Daniele Gallo: *L'efficacia diretta del diritto dell'Unione europea negli ordinamenti nazionali. Evoluzione di una dottrina ancora controversa*, Milano, Giuffré, 2018, 513 págs.

It is not by chance that, following one of the most salient judgments ever delivered in the history of the European integration,[1] there is an increasing call for a refreshed understanding of constitutional pluralism (Dani *et al.*, 2020). As the claim to priority over national laws raised by the EU has been seriously contended at the States' level, it is felt necessary to get back to the foundations of EU law and to read anew the categories that have undergirded the EU's constitutionalisation path. A more profound comprehension of these categories would help both policing the boundaries of such "priority" – spelt out in the conceptual pair "direct effect & primacy" and capturing the limits that it must accept when countered by so called "identitarian arguments" (Weiler & Lustig, 2018: 362).

Thus, it looks simply timing to read a book that, albeit two years old already, has proved somehow prophetic: in fact, it offers several keys to answering such questions and unveils arguments that display the conditions for, and the limitations to, the operability of the "direct effect & primacy" abovementioned pair.

Daniele Gallo's book revisits the turbulent evolution of direct effect as intertwining with primacy and gives reasons to believe that the last chapter of this story has not yet been written. In fact, the message this book launches is twofold, which leaves the reader excited and bemused at once. On one hand, there is admittedly an increasing need for the Court of Justice to turn back to constitutional times and to "crystallize the common core of the EU legal order" (Gallo: p. 429) by more intense and meditated 'judicial activity'.[2] On the other hand, likewise admittedly, there is a certain lack of solid legal arguments to back such crystallization: the *rationale* behind the pair above said exposes a link with "*une certaine idée d'Europe*" which makes it a *wishful thinking*, rather than consolidated law (Barents, 2004: 45; 59; 130). Then, as the book highlights, it would be for the Court of Justice to reshape direct effect and primacy in accord with that *rationale*: the refrain "giving individuals access to law" echoes a pluralistic framework in which the individuals' contributions to lawmaking via judicial review enhanced the EU law legitimacy despite the lack of any such thing as a "general will" to support the legitimation of

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1 *BVerfGe*, Judgment 2 BvR 859/15, *PSPP*, 5 May 2020.

2 Gallo aptly distinguishes 'judicial activity' from 'judicial activism'; the reference is Dawson (2013: 11-31).

such law. This was the template of the Communities at their dawn (Vauchez, 2015: 44): in this context, "we the Court" (Poiares Maduro, 1998: 56) as the fulcrum of a *multilevel* judicial network (Pernice, 1999: 703) would act as the gateway for citizens to shape the law they abide by. It is undoubted that this can only occur by means of legal arguments securing legal certainty within a pre-set political landscape: the landscape that arose in the aftermath of WWII and consolidated within a common political framework as a result of the Soviet Union's demise.

Yet, in the eye of the reader, such reasoning takes the form of a circular argument. According to the author, the Court of Justice should return to operational activities securing legal certainty within a common political framework; but it is that framework what looks controversial in the same view of the author, and this infuses whatever legal arguments with unavoidable doses of political sensitivity – which would impair the law's certainty and disrupt the idea of EU law as a judicial product (Martín Rodríguez, 2016: 265). Conclusively, it seems that such heated political arguments exceed the possibility of the multilevel judiciary, which risks not meeting the expectations of the advocates of enhanced legal integration.

The author is perfectly aware of the loophole that corrodes such an argument, as he accounts for the "still" controversial doctrine of direct effect. The literature cited gives a "state of the art" of the "classic" EU doctrine, with special inclination towards Italian, French and English speaking worlds; the case-law mentioned is rich and carefully analyzed; *plus* – curiously, with perfect timing in a backward perspective – the research is updated to end 2017, just a moment before the Italian Constitutional Court crafted an identitarian argument in response to the Court of Justice in *Taricco*[3] which prevented the application of art. 325 TFEU from dismantling the national rules on penal prescription (Piccirilli, 2018: 814; Faraguna, 2018).

