at first, by a law through which the Court of Justice has found the practice of so-called ‘detailed directives’ legitimate. In a second step, in the text of the Treaty the generic term ‘measures’ has been repeatedly used in place of the traditional term ‘directives’. The term ‘approximation’ has not changed, thereby improving the doubts as to the choice of using regulations of unification on the basis of recognized power to adopt ‘measures’.

With reference to the rules of private international law, the choice to proceed with their ‘communitarisation’, using no longer the instrument of an international convention, but EU regulations, has materialized in the Amsterdam Treaty of 1997, in particular through the amendments to Articles 61 and 65 of the TEC, which gave the Council the power to adopt measures in the field of judicial cooperation in civil matters having cross-border implications. The decision to use the term ‘measures’ is clearly inspired by the experience previously gained in the field of rules of substantive law, but is not exempt with concerns expressed about the power to unify the laws of the Member States through the instrument of regulations. The above-mentioned Article 65, in fact, gives the EU only the limited power to improve and simplify the national legal systems, namely ‘to promote’ the compatibility of the rules applicable in the Member States concerning conflict of laws and of jurisdiction.
Gian Luigi Tosato

European Constraints to Fiscal Policies

It is the purpose of this paper to put the Fiscal Compact in the right perspective and to clarify the extent of the budgetary discipline laid down at the European level. The Fiscal Compact essentially restates a set of rules originally provided in the Maastricht Treaty and subsequently supplemented by the Stability and Growth Pact and the recent Six Pack. The resulting obligations for the Member States are extremely tough but entail a margin of flexibility. The balance budget objective admits some mitigations as to the manners and timing for its achievement. Furthermore, pursuant to Article 126 (3) TFEU, the Commission has to take into account all “relevant factors” (including investment expenses and the financial health of the private sector) before starting an excessive deficit procedure.
Andrea De Guttry

Duty of Care of the EU and Its Member States towards Their Personnel Deployed in International Missions

In this article, the author examines the current interpretation of the “duty of care” and the obligation to protect life in the international legal system. He defines the precise obligations of the EU and its Member States at this regard, points out what has been done so far to implement them, and highlights the potential consequences of violating these obligations.

There are two legal bases for this development: the evolving concept of “duty of care” whose content and scope has become more precise thanks to the significant contribution of international tribunals, and the more general duty incumbent on State and International Organisations to adopt an active policy to protect life. The practical implications of these two rules are discussed in this article and require the European Union Institutions and its Member States to be extremely careful in planning international operations and in dealing with their staff and personnel sent on mission.

As most of the problems associated with the notion of the “duty of care” are similar both for the EU and its Member States, and as they are intrinsically connected and sometimes difficult to address separately, the present investigation will take into account both situations, highlighting where appropriate potential differences in the legal regime regulating the obligations of the EU and those of the Member States. The continuous (and inevitable?) cross-fertilization between the “duty of care” of States and of International Organizations makes the decision to focus the research on both situations almost inevitable.
Giandonato Caggiano

The Balance between the Freedoms of Movement and Non-economic General Interests of the Member States in the Internal Market

The article is devoted to the progressive reduction of national measures restricting the freedoms of circulation in the EU internal market. Generally, the process of legislative harmonization provides an assessment of the balance between the interests of the European Union to market integration and the interests of the Member States. If this is not the case, the Court of Justice held an evaluation on the balance between the four freedoms of movement and the non-economic general interests of the Member States, according to the test of necessity and proportionality. National courts participate through the dialogue of preliminary ruling, within the margin left by the "guidelines" given by the Court of Justice.

The study examines the legitimate restrictions to each of the four freedoms of movement (the concept of “measures having equivalent effect to quantitative restrictions and the directly and indirectly discriminatory rules) and on the basis of fundamental rights (including those of a social nature); it analyzes the rationale and the functioning of the derogations provided by the TFEU and those created by the ECJ (with specific attention the characteristics of the protection of health and the environment). Reflections are also devoted to the strengths and weaknesses of the process of legislative harmonization and the case-law methodology: the first stop the evaluation of conflicting interests while facilitating the application by operators; the second enhance flexibility, yet creating legal uncertainty.

