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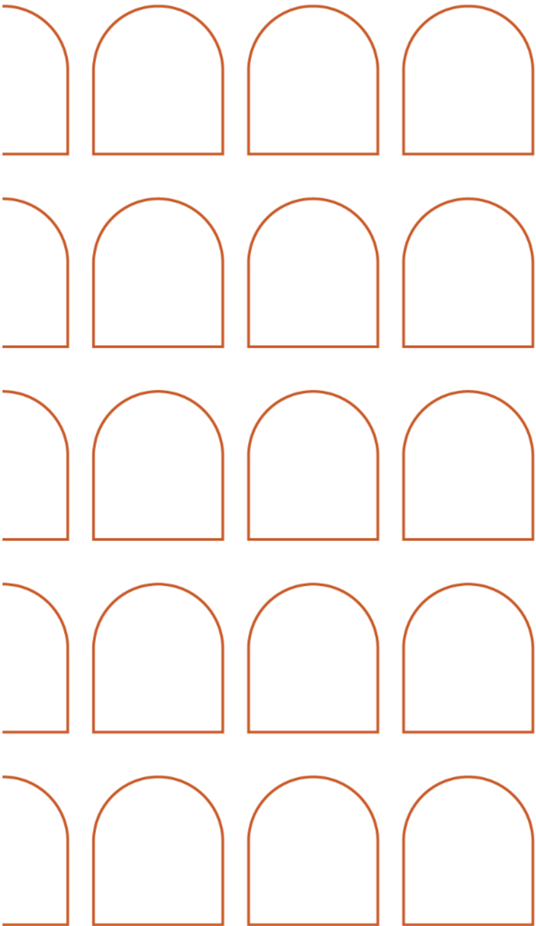

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# WORKING PAPER

## Nicola Catalano (1910-1984): Eurolawyer Extraordinaire

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European University Institute
**Department of History and Civilisation**
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## Abstract

Over the last seventy years, 'Eurolawyers', i.e. jurists with a particular expertise in Community law, have contributed to the European integration process in several different capacities, e.g. as treaty drafters, members of the ECJ, legal advisors to the European institutions, private lawyers, pro-European activists, legal scholars, etc.. Nicola Catalano, however, has served the construction of Europe in all of those capacities. That is why he can be regarded as an 'Eurolawyer extraordinaire'. This paper outlines his biography and seeks to assess his contribution to the European integration process, notably in three areas: the autonomy of Community law, the primacy of Community law, and the EEC preliminary ruling procedure.

## Keywords

Eurolawyers, Community Law, European law, EEC, preliminary ruling procedure

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## Table of Contents

I. Table of Contents ........................................................................................ 6
I. Introduction ................................................................................................... 7
II. Eurolawyer Extraordinaire: a brief biography ............................................................ 8
III. The autonomy of Community Law ...............................................................12
IV. The primacy of Community Law ..................................................................15
V. The preliminary reference procedure ..........................................................19

## I. Introduction

Compared to other areas of law, EU law is a relatively young research field. This may explain why, for the most part of its existence, it lacked a tradition of legal history studies that could provide an account of the richness and significance of the European integration process.[1] Contributions published over the last fifteen years have marked a change in trend. An interest in this topic has emerged first among historians and political scientists[2] and more slowly, among legal scholars.[3] It has been fuelled by the need to achieve 'a novel understanding of the forces that shaped and resisted the current European legal profession together with its legal culture and practice'[4] and to increase knowledge and awareness of the autonomous development of Community/EU law.[5]

From this point of view, examining the lives and deeds of the individuals who have contributed to the European integration process may prove fruitful[6] to comprehend litigation strategies, judicial decision-making, and the drawing of legal opinions as well as to better grasp questions of agency, causality, and interconnection.[7] The French scholar Antoine Vauchez, in particular, has focused on the role of 'Eurolawyers' in the making of a transnational polity, 'in their manifold capacities as jurisconsults-diplomats, corporate lawyers, EU institutions' legal advisers, "politicians of the law", institution-builders, academics, etc.'[8]

While many Eurolawyers have contributed to the European integration process in two or more of those capacities,[9] Nicola Catalano can be regarded as an '*Eurolawyer extraordinaire'* in that, throughout his life, he has engaged with Community law in as many as six different roles: as legal adviser to the ECSC High Authority, as member of the drafting committee of the

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[1] M. RASMUSSEN, *Towards Legal History of European Law*, in *European Papers*, 2021, p. 924.

[2] *Ex multis*, see B. DAVIES, M. RASMUSSEN, *Towards a New History of European Law*, in *Contemporary European History*, 2012, p. 305 ss., B. DAVIES, *Why EU Legal History Matters – A Historian's Response*, in *American University International Law Review*, 2013, p. 1337 ss., M. RASMUSSEN, *Revolutionizing European law: A history of the Van Gend en Loos judgment*, in *International Journal of Constitutional Law*, 2014, p. 136 ss. and A. VAUCHEZ, *Brokering Europe: Eurolawyers and the Making of a Transnational Polity*, Cambridge, 2021.

[3] See for instance A. GRILLI, *Le origini del diritto comunitario*, Bologna, 2009, P.L. LINDSETH, *The Critical Promise of the New History of European Law*, in *Contemporary European History*, 2012, p. 457 ss. and A. ARENA, *From an Unpaid Electricity Bill to the Primacy of EU Law: Gian Galeazzo Stendardi and the Making of Costa v. ENEL*, in *European Journal of International Law*, 2019, p. 1017 ss.

[4] F. NICOLA, *Critical Legal Histories in EU Law*, in *American University International Law Review*, 2013, p. 1177.

[5] G. CAGGIANO, *La dottrina italiana nella fase costituente dell'ordinamento giuridico comunitario*, in *Studi sull'integrazione europea*, 2013, p. 443.

[6] It is worth mentioning the *Key biographies in the legal history of the European Union (1950-1993)* research project carried out by Stefan Vogenauer and Philip Bajon at the Max Planck Institute for Legal History and Legal Theory in Frankfurt am Main. In the framework of this project, an interesting conference took place on 21 and 22 June 2018 (for more information, https://www.lhlt.mpg.de/1467945/event18-06-21-key-biographies).

[7] B. DAVIES, 'Biography as a Window into the European Union's Legal History', in EU LEGAL HISTORY, EU Law Live Weekend Edition no. 49, 2021, p. 8.

[8] See A. VAUCHEZ, Brokering Europe: Eurolawyers and the Making of a Transnational Polity, Cambridge: Cambridge University Press, 2015, p. 8

[9] For instance, Alberto Trabucchi acted as advisor to the ECSC High Authority prior to serving as ECJ judge; Riccardo Monaco published multiple scholarly articles on Community law prior to his appointment as ECJ judge; Gian Galeazzo Stendardi practiced Community law as a private lawyer, published extensively and taught courses on that topic. See E. STEIN, *Lawyers, Judges, and the Making of a Transnational Constitution*, in *American Journal of International Law*, 1981, p. 1-2; T. PAVONE, *The Ghostwriters. Lawyers and the Politics behind the Judicial Construction of Europe*, Cambridge, 2022.

Treaty of Rome, as member of the ECJ, as author of scholarly publications, as private lawyer, and as pro-European activist.

Thus, this paper seeks to assess whether and how Nicola Catalano's different interactions with Community law have enabled him to foster the European integration process, by sketching his biographical profile[10] and focusing on his contribution to three hallmarks of Community law: the principle of autonomy, the doctrine of primacy, and the EEC preliminary reference procedure.

## II. Eurolawyer Extraordinaire: a brief biography

Born in Castellaneta on 17 February 1910, Nicola Catalano graduated in Law in Rome in 1932 and worked as a lawyer until 1939, when he was hired by the *Avvocatura dello Stato*, the legal entity established in 1933 with the task of advising and representing the Kingdom of Italy in judicial proceedings.[11]

With the armistice of Cassabile of September 1943, the Kingdom of Italy joined the Allies in fighting against the *Wermacht*. Following the liberation of Rome in 1944, the purge of fascists from public and private entities began and the editorial offices of some newspapers were placed under government control. Thus, Catalano was appointed as government commissioner for *Il Giornale d'Italia*,[12] a Rome-based newspaper that had become prominent during the Fascist regime thanks to its ties to Mussolini and had even published the Manifesto of Racist Scientists in 1938.[13]

Following the outcome of the Institutional referendum held on 2 and 3 June 1946, the Italian Kingdom was transformed into a Parliamentary Republic, whose Constitution entered into force on 1 January 1948. Catalano witnessed this regime-change firsthand, as he acted as legal adviser to the *Poligrafico dello Stato*, the public entity responsible for minting coins, passports, postage stamps, and the Official Journal, which had to be updated to reflect Italy's new form of State.[14]

In 1948 Catalano's career took an 'international' turn: he was appointed agent, on behalf of the Italian Government, before the conciliation commissions established by the 1947 Peace Treaty between Italy and the victorious powers of World War II.[15] After that appointment, Catalano served as legal adviser to the International Zone of Tangier between 1951 and

[10] To date, Catalano's most comprehensive biographical analysis can be found in V. FRITZ, *Juges et avocats généraux de la Cour de Justice de l'Union européenne (1952-1972). Une approche biographique de l'histoire d'une révolution juridique*, Frankfurt am Main, 2018, p. 197-202.

