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Giuseppe Martinico

**The interpretative rulings of the ECJ as a legal source in the EC  
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Sant'Anna School of Advanced Studies

Department of Law

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## **Abstract**

In the interlaced system of the European legal sources, the interpretative mission of the ECJ has a fundamental role. Starting from Pizzorusso's definition of the sources of law we will focus on the *erga omnes* effects of the interpretative rulings of the ECJ.

## **Keywords**

Interpretative rulings, ECJ, sources of law, EC law, preliminary ruling.

# *The interpretative rulings of the ECJ as a legal source in the EC law*

Giuseppe Martinico<sup>1</sup>

Summary: 1. The interpretative rulings of the ECJ as the most important cultural sources of EC law.- 2. Why focusing on the interpretative rulings of the ECJ (again)?.- 3. The impossibility of limiting those conclusions only to the interpretative judgements ex 234 ECT and their difference from the English precedents.- 4. Final remarks.

## ***1. The interpretative rulings of the ECJ as the most important cultural sources of EC law.***

The division between rules and political institutions- caused by the global legal phenomena and by the ‘governance’- represents a new form of “separation” in constitutional law and it is well described by Alessandro Pizzorusso<sup>2</sup> as a result of the distinction between cultural and political sources of law which testifies to the impact of these events on the ambit of sources of law.

The political sources of law are the conclusive result of a debate where opposing political forces have clashed in order to influence the manifestation of the will of the state represented by the law and its content; the cultural sources are inferred from the experience of the past (customs, judicial precedent) or from the rational analysis of legal phenomena (the role of the scholars for example). The interpretative rulings of the ECJ belong to the group of cultural sources of law. They have played a fundamental role in pushing forward the reasons of

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<sup>1</sup> PhD at the Sant’Anna School of Advanced Studies, Pisa. STALS Junior editor. [martinico@sssup.it](mailto:martinico@sssup.it). Special acknowledgments go to Alberto Montagner.

<sup>2</sup> A.Pizzorusso, *Fonti politiche e fonti culturali del diritto* in *Studi in onore di T.Liebman, I*, Milano, Giuffrè, 1979, 327 ff. and *Sistemi giuridici comparati*, Milano, Giuffrè, 1998, 263-164 .

integration while political sources (directives, regulation) have been stopped by the traps of the intergovernmental mechanisms. Why? Quite simply: they are flexible sources, more adaptable to the changing aims of “functionalism”, less “exposed” to the attention of national governments, due to the “*benign neglect*”<sup>3</sup> described by Eric Stein. In this part of the paper we will focus on the interpretative rulings of the ECJ, conceived as the most important cultural sources of EC law. By overcoming a formalistic conception of the sources of EC law, we will follow the notion of sources of law as elaborated by the comparative lawyers.

In Italy Livio Paladin<sup>4</sup> (former justice of the Italian Constitutional Court and eminent scholar in Constitutional law) stressed the principle of relativity of the sources of law: every national legal order has its own legal sources and the notion itself of sources of law has to be conceived as a political and internal concept. The consequence of this premise is the necessity to adopt formalistic criteria to define what sources of law are with regard to every legal order considered: it will be necessary to look at the *ad hoc* provisions about the law making process (contained sometimes in the Civil Codes, sometimes in the national Constitutions) to know what are the legal sources of a national order.

The peculiarity of the EC legal order consists of being a “crossroads”<sup>5</sup> of several legal traditions. This feature imposes to search for a notion of source of law not focused on formal criteria.

In this sense the comparative researches in this field (and the comparative method in general) are very useful for us. A source of law is every legal fact or act which has the effects to make, modify or abrogate law. In order to specify the content of such a definition, many scholars have attempted to insist on the effect or on the scope of such acts or facts. Briefly, they attempted to understand what distinguishes a legal act/fact from a non legal act/fact . Pizzorusso<sup>6</sup> tried to look at the effects of a normative act or fact, finding in its *erga omnes* effects

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<sup>3</sup> E.Stein, *Lawyers, Judges and Making of Transnational Constitution*, 1 American Journal of International Law 75, (1981), 1-27.

