The legal integration of national, international and European tax law*

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"Now that the modern conception of the state has undergone a profound transformation, now that the economic dimension is taking over from the political, we must consider a global and virtual horizon; now that, as lawyers, we are contemplating [...] the ever stronger erosion of the system of sources built by our forefathers out of stone, but which now resembles a sandcastle: now we must acknowledge that the time has come for the recovery *of the law*

P. Grossi, *Società, diritto, Stato. Un recupero per il diritto*, Vol. 70, Per la storia del pensiero giuridico moderno, Milan, 2006, p. X—XI

(our translation)

Die Ermächtigung, supranationale Zuständigkeiten auszuüben, stammt allerdings von den Mitgliedstaaten einer solchen Einrichtung. Sie bleiben deshalb dauerhaft die Herren der Verträge. Die Quelle der Gemeinschaftsgewalt und der sie konstituierenden europäischen Verfassung im funktionellen Sinne sind die in ihren Staaten demokratisch verfassten Völker Europas.

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1. Introduction

The main purpose of this article is to draw inspiration from a monographic work dedicated to the sources of tax law and their interpretation and to examine just one of the possible interpretations on the topic, rather than an

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overview of the various theories suggested by scholars.

In order to do so, the first step is to clarify the perspective in which the analysis will be conducted. This should be a simple task, since for reasons of coherence the method used in one of my previous monographic work will be adopted[2]. Simply put, we must first of all characterise the structure of the various sources of law and the relationships between legal orders in terms of legal integration, according to the various understandings to be explained below.

The next step is to illustrate the method of analysis. The most appropriate perspective to demonstrate that the theory of the "legal integration" is the best approach to the variety of sources of law and legal orders is the historical one. As a result, the analysis will be divided into three different periods, conventionally determined, each corresponding to different theoretical models.

Finally, the structure of the analysis. After an overview of the historical developments, the focus will be on tax law, examining a series of cases to demonstrate the heuristic effectiveness of the theory of legal integration.

2. The sovereignty of the law

The subject of the sources of law is intrinsically linked to the idea of the State and its sovereignty. In the *Staatslehre* system, the effectiveness of the law, in the sense of positive law,[3] stemmed from the will of the State as a sovereign body. Thus, the State was conceived as an authority above all other political institutions in a given territory, providing them with direction and unity. The legitimacy of this absolute sovereignty lies in the identification of society with the State, as a result of the triumph and domination of the (liberal) bourgeoisie in the nineteenth century.

As pointed out by other scholars,[4] the consequences of this process are twofold. On the one hand, it gave rise to absolutism, or rather the exclusive

[2] *Il processo di integrazione dei principi tributari nel rapporto fra ordinamento costituzionale, comunitario e diritto internazionale*, Padua, 2008.

[3] G. JELLINEK, *Die Lehre von den Staatenverbindungen*, Berlin, 1882, p. 16: "*Was bis jetzt nur trotz der Souveränität und gegen die Souveränität behauptet werden konnte, kann nur durch die Souveränität erklärt werden*" (p. 36).

[4] F. MODUGNO, *Pluralità degli ordinamenti*, in Enciclopedia del Diritto, Vol. XXXIV, Milan, 1985, p. 1 (p. 2).

power of the national legal order in relation to all other internal (political) institutions and, on the other hand, to relativism, or rather the exclusive power of the national legal order in relation to those of other States. The State acquired an absolute monopoly over domestic sources of law,[5] i.e. those envisaged by the national legal order, in order to exercise it through positive law[6]. Thus, the State became the only public authority with the exclusive power of enacting the law (through positive provisions), depriving all other institutions of this role and reducing the role of the lawyers and judges to that of merely executing the will of the legislator.

With regard to relations between the sovereign legal order, the absolute nature of the law of the State led to the recognition of its relative status, since it implies the recognition of the legal orders of different States, and, at the same time, to the independence (and impenetrability) of the national legal order in relation to other States' legal orders and the international (or supranational) order.

In brief, as a result of the concept of sovereignty, the State and its legal order gave rise to autonomous legal universes[7].

Returning to the relations between the national legal order and the international (or supranational) order, this system inevitably resulted in the foundation (and the efficacy and effectiveness) of international law being based on the self-limitation that the State imposed on itself. In this regard,

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[5] Reference is made to the formal concept of sources, which includes any act able to produce legal rules according to other legal provisions. See V. CRISAFULLI, *Lezioni di diritto costituzionale*, Vol. I, Padua, 1970, p. 44 ss. Constitutional doctrine also acknowledges a substantial concept of sources, specified by any act which *actually* produces rules. On this point, see R. GUASTINI, *Le fonti del diritto. Fondamenti teorici*, Milan, 2010, p. 45 ss., in Trattato di diritto civile e commerciale.