[11] Ibid.

[12] Ibid.

[13] 'Il fascismo e i problemi della razza', *Il giornale d'Italia*, 15 July 1938.

[14] The last issue of the Official Journal of the Italian Kingdom was published on 10 June 1946; the first issue of the Official Journal of the Italian Republic came out on 20 June 1946: it announced the results of the Institutional Referendum, that the Prime Minister would appoint a committee in charge of designing the emblem of the Italian Republic, and that existing banknotes, forms, and printed documents could be employed while stock lasted.

[15] Under Articles 75 and 78 of the Treaty of Peace with Italy, signed in Paris, on 10 February 1947, Italy undertook to return the property it had taken from the territory of the States against which it had fought during the Second World War, to restore the rights and interests of the United Nations and their nationals in Italy and to return the property belonging to them equally. In relation to this, Article 83 provided for the establishment of a conciliation commission in charge of settling any dispute that should arise.

1953.[16] It is in this capacity that he came in direct contact[17] with the implications of the principle of supremacy of international law:[18] a few years earlier, in *Radio-Tanger*, the Mixed Court of Tangier had refused to apply a domestic law at odds with the economic freedoms enshrined in the 'constitutional treaties' establishing the Zone,[19] a holding that Catalano himself expressly endorsed, except for its 'constitutional' overtones, in a legal opinion he drafted in 1951 at the request of the authorities of the Zone.[20]

It is in 1953 that Catalano's career as a 'Eurolawyer' began, as he took on the postition of legal adviser to the High Authority of the European Coal and Steel Community (ECSC) until 1956. In that capacity, he had the opportunity to work in close contact with Michel Gaudet, who had been appointed Director of the High Authority Legal Service in October of the previous year.[21] Also, Catalano had the chance to familiarize himself with litigation before the ECJ: he represented the High Authority in some of the earliest cases ever decided by the ECJ,[22] including *Groupement des Industries Sidérurgiques Luxembourgeoises,* where the Community judges outlined for the first time the implications of the principle of loyal cooperation.[23]

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[16] On the Tangier zone, see C.G. FENWICK, The international status of Tangier, in *American Journal of International Law*, 1929, p. 140 ss. Because of its strategic position, close to the Strait of Gibraltar, in 1923 the Tangier zone was placed under a regime of permanent neutrality, so no military establishment was allowed. The zone was placed under the joint administration of France, Spain and Britain. Later, the governments of Italy, Portugal, Belgium and the Netherlands joined them. The status of the international zone remained until its reintegration with Morocco in 1956.

[17] On the influence of colonial law on international law and Community law see J. KLABBERS, The Emergence of Functionalism in International Institutional Law: Colonial Inspirations, in *European Journal of International Law*, 2014, p. 645; M. ERPELDING, International Law and the European Court of Justice: The Politics of Avoiding History, 22 Journal of the History of International Law (2020) 446; M. ERPELDING, Juristes internationalistes, juristes mixtes, Eurolawyers: l'apport de l'expérience semi-coloniale à l'émergence d'un droit supranational, in Clio@Themis, 2022: http://journals.openedition.org/cliothemis/2023

[18] See F. MORGENSTERN, Judicial Practice and the Supremacy of International Law, in British Yearbook of International Law, 1950, p. 89

[19] Mixed Court of Tangier, Appellate Chamber, Judgment of 10 March 1939, *Ministère Public v. J Aerts et Albert Azerraf (« Radio-Tanger »),* For a French translation, see A. MÉNARD, La Radio- diffusion à Tanger, Paris, Sirey, 1939, p. 47-59.

[20] See N. CATALANO, Limites de la compétence du Tribunal Mixte de la Zone de Tanger, legal opinion, 13 February 1951, p. 3. AMAE, 29POI/1/119, cited in M. ERPELDING, Juristes internationalistes, juristes mixtes, Eurolawyers: l'apport de l'expérience semi-coloniale à l'émergence d'un droit supranational, in Clio@Themis, 2022: http://journals.openedition.org/cliothemis/2023

[21] See J. BAILLEUX, Michel Gaudet, a law entrepreneur: the role of the Legal Service of the European executives in the invention of EC Law and the Birth of the Common Market Law Review, in Common Market Law Review, 2013, p. 359 ss. and A. BOERGER, M. RASMUSSEN, The Making of European Law: Exploring the Life and Work of Michel Gaudet, in American Journal of Legal History, 2017, p. 51 ss.

[22] For instance, Catalano took part in Case 2/54, *Italy v High Authority*, ECLI:EU:C:1954:8, the second ruling given by the ECJ, handed down on 21 December 1954, i.e. the same day as the ECJ's first ruling: Case 1/54, *France v High Authority*, ECLI:EU:C:1954:7.

[23] ECJ, Cases 7/54 and 9/54, Groupement des industries sidérurgiques Luxembourgeoises v High Authority, ECLI:EU:C:1956:2.

Catalano was also part of the Italian delegation involved in the drafting of the Treaties of Rome and participated in the work of the *Groupe juridique*.[24] Set up on 26 June 1956 by the Committee of Heads of Delegation and active between October 1956 and March 1957, this group had the task of giving final legal shape to the Treaties and drafting their general and institutional provisions.[25] Chaired by the Italian diplomat Roberto Ducci, it was composed of Yves Devadder, Pierre Pescatore, Willem Riphagen, Joseph Muhlenhofer, Ernest Wohlfarth, Hans-Peter von Meibom, Georges Vedel, Jean-Jacques de Bresson, and Catalano. Later, in order to take into account what had been achieved in the framework of the ECSC, also Michel Gaudet and Hubert Ehring joined the *Groupe juridique*.

Catalano regarded his work at the *Groupe juridique* as 'intimately linked to the fate of our children'.[26] In particular, it was Catalano, 'avec toute son inventivité latine [et] les extraordinaires ressources de son esprit italien',[27] who proposed to the *Groupe juridique* the introduction of a preliminary reference mechanism that would go beyond the one set out in Article 41 of the ECSC Treaty, which only enabled the ECJ to rule on the validity of the deliberations of the ECSC High Authority and Council.[28] Drawing inspiration from the Italian preliminary constitutionality reference procedure, Catalano put forward the first draft of what would eventually become Article 177 of the Treaty establishing the European Economic Community (TEEC),[29] enabling the ECJ to rule on the interpretation of Community law as well as on the validity of Community acts.

Following the conclusion of the negotiations of the Rome treaties, Catalano went back to his job at the *Avvocatura generale dello Stato*. In that capacity, he represented the Italian State in a number of proceedings before the Italian Constitutional Court, which had been envisaged by the Italian Constitution of 1947,[30] but had become operational only in 1956, due to the Italian Parliament's inability to reach consensus on the appointment of a third of its judges.[31] Drawing on his personal experience as an *Avvocato dello Stato*, Catalano even published an article on the procedural aspects of the Italian preliminary constitutionality review procedure.[32]

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[24] See, generally, A. BOERGER and M. RASMUSSEN, The Dual Nature of the European Community: The Making of the Institutional and Legal Dimensions of European Integration, 1950 to 1967, (forthcoming), notably Chapters 3 and 4.

[25] P. PESCATORE, *Les travaux du «groupe juridique» dans la negociation des traités de Rome*, 1981, p. 159.

[26] Letter from Catalano to Gaudet of 21 October 1956, Fondation Jean Monnet pour l'Europe (the Authors would like to thank Anne Boerger for showing them this document).

[27] That is how Pierre Pescatore remembered him (in R. DUCCI, M.G. MELCHIONNI, *La genèse des traités de Rome. Entretiens inédits avec 18 acteurs et témoins de la négociation*, Lausanne, 2007, p. 78, 81).

