

THE IMPACT OF SUPRANATIONAL LAWS ON  
THE NATIONAL SOVEREIGNTY OF MEMBER STATES,  
WITH PARTICULAR REGARD TO THE JUDICIAL  
REACTION OF UK AND ITALY TO THE NEW  
AGGRESSIVE APPROACH OF THE EUROPEAN COURT  
OF HUMAN RIGHTS

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## I. INTRODUCTION

Our paper is divided in two parts; the first one deals with the European dimension in comparative terms; the second one with the Member States constitutional dimension in a comparative perspective. The first part will compare, from a vertical perspective, how the two European courts, have changed their own idea with regard of the impact of the ECHR and EU laws vis-à-vis the sovereignty of the national legal orders of the ECHR and the EU Member States. This trend has mainly become apparent through recent challenges largely due to the enlargement of Europe to the East.

In this regard it will be argued that the above mentioned trend of convergence finds its roots in the opposite ways in which the two European Courts reacted to the challenges emerging from the enlargement of the European Union and of the Council of Europe towards Eastern Europe. In fact, on the one hand, the ECtHR has opted for an acceleration of judicial activism according to which the Strasbourg judges have started to amplify the direct and indirect effect of their case law on the domestic legal orders; on the other hand, the ECJ seems to have privileged, since the great enlargement of 2004, the appraisal of national constitutional values even of the single Member State.

Against this background, an emerging hypothesis is that the ECJ's recent attitude to the exploitation of EU primacy, combined with the opposite tendency of further centralisation of the adjudicatory powers, favoured by the ECtHR, seems to have reduced the distance between EU law and ECHR law with regard to their relation with domestic law.

First of all, absolute, radical supremacy no longer seems to be a cornerstone of EU law and the ECJ is more and more committed to (working on) a self-restriction of the principle of primacy when it comes to the protection of the fundamental principles of one or more Member States. Second, the progressive self-perception of

the European Court of Strasbourg's constitutional role has led to the consequence of increasing the acknowledgement of the (relative) primacy of the European Court of Human Rights' interpretation of domestic national law.

In the second part of the paper our aim is to verify which has been the impact on the domestic legal orders of the new aggressive approach of the ECtHR, which seems ready to use the doctrine of margin of appreciation in a much less deferent way towards the constitutional values of the Contracting States.

More precisely we have decided to compare, to this regard, the reactions of the Italian and UK legal orders, and in particular of their respective highest jurisdictions, to the new judicial attitude of the Court of Strasbourg which seems to take too little account of national systems.

This choice is based on, at least, two complementary levels; the first one is based on the structural parameter, the second one on judicial decisions.

In relation to their structural disposition, the two above mentioned legal orders experimented, in the same period, a real "revolution", with regard to the rank of the ECHR in their respective sources of law legal systems. A revolution that, according to some scholars, has provoked a process of "constitutionalization" of the ECHR in the UK and Italian legal orders.

In particular, with respect to the UK legal order, the Human Rights Act of 1998 has incorporated the European Convention on Human Rights into domestic law. The former Lord Chancellor and Minister for Justice, Jack Straw, then commented that the Act preserved «the fundamental position established in our constitution: the sovereignty of Parliament... one of the profound strengths of our system». The Act commenced operation in October 2000 and, as it will be shown in the paper, the Parliament sovereignty has really been recently challenged by a very activist approach of the Court of Strasbourg.

With regard to the Italian legal order, article 117, paragraph 1 of the Constitution, which was added by the constitutional revision of 2001, provides that "legislative powers shall be vested in the State and the Regions in compliance with the Constitution and with the constraints deriving from EU legal order and international obligations".

Despite there have been three main readings of this provision by Italian constitutional scholars, there is not doubt that it has had big impact on the rank of the ECHR in the Italian legal system. A status which has been recently clarified by the two pivotal decisions n. 348 and n. 349 of 2007 and by the two important decisions n. 311 and n. 317 of 2009.

With regard to the judicial dimension, the two legal systems have experimented recently a concrete expression of the more robust approach of the Court of Strasbourg. With regard to the Italian system, the reference is to the famous *Lautsi* case adopted the 3th of September 2009 by the European Court of Strasbourg in which it was held that the obligation to display the crucifix in Italian public schools is in violation of art. 2 of ECHR, of protocol 1 (right to education) taken jointly with article 9 of the European Convention, which includes also the freedom not to believe in any religion.

Such decision has been strongly criticised by many constitutional scholars as disregarding not only the Christian roots of the Italian State but the margin of appreciation which should be left to the single Member State. The decision has been also criticised because of its intrusiveness against State sovereignty and national values which should be regulated and protected at the national level. The Italian Government has challenged the case before the “Grande Chambre”, whose decision is expected in the next days.

With respect to the UK legal system, the reference is to the even more recent decision of the European Court of Strasbourg which ruled illegal the U.K.’s blanket denial of the vote to all prisoners. The domestic reaction has been even more dramatic. National media have openly spoken about the concrete possibility to withdraw from the ECHR system and, ever more crucially, British members of Parliament in the House of Commons, at the beginning of February, by 212 votes to reject a proposal based upon a European Court of Human Rights demand that Britain give prisoners the vote. In this respect, it should also be mentioned the recent decision of the High Court under the HRA on prisoners voting rights in the case *Tovey and Hydes v Secretary of State for Justice*. In this case the High Court has held not possible to use s.3 of the Human Rights Act 1998 to interpret s.3 of the 1983 Act

and s.8 of the 2002 Act so as compatible with the Convention. It was not possible to read a provision which provides that a prisoner is “legally incapable” of exercising the vote as though it provided instead that he was “legally capable”.

## FIRST PART: THE SUPRANATIONAL SCENARIO TOWARD A CONVERGENCE BETWEEN THE JUDICIAL ATTITUDES OF THE TWO EUROPEAN COURTS?

### II. THE VERTICAL DIMENSION BETWEEN THE TWO EUROPEAN COURTS: A FOCUS ON THE MORE RECENT JUDICIAL ATTITUDES OF THE EUROPEAN COURT OF HUMAN RIGHTS AND THE EUROPEAN COURT OF JUSTICE WITH REGARD TO THEIR RESPECTIVE OWN “IDEA” OF THE DOMESTIC IMPACT OF EU LAW AND EUROPEAN CONVENTION HUMAN RIGHTS LAW;

As it has been anticipated, in the first part of the paper we focus on the reactions of the two European Courts to the potential increase in the risk of constitutional conflict between national and supranational levels caused by the Europe’s enlargement to the east.

In this regard, in spite of the risk of simplification implied in every attempt at synthesis, it is possible to identify two potentially alternative judicial routes. On the one hand, a further centralisation of adjudication powers, which the ECtHR seems to be favouring after the enlargement of the Council of Europe to the East, and, on the other hand, the appraisal of national constitutional values, which the ECJ seems to have privileged since the major EU enlargement of 2004. A comparison of the different responses of the two European Courts to the same phenomenon appears instrumental to our main conceptual *file rouge* which attempts to analyse the consequences of the enlargement, taking into account multiple, interacting legal regimes.

