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SIRAGUSA AND THE ETERNAL RECURRENCE. REVIVING OLD TESTS TO APPLY THE EU CHARTER OF FUNDAMENTAL RIGHTS TO NATIONAL MEASURES.

Posted on 26 Maggio 2014 by ***Filippo Fontanelli***

On 6 March 2014, the Court delivered the order in the *Siragusa* case. This decision sheds new light on the old question of the application of the Charter of Fundamental Rights of the European Union (Charter) to national measures. In particular, *Siragusa* challenges the efficiency of the recently minted *Fransson*/*Texdata* equivalence, and draws on the almost 20-year old precedents in *Annibaldi*, *Maurin* and *Kremzow* to suggest a more articulated and composite test. The case adds an episode to the disorienting jurisprudence of the Court on article 51(1) of the Charter (a thorough analysis has just been published here).

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The claimant in the main proceedings challenged an Italian measure which required without exception the demolition of certain building works conducted without the previous authorization of the competent authorities, in areas covered by landscape conservation safeguards. The

Italian administrative tribunal raised a question of compatibility with EU law regarding the unconditional obligation to dismantle the works, without a possibility of retrospective clearance, not even if the works are ultimately found to be compatible with the landscape conservation criteria. In the view of the Italian court, this national measure could contradict the EU general principle of proportionality and of the right to property as protected by art. 17 of the Charter.

Naturally, these standards of legality of EU law are capable of displace the domestic provision only if it "implements EU law" under art. 51(1) of the Charter. The referring court listed a range of EU law instruments in the field of environment protection that could substantiate the implementation link, noting that the protection of landscape is a component of EU environmental policies.

This notwithstanding, the Court declined to exercise its jurisdiction, finding that the challenged measures fell outside the scope of EU law. Interestingly, it did not limit itself to use the *Fransson* equivalence (roughly, that the Charter applies whenever EU law applies, see our comment here) to reach this conclusion.

Quite to the contrary, it acknowledged the connection between landscape policies and the EU competence on environmental protection, but also noted that

. . . the concept of 'implementing Union law', as referred to in Article 51 of the Charter, requires *a certain degree of connection* above and beyond the matters covered being closely related or one of those matters having an indirect impact on the other. (emphasis added)

The Court pretended to borrow the standard of a "certain degree of connection" from the 1997 judgment *Kremzow*, but the parallel is not convincing. In that case, the Court noted that the facts in the main proceedings were "not connected *in any way* with any of the situations contemplated by the Treaty provisions" and that the "*purely hypothetical* prospect" of exercising an EU right that could be affected by the national measures was incapable of establishing a "sufficient connection with

Community law" . In the present case, the Court had instead recognized that the situation was connected in some way to EU law: the final decision of the Court was based on an assessment of degree, not on a binary choice between existence and absence of a link. After all, the matrix of the two cases was very different: in *Kremzow* at issue was the *effet utile* of the Treaty provisions on the freedom of movement, which was allegedly threatened by domestic measures that clearly fell outside the scope of EU law. In *Siragusa*, instead, it was precisely the issue of the respective reach of EU and domestic law, and their possible overlap *ratione materiae*, which was at stake.

More revealing is the Court's reference to *Annibaldi* . The Court explained that a national measure "indirectly affecting EU law" might nevertheless fall outside its scope, especially if they have a different purpose. This specification is instructive: it revamps the checklists that the Court provided in the recent cases *Iida* and *Ymeraga* for ascertaining the application of Art. 51(1) of the Charter. With *Siragusa*, these lists are carried over into the post-*Fransson* era, something surprising if it is true that "in *Åkerberg Fransson*, the ECJ's Grand Chamber departed from *Iida*" (see Sarmiento's article here). Not so quick.

More importantly, the use of the 1995 ruling in *Annibaldi* and of its recent applications shows that the message from the German Constitutional Court in the *Anti-Terror Database* decision, a ruling heavily based on *Annibaldi*, was heard loud and clear in Luxembourg (see our comment here).

The Court provided yet another rationale for the non-application of EU law, drawn from *Maurin*: EU law did not impose any obligations on the Member States in the specific situation . That the presence of an EU-derived obligation could serve as the decisive trigger for the Charter had been suggested, among the others, by current vice-President Lenaerts (see his article on ECLR).

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The *Siragusa* judgment is encouraging, even though the inclusion of no

less than three alternative explanations for the non-application of the Charter and the general principles appears an over-compensation for the misleading minimalism of *Fransson* and *Texdata*. The Court implicitly abjured the *Fransson* equivalence as a self-sufficient test, sent a message of reassurance to the *Bundesverfassungsgericht* (dusting for the occasion the *Annibaldi* test which had been forcefully invoked in Karlsruhe), and timidly attempted to propose the presence of a specific EU obligation as the relevant yardstick.

A fourth discrete remark, which might be interpreted as *obiter*, is that the application of EU fundamental rights to national measures pursues the objective of ensuring the "unity, primacy and effectiveness" of EU law (the *Melloni* formula). Therefore, when the national measures pose no risk to said objective, there is no need for the Charter to apply .

The multiple rationales used by the Court make it impossible to discern a clear test, or even which among them would be sufficient, taken separately, to prevent the application of the Charter (for instance, is the absence of a threat to the unity of EU law enough? Is the *Kremzow* test really applicable beyond the safeguard of the *effet utile* of the four freedoms?). However, *Siragusa* might be interpreted as a sign of goodwill, a cautious attempt to engage with the riddle of art. 51(1) of the Charter through plausible argumentation rather than oracular decisions. At least in this respect, vice-President Lenaerts' pragmatism seems to be prevailing over President Skouris' trust in the *Fransson* test as a panacea for all the headaches relating to Art. 51(1) of the Charter. The President commented favourably on the *Fransson* test:

The alignment between the application of the Charter and that of EU law, which is solidly based on an established case law, permitted to extract an appropriate criterion to delimit the scope of application of the Charter (own translation from this article)

However, already in *Siragusa* it seemed that the *Fransson*'s rule needs revisiting or, at least, specification. The President's idea might have to abdicate in favour of the Vice-President's idea, but the situation is still too intricate to decipher yet. In the past days, the Court built on *Siragusa* in

the *Torralbo* and *Pfleger* cases. I will comment these two cases in another post.