[28] However, it must be said that subsequently, the Court went beyond the strictly literal interpretation, allowing references for a preliminary ruling on questions of interpretation to be made on the basis of Article 41 of the ECSC Treaty (A. ARNULL, *Preliminary Rulings and Judicial Politics*, in A. FABIAN, D. GARETH, D. KOCHENOV, J. LINDEBOOM (eds), *The Internal Market and the Future of European Integration: Essays in Honour of Laurence W. Gormley*, Cambridge, 2019, p. 440).

[29] See M. RASMUSSEN, The Origins of a Legal Revolution…, p. 89. A. BOERGER-DE SMEDT, Negotiating the Foundations of European Law, 1950—57: The Legal History of the Treaties of Paris and Rome, in Contemporary European History, 2012, p. 352

[30] See Articles 134 and following of the Italian Constitution and law 11 March 1953, no. 87.

[31] Constitutional Court, Judgment no. 28 of 22 January 1957; no. 48 of 13 March 1957,

[32] N. CATALANO, *Della "Rilevanza" Della Questione Costituzionale Quale Condizione Dell'ordinanza Di Trasmissione Alla Corte*, in *Rassegna mensile dell'Avvocatura dello Stato*, IX, no. 1-2 (1957): 1-7.

At the same time, Catalano became involved in the academic debate on the nature of the European Communities. He took part in the Stresa Conference of 1957,[33] where he acted as *rapporteur* on the sources of law of the ECSC,[34] and published the first comprehensive monograph on the European Economic Community (EEC) and the Euratom,[35] which he updated and republished in 1959.[36]

In 1958, Catalano was appointed as a member of the ECJ.[37] He served as President of Chamber and Judge-Rapporteur in a number of disputes concerning the translation of procedural documents,[38] the activities of the ECSC[39] and Community civil service litigation.[40] He was a member of the ECJ when it recognised, in *Humblet*, that if a legislative or administrative measure adopted by the authorities of a Member State was contrary to Community law, that State was obliged to rescind the measure and to make reparation for any unlawful consequences.[41] Furthermore, he was a member of the ECJ when it delivered the (in)famous *Stork* judgment, holding that the possible violation of fundamental principles of national law could not be taken into consideration in the context of an action for annulment brought against a decision of the High Authority.[42]

Catalano left the ECJ in November 1962, where he was replaced by Alberto Trabucchi.[43] But his commitment to European integration continued as a political activist: he became

[33] See J. BAILLEUX, « Comment l'Europe vint au droit. Le premier congrès international d'études de la CECA (Milan-Stresa 1957)», Revue française de science politique, vol. 60, n° 2, 2010, pp. 295–318

[34] N. CATALANO, 'Le Fonti Normative della Comunità Europea del Carbone e dell'acciaio', Actes officiels du Congrès d'études sur la C.E.C.A 1957.

[35] N. CATALANO, *La Comunità economica europea e l'Euratom*, Milano, 1st Ed., 1957.

[36] N. CATALANO, *La Comunità economica europea e l'Euratom*, Milano, 2nd Ed., 1959.

[37] It is interesting to note that Catalano kept in touch with Gaudet during his tenure at the ECJ. See the Letter from Catalano to Gaudet of 3 September 1958 Fondation Jean Monnet pour l'Europe (reassuring Gaudet that Catalano's position as judge would not impinge on their long-standing friendship and would not refrain him from asking Gaudet's advice on the ECJ's Rules of Procedure and on the internal organisation of the ECJ).

[38] ECJ, 10 May 1960, Case 1-60-REVI, *Acciaieria Ferriera di Roma v High Authority*, ECLI:EU:C:1960:22.

[39] ECJ, 12 February 1960, Joined Cases 15-59 and 29-59, *Société metallurgique de Knutange v High Authority*, ECLI:EU:C:1960:4, 13 July 1961, Joined Cases 2-60 and 3-60, *Niederrheinische Bergwerks AG v High Authority*, ECLI:EU:C:1961:15 and 14 July 1961, Joined Cases 9-60 and 12-60, *Vloeberghs v High Authority*, ECLI:EU:C:1961:18.

[40] ECJ, I June 1961, Case 15-60, *Simon v Court of Justice*, ECLI:EU:C:1961:11 and 14 December 1961, Case 12-61, *Gorter v Conseils*, ECLI:EU:C:1961:29. It should be noted that in the first of these judgments, Catalano is referred to as President of the Court, although at the time that role was held by Andreas Matthias Donner. The reason is probably that the dispute concerned a measure taken by the latter as President of the Court.

[41] ECJ, 16 December 1960, Case C-6/60, *Humblet v Belgian State*, ECLI:EU:C:1960:48, p. 1113.

[42] ECJ, 4 February 1959, Case 1/58, *Stork & Cie. V High Authority*, ECLI:EU:C:1959:4. That line of reasoning was later confirmed in ECJ, 18 May 1962, Case 13/60, *Geitling Ruhrkohlen-Verkaufsgesellschaft and Others v High Authority*, ECLI:EU:C:1962:15 and I April 1965, Case 40/64, *Sgarlata v Commission of the EEC*, ECLI:EU:C:1965:36 and abandoned in 12 November 1969, 29-69, *Stauder / Stadt Ulm*, ECLI:EU:C:1969:57.

[43] Under Article 167 of the TCEE, every three years there was to be a partial replacement of the Judges and Advocates General. Three Judges and one Advocate General drawn by lot were to be designated as being subject to renewal at the end of the first three-year period. Nicola Catalano, Louis Delvaux, Charles-Léon Hammes and Karl Roemer were identified as such. Their functions would then cease in 1961. All four were confirmed, but Catalano resigned in 1962. According to some, the Italian government prompted him to resign in order to allow the appointment of Alberto Trabucchi, supported by Antonio Segni, Minister of Foreign Affairs, and Giuseppe Trabucchi, Minister of the Economy and brother of the future member of the Court (see M. RASMUSSEN, *Establishing a Constitutional Practice of European Law: The History of the Legal Service of the European Executive, 1952-65*, in *Contemporary European History*, 2012, p. 389 and V. FRITZ, *Juges et avocats généraux*…, p. 113-114). A. COHEN, J. MURPHY, *"Ten majestic figures in long amaranth robes": The formation of the court of justice of the European*

President of the *Associazione italiana giuristi europei*, an association set up in 1958 to promote knowledge of Community law, he was a member of the *Consiglio italiano del movimento europeo*, an organization established in 1948 to ensure the co-ordination of pro-European parties, associations, trade unions, etc., a member of the federalist branch of the centre-right Italian Liberal Party,[44] and served as President of the *Comitato per l'Unione Europea*, an entity set up to select the most qualified Liberal and Republican candidates for the European Parliament elections.[45]

Catalano also continued to publish on Community law matters in Italian journals and law reviews. In 1962 he published the first Handbook on European Communities Law, which he updated in 1965.[46] Moreover, he went back to legal practice as a private lawyer specializing in Community law. In this capacity, he represented private parties in as many as 27 cases before the ECJ, 16 of which were preliminary proceedings.[47] He also represented private parties in a number of cases heard by the Italian Constitutional Court,[48] notably in *Frontini*[49] and *Industrie chimiche*,[50] where the Italian Justices acknowledged the primacy of Community law over Italian law but at the same time introduced some constitutional limits (the so-called *controlimiti*) to that principle. Catalano died in Rome on 5 August 1984.[51]

## III. The autonomy of Community Law

The passage in the ECJ judgment in *Van Gend en Loos* that the EEC constitutes a 'new legal order in the field of international law', in favour of which the States have renounced (albeit in limited areas) their sovereign powers,[52] has been traditionally regarded as the first explicit acknowledgement of the autonomous nature of Community law.[53] Over time, the ECJ has

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*communities*, in *Revue française de science politique*, 2010, p. 35 refer to a gentlemen's agreement: Catalano had agreed to resign before his renewed mandate expired. Regardless, Catalano stated that his resignation was due to personal and family reasons (V. FRITZ, *Juges et avocats généraux*…, p. 114).

[44] V. Fritz, *Juges et avocats généraux*…, p. 202.

[45] See 'Lettere al Corriere', Corriere della Sera, 15 giugno 1984, p. 11.

[46] See the first (N. CATALANO, *Manuale di diritto delle Comunità europee*, Milan, 1962) and the second edition (N. CATALANO, *Manuale di diritto delle Comunità europee*, II ed., Milan, 1965).

[47] The Authors would like to thank Tom Pavone for providing this detail.

[48] ICC, Judgments no. 54 of 21 March 1969; no 46 of 12 March 1970; no. 205 of 15 July 1976; no. 163 of 22 December 1977; no. 176 of 6 October 1981; no. 177 of 6 October 1981.

[49] ICC, Judgment no. 183 of 18 December 1973.