### II.1. THE REACTION OF THE EUROPEAN COURT OF HUMAN RIGHTS TO THE ENLARGEMENT OF THE COUNCIL OF EUROPE TO THE EAST

Beginning with the reaction of the ECtHR to the enlargement, as it has been stressed,<sup>1</sup> since the end of the Cold War, the Council of Europe has experienced a

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dramatic increase in the number of members. In 1989, the Council of Europe was an exclusively Western European organisation counting 23 Member States. By 2007, its membership had grown to 47 countries, including almost all of the former communist States of Central and Eastern Europe. Here, our main assumption is that the ECtHR has reacted to the Council of Europe's enlargement to the East with a more explicit understanding of itself as a pan-European constitutional court, as a result of both the exponential growth of its load case and the realistic possibility for it to ascertain systemic human rights violations in Central and Eastern European Countries (hereafter CEE) has implied a shifting away from an exclusively subsidiary role as "secondary guarantor of human rights" to a more central and crucial position as a constitutional adjudicator.<sup>2</sup>

It is arguable that this change in the judicial attitude of the ECtHR emerged for the first time in 1993, in Judge Martens' concurring opinion in the *Branningan* case.<sup>3</sup> On that occasion, the majority of the Court, recalling a judgment from 1978,<sup>4</sup> stated that the choice to determine whether the life of nations may be threatened by a "public emergency" has to be left to the wider margin of the Member States. By reason of their direct and constant contact with the current, pressing needs of the moment, in fact, it was observed, national authorities are in a better position than international judges to decide both on the actual occurrence of such an emergency, and on the nature and scope of the necessary derogations to avert it. Conversely, in his concurring opinion, Judge Martens argued:

Since 1978 "present day conditions" have considerably changed. The situation within the Council of Europe has changed dramatically. It is therefore by no means self-evident that standards which may have been acceptable in 1978 are still so. The 1978 view of the Court as to the

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The first part and the third paragraph of the second part are written by Oreste Pollicino, all the remaining paragraphs of the second part as well as the final remarks are written by Giuseppe Franco Ferrari.

<sup>1</sup> Harmsen, R. "The European convention on human rights after the enlargement." *The International Journal of Human Rights* (2001): 18 ff.

<sup>2</sup> It has been astutely noted that "it was probably not an accident that the Court chose a highly controversial case against Turkey (ECtHR, 23-3-1995, *Loizidou v. Turkey*) to affirm, for the first time in its jurisprudence, the central place of ECHR as "an instrument of the European public order".

<sup>3</sup> ECtHR, 26-5-1993, *Branningan and McBride v. the United Kingdom*, par. 43.

<sup>4</sup> ECtHR, 18-01-1978, *Ireland v. the United Kingdom*, par. 207.

margin of appreciation under Article 15 was, presumably, influenced by the view that the majority of the then Member States of the Council of Europe might be assumed to be societies which (as I put it in my aforementioned dissenting opinion) had been democracies for a long time and, as such, were fully aware both of the importance of the individual right to liberty and of the inherent danger of giving too wide a power of detention to the executive. Since the accession of Eastern and Central European States that assumption has lost its pertinence.

Another call for a more proactive role for the ECtHR as a reaction to the Council of Europe's enlargement came from (again, the same) Judge Martens' separate opinion on the Court's 1995 decision in the *Fisher v. Austria*<sup>5</sup> case. To the then typical self-restraint of the Strasbourg Court, according to which "the European Court should confine itself as far as possible to examining the question raised by the Court before it",<sup>6</sup> Judge Martens objected that:

No provision of the Convention compels the Court to decide in this way on a strict case by case basis. This self-imposed restriction may have been a wise policy when the Court began its career, but it is no longer appropriate. A case law that is developed on a strict case-by-case basis necessarily leads to uncertainty as to both the exact purport of the Court's judgment and the precise content of the Court's doctrine.<sup>7</sup>

The message was indeed quite clear: an explicit invitation addressed to the Court to assume a more general constitutional and centralised role. But it was only some years later (very recently indeed), that the ECtHR seemed ready to accept that invitation. Since 2004, in fact, with regard to some areas of the law<sup>8</sup> and not surprisingly especially in certain judgments directed to CEE Member States, the Strasbourg Court

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<sup>5</sup> ECtHR, 26-4-1995, *Fisher v. Austria*.

<sup>6</sup> ECtHR, *Fisher v. Austria*, par. 44.

<sup>7</sup> ECtHR, *Fisher v. Austria*, separate opinion of Judge Martens, par. 16.

<sup>8</sup> First of all, the freedom of expression, under article 10 ECHR, in relation to which the margin left to Member States has never been very broad, and, secondly, the right to property. In some other areas, as for example, the right to a private life, under article 8 ECHR, when issues of a morally and ethically delicate nature are raised (such as transsexuals, in vitro fertilisation and subsequent use of embryos), the margin of appreciation left to the Member States, even after enlargement, has remained very broad. See ECtHR, 29-4-2002, *UK v. Pretty*, and 10-4-2007, *UK v. Evans*). In other words, every time consensus is lacking within the Member States of the Council of Europe, either as to the relative importance of the interest at stake or as to the best means of protecting it, particularly where the case raises sensitive moral or ethical issues, the margin will be wider (see *X., Y. and Z. v. the United Kingdom*, 22-4-1997, par. 44). There will also usually be a wide margin if the State is required to strike a balance between competing private and public interests or Convention rights.

has started to go beyond the strict case-by-case approach of former years. More precisely, in a decision of 2004, the Court held that a violation of the ECHR had instead seem originated in a systemic problem connected with the malfunctioning of domestic legislation which involved 80,000 persons. The Court suspended 167 complaints pending before it on the same issue until the respondent State secured, through appropriate legal measures and administrative practices, the implementation of the fundamental rights protected by the ECHR (in that case the right to property).<sup>9</sup> In particular, the Court declared that:

Although it is in principle not for the Court to determine what remedial measures may be appropriate to satisfy the respondent State's obligations under Article 46 of the Convention, in view of the systemic situation which it has identified, the Court would observe that general measures at national level are undoubtedly called for in execution of the present judgment, measures which must take into account the many people affected. Above all, the measures adopted must be such as to remedy the systemic defect underlying the Court's finding of a violation so as not to overburden the Convention system with large numbers of applications deriving from the same cause... In this context the Court's concern is to facilitate the most speedy and effective resolution of a dysfunction established in national human rights protection (par. 193).

Consequently, the impression is that recently, as a (late) reaction to the enlargement of the Council of Europe to the east, the ECtHR, with a view to supporting the respondent, very often a CEE<sup>10</sup> State, in fulfilling its obligations under Article 46 of

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<sup>9</sup> See ECtHR, 22-6-2004, *Broniowski versus Polonia*.

<sup>10</sup> See, *mutatis mutandis*, and in connection with a trial Court's lack of independence and impartiality, ECtHR 23-10 2003, *Gençel v. Turkey*, par. 27; 8-4-2004, *Assanidze c. Georgia*; 8-7-2004 *Ilascu e al. c. Moldova and Russia*, where the Court went so far to order that "the respondent States must take every measure to put an end to the arbitrary detention of the applicants still detained and to secure their immediate release" (par. 490). The further attenuation by the last mentioned judgment of Member State margin of appreciation did not pass unobserved. In his partially dissenting opinion, Judge Loucaides states: "Lastly, I realise the objective impossibility for the second respondent State of enforcing the Court's judgment to the letter, going over the head of sovereign Moldova, particularly in order to put an end to the applicants' detention. In *Drozd and Janousek*, the Court said: "The Convention does not require the Contracting Parties to impose its standards on third States or territories" (*Drozd and Janousek v. France and Spain*, judgment of 26 June 1992, Series A no. 240, p. 34, § 110). When that is translated into the language of international law, it surely means that neither the Convention, nor any other text requires signatory States to take counter-measures to end the detention of an alien in a foreign country unless, upon reading our judgment, people welcome the appearance right in the heart of old Europe of a new condominium like the New Hebrides. But I very much doubt that that would be a desirable development».



the Convention, has sought to indicate the type of measure the same State might take to put an end to the systemic situation identified in the present case. In doing so, the Court seems to welcome a new activist approach, suitable with the enlargement of the Council of Europe,<sup>11</sup> towards Member States' legislative and judicial powers. Those States, in turn, seem gradually to lose freedom of choice as to the appropriate means to comply with a judgment notifying a breach of the ECHR<sup>12</sup> and determine the appropriate remedial measures to satisfy the respondent State's obligations under Article 46.<sup>13</sup> It is no coincidence, then, that this approach was introduced in certain decisions addressed to CEE Member States.