<sup>4</sup> L.Paladin, *Le fonti del diritto italiano*, Bologna, Il Mulino, 1996, 20-25.

<sup>5</sup> T.Koopmans, *The birth of European Law at the Crossroads of Legal Traditions*, in *American Journal of comparative law*, 1991, 493-507.

<sup>6</sup> Among the others see: A.Pizzorusso, *Le decisioni di accoglimento della Corte Costituzionale*, in A.Pizzorusso, *La manutenzione del libro delle leggi ed altri studi sulla legislazione*, Torino, Giappichelli, 1999, 122-130, 129; A.Pizzorusso, *Le fonti del diritto*, in A.Scialoja-G.Branca (eds.), *Commentario del codice civile, Disposizioni sulla legge in generale (Art. 1-9)*, Bologna-Roma, 1977.

(conceived as the opposite of the *inter partes* effects which characterize, instead, a contract) the common feature of all the sources of law in order to overcome the critiques put forward towards the theory of the general and abstract act.

In this paper we will start from this reasoning to prove the nature of the interpretative rulings of the ECJ as sources of European law.

### **a) Why focusing on the interpretative rulings of the ECJ (again)?**

Focusing on the cultural sources of law we wish to start by looking at the double nature of art.234 ECT: it works, at the same time, as a rule about the law making process (that is to say, a procedural norm, a norm concerning the normative production) and rule of law making process (namely a norm of production of law, a substantive norm).

Starting from this duality, it is possible to appreciate the importance given in the literature to the first meaning of art. 234 ECT: the preliminary ruling mechanism is acknowledged as a fundamental step for the EU building. On the contrary, it is possible to notice a sort of sceptical carelessness towards the outcome of these proceedings: the interpretative rulings of the ECJ.

Better still, many writings about the norms outcome of the ECJ's interpretation (the principles of the Communitarian law) already exist, but there are very few contributions about the interpretative rulings as autonomous sources of law.

Between the preliminary ruling mechanism as proceedings and the norms extracted from the ECJ's case law, in fact, only an intermediate space exists and it was merely superficially explored.

The sole writings related to the rulings as autonomous sources are those devoted to the analysis of their effects. In their important work, Vandersanden and Barav identified three positions on this question:

1. A first group of authors support the *erga omnes* effects of such judgements, by using different argumentations<sup>7</sup>and by starting from different premises, however.

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<sup>7</sup> A.Trabucchi, *L'effet erga omnes des décisions préjudicelles rendues par la Cour de justice des Communautés européennes*, in *RTDE*, 1974, 56-87 e G.Floridia, *Forma giurisdizionale e risultato normativo del procedimento pregiudiziale davanti alla Corte di giustizia*, in *Diritto comunitario e degli scambi internazionali*, 1978, 1-41.

2. The majority of the scholars deny the *erga omnes* effect for such judgements<sup>8</sup>, underlying, anyway, the possible influence that they can have on the “*a quo*” judge (i.e. the judge who raised the question). A scholar belonging to this group is Ferrari Bravo who distinguishes between the authority of the judgement and its legal effects<sup>9</sup>, acknowledging to the ECJ’s pronounces a “magic strength” which overcomes the “*a quo* trial”.

3. A third point of view is worth mentioning: it acknowledges to the preliminary interpretative rulings an authority which is superior to that exclusively relevant for the “*a quo*” case but which is, at the same time, different from the *erga omnes* effect<sup>10</sup>.

Despite these differences, all these scholarships acknowledge a *de facto ultra partes* effect<sup>11</sup>, beyond the “*a quo*” case: the first group name it “*erga omnes* effect” while the second group defines it as a non legal (but political) effect; finally, the third group recognizes its legal nature but prefers not to name it the “*erga omnes* effect”. The third group in fact, recognizes a normative effect to the interpretative judgement but avoids the formula “*erga omnes*” because of the facultative content of such effect (as we will try to explain below).

The strongest critique to the acknowledgement of the *erga omnes* effect was provided by Ferrari Bravo.