The conclusions confirm the federal dynamic process in EU integration. The check and balance method is an expression of the constitutional function of the Court of Justice until the time of ‘occupation’ of the internal market’ shared competence by the EU harmonization measures.
Cristina Fasone, Nicola Lupo


The article deals with the steady empowerment of the European Parliament by the revision of the European Treaties, and the updating process of its rules: a process that is continuing after the Treaty of Lisbon. Indeed, the European Parliament uses the amendments of its rules instrumentally, aiming at further increasing its power, and it generally succeeds in achieving this objective. This is shown in the present article, firstly through the analysis of the internal bodies of the institution, which is organized in a way that enhances its decisional capability. Secondly, the “form of government” of the European Union is considered, looking at the European Parliament’s relationship with the Commission, also in the light of their 2010 interinstitutional agreement. Finally, the position of the European Parliament within the legislative procedures is examined, taking into account the new forms of cooperation with the national Parliaments.
Monica Lugato

Reflections upon the “Margin of Appreciation” in the European Convention on Human Rights

The present article is an inquiry into the legal base of the margin of appreciation, based upon – but not limited to – the Lautsi (GC) case, where it played a key role. Firstly, the author argues that the margin of appreciation is neither a doctrine nor an interpretive tool, but the result of an interpretive process guided by the rules on the treaty interpretation and that therefore it is according to those rules that its identification by the European Court of Human Rights has to be evaluated. This approach allows to shed some light on the – widely criticized – “European consensus” criterion, under which the Court constructs the “ordinary meaning” of the words used in the ECHR when neither the text, nor the object and purpose, nor the context, offer precise leads. The author argues that the “European consensus” is to be understood as the expression of the subsequent practice of the Contracting Parties in the application of the ECHR, mentioned as one of the elements of interpretation by Article 31, para. 3, lit. b), of the 1969 Vienna Convention.

Secondly, as is increasingly recognized, the margin of appreciation is a corollary of the principle of subsidiarity and is therefore founded upon one of the structural principles of the ECHR, recognized as such by the European Court. The author suggests that, given the concurring roles of national and international authorities in the protection of human rights, it is of crucial importance that their reciprocal rights and duties are clearly identified, with due regard to legitimacy considerations. The role of national democratic authorities, adequately subsidized by the international authorities in the implementation of their international obligations, seems, at the present stage, to require to be enhanced and not erased.
The on-going Fragmentation of the European “statute” of Long-term Residents between Market Integration and Socio-political Integration

Within the European Union, the change of the structure of national communities because of migrations lato sensu (and in particular because of the so-called stabilized migrants) has caused the partial erosion of the traditional dichotomy between the status of citizen and that of non citizen (alien) and the increasing marginalization of the principle of reciprocity between States. Such process has been originated by the need of foreigners to be guaranteed in their human rights and their fundamental freedom, so much referred to in the jurisprudence of the European Court of Human Rights, of the Court of Justice but also of the Italian Constitutional Court. The respect for such needs, apart from the status civitatis, has caused a gradual extension, in favour of non citizens (rectius: citizens of Third-Countries), of some rights traditionally reserved for citizens. Such rights are based on a kind of “stabilization” of the migrant in the host State, which causes the gradual weakening of the otherness characteristics compared with itself and the underlying community; they receive a different “gradualization” according to the degree of stability characterizing the link between the migrant and the host State, even if the solutions adopted within the systems of the European States cannot be assimilated.

This article explores the substantive and procedural contents of the “Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term resident” as one of the legal steps towards an EU approach on regular immigration. Because of its difficult implementation (witnessed by the Report to the European Parliament and to the Council on the application of this Directive in the Member States of 28 September 2011) we underline the provisional nature of the “statute” of the long-term resident between national citizenship and European citizenship.