In the last pages we have describing growing consolidation of the direct effect of ECtHR case-law and, consequently, a greater pervasiveness of the ECHR within the national legal orders that are defendants in Strasbourg.

A second, complementary attitude of the more recent, post-enlargement Strasbourg' case-law has the effect to reinforce the indirect effect of the ECtHR jurisprudence. More precisely, this attitude is not specifically intended to intensify and amplify the scope of the obligations the condemned member State had to fulfill as provided for by Article 46 of the Convention. Instead, it is related to the question of the asserted existence of the obligation for the other contracting States and national judges to respect the *dictum* of ECtHR judgments.<sup>14</sup>

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<sup>11</sup> Membership in the Council of Europe soared from 23 to 41 (including 17 Central and East European countries) between 1990 and 1999.

<sup>12</sup> According to previous constant case law, the Court of Strasbourg has regularly stated that "the contracting parts are free to chose the means whereby they will comply with a judgment in which the Court has found a breach". See, *ex plurimis*, ECtHR, 13-6-1979, *Marckx c. Belgium*, par. 58; 22-3-1983, *Campbell c. UK*, par. 34.

<sup>13</sup> See, along the same lines, ECtHR, *Somogyi*, 18-5-2004, where the Court of Strasbourg "suggested" to Italy that where an applicant has been convicted despite a potential infringement of his right to participate in his trial, the most appropriate form of redress would, in principle, be trial *de novo* or the reopening of the proceedings, in due course and in accordance with the requirements of Article 6 of the Convention.

<sup>14</sup> See, for and an example of the said attitude, ECtHR, 9-6-2009, *Opuş c. Turchia*, ric. 33401/02) where it has stated that «the Court will consider whether the national authorities have sufficiently taken into account the principles flowing from its judgments on similar issues, even when they concern *other* States» (par. 163). Along the same path the memorandum of the President of the European Court of human rights prepared for the Conference on the Future of European Court of Human Rights, Interlaken, 3-7-2009. In particular, Jean Paul Costa remarked as «consensus could make it possible to give binding effect to the Court's judgments in respect of their interpretation of the Convention. This would strengthen the States' obligation to prevent Convention violations. It is no longer acceptable that States fail to draw the consequences as early as possible of a judgment

Although Article 46 is used to provide a not too solid legal basis for extending the direct effect of Strasbourg judgments, the same provision – by attributing, in fact, the obligation of conformity to ECtHR judgments *exclusively* to the State the judgment of condemnation is delivered – is decidedly contrary to the enhancement of the indirect effect of the Strasbourg case law.

It was recently proposed<sup>15</sup> to link this extension to the principle of solidarity. Solemnly provided in Article 3 of the Statute of the Council of Europe, this is one of the founding principles of the entire ECHR legal order.

Now, it will be analyzed the most evident expression of the said attitude: the emerging indifference of the ECHR case law towards the constitutional structure of the member States

Even in this case, the Court of Strasbourg's strong stance seems to represent an answer, years later, to one of the most renown passages of Community case-law. In 1970 the Luxembourg judge stated that «the validity of a community measure or its effect within a member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that State or the principle of a national constitutional structure».<sup>16</sup>

Twenty-eight years later a provision of the Turkish Constitution as interpreted by the Turkish Constitutional Court was brought to the attention of the ECtHR because it contrasted the Convention. The ECtHR pointed out that the latter «The political and institutional organisation of the member States must accordingly respect the rights and principles enshrined in the Convention. It matters little in this context whether the provisions in issue are constitutional...or merely legislative...From the moment that such provisions are the means by which the State concerned exercises its jurisdiction, they are subject to review under the Convention ».<sup>17</sup>

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finding a violation by another State when the same problem exists in their own legal system. The binding effect of interpretation by the Court goes beyond *res judicata* in the strict sense».

<sup>15</sup> Esposito, V. "La liberté des Etats, La liberté des états dans le choix des moyens de la mise en oeuvre des arrêts de la Cour européenne des droits de l'homme." *Revue trimestrielle des droits de l'homme* (2003) : 823 ff.

<sup>16</sup> ECJ, 17-12-1970, *Internationale Handelsgesellschaft*, C-11/70, par. 3

<sup>17</sup> ECtHR, 30-1-1998, *United Communist Party of Turkey v. Turkey*, par. 30.

Here the ECtHR attempted to legitimise *ex post* a series of assumptions that had begun to emerge in its case law some time prior. These assumptions led it to question the legitimacy of constitutional provisions and/or orientations of contracting State Constitutional Courts.

Already in the early '90s,<sup>18</sup> the Court ruled that Article 40, par. 3 of the Irish Constitution, as interpreted by the Supreme Court of Dublin, contrasted the Convention and in particular Article 10, par. 1, regarding freedom of expression. According to the provisions of Article 40, in fact, it was prohibited to give Irish women information about the possibility of having an abortion abroad.

In the second half of the '90s, following the Strasbourg judgment in *Vogt*,<sup>19</sup> the German Constitutional Court was obliged to modify its constitutional provisions whereby active members of "extremist parties", such as Communists or the far right, were excluded from any job in the public services sector.

In 1999<sup>20</sup> in a case that concerned France as defendant State, the claimants complained that the intervention of the State in a pending procedure where they were involved due to the retroactivity of the law, violated the principle of equality of arms and legal certainty.

Even though the *Conseil Constitutionnel* found no violation of the French Constitution, the ECtHR ruled that French law contrasted Article 6 of the Convention.

More recently the ECtHR adopted an even bolder orientation. In the famous case of the Princess of Monaco, its evaluation was antithetical to the one adopted by Europe's most prestigious and feared Constitutional Court.

According to the German Federal Court, the photos of Princess Caroline taken in a public place came under the constitutionally guaranteed right of freedom of the press (Article 5 of the German Constitution). Because she was a public figure, the German Court decided that the photos did not violate her right to privacy. The Court of Strasbourg interpreted the case differently and ruled instead that there had been a breach of Article 8 of the Convention.<sup>21</sup>

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<sup>18</sup> ECtHR, *Open Door and Dublin Well Woman v. Ireland*, 29-10-1992, 14234/88 ; 14235/88.

<sup>19</sup> ECtHR, *Vogt v. Germania*, 26-9-1995, ric. 17851/91.

<sup>20</sup> ECtHR, 28-10-1999, *Zielhinsky and Pradal v. Francia*, ricc. 24846/94 and from 34165/96 to 34173/96.

<sup>21</sup> ECtHR, 24-6-2004, *Von Hannover v. Germania*, ric. 59320/00.

Jean Paul Costa, President of the ECtHR, gave an authentic interpretation of the described orientation that confirms its tendency to raise the constitutional tone of its jurisprudence. As a consequence this also increases ECHR impingement on legal orders. In fact, commenting on some of the aforementioned judgments, he stated that «this reasoning is important because it suggests that the Convention prevails over national constitutions, even if it does not state it as directly as the Luxembourg Court has done in relation to the primacy of Community law (here I would refer, for example, to its 1970 *Internationale Handelsgesellschaft* judgment)».<sup>22</sup>

Italy recently saw its margin of appreciation initially reduced,<sup>23</sup> and then again amplified,<sup>24</sup> in the well-known *Lautsi* saga. In *Lautsi* 1, adopted in November 2009, the ECtHR ruled that the obligation to place a crucifix in school classrooms violated ECHR Article 2, Protocol No. 1 which provided for the right to education and Article 9 that safeguards freedom of conscience, thought and religion.