[6] This phenomenon has been examined especially by legal historians: "the legal landscape of that period was quite narrow. The State was the only essential lawmaker, the only institution able to confer legal character on social rules. The law was reduced to rules, to the expression of the State's supreme will; the system of sources was crystallised in a rigid hierarchical pyramid that deprived subordinate sources of their strength" (P. GROSSI, *Società, diritto, Stato*, Vol. 70, Per la storia del pensiero giuridico moderno, Milan, 2006, p. 239) (our translation). The author then continues: "in this proto-modern legal climate there was not much space for lawyers, either academics or pratictioners. This was the time of legislative idolisation, when the only subject legitimated to express a will and to play not just an active but a monopolistic role was the lawmaker. This worship of the law implied a passive role for all academics and practitioners resulting in mere *exegesis*, a term that is typical of theology and adequate to give an idea of the necessarily passive role of the interpreter towards a text considered as sacred" (p. 239-240) (our translation).

[7] A. VON BOGDANDY, *Common principles for a plurality of orders: A study on public authority in the European legal area*, in International Journal of Constitutional Law, 2014, p. 980 (p. 984).

"*the ultimate decision concerning the existence [of international law] is up to the communities to which it is applied, thus to States. If they recognise international law as binding, there is a basis for its existence, by reason of the psychological nature of all laws*"[8]. According to this theory, international law finds its origins in State sovereignty and, more precisely, in the self-limiting nature of the State, consenting to the regulation of the relations between different legal orders[9]. As a result, external sources become relevant within the State legal order only if they are adopted or transposed by way of a specific act or provision adopted by the State.

However, the most interesting matter is that of the consequences of the theory of the sources of law. This way of interpreting the legal phenomenon presupposes a clear separation between the source of law and the norm, that is to say between the source in a formal sense and the source in a substantial sense, with the prevalence of the former over the latter.

3. The sovereignty of the Constitution

The constitutional process arisen from the Second World War led to the *transformation* of this concept of sovereignty, but not to its wholly *overcoming*.

First of all, sovereignty is reduced to the world of the law, as a manifestation of public authority entirely regulated by the Constitution[10]. In other words, public authority finds its legal basis and its limitations in the Constitution: the legitimacy of this authority belongs to the real world and, more precisely, to the people.

Second, the Constitution results in the end of the monopoly of the law, as it is itself a super-primary source vis-à-vis all other sources. Above all, it recognises the institutional multiplicity characterising social organisations.

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[8] G. JELLINEK, *Allegemeine Staatslehre*, Berlin, 1900, cited in the Italian translation *La dottrina generale dello Stato. I. Studi introduttivi - Dottrina generale sociale dello Stato*, Milan, 1921, p. 669 (our translation).

[9] This is not the only theoretical analysis of dualist doctrines nor the only analysis of relations between legal orders formulated in the twentieth century. For an overview, see G. BIZIOLI, *Il processo di integrazione dei principi tributari nel rapporto fra ordinamento costituzionale, comunitario e diritto internazionale*, p. 2.

[10] One of the concepts of sovereignty developed by G. Jellinek belonged to the "real" world, to be intended as the will of the State describd in a antrophomorphic manner. G. JELLINEK, *Allegemeine Staatslehre*, cit., p. 71-72.

By means of this recognition, the Constitution allows a plurality of authorities (or institutions) to produce legal provisions (both in the formal and substantial sense). In other words, the Constitutions acknowledges the social and institutional plurality that, starting from the end of the nineteenth century, endangered the liberal State, together with the legal plurality of the national polity.

On the external front, the Constitution opens up to the international order, recognising its general rules, but always making them conditional on the primacy of the State's sovereignty: this is known as the "counter-limitations theory". In judgement n. 238 of 22 October 2014,[11] the (Italian) Constitutional Court stated that "*the fundamental principles of the constitutional order and the inalienable rights of the person [constitute] a 'limitation to the entrance (…) of generally recognised international rules to whom the Italian legal order adapts according to Article 10, first paragraph of the Constitution' (…) and [operate] as 'counter-limitations' to the entrance of EU provisions (…) and as limitations to the entrance of provisions executing the Lateran Treaty and the Concordato (…). They represent, in other words, the essential and indefeasible elements of the constitutional order, thus not being subject to modifications of the Constitution*" (our translation). Even though the Court refers to the various limitations using different terms, they exemplify indefeasible necessity and find their basis in the need to protect the constitutional identity of the legal order[12]. As a result, sovereignty, though linked to the "world of (constitutional) law", continues to play a fundamental role in limiting international (and/or supranational) law from penetrating the national system. This role finds its justification in the precedence of State sovereignty over other institutions.

It should be stressed that this interpretation has been adopted not only by the Italian Constitutional Court, but also by the German *Bundesverfassungsgericht* since 1974[13] and further developed in the *Maastricht-Urteil* and *Lissabon-Urteil*. In the latter judgment, the German

[11] Italian Constitutional Court, judgment n. 238, par. 3.2., 22 October 2014.
[12] M. BRANCA, *Il punto sui "controlimiti"*, in Giurisprudenza costituzionale, 2014, p. 3899.
[13] *Bundesverfassungsgericht*, judgment 29 May 1974, *Solange I* (*BVerGE* 37, 271).

Constitutional Court stated that "*[d]as Grundgesetz ermächtigt die für Deutschland handelnden Organe nicht, durch einen Eintritt in einen Bundesstaat das Selbstbestimmungsrecht des Deutschen Volkes in Gestalt der völkerrechtlichen Souveränität Deutschlands aufzugeben. Dieser Schritt ist wegen der mit ihm verbundenen unwiderruflichen Souveränitätsübertragung auf ein neues Legitimationssubjekt allein dem unmittelbar erklärten Willen des Deutschen Volkes vorbehalten*".