[50] ICC, Judgment no. 232 of 22 October 1975.

[51] V. FRITZ, *Juges et avocats généraux*…, p. 202.

[52] ECJ, 5 February 1963, Case 26-62, *Van Gend en Loos v Administratie der Belastingen*, ECLI:EU:C:1963:1, p. 23.

[53] K. LENAERTS, *The autonomy of European Union Law*, in *I Post di AISDUE*, 2019, p. 1-2. For an introduction, see D. HALBERSTAM, *"It's the Autonomy, Stupid!" A Modest Defense of Opinion 2/13 on EU Accession to the ECHR, and the Way Forward*, in *German Law Journal*, 2015, p. 105 ss., M. KLAMERT, *The Autonomy of the EU (and of EU Law): Through the Kaleidoscope*, in *European Law Review*, 2017, p. 815 ss., N. NIC SHUIBHNE, *What is the Autonomy of eu Law, and Why Does that Matter?*, in *Nordic Journal of International Law*, 2019, p. 9 ss. and M.-L. ÖBERG, *Autonomy of the EU Legal Order: A Concept in Need of Revision?*, in *European Public Law*, 2020, p. 705 ss. See also A. ARENA, *Curia non facit saltus: origini ed evoluzione del principio del primato prima della sentenza Costa c. ENEL*, in E. TRIGGIANI et al. (a cura di), *Dialoghi con Ugo Villani*, Bari, 2017, p. 951 and W. PHELAN, *Great judgments of the European Court of Justice*, Cambridge, 2019, p. 22 (arguing that the ECJ had already implicitly acknowledged the specificity of the EEC Treaty relative to other international agreements in Case 7/61, *Commission v. Italy (pork products)).*

confirmed this structural feature of the European integration process, emphasising that the Treaties, unlike ordinary international treaties, have established their own legal order, integrated into the systems of the Member States, which the national courts are obliged to respect.[54]

According to the ECJ, the supranational legal order has its own constitutional framework and founding principles, a particularly sophisticated institutional structure and a full set of legal rules to ensure its operation.[55] Furthermore, it has three major characteristics: the fact that it stems from an independent source of law – meaning, the Treaties –, primacy over the laws of the Member States, and the direct effect of a whole series of provisions.[56] An international agreement cannot undermine autonomy of EU law,[57] which it is for the ECJ to protect.[58]

Before the jurisprudential evolution summarised above took place, Nicola Catalano had already identified certain aspects of the European integration process from which the autonomous nature of Community law seemed to emerge.[59]

Reflecting on the notion of 'supranationality',[60] Catalano pointed out that that notion had political and legal implications. On the political level, it was linked to a federalist perspective: therefore, it had to be interpreted as referring, rather than to a delegation of sovereign powers from the Member States to the Communities, to a distribution of competences, similarly to what happens in a federal State.[61] Catalano spoke of a 'partial federation', since at the time integration concerned only economic matters and did not extend to politics, foreign policy and defence.[62] Nevertheless, the term 'federation' could be used to characterise the Communities because the common European institutions had been entrusted with the power to implement what had been agreed upon with the Treaties, to ensure its correct application, and most importantly to adopt common rules.[63]

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[54] ECJ, 15 July 1964, Case 6-64, *Costa v E.N.E.L.*, ECLI:EU:C:1964:66, p. 1144.

[55] ECJ, 18 December 2014, avis 2/13, *Adhésion de l'Union à la CEDH*, ECLI:EU:C:2014:2454, paras 158, 166.

[56] *Ivi*, para 166.

[57] ECJ, 3 September 2008, Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat International Foundation v Council and Commission*, ECLI:EU:C:2008:461, para 282.

[58] For instance, ECJ, 8 March 2011, avis 1/09, *Accord sur la création d'un système unifié de règlement des litiges en matière de brevets*, ECLI:EU:C:2011:123, para 67.

[59] N. CATALANO, *Le Fonti Normative della Comunità Europea del Carbone e dell'acciaio*, in *Actes officiels du Congrès d'études sur la C.E.C.A 1957*, p. 137 (arguing that 'the peculiar nature and the extremely original content of the [ECSC] Treaty set it apart from any other international instrument')

[60] Many Italian scholars of the time debated on this topic. See for instance R. MONACO, *Le comunità sopranazionali nell'ordinamento internazionale*, in *La Comunità Internazionale*, 1953, p. 441 ss., R. AGO, *Le organizzazioni internazionali e le loro funzioni nel campo dell'attività interna degli Stati*, in *Studi in onore di G. M. De Francesco*, I, Milan, 1957, p. 1 ss. and G. CANSACCHI, *Le comunità sopranazionali, gli ordinamenti comunitari e gli ordinamenti degli Stati membri*, in *Rivista trimestrale di diritto e procedura civile*, 1957, p. 1038 ss. For an overview, see P. FOIS, *Dalla CECA all'Unione europea. Il declino della sovranazionalità*, in *Studi sull'integrazione europea*, 2006, p. 479 ss.

[61] N. CATALANO, *La Comunità economica europea…*, 1957, p. 10 and N. CATALANO, *Manuale…*, p. 15 ss. Years later, Catalano would state something different, as he would describe supranationality as implying a transfer of competences and powers from the Member States to the EEC. He would also distinguish between procedural supranationality (based on deliberation by majority vote) and substantive supranationality (deriving from EEC regulations being directly applicable). See N. Catalano, Sopranazionalità formale e sopranazionalità sostanziale, in Il Foro italiano, 1973, p. 60.

[62] N. CATALANO, *Manuale…*, II ed, p. 21-22 and N. CATALANO, R. SCARPA, *Principi di diritto comunitario*, Milan, 1984.

[63] N. CATALANO, *La Comunità economica europea…*, p. 11-12. As for the federal nature of the European Communities, this opinion was not shared by all the members of the Court of Justice. Louis Delvaux believed that the Court of Justice could be qualified as a federal court (see L. DELVAUX, La Cour de Justice de la Communauté

On the legal level, Catalano first stressed the difficulty of developing an adequate definition of 'supranationality'. However, he believed that this concept expressed at least the impossibility of interpreting the European Communities as mere international law phenomena.[64] Referring to Riccardo Monaco's thought, he stated that their treaty-based origin did not prevent their legal order from being distinct and autonomous both with respect to the international legal order and the Member States' legal orders.[65] Later, Catalano pointed out that autonomy marks Community institutions' action, because their competence derives directly from the Treaties and does not require further intervention by the Member States.[66]

From this, Catalano derived that Community law must be regarded as a new branch of law, which certainly has links with international law, but is not confined to it, just as it also has links with the Member States' legal orders, which are deeply affected by it.[67] According to Catalano, it would have been necessary for European integration to be studied also in international law courses, at least in order to understand the substantial differences between it and international law itself. This would have further justified the rise of a new, independent research field.[68] In this regard, Catalano noted that the scientific autonomy of Community law is linked to the vastness and comprehensive nature of the legislation adopted and the development of

européenne du charbon et de l'acier. Exposé sommaire des principes, organisation, compétence, procédure, le droit en viguer dans la communauté, Paris, 1956, p. 11, retrieved in V. Fritz, Juges et avocats généraux…, p. 143), but Charles-Léon Hammes denied this (see C.-L. HAMMES, Les caractères essentiels de la nature de la Cour de Justice des Communautés européennes, in Bulletin du Cercle François Laurent, 1966, p. 3 ss., retrieved in V. Fritz, Juges et avocats généraux…, p. 147-148). According to Hammes, acknowledging the federal nature of the Court would have meant recognising the primacy of Community jurisdiction over national ones, which could not be, lacking an express attribution of competence in the Treaties. More generally, Hammes denied that the provisions of the Treaties had the characteristics of stability and elaboration typical of the rules that make up a constitution. For his part, Andreas Matthias Donner (A.M. DONNER, Les rapports entre la compétence de la Cour de Justice des Communautés européennes et les tribunaux internes, in Académie de droit international de la Haye, Recueil des cours, Leiden, 1965, p. 5, retrieved in V. FRITZ, Juges et avocats généraux…, p. 147) believed that the structure of the Communities had not to be assessed in the light of distant aims, but focusing on the specific objective pursued, which was the creation of a common market. As for the Italian scholars of the time, see G. MORELLI, *Stati e individui nelle organizzazioni internazionali*, in *Rivista di diritto internazionale*, 1957, p. 3 ss., who argued that the agreement between the founding States could give rise to common institutions, but not to a federal state.