All this considered, there is room to designate Gallo's book as a potential "classic" championing a perspective that is national and Europeanist at once – one that thinks of the EU as a *self-reflexive* polity (Bast, 2005: 34). What it supplies is a valuable account of how the direct effect doctrine has developed, and on what foundations; hence, it provides key elements for today's most urgent debates – namely, to which extent the foundations of EU law can support the *sovereign* claim to priority that EU law itself raises.

The book is divided into two Sections. The First Section offers a detailed overview of the direct effect in its original times, crucial to which is the link

[3] Judgment of the Court of Justice of the EU, C-42/17, M.A.S. & M.B., 5 December 2017, ECLI:EU:C:2017:936; see Bonelli (2018: 357-373).

between the Community representing "a legal order of a new kind" *i.e.* different from any international law system previously established, and the centrality of the individual as a legitimate claimant of rights that States where uncapable of, or reluctant to, recognize. The Second Section highlights the evolution of direct effect "beyond the *Van Gend & Loos* doctrine" to describe its nature as "polysemic, mutable, objective" while shedding light on its relations with primacy in the development of the case-law of the Luxembourg Court. The story terminates by the fascinating portrait of a "hypertrophic primacy" that has "cannibalized" direct effect (Gallo: p. 394) by enforcing the EU law claim to priority *at any cost*, absent the conditions sedimented in the case-law – which would cast doubts on the respect for the legal limits arisen accordingly.

The First Section begins with a detailed account of the *Van Gend & Loos* background: the arguments formulated by the plaintiff, the Commission's endorsement, the more moderate position of the Advocate General and the final judgment of the Court are all carefully analysed. The political origin of the reasoning deployed is obvious in the Commission's stance claiming that "EU law be applied effectively and uniformly in all Member States" (Gallo: p. 9). Advocate General Roemer relied on German national case-law and strove to keep alive the *Lotus* doctrine, according to which limitations to national sovereignty should never be presumed (Beaulac, 2019: 40). As Dutch constitutional law accepts the priority of international law over national law on condition that it has "direct application" – he argued – special attention should turn to whether Community law had direct application; and, though he shared the Commission's assumption that Community law not only establishes an inter-State order but contains an array of provisions addressed to the citizens directly, he endorsed the view that the core of the effectiveness relating to the Community legal order refers to the function of public enforcement carried out by the Commission, rather than to the judicial enforcement performed by the Courts. In this vein, he read Art. 12 TEEC as a multifaceted norm whose main recipients were (not individuals, but) national Governments. Hence, he offered a more prudent interpretation of the "will of the Founding States": they were – he added – perfectly aware of the restrictions to uniform application that the Treaties' layout entailed, and accepted that design nevertheless.

What this story renders is a picture that clearly fits the German *Planungsverfassung* doctrine, the "constitution-to-be" set out by international lawyer and key adviser to the Government in the post-WWII negotiations Carl Fredrich Ophüls. The influence of this theory (Ophüls, 1965: 229) goes precisely in the direction that the author points at: the *Lotus* doctrine is bypassed by virtue of the Community being a legal order of new kind due the original intent of the Founding States – whence a virtually irrefutable presumption could be derived in favour of expanding, in width and depth,

the "scope of application" (Bartoloni, 2018: 62) of Community Law. This doctrine adds to the right-based construct that the Court of justice erects, according to which there is a link between direct effect and the EU's recognition of rights and liberties to individuals in spite of the States' hesitation to do so. Gallo, though not citing Ophüls, implicitly witnesses to the influence of his discourse: he offers a detailed account of how this link has operated in the creation of the whole 'constitutional toolkit' (Shaw, 2000: 342) deployed by the Court of Justice to enforce the uniform application of EU law. In this vein, the emergence of a judicial network in the increasing practice of preliminary review goes hand in hand with the correlation between rights and remedies the Court has regularly maintained with a view to improving the protection of rights in what was going to become a "multilevel" legal space of rights and freedoms Europe-wide.