Here is only important to note that the Court kept its distance from its precedent related to the relationship between religious symbols and the principle of secularism.<sup>25</sup> In particular, the ECtHR, in this respect, had previously recognised, in *Sabin*, with regard to the issue related to the right for a female student to wear a veil in class, that «it is not for the Court to substitute its view for that of the university authorities. By reason of their direct and continuous contact with the education community, the university authorities are in principle better placed than an international court to evaluate local needs and conditions or the requirements of a particular course».<sup>26</sup>

It was no accident that the ECtHR failed, in *Lautsi* 1, to include an analysis of comparative law, which in general characterizes the reasoning of its judgments dealing with the ECHR conformity of religious symbols. Such an analysis would have revealed, also in *Lautsi* what emerged in the reasoning of the previous judgments, i.e.

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<sup>22</sup> Inaugural speech of Jean-Paul Costa during the visit of the ECtHR judges to the Russian Constitutional Court, 10-11- of May 2007.

<sup>23</sup> ECtHR, II section, 3-11-2009, 30814/06, *Lautsi v. Italy*,

<sup>24</sup> ECtHR, Grande Chamber, 18-3-2011, 30814/06 *Lautsi v. Italy*,

<sup>25</sup> ECtHR, 10-11-2005, *Sabin c. Turchia*, ric. 44774/98 and ECtHR, 15-2-2001, *Dahlab c. Svizzera*, ric. 42393/98.

<sup>26</sup> ECtHR, 10-11-2005, *Sabin c. Turchia*, par. 121.

the lack of consensus in Europe over the matter which meant that a conspicuous margin of appreciation was left up to local decision.

In *Lautsi* 1, to the contrary, the ECtHR gave an anomalous evaluation of “local dimension” of the matter, in particular referring to the “special” role which Christianity occupies the Italian society and, in particular, how difficult is the question of a crucifix in a country such as Italy with its strong Catholic traditions and how, consequently, even more difficult it is to protect non-believers in need of protection.

Despite the intentions of the Strasbourg judges to support, by underlining the local dimension of the problem, the persuasiveness of its reasoning, the said technique ended up having a boomerang effect because of the risk of further enhancing both the local specificity of the question and the need to evaluate and resolve conflicting interests by State decision.

It has been stated<sup>27</sup> that the ECtHR’s antimajoritarian role played in *Lautsi* 1 was a positive factor, useful to correct some deficiencies of the majoritarian democracy. It may be, but such a role seems also not only to cause a substantial annulment of the national margin of appreciation<sup>28</sup> but also to radically transform the very nature of the European Court of Human Rights (from an international Court to a quasi-constitutional one) and the rationale at the basis of the ECtHR system (from individual justice to constitutional justice), especially after the entry into force of protocol 14.<sup>29</sup>

The judgment, in *Lautsi* 1, exactly for those reasons, as it will be seen in the second part of the paper, has been fierily stigmatized by many constitutional scholars as disregarding the Christian roots of our State and because of its intrusiveness against State sovereignty and national values which should be regulated and protected at the national level.

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<sup>27</sup> Mancini, S. “The Crucifix Rage: Supra-National Constitutionalism Bumps Against the Counter-Majoritarian Difficulty.” *European Constitutional Law Review* (2010): 6 ff.

<sup>28</sup> Contra see also Benvenuti, E. “Judicial Misgiving Regarding the Application of International Norms: an Analysis of Attitudes of National Courts.” *European Journal of International Law* (1993): 159 ff.

<sup>29</sup> The protocol 14, entered into force the 1-6-2010, provides a new criteria according to which the ECtHR could declare not receivable the individual petition also when «the applicant has not suffered a significant disadvantage». It is evident how the above mentioned condition, due to its vagueness, represents an additional element of flexibility and discretion granted to the ECtHR and will require interpretation establishing objective criteria through the gradual development of the case-law of the Court. In the meanwhile, the enhancement of the move from a logic of individual justice to a logic of constitutional justice could not be denied.

## II.2. THE REACTION OF THE EUROPEAN COURT OF JUSTICE TO THE ENLARGEMENT OF THE EUROPEAN UNION

The further centralisation of the ECtHR's adjudication powers, along with the reduction of the appreciation margin, namely at the level of CEE Member States, may not be regarded as a foolish activist jump but rather as a measured step aimed at reducing the exploding case load, bearing in mind Sadursky's words: "If there is a domain in which concern over national identity and accompanying notions of sovereignty are obviously weak in Central and Eastern Europe it is in the field of protection of individual rights".<sup>30</sup> The same does not apply to the different scenario of the EU constitutional dimension. In that area the penetration of European law into the domestic legal orders and the constitutional conflict between national and supranational levels do not seem destined always to expand, as in the case of the ECtHR intervention, the content of the constitutional rights. Rather, to the contrary, as the saga of the European Arrest Warrant shows, at least sometimes, it operates to force constitutional change with a restrictive result for certain Member States.<sup>31</sup>

Against this background, and with regard to the new "season" of a centralised judicial activism of the ECtHR, the relevant question is whether (and if so, in which direction) the ECJ has somehow developed a new judicial sensitivity after the 2004 and 2007 enlargements. The addition of twelve, not always homogeneous, constitutional identities seems in fact to entail that the ECJ's exclusive reference to the concept of common constitutional traditions is starting to become progressively less suitable, especially if it is considered, with particular emphasis on CEE Member States, that:

After the fall of communism, national identity (often perceived in an ethnic rather than civic fashion) has been either the only or the most powerful social factor, other than those identified with social foundations of the *ancien regime*, capable of injecting a necessary degree of coherence into society and of countervailing

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<sup>30</sup> The main reason, according to Sadursky, is that "the legacy of Communism under which individual rights were systematically trampled on is still fresh in many peoples'minds". See Sadurski, W. "The Role of the EU charter of fundamental rights in the process of the enlargement." *Law and Governance in an Enlarged Union*. Eds. G. A. Berman, K. Pistor. Oxford: Oxford University Press, 2004: 80.

<sup>31</sup> Along these lines, see Sarmiento, S. "European Union: The European Arrest warrant and the quest for constitutional coherence." *International Journal of Constitutional Law* (2008): 171 ff.

the anomie of a disintegrated, decentralised and demoralised society.<sup>32</sup>

The situation is even more complicated because, within the CEE, more identities exist asking for recognition: the majority ones and many minorities.<sup>33</sup>

Bearing these considerations in mind, the key question may be: how is the ECJ responding to the change, in a pluralistic identity-based direction, of the dynamic nature of constitutional tolerance?<sup>34</sup> It has been argued that, before the enlargement, the ECJ, in order to foster constitutional tolerance by Member States, applied a two-level argumentative strategy: the first level approach addressed national legislative and executive bodies, and the second the national courts.<sup>35</sup> Briefly, it appears that, with regard to that first aspect, the ECJ seems to have understood the extent of the change in the relationship between the European dimension and the Member States' constitutional dimensions after 2004. As to the second, however, there is still a long way to go, even if certain steps in the right direction have already been taken. The next section of the paper is dedicated to the attempt to find some empirical support of these assumptions.

### II.3. THE E.U. MEMBER STATES' POLITICAL BODIES AS ECJ INTERLOCUTORS

It has been argued<sup>36</sup> that, in order to prevent potential "sovereignist" reactions by Member States, and namely in order to enhance this miraculous "voluntary

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<sup>32</sup> Sadursky, W. "Constitutionalization of the EU and the Sovereignty concerns of the new accession States: the role of the charter of Rights." *EUI Working Paper Law 11/03*, [www.iue.it/PUB/Law03-10.pdf](http://www.iue.it/PUB/Law03-10.pdf), 6 ff., 12.