The previous case law of the ECJ would be an element of fact contributing to the exclusion of the pre-condition of the preliminary ruling proceedings: the doubt of the judge. The interpretative judgements would be an external fact unable to

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<sup>8</sup> P.Pescatore, *Il rinvio pregiudiziale di cui al 177 del Trattato C.E.E. e la cooperazione fra Corte di giustizia e giudici nazionali*, *Foro it.*, IV, pt. 5, 1986, 26-47, 41; F.Pocar, *Diritto dell’Unione e delle Comunità europee*, Milano, Giuffrè, 1997, 356.; A.Briguglio, Voce: “*Pregiudiziale comunitaria*”, *Enc.giuridica Treccani*, XXIII, Roma, Treccani, 1997, 1-19, 13.

<sup>9</sup> “*Qui vengono in considerazione i caratteri generali del procedimento ex 177 e l’esigenza, dalla quale, procede tutto il meccanismo in esame, di assicurare l’uniforme interpretazione e, di conseguenza, la corretta applicazione del diritto comunitario. Proprio perché la pronuncia della Corte attiene solo al primo aspetto, mentre l’applicazione del diritto è compito del giudice interno, essa, pur avendo degli effetti giuridici limitati, si solleva, naturalmente, al di là della specie decisa. E proprio per questa ragione essa ha un’ autorità (ma non degli effetti giuridici) più vasta, investendo tutte le possibili ipotesi in cui la medesima questione si ripresenti davanti ad un giudice interno*”, in L.Ferrari Bravo, *Commento sub art. 177*, in R.Quadri- R.Monaco, A.Trabucchi (eds.), *Commentario CEE*, III, Giuffrè, Milano, 1965, 1310-1334, 1332.

<sup>10</sup> G.Vandersanden-A.Barav, *Contentieux communautaire*, Bruxelles, Bruylant Bruxelles, 1977, 312-315 ; G.Vandersanden, *De l’autorité de la chose jugée des arrêts préjudiciels d’interprétation rendues des Communats européennes*, in *Revue critique de jurisprudence belge*, 1972, 508-523.

<sup>11</sup> G.Gaja, *Introduzione al diritto comunitario*, Roma-Bari, Laterza, 1996, 58-68; G.Tesauro, *Diritto comunitario*, Padova, Cedam, 2001, 250-191.

deviate from the system designed by art. 234: a confirmation of this statement could be found in the absence of reference to other legal sources in art. 234 ECT. Two considerations on this point: firstly, art. 234 is made up of a legal mosaic which also includes the provisions of the ECJ rules of procedure (specifically art. 104) and art. 220 ETC.

The classic pronouncement *Cilfit*<sup>12</sup> showed that the combination of these factors can produce a change in the legal position of a quo judge.

By looking at these provisions, in fact, it is possible to challenge this argument.

Among the arguments pro *erga omnes* effects, one can recall the peculiar function of the preliminary ruling mechanism, namely the abstract character of the cause and the public order rationale of the proceedings as recalled by Vandersanden. Moreover according to Vandersanden and Pepy<sup>13</sup>, it is possible to say that the judgement and, according to the theory of incorporation, the interpretation itself cannot be divided from the interpreted provision like a new rule without ambiguities. It is similar to the interpretative legislative statutes (“*leggi interpretative*”) and assumes the same normative strength as the interpreted provisions<sup>14</sup>. Another reason for acknowledging the *erga omnes* effect would be the declarative and non-constitutive activity of the judge: these judgements, in fact, are based on the direct EC effect/direct applicable norm and from this norm they could acquire the same qualities and normative feature becoming EC legal sources.

A first feature shared by all the supporters of the *erga omnes* effects of the interpretative judgements is the delimitation of their reasoning to preliminary rulings, as described by art. 234 ECT.

In these pages we will try to explain the reasons for supporting the argument that these rulings are of such a nature by starting from the preliminary ruling mechanism.

Even if the scholarship has admitted pacifically the *erga omnes* effect for the rulings of invalidity of art. 230 ECT, it is less likely with regard to the judgements of invalidity ex art. 234 ECT.

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<sup>12</sup> *SRL Cilfit e Lanificio di Gavardo SPA contro Ministero della Sanità*, C- 283/81, ECR. 1982, 3415.