The Second Section follows the trajectory of the "objectivization" of the direct effect doctrine, which results in more nuanced lines of reasoning articulated by the Court of Justice in order to expand the width and depth of the Community law's influence over national legal orders even when the link with individual rights and liberties appears loosened, or wholly lacks. The manifold use of the direct effect concept to this (still, political) aim is well depicted in the "chameleonic fashion" (Gallo: p. 163) that direct effect itself acquires.

Key to this account is the dichotomy between "subjective-substitutive" and "objective-oppositional" direct effect. In the first case, direct effect 1) confers a right on the claimant and 2) replaces the national norm. In the second case, direct effect 1) does not confer a right directly on the claimant, but somehow gives her factual or legal advantages; furthermore, 2) it does not replace the national norm but in some other ways prevents its application for the benefit of the claimant.

Whether such a second type of direct effect exists under EU law is controversial. The positions maintained relate to the overall understanding of the relations between national and EU law. Whereas some scholars tend to preserve the link between direct effect and a claim for rights and liberties – thus questioning the operability of direct effect should such a tie evaporate or be missing altogether – others aim to include a broader set of legal arguments within the direct effect category, yet mutually discerning each argumentative line to give a more comprehensive picture of the priority that EU law claims over national laws (Gallo, p. 169; pp. 240-241). Others, too, in a strictly monist fashion, tend to consider direct effect as a temporary feature of EU law, "an infant disease" (Pescatore, 2015: 135) that would prove unnecessary once Community law is recognised as uncontested superior law in the guise of a federal order – which 'ought to be', according to some, the current case nowadays (Baquero Cruz, 2018: p. 27).

In this context, Gallo opts to defend legal pluralism, and yet he maintains that an oppositional-objective direct effect is configurable under EU law (Gallo, p. 243).

He raises six points to support his line of argument:

1. Notions such as the "*directe invocabilité*" of a norm do exist in certain national legal orders, such as France, Belgium and the Netherlands;
2. Although it may not directly supply a right to the claimant, an EU norm may in any case offer "advantages", in law or in fact, to the claim she supports, so that the *invocabilité* of the EU norm would anyhow be beneficial for the claimant – which is in line with the argument for a "subjective-substitutive" direct effect.
3. As a norm must be unconditioned to have direct effect, it may be argued that the content and consequences of the claim it raises over national law vary according to the margin of discretion left to States, so that intermediate nuances in such discretion be treated accordingly as variations of the same concept – *i.e.* direct effect.
4. A tie must be secured between disapplication of national law and direct effect, as a disapplication could not be based on primacy solely.
5. A more limited conception of direct effect would not account for the cases in which national authorities apply EU law instead of national law regardless of a right being claimed – often resorting to a partial application of EU law, the national discipline remaining applicable notwithstanding.
6. Such an extensive conception of direct effect would not invariably encompass the law stemming from the so called "Third Pillar", *i.e.* Justice and Home Affairs as well as Foreign Policy – reference is made to the *Pupino* case and to the comments raising the claim for an "extended" direct effect.[4]

The apparent heterogeneity of the arguments raised points to the decreasing rigueur of the concept itself. Gallo does not dispute that opening the door to a more vaguely defined category of direct effect would result in blurring the boundaries of such concept: he argues that this has been precisely the case in the Court of Justice's evolutionary path. Particularly, the set of requirements pointing at the existence of a clear, precise and unconditional EU norm for direct effect to occur has been reduced by the Court, he contends, to merely ascertaining the unconditional nature of that norm (Gallo, p. 202).

[4] Judgment of the Court of Justice of the EU, C-105/03, Pupino, 16 June 2005, ECLI:EU:C:2005:386.

This is crucial to the twofold conclusion he derives: 1) eventually, direct effect has been refined "*à la carte*" (Gallo, p. 177) in the Court of Justice's case-law, and 2) the extreme flexibility of the concept further increases when so-called "programmatic norms"(Gallo, p. 185) come under attention, particularly the rights provided for in the Charter (Gallo, p. 195).

In the author's view, this looks like a good reason to acknowledge the broadened scope of the direct effect notion with a view to controlling the evolution of case-law, so as to avoid a *tout court* extension of the primacy's concept regardless to the conditions for direct effect to apply.