We hope that the gradual “emancipation” - carried out both in the derived law and in the jurisprudence of the Court of Justice - of the Italian citizenship, as regards its being functional to free market, is liable to produce effects also as regards the rights of foreigners coming from Third Countries. In the light of a synthesis between “inclusionary and exclusionary” dimensions of citizenship, the passage could be from a European citizenship which has been for a long time the “fundamental status” of the citizens of member States, to an intermediate status “with real significance for everyone”, becoming a real instrument of social integration.
Even before it became legal tender, the euro has been and is, today more than ever, the focus of an intense debate in which different voices and positions are interwoven. The considerable attention paid to the single currency is related to the evidence of the success (or the failure) of the European project on the single currency, essentially seen in a macroeconomic perspective: the lion’s share in the debate is played, in this sense, by the amount of analysis, studies, statements about the economic changes and financial implications that the adoption of the euro has led and will lead for the economy at the Member States, the European Union and the wider international context levels. There is, however, another side of the euro, which is strongly linked to the citizenship-building process and, paradoxically, results as a less and/or properly thematized matter both by the scientific community and policy makers. In particular, four dimensions of this “hidden side” of the euro can be detected:

- the cultural one, identifying the currency as an instrument to foster a common identity;
- the social one, identifying the euro as a communication and exchange means that ties people in a community based on trust;
- the one of the economy of everyday life, as currencies allow citizens to access to goods and services, to sell and purchase, to measure the value of their own work;
- the political one, as currencies represent the political system that, by emitting them, exercises powers on the behalf of citizens that chose it.

The article attempts to analyse these hidden dimensions by firstly presenting the results of a survey carried out by FONDACA between 2010 and 2011, aimed at investigating the extent to which they have been dealt in the scientific and policy debate. Then, a more analytical reflection on the “other side of the euro” is provided, by analyzing the dimensions as an empirical phenomenon.
The paper analyzes the legal measures adopted by the European Union (EU) and its Member States in order to manage the global financial and economic crisis that started in 2007. The Author divides those measures into three main groups: rules adopted to regulate EU economic policies in physiological – that is “non-crisis” – conditions; general rules for critical economic situations that were not specifically thought of for the ongoing crisis; ad hoc instruments built to deal with the ongoing crisis (e.g. Euro-Plus Pact; the so-called six pack; the European semester; the European Financial Stabilization Mechanism; the European Fund of Financial Stability; the Treaty on stability, coordination and governance in the economic and monetary union; the European Stability Mechanism).

The Author concludes that all the examined measures have resulted in modifying the European Union economic constitution.
Valeria di Comite

The “Wish to Live Together” with the Family and the Denial of the Right to Family Reunification for “Static” European Citizens in the Light of Dereci Judgment

In 2011 the Court of Justice of the European Union defined the scope of the Treaty provisions concerning European citizenship, as regards some questions relating to the right of residence of those third-country nationals who are related to “static” European citizens. The case Ruiz Zambrano paved the way, when the Court first recognized, according to Article 20 TFEU, the right of a third-country citizen to obtain the right of residence in the State where his two sons – both European citizens – lived. The Court’s position stated in this case does not seem to be contradicted from the cases that followed, that clarify the exceptional character of the Ruiz Zambrano ruling. A clear sign in this sense was given by the McCarthy and, above all, by the Dereci rulings. The latter clearly shows that the main question was if the “wish” of the applicants in the main proceedings “to live with” their family members, who are European Union citizens, may be protected in the European Union. To answer this question the Court narrows the scope of the criteria based on the privation of the “genuine enjoyment of the substance of the rights” conferred by virtue of the status of European citizenship. At the same time the Court shows the implication of this question with the protection of fundamental rights. This work investigates whether and in which cases the “right of residence” of third-country nationals and the “right to respect family life” may be protected in the European Union, with a particular focus on the improvements and limits of the recent EU case-law.
Between 2007 and 2009, after the agreements concluded with Libya to combat clandestine immigration, Italy instated a policy of sending undocumented migrants and asylum seekers on the high sea; in several cases the persons intercepted were taken back to Libya.

On February 23, 2012, the Grand Chamber of the European Court of Human Rights issued a landmark judgment in the case of *Hirsi Jamaa et al. v. Italy* against such operations. The Chamber held that there had been two violations of Article 3 ECHR (obligation of member States to protect the applicants from torture and inhuman or degrading treatment) because the applicants had been exposed to the risk of ill-treatment in Libya and of repatriation to Somalia or Eritrea, a violation of Article 4 of Protocol No. 4 to Convention (prohibition of collective expulsion of non-nationals), finally, a violation of Article 13 (right to effective remedy), taken in conjunction with the other Articles (for lack of suspensive effect, the applicants had no remedy available to them satisfying the requirements of Article 13).