With regard to the sources, there are no changes compared to the points made in the previous paragraphs. All legal orders – the national legal order, the international and the European ones – appear as separate and, therefore, separate also their sources, and their effectiveness within the national order depends on the express recognition by the State (through adoption and implementation).

4. The sovereignty of principles

After the Second World War, Europe embraced not only modern democratic constitutions, but also the (economic) integration and the recognition, at supranational level, of fundamental human rights and freedoms. Although limited, at least at the beginning, to the traditional system of relations between the national and international legal orders, these phenomena have gradually taken on an autonomous and original legal understanding, leading to a *fracture*, i.e. a *revolution*, in the evolution of legal thinking[14].

The first signs of such changes are to be found in the case law of the Court of Justice of the European Union. In *Van Gend & Loos*, the Court defined the EU experience as "*a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only the Member States but also their nationals*"[15]. This sentence includes, *in nuce*, the elements of the

[14] The expression must be intended in the "conviction that (…) the law, in its essence, physiologically and accurately mirrors a civilisation" (P. GROSSI, *Pensiero giuridico (Appunto per una 'voce' enciclopedica)*, Vol. XVII, Quaderni fiorentini per la storia del pensiero giuridico moderno, Milan, 1988, p. 263 (p. 264) (our translation). The Author observes that "Western society had the peculiar privilege to have built its civilisation as law; Western civilisation is essentially a legal civilisation, in the sense that the law plays a fundamental role in its architecture" (p. 265) (our translation).

[15] Court of Justice of the European Union, judgment 5 February 1963, 26/62, *NV Algemene Transport - en Expeditie Onderneming van Gend & Loos*.

legal revolution: the European Union legal order represents a *tertium genus* that cannot be reduced to national or international experience. As a result of the EU phenomenon, national sovereignty underwent a *diminutio*, depriving it of its absolute character.

At the same time, certain scholars and a number of judgments of the (Italian) Constitutional Court started to recognise the predominance of international conventions on human rights and fundamental freedoms over national sources in the formal sense, and the hierarchy of the sources of law. In judgment n. 10, 19 January 1993, the Constitutional Court referred to provisions of the 1950 European Conventions on Human Rights and Fundamental Freedoms (ECHR)[16] and the 1966 International Covenant on Civil and Political Rights,[17] both ratified and implemented by Italy, to clarify the meaning of the fundamental right of defence enshrined in Article 24, par. II, of the Italian Constitution. With regard to the right of the accused to be informed in a language that he knows, the Court stated that "*it is a right the safeguarding of which, though provided by rules on the same level as the law [the above-mentioned international conventions], represents an implicit value in the constitutional system as part of the unbreakable right of defence (Article 24, par. II), to the advantage of every person (Italian national or non-national), and it follows that, in light of its nature as a fundamental principle, pursuant to Article 2 of the Constitution, the Court is bound to interpret the rules safeguarding the right to defence with regard to a clear understanding of the charges, giving them an extensive meaning, in order to make this right as effective as possible*" (our translation)[18].

Such developments have resulted in numerous attempts to comprehend this new line of legal thinking. Setting aside traditional models to explain this change,[19] scholars have relied on a re-evaluation of the law as a social phenomenon and, thus, on a re-evaluation of legal pluralism not only within national legal orders, but also as a fundamental element of the entire legal system.

[16] European Convention on Human Rights.
[17] International Covenant on Civil and Political Rights.
[18] Italian Constitutional Court, judgement, n. 10, 19 January 1993.
[19] With regard to tax law, see, *inter alia,* L. FERLAZZO NATOLI, *Rapporto tra ordinamento comunitario ed interno nel diritto tributario: dalla teoria dualista a quella monista?*, p. 323, in L. Perrone e C. Berliri (ed.), Diritto tributario e Corte costituzionale, Naples-Rome, 2006.

The most cogent of these arguments is that the relationship between different legal orders can be understood in terms of "legal integration" and, more specifically, as far as Europe is concerned, in terms of European (legal) integration.

First of all, it is necessary to clarify that this expression has nothing in common with the ideas put forward by Smend in the 1920s, who employed the term "integration" to describe the socio-economic process of the realisation of a State through the progressive assimilation of civil society[20].

Rather, in initial attempts, integration has been described as "*the establishment of a common interest between two or more States in an essential area, such as security or economic affairs, and it is brought into being by the organization of inter-State relations on the basis of an attitude of solidarity in such a way that the safeguarding of the over-all interests prevails over motives drawn from the defence of national interest*"[21]. In this attempt, the author acknowledges the profound difference between the relationship between the national order and the European one on the one hand, and, on the other hand, the relationship between the national order and the international one, since it is based on solidarity among Member States and on a common European interest prevailing over national interests. We are no longer dealing with the resolution of conflicts between States by means of shared rules, but rather with the creation and regulation of a common interest that is different from the sum of national interests. *In nuce*, this vision encompasses all the elements that characterise the new European legal thinking.