<sup>33</sup> See Ganino, M. "Profili costituzionali ed allargamento dell'Unione Europea." *L'Europa di Domani, Verso l'Allargamento dell'Unione*. Eds. M. Ganino, G. Venturini. Milano: Giuffrè, 2002: 113 ff., at 135.

<sup>34</sup> The constitutional ingredient which shapes the European legal order's uniqueness, according to which, in Joseph Weiler's usual brilliant terms, "constitutional actors in the Member States accept the European Constitutional discipline not because as a matter of legal doctrine.... They accept it as an autonomous voluntary act endlessly renewed by each instance of subordination .... The Quebecois are told in the name *of the people* of Canada, you are obliged to obey. The French or the Italians or the Germans are told: in the name *of peoples* of Europe, you are invited to obey.... When acceptance and subordination is voluntary, it constitutes an act of true liberty and emancipation from collective self-arrogance and constitutional fetishism: a high expression of Constitutional Tolerance". See Weiler, J. "Federalism and Constitutionalism: Europe's Sonderweg." *Harvard Jean Monnet Paper* 10 (2000): 13.

<sup>35</sup> See Pollicino, O. "Legal Reasoning of the Court of Justice in the Context of the Principle of Equality Between Judicial Activism and Self-restraint." *German Law Journal* (2004): 283 ff.

<sup>36</sup> Martinico G., O. Pollicino. "Between constitutional tolerance and judicial activism: the "specificity" of the European judicial law." *European Journal of Law Reform* (2008): 99 ff.

obedience”, in the last few decades the ECJ has resorted to applying the “majoritarian activist approach”.<sup>37</sup> According to this approach, among the various solutions to a case, European judges may opt for the final ruling that is most likely to meet the highest degree of consensus in the majority of Member States.<sup>38</sup> European judges seem to have understood that if such an approach had been partially<sup>39</sup> able to convince Germans and Italians when they were “invited” to obey the European discipline in the name of the peoples of Europe, the same “invitation” would have proven much less successful when applied to Estonians or Hungarians.

The post-2004 era has called, then, for a new *ad hoc* judicial strategy to combine with the pre-2004 majoritarian activist approach. After all, what new member States need to be reassured about seems to be that even if, with regard to those national values relating to a peculiar constitutional identity to protect, they found themselves in a minority or isolated position, the European judges would not sacrifice them on the altar of the majoritarian-activist approach. It does not seem a coincidence, indeed, that some months after the 2004 enlargement, the Court stated, against an exclusively majoritarian logic, for the very first time, that “it is not indispensable in that respect for the restrictive measure issued by the authorities of a Member State to correspond to a conception shared by all Member States as regards the precise way in which the fundamental right or legitimate interest in question is to be protected”.<sup>40</sup>

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<sup>37</sup> Miguel Maduro identifies the same judicial approach in the different field of European economic constitution. See Maduro, M. P. *We, the Court. The European Court of Justice and Economic Constitution*. Oxford: OUP (1998): 72 ff.

<sup>38</sup> In particular, a previous work attempted to prove how the reference to the majoritarian approach has been able to explain how it is not unusual in European case law that a couple of cases, which are very similar in their factual and/or legal background, are decided in an opposite, thus almost schizophrenic, way by the ECJ. The key to the apparent enigma has been found by reflecting upon the impact that a decision can have on the national legal systems by the application of the majoritarian activism approach, as is proved by the following case law analysis of two decisions in the field of protection of sexual minorities. See Pollicino, O. *La discriminazione sulla base del sesso nel diritto comunitario*. Milano: Giuffrè, 2005.

<sup>39</sup> Doubts about the real persuasion attitude of the mentioned judicial strategy has been advanced by Matey Avbely, by arguing that “The damaging effect of the ‘supranational’ counter-majoritarian difficulty on legitimacy appears to be doubled: the whole ‘national demos’ is turned into minority and the prevailing value-based view – the identity of the majority of the ‘national demos’, is compromised in favour of a distinct European demos”. See Avbely, M. “European Court of Justice and the Question of Value Choices: Fundamental human rights as an exception to the freedom of movement of goods.” *Jean Monnet Working Papers 6/2004*, Jean Monnet Chair.

<sup>40</sup> Court of Justice, 14-10-2004, C-36/02, *Omega*, I-9609, par. 37.



The factual background of the *Omega* decision mentioned above is too well-known to iterate. It is enough to recall here that the question was whether the aim of protecting a constitutional right, in that case the right of human dignity, representing a top priority issue for one Member State (in that case, Germany), could possibly justify a restriction of freedom of services, a fundamental freedom but also a fundamental right of the European economic constitution. The outcome of the decision is even more famous: “Community law does not preclude an economic activity consisting of the commercial exploitation of games simulating acts of homicide from being made subject to a national prohibition measure adopted on grounds of protecting public policy by reason of the fact that that activity is an affront to human dignity”.<sup>41</sup> What seems instead to have been undervalued in several commentaries on the case is the circumstance that European judges, in order to acknowledge the protection of the single Member State’s constitutional values, had to manipulate their previous judgment, which clearly reflected the then prevailing approach of the majoritarian (if not unanimous) logic at the heart of the justification grounds for the restriction of fundamental freedoms.<sup>42</sup> The ECJ was then able to give an authentic (manipulated) interpretation of its precedent explaining how:

Although, in paragraph 60 of *Schindler* the Court referred to moral, religious or cultural considerations which lead all Member States to make the organisation of lotteries and other games with money subject to restrictions, it was not its intention, by mentioning that common conception, to formulate a general criterion for assessing the proportionality of any national measure which restricts the exercise of an economic activity.<sup>43</sup>

In other words, there emerges a shift in the judicial reasoning of the ECJ, from a pre-accession majoritarian activist approach to a post-accession reference to the necessary protection, at least in the most sensitive cases, of the fundamental rights peculiar even to a single Member State’s constitutional identity. Upon closer inspection, the attention to national values, far from being a post-2004 accession novelty, has always been a main feature of the ECJ case-law related to the

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<sup>41</sup> *Omega*, par. 41.

<sup>42</sup> ECJ, 24-3-1994, C-275/92, *Schindler*, I-1039.

<sup>43</sup> ECJ, *Omega*, par. 37.

achievement of a European single market. This is, in particular, with regard to consumer protection and the preservation of public order as legitimate national justification for the hindrance to fundamental freedoms, especially freedom of establishment and freedom to provide services. It is enough to consider the case-law related to gambling. Here, since 1994,<sup>44</sup> the Court has admitted that moral, religious and cultural factors, and the morally and financially harmful consequences for individuals and societies associated with gambling, could serve to justify the existence, on the part of the national authorities, of an appreciation margin sufficient to enable them to determine what kind of consumer protection and public order preservation they should apply. The innovative element of the post-accession phase, connected mainly with the need to provide a reassurance argument for the strong, identity-based demand for recognition coming from the new CEE Member States, is instead the willingness of the ECJ to take a step back if the protection of a national constitutional right is at stake. As it has been objected that “the phase of justification before the ECJ is a phase in which the Court strikes a balance between competing values of the Member States and the economic values of the Union and makes the final determination”, the added value of the relevant post-accession case-law<sup>45</sup> is that fundamental rights become a legitimate justified obstacle to the further enhancement of the European economic constitution even if that ground of justification it is not at all enshrined in the founding Treaties.