[64] N. CATALANO, *La Comunità economica europea*…, p. 6. As for other Italian scholars of the time, Morelli thought that there was no derivative link between a community of states, such as the international community whose legal system governs interstate relations, and other communities in which a series of rules are addressed to individual and private entities, which therefore appear to be holders of legal situations and subjects of the corresponding legal system. That would lead to acknowledge the originality of the European Communities and their autonomy with respect to international law. Monaco thought the autonomy of international bodies entailed a potential for development and self-organisation. Therefore, the European Communities' legal order could be considered as separate and distinct from that of the Member States. However, that could not lead to regard the European Communities as having a federal nature, as they lacked the political features of a federal state. As for Quadri, his understanding of the European integration process underwent changes over time. However, in the fourth edition of his handbook, he denied that the European Communities were separate entities from the Member States and had an autonomous standing within the international community. For an overview of the Italian academic debate on those issues, see A. MIGLIAZZA, Le Comunità europee in rapporto al diritto internazionale e al diritto degli Stati membri, Milan, 1964, p. 2 ss.

[65] N. CATALANO, *La Comunità economica europea*…, p. 239, note 3. Catalano refers to R. MONACO, *Le istituzioni internazionali di cooperazione europea*, Milan, 1956.

[66] N. CATALANO, R. SCARPA, *Principi*…, p. 95.

[67] N. CATALANO, *Manuale*…, p. 1-2.

[68] N. CATALANO, *Manuale*…, II ed., p. 711.

Community law's own principles and methods of investigation.[69] This would have justified the choice by law schools to offer European Law courses.[70]

## IV. The primacy of Community Law

One of the main corollaries of Catalano's vision of the Communities as a protofederal experience was the primacy of Community law over domestic law, which Catalano endorsed in unequivocal terms at the roundtable of the Stresa conference on 1 June 1957: 'les normes […] de la Communauté doivent primer substantiellement sur les normes nationales […] parce que les États membres sont soumis à la Communauté'.[71]

However, as the eminent European legal historian Mayne J. Richard put it in respect to the implementation of the Schuman declaration, 'the devil is in the details':[72] translating the idea that Community law should prevail on domestic law into an enforceable legal doctrine was a long journey, and Catalano's contribution to it was not a straight line either.

Catalano's initial view of Community primacy was a *partial* one, in that Community law, at least in Italy, would prevail only on domestic laws enacted before the ratification of the Community treaties. In his contribution to the Stresa Conference proceedings and in his 1957 monograph on the EEC, Catalano argued that the Community treaties had entered the legal orders of the Member States by virtue of their ratification law.[73] In Italy, that law had the same value as any other domestic law,[74] because the Italian Constitution did not, unlike the constitutions of other Member States, provide for the primacy of international treaties over domestic laws. Thus, Community law, though its ratification law, would impliedly repeal earlier domestic laws,[75] but it would also be impliedly repealed by later domestic laws, pursuant to the well-established principle *lex posterior derogat priori*.[76] Italian courts could only apply earlier Community law *in lieu* of subsequent domestic laws if they could construe the former as an exception to the latter, pursuant to the principle *lex specialis derogat generali.*[77]

Catalano's initial view of Community primacy was also an *international* one, in that conflicts between Community law and subsequent domestic laws were 'irrelevant from the perspective of the Italian legal order', i.e. for Italian state organs, but only mattered at the Community level, i.e. in the relationship between Italy, the other Member States, and the Community Institutions.[78] Catalano agreed with eminent international law professor Rolando Quadri that Article 10 of the Italian Constitution (which incorporated generally recognized principles of

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[69] N. CATALANO, *Manuale*…, II ed., p. 2, note 4. Catalano refers to A. ROCCO, *Principi di diritto commerciale*, 1928, Turin, p. 74.
[70] N. CATALANO, *Manuale*…, II ed., p. 2, nota 4.
[71] W. ALEXANDER, 'Compte rendu' in *Actes officiels du congrès d'études sur la C.E.C.A.*, 1957, p. 331.
[72] M. J. RICHARD, *The Community of Europe*, 1963, p. 92. This is believed to be one of the earliest occurrences of the idiom.
[73] N. CATALANO, 'Le Fonti Normative…, p. 117 ss.
[74] N. CATALANO, *La CEE e l'Euratom*, 1957, p. 60.
[75] Ibid.
[76] Ibid., p. 63.
[77] Ibid. p. 65 and 67.
[78] Ibid., p. 64.

international law – such as *pacta sunt servanda* – into the Italian legal order) required Italy not to enact laws incompatible with its treaty obligations, but he did not go as far as to endorse the view that the Italian Constitutional Court could strike down those laws as unconstitutional.[79] Rather, Catalano believed that the enactment of national laws at variance with Community law constituted a violation of the principle of loyal cooperation laid down in the Community Treaties, which could trigger the infringement mechanisms provided therein and, eventually, lead to a judgment of the ECJ establishing a breach of Community law and requiring the Italian Republic to repeal or amend the offending provisions.[80]

Catalano's *international* view on primacy found support in the ECJ jurisprudence during his tenure as a judge. In fact, in 1960 the ECJ ruled in *Humblet* that the ECSC Treaty and the Protocol on Immunities had 'the force of law in the Member States following their ratification and which take precedence over national law' and that when the ECJ found that 'a legislative or administrative measure adopted by the authorities of a Member State is contrary to Community law, that Member State [was] obliged […] to rescind the measure in question and to make reparation of any unlawful consequences which may have ensued'.[81] It is not known to what extent Catalano – who was an ECJ judge at the time but did *not* act as rapporteur on that case – was behind that dictum, but it is undeniable that, as one of the few case comments aptly put it, the observance of the primacy of Community law was still 'left to the goodwill of the national governments'.[82]

The most explicit endorsement of Catalano's views on Community primacy came from the Italian Constitutional Court's judgment in *Costa v. ENEL* of 1964, a case involving a conflict between the EEC Treaty and the Italian electricity nationalization law. In line with Catalano's *partial* view of primacy, the Italian Justices found that the EEC Treaty in the Italian legal order had the same value as that of its ratification law and could thus be overridden by subsequent laws, such as the electricity nationalization law enacted in 1962.[83] The Italian Constitutional Court added that the EEC Treaty ratification law was based on Article 11 of the Italian Constitution but found that that provision did not confer the ratification law a special status *vis-à-vis* subsequent laws.[84] In line with Catalano's *international* view of primacy, the Italian Justices added that albeit the primacy of subsequent domestic statutes could entail consequences at the international level, they were irrelevant in the domestic legal order.[85]

Although the ICC judgment in *Costa v. ENEL* of February 1964 was directly inspired by Catalano's writings – the Italian Justice had espoused the arguments made by the Italian Government, which in turn expressly cited Catalano's Community law handbook published in 1962[86] – he strongly criticized when it came out,[87] possibly because he had changed his mind

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[79] Ibid. p. 64, fn. 9 (expressly refusing to take a position on the unconstitutionality of laws at variance with international agreements).

[80] Ibid. p. 65 and 67. See also N. CATALANO, Les sources du droit de la Communauté Européenne du Charbon et de l'Acier, in Actes officiels du congres international d'etudes sur la Communauté Européenne du Charbon et de l'Acier. II: La Communauté Européenne du Charbon et de l'Acier et les Etats Membres, Milan, 1957, p. 160.

[81] ECJ, 16 December 1960, Case C-6/60-IMM, *Humblet / Stato belga*, ECLI:EU:C:1960:48, p. 1113.

[82] J. AMPHOUX, *L'arrêt de la Cour de Justice des Communautés Européennes du 16 décembre 1960 dans l'affaire Humblet*: Pedone, 1961, 574.

[83] ICC, Judgment no. 14 of 24 February 1964, para. 6.

[84] Ibid.

[85] Ibid.

[86] In this regard, see A. ARENA, *From an Unpaid Electricity Bill…*, p. 1024.

[87] N. CATALANO, 'Portata Dell'art. 11 Della Costituzione in Relazione Ai Trattati Istitutivi Delle Comunità Europee', 87 *Foro italiano*, no. 3 (1964) 464 (stating that the the ICC's 'shockingly hasty decision', the 'limited knowledge of

on the application of Community primacy to supervening domestic laws. Not only Catalano contributed to the October 1963 FIDE resolution on directly applicable Community provisions, which emphatically stated that it was 'absolutely necessary that all Member States recognize the primacy of Community law on domestic provisions, *even if adopted subsequently*', but he expressly noted that the resolution had been framed in those terms 'pour laisser la porte ouverte aux juristes qui trouveraient un expedient pour saisir ou faire saisir la Cour de Justice'.