In particular, the Court ruled that Italy had exercised both *de jure* and *de facto* control over the applicants from the moment they were taken aboard Italian ships, and restated that special nature of the maritime environment cannot justify an area outside the law where individuals are covered by no legal system capable of affording their enjoyment of the rights and guarantees protected by the Convention (§178). The *Hirsi* judgment has clarified the extraterritorial protection offered by the Convention, and in particular that the *non-refoulement* under Article 3 ECHR also applies on the high seas. The judgment has implications for Frontex operations.
The article is devoted to the debate on the impact of the Return Directive on national criminal legislation.

In particular, the article focuses on the judgments of the Court of Justice in *El Dridi* and *Achughbabian* cases and their consequences in the French legal system. It highlights, as asserted by the EU courts, that the administrative detention of illegal alien or illegal immigrant is the last resort of the coercive measures envisaged by the Return Directive, the purpose of which is to ensure that the Member State shall make every reasonable effort to make the return with respect of the fundamental rights of citizens of Third Countries and to prevent that the deprivation of the freedom of those people would continue beyond acceptable limits and would be proportionate in order to effectively pursue expulsion. It follows that the national law-maker has full jurisdiction to resort to the criminal law and to the imprisonment or before beginning the return process and, in particular, in the preliminary stage of this procedure, which may provide for the arrest or detention of foreigners in order to identify them and prevent their flight, or when the return procedure could be considered exhausted.
Fabio Ferraro

The New Instrument of the Participatory Democracy and Its First Applications

This article deals with the European citizens initiative, which is a topic of great relevancy and interest in strengthening the democratic legitimacy of the European Union. Indeed, this new instrument of participatory democracy gives EU citizens the possibility to invite the European Commission to present a proposal for a legal act. The article touches upon the most salient aspects and problems of the citizens initiative, recalling the first registered initiatives published on the Commission’s website. The major problem regarding implementation of the citizens initiative is that the Commission is not obliged to propose a legal act at the completion of the procedure.
The article analyses the 2011 draft agreement between the European Union and the Council of Europe on the Union’s accession to the European Convention on Human Rights. The study highlights some of the more controversial issues in the negotiations for accessions, namely the co-respondency mechanism envisaged by the draft agreement in order to preserve the autonomy of the EU legal and institutional structure, and the asymmetries that may arise in the jurisdiction of the ECJ and the ECHR respectively relating to human rights in the EU legal system. The article concludes that many problems still remain unsolved, and it is up to the EU institutions to put in place adequate mechanisms to ensure compliance with the ECHR and execution of ECHR judgements, taking into account not only the preservation of the internal balance between EU and Member States, but also, and foremost, the citizens’ interest in an efficient and effective system of human rights protection at the European level.
Over the past ten years, the fight against international terrorism has involved States and international organizations (first and foremost, the United Nations and its organs) in the search for new legal instruments to target and punish those responsible for crimes, including individuals. Security Council Resolution no. 1267/1999 first imposed sanctions against the Taliban for their support of the Al-Qaida organization and established a Sanctions Committee for the dual purpose of designating Taliban individuals and entities associated with Al-Qaida and monitoring the implementation of the sanctions. After 11 September 2001, the sanctions regime was extended to the “Al-Qaida network” and strengthened through new measures, but it raised some problems with respect to the international human rights standard, because of the lack of transparency and due process in both the listing and the delisting procedures. These features affect the very nature of the sanctions, by making them similar to criminal penalties, although imposed without any trial. Given the absence of a judicial review mechanism of the Security Council’s measures before the International Court of Justice, domestic and European courts have been required to ensure the respect of the rule of law principle towards individuals affected by targeted sanctions, as occurred in the famous Kadi case. In such a context, this paper aims to investigate the admissibility and the limits of the “diffuse judicial review” of the Security Council’s sanctions regime in the light of the international human rights law.
The recent Order of the EU Court of Justice on Currà case raises one more time the matter of balancing the State immunity from civil jurisdiction and the individual right of suing for damages occurred in case of breach of fundamental human rights within the EU law perspective. The Order was passed just few months after the well-know decision of the International Court of Justice on “Jurisdictional Immunities of State (Germany v. Italy: Greece intervening)”. The Order is substantially in compliance with the EU case-law for similar matters. In spite of that, there are two issues deriving our attention: the first is related to the reasoning followed by the Court which is not entirely convincing. According to us, the Court fails to rightly classify the real object of the preliminary ruling, which belongs to the “judicial cooperation on civil matters” (in this case ruled by EU Regulation 44/01); thus, it fails to consider the real legal basis on which it could deny its jurisdiction: the classification of the facts under consideration as iure imperii actions. As a further consequence, the CJEU does not take into consideration Article 66 of Regulation 44/01 which should govern its ratione temporis competence. Therefore, it wrongly assumes its lack of jurisdiction. The second topic is related to future development of the EU case-law about the wider issue of rightly balancing State immunity and protection of fundamental human rights. As far as we know, this is one of the first judgements occurred on this matter after the Lisbon Treaty and the first after the above mentioned ICJ’s decision. The EU Court, in our view, has shown a “conservative” approach, which is not properly consistent with the attitude that the EU showed in the past; and it gives a clear signal for the future development of its jurisprudence on this matter.
Chiara Gabrielli