The same vision, even more clearly expressed, was confirmed in a judgment of 14 February 2008,<sup>46</sup> which so far has gone strangely unnoticed. Since it is not well known, we begin with a brief overview of the case might be useful. The dispute in the main proceedings concerned the importation by a German company of Japanese cartoons known as *animé* in DVD or videocassette format from the United Kingdom

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<sup>44</sup> ECJ, 21-9-1999, C-124/97 *Läära and Others*, I-6067- Along the same lines, more recently, see 6-11-2003, *Gambelli*, case C-243/01, and 6-3-2007, *Placanica*, in Joined Cases C-338/04, C-359/04 and C-360/04, where the Court expressly states as “context, moral, religious or cultural factors, as well as the morally and financially harmful consequences for the individual and for society associated with betting and gaming, may serve to justify a margin of discretion for the national authorities, sufficient to enable them to determine what is required in order to ensure consumer protection and the preservation of public order (par. 47)”.

<sup>45</sup> *Omega*, anticipated by Case C-112/00, *Eugen Schmidberger Internationale Transporte Planzüge v. Republik Österreich*, I-5659

<sup>46</sup> ECJ, 14-2-2008, C-244/06, *Dynamic Medien Vertriebs GmbH*, in ECR I-183.

to Germany. The cartoons were examined before importation by the British Board of Film Classification (BBFC). The latter checked the audience targeted by the image storage media by applying the provisions relating to the protection of young persons in force in the United Kingdom and classified them in the category “suitable only for 15 years and over”. The image storage media therefore bore a BBFC label stating that they may be viewed only by persons aged 15 years or older. Dynamic Medien, a competitor of Avides Media, brought proceedings for interim relief before the *Landgericht* (Regional Court) of Koblenz (Germany) with a view to prohibiting Avides Media from selling such image storage media by mail order. Dynamic Medien submitted that the legislation on the protection of young persons prohibits the sale by mail order of image storage media which have not been examined in Germany in accordance with that law, and which do not bear an age-limit label corresponding to a classification decision from a German higher regional authority or a national self-regulation body (the “competent authority”). By a decision of 8 June 2004, the Koblenz *Landgericht* held that mail-order sales of image storage media bearing an age-limit label from the BBFC alone was contrary to the provisions of the law on the protection of young persons and constituted anti-competitive conduct. On 21 December 2004, the *Oberlandesgericht* (Higher Regional Court) of Koblenz, ruling in an application for interim relief, confirmed that decision. The Koblenz *Landgericht*, called to rule on the merits of the dispute and unsure whether the prohibition provided for by the law on the protection of young persons complied with the provisions of (former) Article 28 TEC, decided to stay the proceedings and to refer to the ECJ for a preliminary ruling. The German Court asked the ECJ whether the principle of free movement of goods precludes the German law prohibiting the sale by mail order of DVDs and videos that are not labelled as having been vetted by the German authorities as to their suitability for young people. The German Court also asked whether the German prohibition could be justified under (former) Article 30 TEC.

The ECJ held, in the first place, that German rules constitute a measure having an effect equivalent to quantitative restrictions within the meaning of (former) Article 28 TEC, which in principle is incompatible with the obligations arising from that article unless it can be objectively justified. The Court then considered whether the

German measures could be justified as being necessary to protect young people, being an objective linked to public morality and public policy, which are recognised as grounds for justification in (former) Article 30 TEC. The Court held that the German measures were so justified. The Court stated in particular:

...that it is not indispensable that restrictive measures laid down by the authorities of a Member State to protect the rights of the child, correspond to a conception shared by all Member States as regards the level of protection and the detailed rules relating to it (see, by analogy, *Omega*, paragraph 37). As that conception may vary from one Member State to another on the basis of, inter alia, moral or cultural views, Member States must be recognised as having a definite margin of discretion.<sup>47</sup>

Despite the reference to the analogy of the *Omega* case, in *Dynamic Medien* the ECJ seems to have gone further with the appraisal of the national constitutional values of the particular Member State, in the direction of indirect reassurance towards the new Member States. The case presents a twofold innovation. Firstly, by making express reference to different levels of the protection of fundamental rights within Member States (rather than by *way of protection* as in *Omega*), and by acknowledging for the first time a definite margin of discretion to the individual Member State, the ECJ has achieved a double objective. On one hand, the Court refused to follow the highest standard-based conception of fundamental human rights<sup>48</sup> whilst, on the other, it has explicitly confirmed its willingness to adhere to the substantive nature of fundamental rights. In Alexy's words,<sup>49</sup> they are substantively fundamental because they enshrine the basic normative structures of state and society.

It would be difficult not to catch the link between, on one hand, the Court's step back, facing the fundamental boundaries<sup>50</sup> of basic value-oriented choices of the Member States, in its obsessive enhancement of European law uniformity and, on the other hand, the aim to reassure (also) CEE States that their constitutional identity

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<sup>47</sup> *Dynamic Medien Vertriebs GmbH*, par. 48.

<sup>48</sup> See Besselink, L.F.M. "Entrapped by the maximum standard: on fundamental rights, pluralism and subsidiarity in the European Union." *Common Market Law Rev* (1998): 629 ff., at 636.

<sup>49</sup> See Alexy, R. *A theory of constitutional rights*. Oxford: OUP, 2002: 349 ff., at 350.

<sup>50</sup> See Weiler, J.H.H. "Fundamental Rights and Fundamental Boundaries: On Standards and Values in the Protection of Human Rights." *The European Union and Human Rights*. Eds. N. Neuwahl and A. Rosas. Martinus Nijhoff Publishers Dordrecht, 1995: 51, 52.

is not going to be sacrificed in the name of the achievement of European economic values.

Secondly, the reference to the European Charter of Fundamental Rights is also very innovative in this regard. Departing from other cases where the ECJ has made explicit reference to the Charter,<sup>51</sup> here the mentioned reference is the sole means to assert European primary legal protection of the fundamental right in question.<sup>52</sup> It is not a coincidence that, in light of this judicial strategy of reassurance being put in place, and after years of indifference, the ECJ started to make express reference in its reasoning to the Charter almost immediately after the accession of the CEE Member States. As it has been astutely argued: “There is a high degree of congruence between the structure of constitutional rights in the post-communist countries of Central and Eastern Europe and the structure of the rights as displayed in the EU Charter”.<sup>53</sup>

In light of the scenario that the last pages have tried to delineate, it is perhaps possible to advance further in the attempt to systematise the reactions to the enlargement that have characterised the judicial approach of the ECJ. The Court of Luxembourg seems in fact increasingly committed to work on a self-restriction of the EC primacy principle, when it comes to the protection of identity-based constitutional dimensions of one or more Member States. It is a precise strategy of the ECJ, whose aim seems, in line with the *Solange* approach, to prevent further positions (also) of the CEE Courts by somehow “internalising”, as in *Omega* and *Dynamic Medien*, the “counterlimits” doctrine in its case law.

In other words, the “evolutionary nature of the doctrine of supremacy”<sup>54</sup> seems to have undergone another transfiguration phase after the 2004 enlargement, from an

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<sup>51</sup> ECJ, 27-6-2006, C-540/03, par. 38; 13-3-2007, C-432/05, par. 37; 3-5-2007, C-303/05; 11-12-2007, C-438/05, *Viking* and 18-12-2007, C-341/05, *Laval*.

<sup>52</sup> The Court of Justice (at par. 41) stated that “the protection of the child is also enshrined in instruments drawn up within the framework of the European Union, such as the Charter of Fundamental Rights of the European Union, proclaimed on 7 December 2000 in Nice (OJ 2000 C 364, p. 1), Article 24(1) of which provides that children have the right to such protection and care as is necessary for their well-being”.

<sup>53</sup> Sadurski, W. “The Role of the EU charter of fundamental rights in the process of the enlargement.” *Law and Governance in an enlarged Union*. Eds. G. A. Berman, K. Pistor. Oxford: OUP, 2004: 61 ff., at 83. See for arguments supporting this point Sadurski, W. “Charter and Enlargement.” *European Law Journal* (2002): 340, 348 ff.