Most likely, the 'juristes' Catalano had in mind were Gian Galeazzo Stendardi and Flaminio Costa who,[88] after an unsuccessful attempt in September 1963, in January 1964 were able to convince the Small-claims Court of Milan to submit a preliminary reference to the ECJ on the consistency of Italy's electricity nationalisation law with the EEC Treaty.[89] This led to the landmark *Costa v. ENEL* ruling of 15 July 1964,[90] affirming that national courts were obliged to apply Community provisions, irrespective of any conflicting provision of domestic law. Catalano lauded that ruling in several of his subsequent publications.[91]

While the ruling in *Costa v. ENEL* defined the notion of primacy at the Community level, and indeed was expressly recalled several years later in Declaration no. 17 attached to the Lisbon Treaty,[92] the relationship between the Community and the Italian legal order was still in a state of flux, at least in the Italian legal order.[93] For starters, would Italian courts side with the ECJ or the ICC on the issue of Community primacy?

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the [legal] texts and the lack of any interest could turn [Italy's] professed and widespread Europeanism into empty words').

[88] Catalano and Stendardi had both attended the Stresa Conference in 1957; they were both lecturers in the Milan-based course on the Fundamentals of the law of the European Communities in 1965 ('Pella inaugura il corso sulla Comunità Europea', Corriere dell'informazione, 15 dicembre 1965, p. 4). and they jointly represented a client before the Council of State in 1966 ('Sarà abbattuto lo stabile di fronte all'università?', Corriere dell'informazione, 14 settembre 1966, p. 4).

[89] See A. ARENA, 'From an unpaid electricity bill…'.

[90] ECJ, 15 July 1964, Case 6/64, *Costa v E.N.E.L.*, ECLI:EU:C:1964:66.

[91] N. CATALANO, *Sentenza 15 luglio 1964 (causa 6/64); Pres. Donner P., Rel. Lecourt, Avv. gen. Lagrange (concl. conf.); Costa (Avv. Costa, Stendardi) c. E.n.el. (Avv. M. S. Giannini); interv. Governo della Repubblica italiana (Avv. dello Stato Tracanna)*, in *Il Foro Italiano*, 1964, p. 154 and N. CATALANO, *Manuale…*, II ed. p. 180-181.

[92] Declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007 - A. Declarations concerning provisions of the Treaties - 17. Declaration concerning primacy.

[93] It might be interesting to recall that, according to some Italian scholars of the time, Community treaties included constitutional provisions (for instance, those dealing with the common market freedoms) that should take precedence over any contrary domestic statute, even if adopted subsequently (G. STENDARDI, *I rapporti fra ordinamenti giuridici italiano e delle Comunità europee*, Milan, 1958, p. 39, 50, 103). Others thought that primacy could derive from an *extra ordinem* constitutional custom (F. LA VALLE, La continuità tra l'ordinamento comunitario europeo e l'ordinamento italiano e la gerarchia unitaria delle fonti normative, in Rivista trimestrale di diritto e procedura civile, 1965, p. 637 ss.), a systemic interpretation of the Italian Constitution that would lead to overcoming national sovereignty (G. GEMMA, Giurisprudenza costituzionale in materia comunitaria (1964-1976) e superamento della sovranità nazionale, in Rivista trimestrale di diritto pubblico, 1977, p. 1175 ss.) or the crisis of national sovereignty (M. CAPURSO, Le ideologie giuridiche dello Stato nazionale moderno e l'ordinamento comunitario nella giurisprudenza italiana, in Studi parlamentari, 1975, p. 247 ss.). For the positions of other Italian scholars, see for instance L. FERRARI BRAVO, *L'issue de l'affaire Costa c. E.N.E.L. devant le Conciliatore de Milan*, in *Cahiers de droit européen*, 1967, p. 200 ss., M. BERRI, *Sulla priorità del diritto comunitario*, in *Giustizia civile*, 1964, p. 1894 ss., P. GORI, *La preminenza del diritto della Comunità europea sul diritto interno degli Stati membri*, in *Giurisprudenza italiana*, 1964, p. 1073 ss, and C. RIBOLZI, *La nazionalizzazione dell'energia elettrica in Italia e la Comunità economica europea*, in *Il Foro padano*, 1964, p. 25 ss. For an overview, see G. ITZCOVICH, *Teorie e ideologie del diritto comunitario*, Turin, 2006.

Catalano was nothing short of an apostle of the ECJ's doctrine of Community primacy, not only as a scholar but also as a private lawyer specializing in Community law:[94] he represented private parties in as many as 16 preliminary cases originating from Italian courts,[95] thus showing how Community law could be 'mobilized' to achieve change in the Italian legal order[96] and, in so doing, rallying a number of Italian judges to the cause of European integration-through-law.[97]

Moreover, Catalano was instrumental in prompting the acceptance of Community primacy by the ICC itself. He was one of the lawyers in the *Frontini* case of 1973,[98] where the ICC ruled that the Italian law of ratification of the EEC Treaty was consistent with Article 11 of the Italian Constitution and recognized the primacy of Community regulations over subsequent domestic laws in areas of Community competence, and in the *Industrie Chimiche* case of 1975,[99] where the ICC ruled that Italian courts faced with domestic laws at variance with Community regulations, or unduly transposing those regulations into Italian law, were required refer the matter to the ICC, so that it could strike down those laws as unconstitutional.[100]

Whilst the *Industrie Chimiche* ruling brought the ICC closer to the ECJ on the issue of primacy, it was regarded as unsatisfactory by the Community judges:[101] in *Simmenthal* (1978) they ruled that domestic courts should set aside domestic laws at variance with directly effective Community provisions, without requesting or awaiting the ICC to declare those laws unconstitutional. This prompted the ICC's judgment in *Granital* of 1984,[102] which stated that Italian courts should set aside law at variance with Community regulations, rather than referring the matter to the ICC.[103]

Catalano's written submissions in *Industrie Chimiche,* however, reveal that he had already anticipated that recourse to the Italian preliminary constitutionality reference was, by itself, not an adequate mechanism to remove the numerous Italian laws at variance with Community regulations, as it would entail 'inordinate delays' in the application of those regulations.[104] However, he also believed that the disapplication of incompatible domestic laws by ordinary courts and their invalidation by the ICC were 'not mutually exclusive solutions':[105] the former provided a 'quick and easy' fix in individual cases, the latter provided a more 'permanent and comprehensive' result for the Italian legal order as a whole. It is remarkable that the ECJ and

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[94] On the Eurolawyers, see A. VAUCHEZ, *Brokering Europe…*, ID., *How to Become a Transnational Elite: Lawyers' Politics at the Genesis of the European Communities (1950-1970)*, in A.L. KJÆR, M. RASK MADSEN, H. PETERSEN (eds) *Paradoxes of European Legal Integration*, London, 2016, and L. AVRIL, *Passer à l'Europe. Logiques et formes de l'investissement des premiers Eurolawyers dans les politiques européennes*, in *Politique européenne*, 2020, p. 124 ss.

[95] See T. PAVONE, *The Ghostwriters…*

[96] For a recent study of this phenomenon in the field of migration, see V. PASSALACQUA, 'Legal mobilization via preliminary reference: Insights from the case of migrant rights', 58 Common market law review, 2021, p. 751-776.

[97] See J. WEILER, 'The Transformation of Europe', 100 Yale Law Journal (1991) 2426.

[98] ICC, Judgment no. 183 of 18 December 1973.

[99] ICC, Judgment no. 232 of 22 October 1975.

[100] *Ivi*, para 6.

[101] ECJ, 9 March 1978, Case 106/77, *Amministrazione delle Finanze dello Stato v Simmenthal SpA*, ECLI:EU:C:1978:49.

[102] ICC, Judgment no. 170 of 5 June 1984.

[103] Ibid., para 3.

[104] ICC, Case no. 50 of 1975, observations on behalf of Industrie Chimiche, p. 8.