The Notion of Extra-Territorial Jurisdiction in Light of Recent Case-law

This paper deals with the evolution of the notion of extra-territorial jurisdiction of the Contracting States of the ECHR (under ECHR Article 1) in the jurisprudence of the European Court of Human Rights, with particular reference to the most recent cases: the *Al-Skeini* decision on the control of a territory and/or of an individual through the actions of state agents and the exercise of public powers, also during patrolling and exchange of fire in open spaces; the *Al-Jedda* decision on the conduct of troops that operate in the field of a multi-national force based on a Security Council resolution; the *Hirsi* decision on the activity of police on the high seas. In this recent case-law, the European Court seems to be more in line with the International Law Commission’s codification. The case-law that will be examined in this work will show an evolving path that strengthens the jurisdictional protection of human rights in the ECHR.
Claudia Morini

The EU Action Aimed at Strengthening Procedural Rights of Suspected or Accused Persons in Criminal Proceedings

Considering the importance of procedural rights of suspected or accused persons in criminal proceedings and the complexity of harmonizing them at EU level, a decision was taken in order to address them in a step-by-step approach. To achieve common standards in this field, and create the basis for mutual trust, a Roadmap on procedural rights was adopted in 2009 by the Justice Council proposing five legislative measures: the right to interpretation and translation; the right to information about rights (Letter of Rights); legal advice, before and at trial; the right for a detained person to communicate with family members, employers and consular authorities; protection for vulnerable suspects. According to this roadmap, several legislative acts have been adopted to date, such as the Council Framework Decision 2009/299/JHA of 26 February 2009 enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial and the Directive on the right to interpretation and translation in criminal proceedings. The aim of this paper is to analyze existing legislative measures dealing with procedural safeguards in criminal proceeding.
Chiara Sisler

Mixed Agreements and the Preliminary Ruling Jurisdiction of the Court of Justice: An Interpretative Approach

This article addresses the limits of the Court of Justice’s jurisdiction to give preliminary rulings on the interpretation of mixed agreements. Although the issue has been the subject of several judgements, the criteria governing the allocation of competences between the Court and national judges have not yet been fully clarified. The reason for this is to be found in the extensive approach of the Court towards its jurisdiction, that has resulted in a complicated picture where solutions are not supported by coherent arguments and decisions lack predictability. This article aims at proposing a systematic reading of the case-law of the Court, drawing inspiration from a recent judgement to further elaborate on the issue.
Andrea Spagnolo

The Transfer of Suspected Pirates in the Context of EUNAVFOR: The Agreements between EU and Third States

The article focuses on the agreements concluded by the EU for the transfer of suspected pirates captured in the context of EUNAVFOR to Kenya, Seychelles and Mauritius. After a brief introduction, the first part of the article explores the applicability of human rights treaties and of the principle of non refoulement to the transfer of suspected pirates. In this regard, a detailed description of the provisions contained in the above mentioned agreements is presented, in order to shed a light on the possible gap in the protection of fundamental rights. The second part of the article deals with the attribution of conducts when individuals suffer violation of the agreements taking into account the peculiar features of the regime created by the agreements within the context of EUNAVFOR. In this regard, the applicability of the effective control as the most suitable criterion is investigated, in order to ascertain the subject to whom the conduct is attributable.