The theoretical work on European integration as a process of legal integration has mainly been carried out by German scholars (who, though under the influence of legal positivism, have never entirely abandoned the medieval and post-medieval legal tradition). Based on Monnet's well-known conception, Ipsen describes the European Communities in terms of the "*Zweckverbände funktioneller Integration*" of legal orders,[22] thus casting light on two of the fundamental elements of European legal (and social and

[20] R. SMEND, *Verfassung und Verfassungsrecht*, Berlin, 1928.
[21] P. PESCATORE, *International Law and Community Law - A Comparative Analysis*, in Common Market Law Review, 1970, p. 167 (p. 169).
[22] H.P. IPSEN, *Europäisches Gemeinschaftsrecht*, Tübingen, 1972, p. 196.

economic) experience. First, that European (legal) integration is a process, an uninterrupted sequence of acts and activities aimed at a given purpose. Second, that the European experience translates into a functional integration pursuing an interest (or set of interests) common to all Member States.

We now analyse at least two other questions, that are essential in order to fully understand the meaning of legal integration: the object of integration and its relevance, also at the international (and not just the European) level.

Both legal orders and institutions are affected by the process of legal integration[23]. With regard to legal orders, juridical integration is to be intended as the unification of two or more legal orders. This process results in disorder, along with a tendency to a new and integrated legal order, which is the product of the interaction of principles and rules that are part of different legal systems.

Further, this process is a multi-directional one: European law becomes integrated as part of national law, but national law also becomes integrated as part of European law. In turn, both legal orders are open to international provisions and principles concerning the protection of human rights. The "top-down" evolution of European law is mirrored by the elaboration of the "prevalence" and "direct effect" of EU provisions. On the other hand, the "bottom-up" process has been acknowledged by the Court of Justice of the European Union as filling voids in the EU legal order, also in response to the position of the Italian and German Constitutional Courts of the 1970s[24].

In the second meaning, integration concerns institutions from different legal

[23] G. ITZCOVICH, *Integrazione giuridica. Un'analisi concettuale*, in Diritto Pubblico, 2005, p. 749 (p. 759).

[24] The integration of national law was upheld by the European Court of Justice, judgment 11/70, 17 December 1970, *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, in OJEU p. 1125: "respect for fundamental rights forms an integral part of the genreal principles of law protected by the Court of Justice" (par. 4). The integration of international law was then confirmed by the European Court of Justice, judgment, 4/73, 14 May 1974, *J. Nold, Kohlen- und Baustoffgroßhandlung v Commissione delle Comunità europee*, in OJEU p. 985: "international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of Community law" (par. 13). For further references, see G. BIZIOLI, *Il processo di integrazione dei principi tributari nel rapporto fra ordinamento costituzionale, comunitario e diritto internazionale*, cit., p. 67.

orders, that "cooperate for the realisation of a common law"[25]. The creation of the European Communities, then of the European Union, produced an integrated apparatus aiming at the implementation of European law, with regard both to the jurisdictional and the administrative function. The most innovative creation of the European system is probably the integration between the Court of Justice of the European Union and the domestic courts, constantly cooperating in the interpretation and implementation of European law[26]. Thus, it has been argued that the "*pursuit of (…) an integrated legal order (…) has passed through both the creation of an integrated European judiciary system – an institutional circuit between the Court of Justice and national courts: an aspect of political integration – and the creation of a community of European lawyers – a common language, common principles, mutual trust: an aspect of socio-cultural integra*tion" (our translation)[27].

Since the early 1970s, scholars of international law have started to identify and describe a particular legal phenomenon known as "soft law"[28]. This term does not refer to a homogeneous system of acts, actors or institutions participating in their realisation. Rather, the expression aims merely at describing rules and codes of conduct without binding effect, though capable of producing some practical effects[29]. This definition is thus essentially negative, referring to all acts and rules that are not binding but which contribute to the customary international rules, the preparation of a legal basis for international treaties and their interpretation or integration. These acts and rules seem to play, at a function level, an instrumental and accessory role in relation to legally binding acts.

However, clearly the process of legal integration also involves soft law, both

[25] G. ITZCOVICH, *Integrazione giuridica. Un'analisi concettuale*, cit., p. 751.
[26] Legal doctrine on this matter is extensive. For further analysis, see A.M. SLAUGHTER, A. STONE SWEET, J.H.H. WEILER, *The European Court and National Courts*, Oxford, 1998, p. 227.
[27] G. ITZCOVICH, *Integrazione giuridica. Un'analisi concettuale*, cit., p. 774.
[28] The best translation equivalent in Italian appears to be "atti quasi-giuridici" (A. TANZI, *Introduzione al diritto internazionale contemporaneo*, Padua, 2003, p. 169). According to M. DISTEFANO, *Origini e funzioni del* soft law *in diritto internazionale*, in Lavoro e Diritto, 2003, p. 17 (p. 18), the expression was coined, during a series of lectures held by Lord A.D. McNair approximately at the end of the 1960s.
[29] For an introduction to soft law, see M. DISTEFANO, *Origini e funzioni del* soft law *in diritto internazionale*, cit., p. 20, and, for tax law, H. GRIBNAU, *Improving the Legitimacy of Soft Law in EU Tax Law*, in Intertax, 2007, p. 30 (p. 33).

at the normative and the institutional level. Soft law differs from hard law in terms of its effects (binding or non-binding), not by reason of the nature and structure of the rules. As far as the institutional aspect is concerned, soft law embodies in a tangible manner the "social" dimension of the law, reflecting an extensive development of the law, starting from civil society. From this point of view, it is a flexible tool implying the involvement not only of the actors who are institutionally responsible for the production of the law, but also (private) actors to whom the law is addressed.