[105] Ibid., p. 24.

the ICC came to similar conclusions only in recent times, respectively in *Melki and Abdeli*[106] and in *Bolognesi v. CONSOB*.[107]

Thus, Catalano asked the ICC to state that all Italian courts could immediately set aside domestic provisions at variance with Community regulations, a solution that the ICC plainly rejected in *Industrie Chimiche,*[108] but would espouse 9 years later in *Granital*.[109]

## V. The preliminary reference procedure

As noted, it was Catalano's proposal that led to the introduction of the preliminary ruling of interpretation procedure in the TEEC. That proposal was inspired by the preliminary ruling of validity procedure under Article 41 of the ECSC Treaty, the Italian preliminary constitutionality review procedure of 1953,[110] and, perhaps, the Upper Silesian Tribunal evocation procedure laid down in the Geneva Convention of 1922.[111]

On 13 December 1956, Catalano submitted the *groupe juridique* the draft of a provision that would grant the ECJ exclusive jurisdiction to rule on the interpretation and application of the EEC Treaty and of measures taken in implementation thereof upon a request submitted by a court of last instance of one of the Member States.[112] The *groupe juridique* on 15 December 1956 put forward three alternative versions of that provision.[113] The third one was chosen as the basis of what eventually became Article 177 TEEC.[114]

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[106] ECJ, 22 June 2010, Joined cases C-188/10 and C-189/10, *Aziz Melki and Sélim Abdeli*, ECLI:EU:C:2010:363, operative part (holding that, under certain conditions, Article 267 TFEU does not preclude national constitutionality review procedures)

[107] ICC, Order no. 117 of 6 March 2019 (asserting its jurisdiction to review the constitutionality of Italian laws at variance with the principles set out in the EU Charter of Fundamental rights, but also acknowledging the prerogative of ordinary courts to immediately disapply those laws).

[108] See para 6 of the *Industrie Chimiche* judgment.

[109] See para 5 of the *Granital* judgment.

[110] N. CATALANO, 'La Corte costituzionale e le Comunità europee', *Foro Italiano*, IV, fasc. 7, 1963, p. 68 (stating that Article 177 EEC 'was inspired by article 23 of Italian law no. 87 of 11 March 1953' i.e. the law setting out the procedural aspects of the Italian preliminary constitutionality reference'); N. CATALANO, 'Sentenza 4 Febbraio 1965 (in Causa 20/64); Pres. Hammes P., Rel. Donner, Avv. Gen. Gand (Concl. Conf.); Soc. Albatros C. Soc. So.Pe.Co.', Foro Italiano 88, no. 4 (1965), 63 (stating that Article 177 EEC was 'directly inspired' by the Italian preliminary constitutionality reference).

[111] See M. ERPELDING, Local International Adjudication: The Groundbreaking 'Experiment' of the Arbitral Tribunal for Upper Silesia Introduction: Mitigating the Side-Effects of Self-Determination, in M. ERPELDING, B. HESS, H. RUIZ FABRI (eds), Peace Through Law. The Versailles Peace Treaty and Dispute Settlement After World War I, Baden-Baden, 2019, p. 277, 318 (arguing that 'despite the difference in nomenclature, the EEC Treaty's preliminary procedure before the ECJ bore a striking resemblance to the evocation procedure before the Upper Silesian Arbitral Tribunal'). See also G. CONWAY, The Arbitral Tribunal for Upper Silesia: An Early Success in International Adjudication, in I. DE LA RASILLA, J.E. VIÑUALES, Experiments in International Adjudication: Historical Accounts, Cambridge, 2019, p. 98 (arguing that the evocation procedure is the equivalent of what would now be called preliminary reference procedure).

[112] GROUPE DE REDACTION, 'Projet de rédaction d'articles relatifs aux institutions de la Communauté pour le marché commun', 13 December 1956, p. 2 (entitled 'Article 24 (Proposition de M. Catalano)').

[113] GROUPE DE REDACTION, 'Projet de rédaction d'articles relatifs aux institutions de la Communauté pour le marché commun', 15 December 1956, p. 2 (entitled 'Article 25').

[114] A. BOERGER and M. RASMUSSEN, The Dual Nature of the European Community: The Making of the Institutional and Legal Dimensions of European Integration, 1950 to 1967, (forthcoming), notably Chapters 4.

Article 177 TEEC differed from Catalano's first draft in three respects: i) it did not expressly characterise the ECJ's jurisdiction as 'exclusive', ii) it enabled the ECJ to rule on the 'interpretation' of EEC law and the 'validity' of EEC acts, but not on their 'application', iii) it enabled all domestic courts to request a preliminary ruling, but only required domestic courts of last instance to do so.

With reference to the exclusivity of the ECJ's jurisdiction, a distinction must be made between the preliminary ruling of interpretation procedure and the preliminary ruling of validity procedure. As to the latter, the ECJ in *Foto-Frost* clarified that domestic courts had no jurisdiction to rule on the validity of EEC acts, thus bringing the EEC preliminary ruling of validity procedure in line with the one laid out in Article 41 of the ECSC Treaty.[115] As to the preliminary ruling of interpretation procedure, instead, the ECJ has reserved for itself only the 'last word' on the interpretation of Community law, thus recognizing that domestic courts too have the authority to interpret Community law.[116] Catalano, however, seemed not to notice that that part of his proposal had not made it into the text of Article 177 TEEC and argued, in several of his scholarly writings, that 'domestic courts had no jurisdiction to interpret Community law'.[117]

As regards the ECJ's jurisdiction to rule on the 'application' of Community law, the presence of that word in Catalano's draft suggests that he was aware that the preliminary ruling procedure could be employed to obtain from the ECJ a ruling on the compatibility between Community law and domestic law, i.e. as a judicial review procedure. This is corroborated *ex ante* by his source of inspiration, i.e. the Italian preliminary constitutionality reference, which is most certainly a judicial review procedure, as well as *ex post* by the *Humblet* dictum on the primacy of Community law, as that ruling had been adopted thanks to a provision that enabled the ECJ to rule 'sur l'interprétation ou l'application' of the provisions of the Protocol on immunities. Thus, in *Van Gend en Loos* and *Costa v. ENEL* the ECJ did not transform the EEC preliminary ruling into something different, but merely refused to draw what Catalano himself called an 'artificial' line between 'interpretation' and 'application' of Community law.[118]

Turning to the issue as to which domestic courts could refer questions to the ECJ, Catalano's suggestion that only courts of last instance should be allowed to submit preliminary references was probably based on his experience as *Avvocato dello Stato*: in his 1957 monograph, he noted that the main shortcoming of the Italian preliminary constitutionality review procedure was the 'excessive number' of references made by Italian courts, many of which failed to carefully assess the relevance of the reference for the solution of the dispute in the main proceedings.[119] Catalano added that, since his 'reasonable' suggestion had been rejected, he expected that lower domestic courts would not hesitate to submit references to

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[115] ECJ, 22 October 1987, Case 314/85, *Foto-Frost v Hauptzollamt Lübeck-Ost*, ECLI:EU:C:1987:452.

[116] See for instance ECJ, 8 March 2011, Opinion 1/09, *Agreement creating a Unified Patent Litigation System*, ECLI:EU:C:2011:123, para 69 ('The national court, in collaboration with the Court of Justice, fulfils a duty *entrusted to them both* of ensuring that in the *interpretation and application* of the Treaties the law is observed') (emphasis added).

[117] N. CATALANO, 'The Italian Constitutional Court and the European Communities', *Common Market Law Review* 1963, p. 322 ('In fact it may be said that the national courts as a whole (since the judgments passed by the lower courts are subject to the control of the higher courts) are not competent to express opinions on the interpretation of the Treaty; and that this competence is reserved to the Court of Justice of the European Communities only'); N. CATALANO, 'La Corte costituzionale e le Comunità europee', *Foro Italiano*, IV, fasc. 7, 1963, p. 69 (expressing exactly the same argument).

[118] N. CATALANO, *Sentenza 4 febbraio 1965 (in causa 20/64); Pres. Hammes P., Rel. Donner, Avv. gen. Gand (concl. conf.); Soc. Albatros c. Soc. So.pe.co.*, in *Il Foro Italiano*, 1965, p. 62-63.

[119] N. CATALANO, *La Comunità economica europea e l'Euratom*, II ed., Milano, 1957, p. 35.

the ECJ.[120] His prediction turned out to be right, as domestic courts made a 'wide and enthusiastic' use of the preliminary ruling procedure.[121] With hindsight, it is auspicious that the drafting committee did not follow Catalano's proposal, as otherwise many ECJ preliminary rulings originating from references made by lower courts would have never seen the light of day.[122]

Catalano also engaged with the issue whether the ICC could be regarded as a court within the meaning of Article 177 TEEC. In order to provide an answer, he focused on the ICC's main functions, namely reviewing the constitutionality of the laws and solving conflicts regarding the allocation of power among the branches of the State and between the State and the Regions. According to Catalano, the performance of these tasks would not raise issues regarding the interpretation of the Treaties, unless they concerned the compatibility between Community provisions and the basic principles of the Constitution.[123] However, in Catalano's view, this would have been nothing more than a theoretical problem.[124] Subsequent developments in the ICC's case law regarding the counter-limits doctrine would prove this prediction too optimistic.[125]

According to Catalano, the obligation imposed on domestic courts of last instance to refer questions involving the interpretation of EEC law to the ECJ was virtually absolute: in particular – and this was one of the main differences between the EEC preliminary reference procedure and the Italian preliminary constitutionality review procedure – domestic courts of last instance had no power to assess whether the interpretative question was well-founded and thus to refuse to submit preliminary references when the relevant EEC provision was sufficiently clear so as not to give rise to any reasonable doubt. Thus, Catalano strongly criticized the French Council of State's judgment of 9 June 1964 that refused to submit a preliminary reference on the basis of the *acte claire* doctrine, noting that the risk of divergent interpretations of EEC norms by courts belonging to different legal system and that of misleading interpretation of individual EEC norms without taking account of the whole system warranted the referral of interpretative questions to a specialised court such as the ECJ.[126] Yet, the ECJ famously endorsed the *acte claire* doctrine in *CILFIT* in 1982[127] and reaffirmed it, exactly 39 years later, in *Consorzio Italian Management*.[128]

[120] Ibid., p. 36.