<sup>13</sup> A.Pepy, *Le rôle de la Cour de justice des Communautés européennes dans l'application de l'article 177 du Traité de Rome*, in *Cahiers de droit européen*, 1966, 484-487.

<sup>14</sup> G.Vandersanden, *Op.cit.*, 521

However the ECJ has extended some procedural mechanisms provided for the proceedings of art. 230 to that of art. 234: it is the case, for example, of the provisions contained in art. 231, 4, ECT. The rationale of such an extension can be found in the similarities existing between the proceedings of art. 230 and 234 ECT as the Court admitted in *Roquette*<sup>15</sup> case:

*“The second paragraph of article 177 of the EEC Treaty, whereby the Court of justice may state which of the effects of a regulation which it has declared void shall be considered as definitive, is applicable by analogy, for the same reasons of legal certainty as those which form the basis of that provision, to the judgements whereby the Court, in giving a ruling under article 177, declares that a regulation is void”.*

As it can be inferred, the rationale of these two proceedings is analogous: cleaning the legal order from the legal impurities in the name of the principle of coherence and legal certainty. At the same time in the ECJ’s case law the autonomy between the two proceedings was compromised. The parties, in fact, were permitted to use 234, while they had had the possibility of using 230, the term for which had however expired without them having taken advantage of this mechanism<sup>16</sup>.

For some scholars, in this way the ECJ would have sacrificed the autonomy of remedies, in reality, it admitted their complementarity.

Vandersanden recalls that art 230 and art 234 are two sides of the same coin and the extension of provision devoted to art 230 formally to the mechanism of art 234 shows this comparability: very clearly so on this point in the case n. 112/83<sup>17</sup>:

*“The Court’s power to impose temporal limits on the effects of a declaration that a legislative act is invalid, in the context of preliminary ruling under indent (b) of the first paragraph of article 177, is justified by the interpretation of article 174 of the Treaty having regard to the necessary consistency between the preliminary ruling procedure and the action for annulment, which are two mechanisms provided by the Treaty for reviewing the legality of acts of the Community institutions. The possibility of imposing temporal limits on the effects of the invalidity of a Community regulation,*

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<sup>15</sup>*Roquette*, C-145/79, ECR., 1980, 2917, cit. da G.M.Ubertazzi, *Gli effetti ratione temporis delle sentenze pregiudiziali in materia di validità degli atti comunitari, Dir. comunitario e degli scambi internazionale*, 1985, 75 ff.

<sup>16</sup> See *Accrington (The Queen/Intervention Board for Agricultural Produce, ex parte Accrington Beef)*, C-241/95, ECR. 1996, I, 6699 ss.), *Eurotunnel (Eurotunnel and others/SeaFrance)*, C- 408/95, ECR 97, I-6315) e *Wiljio NV (Wiljo/Belgische Staat)* C-178/95, ECR. 1997, I, 585 ff.

<sup>17</sup>*Société des produits de maïs S.A. Contro Administration des douanes et droits indirects* C-112/83, ECR., 1985, 719.



*whether under article 173 or article 177, is a power conferred on the Court by the Treaty in the interest of the uniform application of Community law throughout the Community<sup>18</sup>.*

A confirmation of the equalization in the effects between the judgements of invalidity and those of annulment can be found in *International Chemical Corporation* case, despite the comments of the scholarship:

*“Although a judgment of the Court given under article 177 of the treaty declaring an act of an institution, in particular a Council or Commission regulation, to be void is directly addressed only to the national court which brought the matter before the Court, it is a sufficient reason for any other national court to regard that act as void for the purposes of a judgment which it has to give.*

*That assertion does not however mean that national courts are deprived of the power given to them by article 177 of the Treaty and it rests with those courts to decide whether there is a need to raise once again a question which has already been settled by the Court where the Court has previously declared an act of a Community institution to be void, there may be such a need specially if questions arise as to the grounds, the scope and possibly the consequences of the nullity established earlier<sup>19</sup>”.*

This extract is very important because it stresses the possibility of raising the question for the other judges different from *a quo* judge but, at the same time, specifies when the former can raise the question: only if there are doubts about the consequences, the reasons and the scope of a situation (the declaration of invalidity) which cannot be discussed in itself. The declaration of invalidity cannot be discussed in its content, on the contrary it remains untouchable and represents the basis for a new judicial dialogue between judges which can be focused only on its consequences and delimitation. We will come back on this point.