<sup>54</sup> Weiler, J.H.H. “The Community System, the Dual Character of Supranationalism.” *Yearbook of European Law* (1981): 268 ff., at 275.

uncompromising version<sup>55</sup> to a compromising one. It is not a coincidence that the Treaty establishing the European Constitution of 2004 provided, immediately prior to the EC primacy principle codification, at Article I-6, the following complementary principle:

The Union shall respect the equality of the Member States before the constitution as well as their national identity, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect the entire state functions, including the territorial integrity of the state, maintaining law and order and safeguarding national security.

Moreover, it does not appear to be any coincidence either that, in the “substantial reincarnation” of that Treaty agreed in Lisbon in December 2007, notwithstanding the lack of an express codification of the principle of primacy of EC law, the principle enshrined in Article 1-5 of the Treaty establishing the European Constitution has been textually provided by Article 4.2 of the Lisbon Treaty (with the further specification that national security remains the sole responsibility of each Member State).

In a different context, Mattias Kumm has stated that the primacy principle’s new “season” following the 2004 enlargement, with a view to the new Treaty of Lisbon, which should come into force on 1 January 2009, requires that: “When EU law conflicts with clear and specific national constitutional norms that reflect a national commitment to a constitutional essential, concerns related to democratic legitimacy override considerations relating to the uniform and effective enforcement of EU law”.<sup>56</sup> In other words: “Guarantee of the constitutional identities of Member States in the constitutional Treaty should be interpreted by the ECJ to authorise national Courts to set aside EU law on certain limited grounds that derive from the national constitutions”.<sup>57</sup>

If this impression is to be confirmed in the future,<sup>58</sup> then the ECJ has found, thanks to the new parameter provided by Article 4.2 of the EU Treaty, as amended by the

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<sup>55</sup> Weiler, J.H.H. “The Transformation of Europe.” *Yale Law Journal* (1991): 2403 ff., at 2414.

<sup>56</sup> Kumm, M. “The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and After the Constitutional Treaty.” *European Law Journal* (2005): 262 ff., at 286.

<sup>57</sup> Kumm, M. *The Jurisprudence*, cit. 303.

<sup>58</sup> The first confirmation of the “good use” that the ECJ could make of the new 4.2 is given by a very recent judgment of the same Court (ECJ, 22-12-2012, *Ilonka Sayn-Wittgenstein v. Landeshauptmann von*

Lisbon Treaty, the appropriate judicial mechanism to prevent the occurrence of the most frequent constitutional conflict between the EC and national levels – the dualistic tension between the irresistible, overriding vocation of the ECJ's *Simmenthal* mandate and the equally monolithic national constitutional mandate to preserve the core of fundamental rights from EC “invasion”.

As a matter of example, an EU norm that took precedence over a Member State's constitutional provision which asserts its constitutional identity, would clash, in fact, with EU law itself, and with Article 4.2 of the new EU Treaty, which requires, as we have seen, that EU Law respects the national identity of the Member States. Consequently, in case of such a conflict, the hypothesis of annulment of a piece of EU law by the Member States' constitutional courts would appear even less realistic. Conversely, the circumstance that a parameter of European law is violated would imply the competence of national ordinary judges, in their European mandate role, to set aside that piece of EC law clashing with the principle enshrined in Article 4.2 of the EU Treaty as amended by the Lisbon Treaty.

SECOND PART: (THE COMPARATIVE PUBLIC LAW SCENARIO): THE IMPACT OF THE  
EUROPEAN CONVENTION OF HUMAN RIGHTS ON THE ITALIAN AND UK LEGAL  
SYSTEMS, WITH PARTICULAR REGARD TO THE RECENT AGGRESSIVE SEASON OF THE  
CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

III. THE ITALIAN CONTEXT: THE RELATIONSHIP BETWEEN THE EUROPEAN  
CONVENTION OF HUMAN RIGHTS AND NATIONAL LEGAL ORDER BEFORE AND

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*Wien*, in [www.curia.eu.int](http://www.curia.eu.int)). In this decision, the Luxembourg judges affirmed that it “does not appear disproportionate for a Member State to seek to attain the objective of protecting the principle of equal treatment by prohibiting any acquisition, possession or use, by its nationals, of titles of nobility or noble elements which may create the impression that the bearer of the name is holder of such a rank. By refusing to recognise the noble elements of a name such as that of the applicant in the main proceedings, the Austrian authorities responsible for civil status matters do not appear to have gone further than is necessary in order to ensure the attainment of the fundamental constitutional objective pursued by them.” (par. 93). In order to justify that assumption the ECJ not only recalled that “The Court has already explained in that regard that it is not indispensable for the restrictive measure issued by the authorities of a Member State to correspond to a conception shared by all Member States as regards the precise way in which the fundamental right or legitimate interest in question is to be protected and that, on the contrary, the need for, and proportionality of, the provisions adopted are not excluded merely because one Member State has chosen a system of protection different from that adopted by another State (see *Omega*, paragraphs 37 and 38)”, but also, for the first time by expressly making reference to new “constitutional basis” that “it must also be noted that, in accordance with Article 4(2) TEU, the European Union is to respect the national identities of its Member States, which include the status of the State as a Republic” (parr. 91-92).

AFTER THE INTRODUCTION OF ARTICLE 117, PAR. 1, OF THE ITALIAN CONSTITUTION  
AND DECISIONS NN. 348 AND 349 OF 2007 OF THE ITALIAN CONSTITUTIONAL  
COURT.

It is never too late. In two decisions handed down at the end of October 2007, the Italian Constitutional Court seems finally to have begun to take seriously one of the Italian Constitution's fundamental principles: the openness to international law which is embodied in Articles 10, 11 and – the provision chosen by the Constitutional Court in the judgments being examined – 117, paragraph 1 of the Constitution, which was added by the constitutional revision of 2001.<sup>59</sup> In the past the Italian Constitutional Court had been already asked to identify the role played by the ECHR in the Italian legal system. In this regard, an important distinction in time should be drawn between the situation before and after the constitutional revision of 2001, which added Article 117, paragraph 1.

In order fully to understand the reasoning and the final outcome of the two decisions mentioned here, it is important to set them in the context of previous case-law in the light of the meaning attributed by Italian constitutional scholars and by the Constitutional Court to the relevant constitutional provisions.

Starting with the first relevant judgments, the Constitutional Court has substantially argued that, in keeping with the dualistic matrix of the Italian legal system, the ECHR, as well as all ratified international Treaties, has the same position in the hierarchy of Italian sources of law as that assigned to the national Act through which it has been included in the internal legal order.<sup>60</sup>

Given the fact this has happened for the ECHR – as for all other international Treaties – via an ordinary statute<sup>61</sup> the Constitutional Court, apart from an isolated

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<sup>59</sup> Art. 10, para. 1, prescribes that «the Italian legal order complies with the norms of international law generally recognized». Art. 11 provides that: «Italy rejects war as an instrument of aggression against the freedoms of other peoples and as a means for settling international controversies; it agrees, on conditions of equality with other states, to the limitations of sovereignty necessary for an order that ensures peace and justice among Nations; it promotes and encourages international organizations having such ends in view». In accordance with Art. 117, para. 1 (added by the constitutional revision of 2001): «legislative powers shall be vested in the State and the Regions in compliance with the Constitution and with the constraints deriving from EU legal order and international obligations»-

<sup>60</sup> Constitutional Court, judgments No. 188/1980, No. 153/1987, No. 323/1989 and No. 315/ 1990.

<sup>61</sup> Law 4 -8-1955 n. 848.



decision<sup>62</sup>, has, prior to the judgments analysed here, attributed to the ECHR the legal value proper to an ordinary statutory law.