Finally, it must be stressed that this phenomenon concerns international law, in relation to which soft law was first set up and developed, and EU law. In the field of international law, the 1948 Universal Declaration on Human Rights,[30] constituting the basis for all subsequent UN international treaties on human rights, is one of the leading examples. With regard to tax law, the same may be said of the OECD Model Convention against double taxation,[31] together with its Commentary. Within the EU legal order, for years scholars have been analysing the relationship between recommendations, communications and codes of conduct on the one hand and the evolution of coordination in tax law on the other[32]. In this connection, soft law becomes a tool that makes it possible to bypass the requirement for a unanimous vote on the harmonisation of tax law.

Drawing some conclusions and in an attempt to summarise the phenomenon, it is necessary once again to resort to the German legal lexicon: European legal integration has led to a *Rechtsgemeinschaft*[33]*.* Such a "community of law" is characterised by a legal order that is an integral part of those of the Member States but also by an integrated institutional circuit as the source of "shared legality".

As mentioned above, integration also involves international rules. In this case, however, the phenomenon is quantitatively different from the European integration process. In fact, the legal integration of international

[30] Universal Declaration on Human Rights.
[31] OECD Model Convention on Double Taxation.
[32] See G. MELIS, *Coordinamento fiscale nell'Unione europea*, in Enciclopedia del Diritto, Annali, I, Milano 2007, p. 394 (p. 407) and H. GRIBNAU, *Improving the Legitimacy of Soft Law in EU Tax Law*, p. 30.
[33] The expression has been used also by the European Court of Justice, judgment 294/83, 23 April 1986, *Parti écologiste "Les Verts" v European Parliament*, in OJEU p. 1339, § 23.

rules concerns only fundamental human rights and freedoms as recognised by international treaties, i.e. only rules that have a particular axiomatic relevance in international law[34]. In the European context, reference must be made to the ECHR, founded on a set of cultural and juridical principles that are common to all the contracting parties[35].

However, the nature of this phenomenon is similar to the nature of European integration as it is grounded both on legislative integration and an integrated institutional system. Again, in the case of the ECHR, the role played by the European Court of Human Rights is paramount and essential for the creation of common legal thinking.

This first part does not require any particular concluding remarks, as the conclusions should be clear from the above. However, one final point needs to be made with reference to the concept of sovereignty. There is no doubt that this concept has survived all historical events taking place since the seventeenth century when it was first theorised, leading to the current economic and financial globalisation. There is also no doubt that the concept has undergone profound changes in meaning, with a transition from substantial interdependence between powers (in the sense of supremacy and the State) to the axiological predominance, within the legal order, of the fundamental underlying principles. Over the centuries this process has resulted in the decline of the "sovereign" and the affirmation of the shared values of the national, European and international community

[34] The doctrine on the subject is extensive. An introduction is to be found in I. PERNICE, *Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited?*, in Common Market Law Review, 1999, p. 703 and A. RUGGERI, *Metodi e dottrine dei costituzionalisti ed orientamenti della giurisprudenza costituzionale in tema di fonti e della loro composizione in sistema*, in Diritto e Società, 2000, p. 141.

[35] It is well known that the Italian constitutional case law defends positions which are essentially formalistic and does not share this idea. Since judgments no. 348 and 349, 24 October 2007, which for the first time dealt with the interpretation of the new Article 117, par. 1, of the Constittution, ECHR rules have been qualified as "rules which stand in between", with the ability to result in the unconstitutionality of provisions which are in contrast with them. At par. 3.3 of Judgment n. 348, the Court states that "the distinction between ECHR and EC rules must be confirmed in the present proceeding as stated by former case law of this Court, meaning that ECHR rules, though considerably relevant, in protecting fundamental human rights and freedoms, are, however, conventional international rules, which are binding on the State but are not able to produce direct effects in the national legal order which allow judges to apply them in their proceedings and not to apply hypothetical contrasting national provisions".

5. The case of tax law

5.1 The principle of tax equality

In tax law, the principle of equality is one of the clearest examples of the process of integration of principles.

Equality represents one of the fundamental values in all modern legal systems (at least on the European continent)[36] and its axiological value derives directly from the French revolution, which resulted in a clean break with the *ancien régime*.

Neither the EU legal order nor the ECHR enshrine a general principle of equality, at least in formal terms. However, both adopt a principle of non-discrimination which, in the case of the EU, was limited to nationality and sex, at least until the adoption of the EU Charter of Fundamental Rights.[37] However, the evolution of case law has gradually led to a principle of equality as a basis for the European legal order, even beyond the economic field. The positivisation in formal terms of this process took place as a result of Article 20 of the EU Charter of Fundamental Rights.