Having said this, now we ought to look at the provisions of ECT which do not deny the nature of legal sources of the interpretative judgements of the ECJ.

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<sup>18</sup>To explain the difference between the mechanisms of art. 230 and 234, Berardis distinguishes between *ultra partes* effect and *erga omnes* effect, stressing that in art. 230 the annulment directly impacts on the legal order while in mechanism of art. 234, the pronouncement of invalidity has an indirect influence: “*la differenza essenziale fra la sentenza di annullamento e la sentenza dichiarante l’invalidità è che la prima incide direttamente sull’ordinamento comunitario cancellando erga omnes e ex tunc l’atto incriminato, mentre la seconda agisce piuttosto sui giudici chiamati a decidere una controversia, i quali non possono più, ai fini della soluzione di quest’ultima, applicare l’atto colpito dalla dichiarazione di non validità*” G.Berardis, *Gli effetti delle sentenze pregiudiziali della Corte di giustizia delle Comunità europee*, in *Diritto comunitario e degli scambi internazionali*, 1982, 245-273, 261.

<sup>19</sup> *International Chemical Corporation contro Amministrazione delle Finanze dello Stato*, C-66/80, ECR, 1981, 1191.

According to a formalistic approach, all the legal sources of the EU legal system are enumerated in art 249 ECT.

This argument neglects the existence of other sources like, for example, the common constitutional traditions (art. 6 EUT) or the self-executing directives.

What does this *erga omnes* effect amount to?

It consists of the change in legal position of the judge of final instance from a position of duty to raise the question in presence of a doubt into a possibility to raise the question (even) if a previous pronouncement of the ECJ in the same or in a very similar case exists.

If we look at art 234, it is worth noticing that it does not distinguish between the effects of judgements of invalidity and interpretation: it does not say that the latter has an x effect and the former an y effect. Thus it is more correct to say the Treaty does not deny the possibility of giving *erga omnes* effect to the interpretative judgements and the case law of ECJ has improved this possibility by extending it to all interpretative judgements:

*‘The Court of Justice shall have jurisdiction to give preliminary rulings concerning:*

*(a) the interpretation of this Treaty;*

*(b) the validity and interpretation of acts of the institutions of the Community and of the ECB;*

*(c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide.*

*Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon. Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice’.*

Another formalistic argument consists of the theory for which every EC legal sources is contained in art. 249 ECT. This argument can be challenged by recalling the existence of other sources of EC law which are not contained in that “catalogue”: for example, the common constitutional traditions (art. 6 EUT) and the self-executing directives, not mentioned in art. 249 ECT.

As well as this, the ECJ has sometimes equated its interpretative judgements to the EC law, in *Köbler*<sup>20</sup> case, for examples it acknowledges that:

*“The principle that it is for the legal system of each Member State to determine which court or tribunal has jurisdiction to hear disputes involving individual rights derived from Community law, subject to the reservation that effective judicial protection be ensured, is applicable to actions for damages brought by individuals against a Member State on the basis of an alleged breach of Community law by a supreme court”.*

And before:

*“In any event, an infringement of Community law will be sufficiently serious where the decision concerned was made in manifest breach of the case-law of the Court in the matter (see to that effect *Brasserie du Pêcheur and Factortame*, cited above, paragraph 57)”.*

Then the nature of the sources of law of the judgements is confirmed by many official references, for example in the Preamble of the Charter of Nice:

*“ This Charter reaffirms, with due regard for the powers and tasks of the Community and the Union and the principle of subsidiarity, the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Community and by the Council of Europe and the case-law of the Court of Justice of the European Communities and of the European Court of Human Rights”.*

The nature of the sources of EC law of these rulings was further acknowledged by the Italian Constitutional Court-as we saw above-: sentenza 113/85<sup>21</sup> e 389/89<sup>22</sup>, ordinanza 255/99<sup>23</sup>, ordinanza 132/90<sup>24</sup>, sentenza 168/91<sup>25</sup>, sentenza 285/93<sup>26</sup>, ordinanza 62/03<sup>27</sup>.