[121] See J. WEILER, 'The Transformation of Europe', 100 Yale Law Journal (1991) 2426.

[122] One may think of the Milan *Giudice conciliatore* in *Costa v E.N.E.L.*, the *Pretura di Susa* in *Simmenthal*, or the Vicenza *Pretura circondariale* in ECJ, 9 November 1995, Case C-473/93, *Francovich v Italy*, ECLI:EU:C:1995:372.

[123] N. CATALANO, *The Italian Constitutional Court and the European Communities*, in *Common Market Law Review*, 1963, p. 321-323. For the Italian version, see N. CATALANO, *La Corte costituzionale e le Comunità europee*, in *Il Foro Italiano*, 1963, p. 67 ss.

[124] N. CATALANO, *La Corte costituzionale e le Comunità europee*, cit., p. 69, note 2.

[125] See for instance ICC, Judgment no. 98 of 16 December 1965, and the above-mentioned *Frontini* judgment.

[126] N. CATALANO, *Sentenza 4 febbraio 1965 (in causa 20/64); Pres. Hammes P., Rel. Donner, Avv. gen. Gand (concl. conf.); Soc. Albatros c. Soc. So.pe.co.*, in *Il Foro Italiano*, 1965, p. 62-63.

[127] ECJ, 6 October 1982, Case 283/81, *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health,* ECLI:EU:C:1982:335.

[128] ECJ, 6 October 2021, Case C-561/19, *Consorzio Italian Management v. RFI,* ECLI:EU:C:2021:799.

## VI. Conclusion

For many years, Community law was considered as a part of international law and this explains why many a professor of that subject devoted their analysis to this new legal phenomenon.[129] In this context, Nicola Catalano stands out as he was *not a professor of international law*,[130] but only a disciple of that subject, as he declared in the course of the Stresa conference.[131] In particular, Catalano believed that the Communities were (partial) federations and engaged with Community law in several capacities: i.e. as legal adviser to the ECSC High Authority, as member of the drafting committee of the Treaty of Rome, as member of the ECJ, as author of scholarly publications, as private lawyer, and as pro-European activist.

It is perhaps because of his distinctive career path that, although some of Catalano's ideas, such as those on the primacy of Community law, were initially anchored to international law, he had no hesitation to cut those ties when he realized, thanks to his firsthand experience with Community law, that those solutions did not suit the needs of a nascent European federation. In one publication, he candidly admitted his change of heart, thus suggesting that, to him, the implementation of practical solutions that would promote European integration mattered more than consistency with his own theoretical assumptions.[132]

Moreover, Catalano was aware that the Communities were perfectible and identified a fundamental flaw in the choice to limit integration to certain areas only.[133] This could have had negative consequences on the functioning of the internal market, distorting competition, for example.[134] However, he did not see any need to overcome the differences between the Member States' legal orders. Rather, he thought that the EEC could promote 'adaptation', meaning the gradual reduction of differences.[135] Thus, integration should not have resulted in absolute uniformity between the Member States' legal orders, that could have retained their specific features.[136]

Yet, Catalano firmly believed that there were limits to the choices that the Member States could make, and especially one: European integration was irrevocable.[137] After accession, it would not have been possible to withdraw from the European Communities, unless a revolution

[129] See B. CONFORTI, *La dottrina di diritto comunitario: questa sconosciuta*, in *Il Diritto dell'Unione europea*, 2004, p. 1 ss., A. TIZZANO, *Postilla: I "neocoms" e la "scoperta" del diritto comunitario*, in *Il Diritto dell'Unione europea*, 2004, p. 4 ss. and E. CANNIZZARO, *Il contributo della dottrina italiana all'evoluzione del diritto dell'integrazione europea*, in A. TIZZANO (a cura di), *Il processo d'integrazione europea: un bilancio 50 anni dopo i Trattati di Roma*, Torino, 2008, p. 31 ss.

[130] Although he worked as University assistant at "La Sapienza" University from 1939 to 1950 (https://curia.europa.eu/jcms/jcms/Jo2_7014/it/).

[131] *Compte rendu des séances du 1 juin,* in *Actes officiels du congres international d'études sur la Communauté européenne du charbon et de l'acier*, Milan, 1957, 326 ('je ne suis pas professeur de droit international. J'ai été peut-être un mauvais élève […] de cette matière si passionante. Mais, Dieu merci, il n'existe pas de rideau de fer entre les différentes branches du droit : c'est pour cela que j'ose prendre la parole à ce Congrès').

[132] N. CATALANO, *Lo stile delle sentenze della Corte di giustizia delle Comunità europee*, in *Il Foro Italiano*, 1969, p. 141 ss.

[133] N. CATALANO, *La Comunità economica europea*…, p. 246.

[134] N. CATALANO, *La Communauté économique européenne et l'unification, le rapprochement et l'harmonisation du droit des Etats membres*, in *Revue internationale de droit comparé*, 1961, p. 11.

[135] *Ivi*.

[136] See N. CATALANO, 'La Communauté Économique Européenne et l'unification: Le Rapprochement et L'harmonisation du Droit des Etats Membres' *Revue internationale de droit comparé*, 1961, p. 5-17.

[137] N. CATALANO, *La Comunità economica europea*…, p. 49.

had taken place.[138] One may wonder what he would have thought of Article 50 TEU and Brexit. Even more so, one may wonder what he would have thought of the current trend to question the European integration process from within, challenging the primacy of EU law,[139] and what solution he would have proposed.

The answer, arguably, can be found in a case note published by Catalano in 1966:

> European integration is going through a moment of crisis, characterised above all by the strenuous resistance of the Member States to Community action. In spite of the repeated and proclaimed declarations of Europeanism, the Member States still do not fully submit to the necessary primacy of Community action, without which the very structure of European economic integration, which is federal in nature, would remain inoperative. The Community crisis, exacerbated by the well-known French attitude, inevitably makes the action of the Community's political bodies, and in particular the Commission, more hesitant. It is only the Court that, through a calm but courageous interpretation of Community law, can encourage the Member States and the Communities' bodies to comply with the obligations enshrined in the Treaties establishing the European Communities. However, for this to be possible, it is necessary to ensure that anyone who may have an interest in bringing judicial proceedings is given the appropriate means of action.[140]

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[138] *Ivi*, p. 241-242, N. CATALANO, *Manuale*… p. 503, and N. CATALANO, *Manuale*…, II ed., p. 705-706. By 'revolution', Catalano meant extreme situations, such as wars.

[139] See the cases of the Polish Constitutional Tribunal (on the topic, G. DI FEDERICO, *Il Tribunale costituzionale polacco si pronuncia sul primato (della Costituzione polacca): et nunc quo vadis?*, in *BlogDUE*, 13 October 2021, P. MANZINI, *Verso un recesso de facto della Polonia dall'Unione europea?*, in *Eurojus*, 25 October 2021 and C. SANNA, *Dalla violazione dello Stato di diritto alla negazione del primato del diritto dell'Unione sul diritto interno: le derive della "questione polacca"*, in *Eurojus*, 31 December 2021) and the Romanian Constitutional Court (see B. SELEJAN-GUTAN, *A Tale of Primacy Part. II. The Romanian Constitutional Court on a Slippery Slope*, in *Verfassungsblog*, 18 June 2021).

[140] N. CATALANO, *Sentenza 1° marzo 1966 (in causa 48/65); Pres. Hammes P., Rel. Donner, Avv. gen. Gand (concl. conf.); Lütticke e altri (Avv. Wendt) c. Commissione C.e.e. (Rapp. Thiesing)*, in *Il Foro Italiano*, 1966, p. 94 (our translation).

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