Limiting the scope of the analysis to the EU and to the economic aspects, the regulation of the internal market laid down by the Treaties can be traced back to the common principle of equality,[38] though this claim requires further clarification. It does not mean that the regulation of the internal market is based entirely on the principle of equality. Apart from tax law, or even within tax law, in relation to the free movement of goods, the internal market is intended to safeguard not only equal treatment, but also the free movement of citizens[39]. However, in tax law, the case law of the Court of Justice of the European Union deals with all questions of compatibility between national tax systems and the internal market in terms

[36] For example, Art. 1 of the *Déclaration des Droits de l'Homme et du Citoyen* (recalled by the current French Constitution); Art. 3 of the *Grundgesetz*; Art. 3 of the Italian Constitution and Art. 14 of the *Constitución española*.

[37] EU Charter of Fundamental Rights. For further details, see G. BIZIOLI, *Il principio di non discriminazione*, p. 191, in A. Di Pietro, T. Tassani, I principi europei del diritto tributario, Padua, 2013.

[38] Again, for further details see G. BIZIOLI, *Il principio di non discriminazione*, cit., p. 197.

[39] M. LEHNER, *Limitation of the national power of taxation by the fundamental freedoms and non–discrimination clauses of the EC Treaty*, in EC Tax Review, 2000, p. 5 (p. 7); E. REIMER, *Die Auswirkungen der Grundfreiheiten auf das Ertragsteuerrecht der Bundesrepublik Deutschland – Eine Bestandsaufnahme –*, p. 39 (p. 58-59), in M. Lehner (Hrsg.), Grundfreiheiten im Steuerrecht der EU-Staaten, München, 2000).

of equal treatment between cross-border and internal transactions. As a result, fundamental freedoms and the prohibition on State aid follow the traditional three-part pattern for the evaluation in terms of equality, considering: the specific case, a comparator, and positive regulation, and also the principle of proportionality (or reasonableness, according to the Italian definition) between the national tax provision and its purpose (or the national or European interest pursued).

It is well-known that the European case law on this matter is extensive. With regard to fundamental freedoms, equality of treatment is analysed in connection with the prohibition of discrimination or restriction respectively in the State of the source of income (or assets) and in the State of residence of whoever holds the income (or assets)[40]. With regard to the prohibition of State aid, the key concept is that of "selectivity", both material and geographical. Particularly, the application of selectivity to tax provisions implies a comparison between the national aid provision and the "ordinary" regime[41]. From the comparison between the mentioned regulations arises the compliance (or not) of the national favourable treatment[42], except for the existence of a general interest and its proportionality.

The interpretation of Article 3 of the Italian Constitution, like that of the

[40] An analysis of the turbulent evolution of tax case law with regards to fundamental freedoms can be found in C. SACCHETTO, *Le libertà fondamentali ed i sistemi fiscali nazionali attraverso la giurisprudenza della Corte di Giustizia UE in materia di imposte dirette*, p. 43, in La normativa tributaria nella giuripsrudenza delle Corti e nella nuova legislatura. Atti del Convegno "Gli ottanta anni di Diritto e Pratica Tributaria" (Genoa 9-10 February 2007), edited by V. Uckmar, Padua, 2007; F.A. GARCÍA PRATS, *Imposición directa, no discriminación y derecho comunitario*, Madrid, 1998; M. ISENBAERT, *EC law and the sovereignty of the member states in direct taxation*, Amsterdam, 2010.

[41] C. MICHEAU, *State Aid, Subsidy and Tax Incentives under EU and WTO Law*, Alphen aan den Rijn, 2014, p. 219, where it is preliminarily observed that: "*assessing the selectivity of a tax measure requires defining a dividing line between general and specific tax measures*" (p. 224).

[42] Court of Justice of the European Union, judgment 8 November 2001, C-143/99, *Adria-Wien Pipelin GmbH and Wietersdorfer & Peggauer Zementweke GmbH v Finanzlandesdirektion für Kärnten*: "For the application of Article 92 of the Treaty, it is irrelevant that the situation of the presumed beneficiary of the measure is better or worse in comparison with the situation under the law as it previously stood, or has not altered over time (see, to that effect, Case 57/86 *Greece* v *Commission* [1988] ECR 2855, paragraph 10). The only question to be determined is whether, under a particular statutory scheme, a State measure is such as to favour "certain undertakings or the production of certain goods" within the meaning of Article 92(1) of the Treaty in comparison with other undertakings which are in a legal and factual situation that is comparable in the light of the objective pursued by the measure in question".

principles of equality enshrined in other European constitutions, therefore prohibits all discrimination based on the residence of the subject or on the localisation of the income outside the territory of the State. It also prohibits all tax aid granting assistance only to favoured enterprises. As already mentioned in section 4, the source of the provision is irrelevant. On the other hand, its substantial content, which according to European case law is required to comply with national constitutional provisions, is of great relevance.

Finally, the effects are relevant also at the legislative level, since the meaning of the principle of equality changes in the process of integration with the European concept, as legislative provisions become binding for the courts[43].