In this light, Gallo underlines the variety of terms and the distinct semantic areas evoked by the rather imprecise language of the Court. His focus shifts to the concept of "*invocabilité*" of a right, as well as on the diverse terms used to describe the priority that EU law must be conceded in rather different cases. He ties such diversity to the different pre-comprehension that each Community law scholar owes to her national studies' background. Such diversities, somehow intrinsic to the EU, add to the laconic reasoning regularly displayed in the judgments to account for the difficulties in setting the scene of a better established, more 'legal certainty-friendly' doctrine of direct effect. This regular overlap of concepts and arguments has tarnished the right-based construct as grounds for direct effect to occur and paved the way to a multi-faceted figure of the EU law priority claim. In this respect, Gallo envisages a description with four circles. In the first circle, the broadest, stands what he calls "efficacy" *lato sensu*, *i.e.* "priority" as the most elementary content of the claim that EU law raises over national law. This circle contains a sub-circle, labelled *direct efficacity*, in which the twofold elements of "subjective-substitutive" and "objective-oppositional" direct effect stay aligned; the space between the circles belongs to indirect applicability and hosts the concepts of damages' liability and consistent interpretation. Yet, such circles are neither perfectly concentric nor perfectly coincident; rather, they appear as continuously deforming and interfering with one another in a continuous motion of re-arrangement of the EU law priority claim.

Most recently, the author concludes, the *Taricco* ruling has demonstrated that the direct effect has been swallowed by pure primacy; *i.e.*, that EU law can claim priority in the starkest form of direct effect even when there is no possibility that the claimants obtain a right, or an empirical advantage, from EU law being applied with priority over national law.

This reasoning, one may say, acquires a special force within the domain of the European Monetary Union (López Escudero, 2015: 361; Markakis, 2020: 50).

It has been noticed that in *Rimšēvičs*[5] the Court of Justice backs a claim that has potential to invade several EU law domains (Sarmiento Ramírez-Escudero, 2019; Bast, 2019; Hinarejos, 2019: 1649). Additionally, a similar trend is discernible in cases concerning national measures implementing *Memoranda of Understanding* (MoU) agreed on with a State who requests financial assistance under the relevant legal framework, be it within or outside EU. In such cases, the Court of Justice scrutinizes national law implementing the MoU against the background of the Charter, that law being seen as direct implementation of an act of (signed by) the EU institutions (Donaire Villa, 2018; Poulou, 2017: 991); yet, this runs in obvious derogation to the principle of conferral.

Gallo's book stops just before Taricco's last stage, i.e. when the Italian Constitutional Court rules out an EU law priority claim that is felt as overwhelming, hence intolerable. It is, therefore, a genuine account of a pro-Europe line of legal reasoning and political understanding that is today under severe contestation, as the confrontation tends to degenerate in the dichotomy "Europeanists *v* Sovereigntists". Nonetheless, within such a trite polarization, the road to re-affirming constitutional pluralism, hence a peaceful balance of rights and duties in the European legal space (von Bogdandy, 2016: 519) displays in Gallo's most powerful conclusion:

> Direct effect ensures that the principles of conferral, subsidiarity and sincere cooperation are not undermined by the generalized, uncontested application of EU law primacy and by the consequent non-application of national laws. Direct effect is a meeting place, a synthesis of different legal traditions. It is a sign and an instrument of integration; it supplies the reader with a compass to find directions within an indefinite, manifold array of legal categories of substantive and procedural law. Direct effect remains essential: it is capable of spelling in federal terms a legal order that, yet mature and unique, is not a federal legal order. As long as – and if – the EU become a political federal order, there would be no need to establish, by means of direct effect, a filter and a set of conditions to determine whether EU law must enjoy priority over national law for the advantage of individual rights. Only in such a case must courts do as they do with national law – apply federal norms, regardless of their (direct or not) effect.[6]

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5 Judgment of the Court of Justice of the EU, Joined Cases C-202/18 and C-238/18, Ilmārs Rimšēvičs and BCE v Latvia, 26 February 2019, ECLI:EU:C:2019:139, para. 46.

6 D. Gallo, *cit.*, 428-429.

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