The reasoning of the Italian constitutional court takes as its starting point the particular position covered by the ECJ in the EC legal system. The interpretative

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<sup>20</sup> *Köbler*, C-224/01, ECR, 2003, I-10239.

<sup>21</sup> Corte Costituzionale, sentenza del 19 aprile 1985, n. 113.

<sup>22</sup> Corte Costituzionale, sentenza del 4 luglio 1989, n. 389.

<sup>23</sup> Corte Costituzionale, ordinanza dell'11 giugno 1999, n. 255.

<sup>24</sup> Corte Costituzionale, ordinanza del 7 marzo 1990, n. 132.

<sup>25</sup> Corte Costituzionale, sentenza dell'8 aprile 1991, n. 168.

<sup>26</sup> Corte Costituzionale, sentenza del 10 giugno 1993, n. 285.

<sup>27</sup> Corte Costituzionale, ordinanza del 12 marzo 2003, n. 62.

judgements of the ECJ would be second grade sources or indirect effect sources because they infer their legal power from the interpreted provisions.

In fact the Italian Court recognized the content and the effects of the classic communitarian sources (direct effect and direct applicability) only if the interpreted provisions have such effects.

Thus, the treaty does not forbid the possibility to give *erga omnes* effect to the interpretative judgements and on the contrary, there many indications in the Treaties, in the ECJ and Italian Constitutional Court case laws which explicitly or implicitly support the opposite conclusion. It is possible to say that such an effect consists of the modification of the position of final instance judge (from a condition of duty to raise question in presence of a doubt into a condition of possibility). Having proved this, the next step consists in the understanding of the *erga omnes* effects of such judgements. To understand the content of their effects, we have to look at a very famous extract of *Cilfit* judgement:

*“Although the third paragraph of article 177 of the EEC Treaty unreservedly requires national courts or tribunals against whose decisions there is no judicial remedy under national law to refer to the Court every question of interpretation already given by the Court may however deprive the obligation of its purpose and thus empty it of its substance. Such is the case especially when the question raised is materially identical with a question which has already been the subject of a preliminary ruling in a similar case or there previous decisions to the Court have already dealt with the point of law in question, irrespective of the nature of the proceedings which led to those decisions, even though the questions at issue are not strictly identical. However, it must not be forgotten that in all such circumstances national courts and tribunals, including those referred to in the third paragraph of article 177, remain entirely at liberty to bring a matter before the Court of justice if they consider it appropriate to do so”.*

Thus the *erga omnes* effects consist of the change of legal position for the national judge against whose decisions there is no judicial remedy under national law: according to the letter of the ECT, he would be forced to raise the question in case of doubt but his legal position (which should be a condition of duty, so a condition of *agere debere*) changes itself into a condition of possibility in presence of a previous judgement of the Court. This does not imply the impossibility to raise the question for the same judge if there is a sufficient motive to change the

court statement and- in fact- a change in Court reasoning in similar cases can be found in cases like in *Kalanke*<sup>28</sup> and *Marschall*,<sup>29</sup>

At the same time, the judge can raise the question if he is not be persuaded by the previous case law of the ECJ and, furthermore, is convinced that the ECJ can change its opinion because the evolution of the interpretation of the EC law is a value to be defended.

The “procedural side” of this mutation is what is provided in art. 104 of the rules of procedures of ECJ, that is the passage from the form of judgement to the form of order :

*“3. Where a question referred to the Court for a preliminary ruling is identical to a question on which the Court has already ruled, or where the answer to such a question may be clearly deduced from existing case-law, the Court may, after hearing the Advocate General, at any time give its decision by reasoned order in which reference is made to its previous judgment or to the relevant case-law”.*

An important point to acquire is that the national judge is not free to avoid the cooperation: if he does not want to follow a previous judgement he must raise the question and the consequence of contrary behaviour is the violation of EC law and the activation of the mechanism under art. 220 ECT, as the Court said in *Köbler*: so, the possible state liability for violation of EC law is the sanction for the evasion of the *erga omnes* effect by the national judge.