Turning our attention to the ECHR, it must be noted first of all that Article 14 is a general provision, the scope of which is extended to any form of discrimination, to be applied together with another conventional provision. Even though the European Court of Human Rights has acknowledged the possibility of applying Article 14 also to tax law, this application has been limited, and the matter is left to the discretion of the Member States[44]. As a result, this principle does not have the same axiological importance as the same principle has in the EU legal order.

5.2 Abuse of law in tax law

Another example of legal integration relates to the influence of the prohibition in European case law of the abuse of law in connection with Value Added Tax (VAT), and as a justification for different treatment in relation to fundamental freedoms.

This evolution is well-known and will therefore be only briefly outlined here. After the recognition, in *Halifax*, of the prohibition of abuse of law in the

[43] This effect has been examined by G. D'ANGELO, *Integrazione europea e interpretazione nel diritto tributario*, Padua, 2013, p. 59 ss., who distinguishes between the consequences in interpretation according to the different fields of tax law (direct taxation, indirect taxation, administrative phase and contentious phase).

[44] This line of case law is to be found in the judgments on the discriminatory character of differences in the tax treatment between income from salaried employment and the income of self-employed persons (*ex multis*, ECHR, judgment 19 December 1974, *X* v. *Austria*) and on differences in the tax treatment of married and unmarried couples (ECHR, judgment 13 October 1993, *Feteris-Geerards* v. *The Netherlands*).

common VAT system,[45] even the Court of Cassation has reverted to a line of reasoning adopted in earlier case law, ruling that this prohibition is applicable also in relation to direct taxation, since Member States are required to "*exercise this competence in the respect of fundamental principles and freedoms provided in the EC Treaty*"[46].

Even though such conclusions are not entirely justified, since the prohibition of the abuse of law is not a general principle of the EU legal order, but performs different functions in relation to the various fields to which it applies,[47] as later acknowledged by the Corte di Cassazione,[48] this reasoning forms part of the theory of legal integration.

Furthermore, there is no doubt that the evolution of the prohibition of the abuse of law within EU law has significantly influenced the interpretations handed down by the Corte di Cassazione, first by extending such prohibition to non-harmonised taxes and, later, by acknowledging the "existence of a general anti-avoidance principle; with the clarification that the source of this principle, with regard to non-harmonised taxes, such as direct taxes, is to be found not in EU case law, but rather in constitutional principles of the Italian tax legal order" (our translation). This statement is a clear example of the above-mentioned process of institutional juridical integration, originating in the dialogue between courts which are (formally) part of different legal orders. This dialogue entails, on the legislative level, the creation of an integrated legal order and, on the cultural level, the development of common legal thinking.

A similar process is also affecting the principle of the right to a fair hearing.

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[45] Court of Justice of the European Union, judgment 21 February 2006, C-255/02, *Halifax plc, Leeds Permanent Development Services Ltd e County Wide Property Investments Ltd v Commissioners of Customs & Excise*, in OJEU p. 1609: "The application of Community legislation cannot be extended to cover abusive practices by economic operators, that is to say transactions carried out not in the context of normal commercial operations, but solely for the purpose of wrongfully obtaining advantages provided for by Community law. That principle of prohibiting abusive practices also applies to the sphere of VAT" (§§ 69-70).

[46] Corte di Cassazione, V, judgment 29 September 2009, n. 21221, par. 3.5. This interpretation was then confirmed by judgments n. 8772, 4 April 2008, n. 10257, 21 April 2008, n. 23633 15 November 2008, and n. 25374, 17 October 2008.

[47] See, *inter alia*, F. VANISTENDAEL, Cadbury Schweppes *and Abuse from an EU Tax Law Perspective*, p. 407 (p. 422 ss.), in R. de la Feria and S. Vogenauer (Eds.), Prohibition of Abuse of Law. A New General Principle of EU Law?, Oxford and Portland, 2011.

[48] Court of Cassation, joint sessions, judgments n. 30055, n. 30057 and n. 30058, 24 December 2008.

In its recent judgment n. 19667, 18 September 2014,[49] the Corte di Cassazione, after having recognised the constitutional importance of the "*model of the 'participated decision' through the promotion of the right to a fair hearing (…) between the administration and the taxpayer*", stated that "*the respect of the right of defence and of the consequent right for all persons to be heard before the adoption of any decision liable to affect their interests in a negative way, constitutes a fundamental principle of Union law, as stated by the Court of Justice in its recent judgements of 3 July 2014, Kamino International Logistics,*[50] *where it recalls also its previous judgment of 18 December 2008, Sopropè*"[51].

5.3 The prohibition of confiscatory taxes

Article 1 of ECHR Protocol n. 1 provides, on the one hand, that "*[e]very natural or legal person is entitled to the peaceful enjoyment of his possessions*" and, on the other hand, that no one shall be deprived of his possessions except under specific conditions, both substantial and formal[52]. In addition, the Article provides that the recognition of such a right cannot deprive the contracting State of the power "*to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties*".

The interpretation that has gradually gained consensus in European case law considers taxes as a legitimate "interference" in the exercise of private property[53]. This has two main consequences. On the one hand, the

[49] Court of Cassation, judgement n. 19667, 18 September 2014.
[50] Court of Justice of the European Union, judgment, C-129/13, 3 July 2014, *Kamino International Logistics*.
[51] Court of Justice of the European Union, judgment C-349/07, 18 December 2008, *Sopropè*.
[52] This is the official wording of the Article: "[e]very natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties".
[53] See ECHR, judgment 2 July 2013, *R.Sz. v. Hungary*, par 31. It must be noted that European case law uses the term "interference" as a synthesis of the concepts of deprivation of the right of property (second sentence of the first paragraph) and of regulation of the said right (second paragraph). This kind of theoretical analysis has been confirmed by the

intervention of the public authority, as a negative limitation on the exercise of a fundamental right, cannot result in an imposition that is excessive or in any way likely to substantially damage the taxpayer's financial situation[54]. On the other hand, since it is an "interference", the rule leaves States with the possibility to adopt special regulations in order to ensure the collection of taxes (or, in other words, the national fiscal interest).

The question of excessive taxation seems to be the result of a judgment based on the balancing of rights, where the Court of Justice of the European Union aims to strike a "'*fair balance' between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights*"[55]. Such a balance is grounded on two factors: the purpose of the national tax provision and the "*reasonable relationship of proportionality between the means employed and the aim sought to be realised*"[56]. The dichotomy which some Italian scholars refer to with regards to the nature of constitutional limitations to the exercise of tax powers can be found in international conventions as well, with reference both to the source of the tax and the quantification of the economic

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doctrine, especially Anglo-Saxon legal scholars. For example, see R. NOZICK, *Anarchy, State, and Utopia*, New York, 1977, p. 169: "[t]axation of earnings from labor is on a par with forced labor" and R.A. EPSTEIN, *Taxation in a Lockean World*, in Soc. Phil. Pol., 1986, p. 49: "[t]axation is the power to coerce other individuals to surrender their property without their consent".

[54] One of the first rulings on this matter is ECHR Commission, decision 14 December 1988, *Wasa Liv Ömsesidigt, Försäkringbolaget Valands Pensionsstiftelse, a group of approximately 15.000 individuals v. Suède*, in D.R. n. 58, p. 163: "(…) though it is certain that no general prohibition of taxes payable exclusively out of the tax-payer's capital can be derived from Article 1 (P1-1), a financial liability arising out of the raising of taxes or contributions may adversely affect the guarantee secured under this provision if it places an excessive burden on the person or entity concerned or fundamentally interferes with his or its financial position". More recently, ECHR, judgment 3 July 2003, *Buffalo*, par. 32; judgment 3 June 2004, *Di Belmonte (n. 2) c. l'Italie*, par. 1; judgment 4 January 2008, *Imbert de Tremiolles c. France*; judgement 16 March 2010, *Di Belmonte c. Italie*, par. 40; judgment 20 September 2011, *Yukos*, par. 606; judgment 14 May 2013, *N.K.M. v. Hungary*, par. 60 and 70-72; judgment 25 June 2013, *Gáll*, par. 59 and 69-71; judgment 2 July 2013, *R.Sz.*, par. 49 and 59-61. In terms which are formally different, but substantially identical, see judgment 23 February 1995, *Gasus*, par. 67: "it was already understood to reserve the States' power to pass whatever fiscal laws they considered desirable, provided always that measures in this field did not amount to arbitrary confiscation"; judgment 11 October 2005, *Masa Invest Group v. Ukraine*. See also R. ERGEC, *Taxation and Property* Rights under the European Convention on Human Rights, in Intertax, 2011, p. 2, according to which "recent case law has a broader approach by avoiding the term "confiscation"" (p. 3).

[55] ECHR Commission, decision 14 December 1988, *Wasa Liv Ömsesidigt, Försäkringbolaget Valands Pensionsstiftelse, a group of approximately 15.000 individuals v. Suède*, in D.R. n. 58, p. 163; ECHR, *R.Sz. v. Hungary*, par. 31.

[56] European Court of Human Rights, judgment 2 July 2013, *R.Sz.*, par. 31.

transaction which constitutes the basis for taxation[57].

The conclusion to be drawn from this brief analysis is that the ECHR influences national rules concerning the quantification of taxes, thus integrating the principle of the ability to pay, in the sense that taxes cannot be excessive or particularly detrimental to the economic source that is assumed to be the basis for taxation. Even though national legislatures remain the holders of taxing powers and of all choices on the matter, in particular with regard to the economic transactions to tax, they are nonetheless bound by Article 1 of the Protocol in determining the maximum amount of tax.

The analysis of the "substantial" tax regulation contained in the ECHR leads to the same conclusions drawn in relation to the EU legal order: the perspective in which to examine the relationship between the sources of law and the relationships between legal orders is that which is typical of legal integration, both legislative and institutional.

6. Conclusion

The conclusions are fairly easy to draw. In the second half of the twentieth century, European experience and the international recognition of human rights led to a revolution in legal thinking. This revolution overturned the way of interpreting the sources of law and the relationship between legal orders. With regard to the sources of law, substance (the rules) prevails over form (the sources). The relationship between legal orders, on the other hand, must be analysed in terms of the integration of both rules and institutions.

[57] E. DE MITA, *Principi di diritto tributario*, Milan, 2007, p. 84.