### ***3. The impossibility of limiting those conclusions only to the interpretative judgements ex 234 ECT and their difference from the English precedents.***

We will try to support the extension of what has been said about the interpretative rulings ex art. 234 ECT to other interpretative rulings of the ECJ.

The first indication is given by the ECJ itself in its *Cilfit* case. There it was decided not to extend the influence of such rulings beyond the *a quo* judge without regard for “*the nature of the proceedings which led to those decisions*”.

From a procedural point of view, art. 104, 3, itself does not distinguish among the genesis (proceedings) of the interpretative judgements and the same conclusion

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<sup>28</sup> Case C-450/93, *Kalanke v. Freie Hansestadt Bremen*, 1995 E.C.R. I-3051.

<sup>29</sup> Case C-409/95, *Marschall v. Land Nordrhein-Westfalen*, 1997 R.a.c.c. I-6363.

can be adopted when looking at the importance granted to the ECJ case law in the field of human rights by the Charter of Nice.

The reason is clear: the interpretative function of the ECJ in fact characterizes all its activity despite the peculiarity of the preliminary ruling, as we can infer from art. 220 (which is the opening provision of the title of the ECJ).

Among the cultural sources of law Pizzorusso also includes the English precedents but it is not preferable to compare the interpretative rulings of the ECJ to the English precedents. Despite some scholarly trends<sup>30</sup>, we think it is impossible to find the preconditions of the bindingness of the English precedent in the EU law context. It is not correct to talk about precedent in the EU because the *stare decisis* principle presumes three elements<sup>31</sup>:

1. a hierarchy of Courts (following the drawing up of the Judicatures Act);
2. a system of official reports;
3. the prevalence of the non-written sources of law over the written sources (with obvious consequences on the statutory interpretation).

The first element is not present in the EC law context due to the particular conformation of the judiciary system partly composed of national judges. If the supremacy of EC law is obvious, it is more complicated to say that the relationships between the orders and their judges can be read in the light of the pure hierarchical criteria, indeed, the ECT Treaty itself seems to lean toward the competence criteria. A system of European Court Reports exists but it is not comparable with the English one. The first element is more questionable in the EU context: from a numerical point of view, many examples of EC legislation exist but undoubtedly the interpretative rulings of the ECJ have had a fundamental role in EC law development.

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<sup>30</sup> P.Mengozzi, *Il diritto comunitario e dell'Unione europea*, in F.Galgano (ed) *Trattato di diritto commerciale e di diritto pubblico dell'economia*, Padova, CEDAM, 1997, 250.

<sup>31</sup> For example M.Zander, *The Law-making process*, Cambridge University Press, 2004, 215; see also T.Koopmans, *Stare decisis in European Law*, in D.O'Keefe-H.G.Scherms (eds.), *Essays in European Law and integration*, 11-27, 14ff.

#### **4. Final remarks**

As the fathers of the multilevel constitutionalism<sup>32</sup> have already pointed out, the European Constitution (conceived in a ‘material’ sense) already exists: it is an ‘integrated’ Constitution, the result of the never-ending coordination between the national and supranational levels. The best proof of such integrated nature is represented by existence of common sources of law between national and supranational legal orders.

This phenomenon provides a legal continuity to the system, which in turn exalts the interpretative mission of the ECJ according to art. 220 ECT.

The flexibility in legal sources systems caused by the globalization exalts the cultural sources of law. Among these kinds of sources, we attempted to focus on the interpretative rulings of the ECJ which contributed to the creation of the European (‘material’) Constitution.

As a matter of fact, in the European context the cultural sources of law represent the “carriage” which assure the communication between the national fundamental principles and the common constitutional traditions: from the national to the supranational legal orders (and back again), thanks to the art. 234 ECT dynamics.

After the Constitutional failure and despite the ‘shyness’ of the political sources of law (see, for example, the Reform Treaty of Lisbon), the European constitutional process still keeps alive its chances to come to a successful result thanks to the interpretative mission of the ECJ and to the flexibility of its rulings.

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<sup>32</sup>I. Pernice, *Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution Making-Revisited?*, CMLR 703-750, 707 (1999).