To put it simply, according to this jurisprudential orientation, the ECHR could be abrogated by any successive statutory law that conflicted with it. The abrogative effect, in the absence of any constitutional protection for the ECHR, would result in the *lex posterior derogat legi priori* rule being applied in order to solve the conflict between two statutes placed in the same position on the scale of the sources of law.

Long before the adoption of Article 117, paragraph 1, legal scholars had tried to find a constitutional basis for the ECHR in order to justify a higher position for the Convention in the hierarchy of law. That basis has been identified by a first group of authors in Article 10 of the Italian Constitution, by a second group in Article 11 and by third group in Article 2<sup>63</sup> of the Italian Constitution. According to the first thesis, the ECHR would include general rules which are part of the generally recognised tenets of international law, to which Article 10 attributes a special status. This would imply that the ECHR rules, independently of any formal ratification, could find direct access, at a constitutional level, to the Italian legal system through its duty, provided by Article 10, to conform to the tenets of international law.

According to the second group of authors, the ECHR's constitutional foundation could be found in Article 11 of the Italian Constitution, which admits «the limitations of sovereignty necessary for an order that ensures peace and justice among Nations». This provision, which was originally intended to represent the constitutional authorisation to join the United Nations, has been used by the Italian Constitutional Court to combine the European Court of Justice primacy doctrine over national (even constitutional) law with the need to protect fundamental rights on a constitutional level. On this view, the same treatment could be accorded, under the same provision, to the ECHR.

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<sup>62</sup> Decision No. 10/1993 in which the Constitutional Court speaks, in relation to the ECHR and its ratification by ordinary law, in terms of an 'atypical source of law'. This special status enjoyed by ECHR, according to this judgment, would place it in a better position in the hierarchy of sources of law with respect to the ordinary legal order.

<sup>63</sup> Art. 2 of the Italian Constitution provides that: «The Republic recognises and guarantees the inviolable rights of the person, as an individual and in the social groups where human personality is expressed. The Republic expects that the fundamental duties of political, economic and social solidarity be fulfilled».

With regard to the third view, the reference to the inviolable rights recognized and guaranteed by Article 2 of the Constitution is taken into consideration. This clause would allow constitutional protection for the ‘new fundamental rights’ arising after the adoption of the Constitution of 1948. Among these rights, those provided by the ECHR would find a (constitutional) place.

In its case-law, the Constitutional Court has not shown any great enthusiasm towards these attempts to give special constitutional protection to the ECHR. In relation to Article 10 of the Constitution, the Constitutional Court has specified that the privileged constitutional status enjoyed by the tenets of international law as generally recognised rules is not extendable to international obligations – as is the case of the ECHR – undertaken by the State with an international Treaty.<sup>64</sup>

Regarding Article 11, the Constitutional Court, treating the issue as if it were beyond dispute and recalling a 27-year old precedent<sup>65</sup>, affirmed that no international Treaty – irrespective of its subject area – can entail any limitation on sovereignty under the terms provided by Article 11 of the Constitution. In relation to interpreting Article 2 of the Constitution as an open clause suitable to give constitutional protection to new fundamental rights, the Constitutional Court did not assess the issue with specific reference to the ECHR. In more general terms, it clarified that the guarantee provided by Article 2 is intended to refer only to the rights expressly enunciated in the Constitution and to those directly connected to them.

At the end of the 1990s, the Constitutional Court, without changing its opinion about the place occupied by the ECHR in the Italian sources of law hierarchy, began looking at the relationship between the Italian constitutional legal system and the ECHR in a different and complementary way.

In particular, in decision No. 388/1999 the Court seems to have drawn a distinction, in relation to the sources of international law, between the content, the material area on which the international Treaty is concluded, and its container, the ordinary statute which transforms the international source into a national law. In this regard, it is argued by the Constitutional Court that, in the case in which the content is

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<sup>64</sup> Constitutional Court, judgments No. 48/79, No. 32/60, No. 104/69, No. 14/64, No. 323/1989.

<sup>65</sup> Constitutional Court, judgment No. 188/1980.

characterized by the aim to protect human rights, those rights, independently from the position of the container, should enjoy a constitutional guarantee. In other words, starting from this decision, the Constitutional Court seems more interested in looking not only, from a formal(istic) point of view, at the static position of the ECHR in the hierarchy of the sources of law, but, from a substantial and axiological point of view, and due to its fundamental rights-based content, at its suitability to complement the recognition of inviolable fundamental rights protected by Article 2 of the Constitution.

The constitutional scenario thus described has been integrated by the adoption, in 2001, of new Article 117, paragraph 1, which provides, as already noted, that 'legislative powers shall be vested in the State and the Regions in compliance with the Constitution and with the constraints deriving from the EU legal order and international obligations.'

There have been three main readings of this provision by Italian constitutional scholars.

According to the first thesis, nothing really has changed in the relationship between the Italian legal order and the sources of international law.<sup>66</sup> From this point of view, Article 117 paragraph 1 only refers to the relationship between state laws and regional laws and its purpose would not have been that of governing the new hierarchy of their respective sources of law.

A second, different interpretation has identified in the new provision the cause for a radical change from a dualistic to a monistic matrix of the Italian legal system. In other words, pursuant to Article 117, paragraph 1, all international Treaties to which the Italian State is a party, and the ECHR in particular, would enjoy the same special status in the national legal order as that awarded to general norms of international law by Article 10.<sup>67</sup>

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<sup>66</sup> Pinelli, C. "I limiti generali alla potestà legislativa statale e regionale e i rapporti con l'ordinamento comunitario." *Foro italiano* (2001), V: 194 ff.

<sup>67</sup> D'Arena, D. A. "La nuova disciplina costituzionale dei rapporti internazionali e con l'Unione europea." *Rassegna Parlamentare* (2002): 916 ff.

A third thesis argues the ‘middle way’.<sup>68</sup> The constitutional provision grants immunity to abrogation by subsequent domestic law to international Treaties which have been incorporated into the Italian legal order by Act of Parliament. In this view the dualistic matrix of the Italian legal system remains intact. This means that an ordinary law in conflict with the ECHR would be subject to review by the Constitutional Court for its potential violation of Article 117, paragraph 1 of the Constitution.

Until the decisions analysed here, the Constitutional Court never had the opportunity to clarify whether or not Article 117, paragraph 1 of the Constitution changed the relationship between the Italian constitutional legal order and the sources of international law.

In the meanwhile, making almost no reference to ‘new’ Article 117, paragraph 1, some ordinary judges, in the new millennium, have started looking at the relationship between the ECHR and the national legal order in a surprising, if not revolutionary, way.

The Tribunal of Genoa,<sup>69</sup> followed by other Courts of first and second instance, in order to solve a conflict between ordinary national laws and ECHR principles, has started to apply the same solution according to which, since the adoption of the historic decision of the Constitutional Court in *Granital* in 1984<sup>70</sup>, ordinary judges have acknowledge the priority of EC law in cases of conflict between national law and EC law.

The latter approach, supported also by the highest ordinary and administrative Courts,<sup>71</sup> has mainly been founded on the consideration that, due to the incorporation of the ECHR in the European dimension through the bridge provided for by the general principles of EC law mentioned in Article 6 of the Treaty of the

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<sup>68</sup> See, among others, recently, Cartabia, M. “Taking Dialogue Seriously’ The Renewed Need for a Judicial Dialogue at the Time of Constitutional Activism in the European Union.” *Jean Monnet Working paper*, 12/07, <http://www.jeanmonnetprogram.org/papers/07/071201.html>

<sup>69</sup> Tribunal of Genoa, 23-11-2000; Court of Appeal of Rome, 11-4-2002; Court of Appeal of Florence, 20-1-2005.

<sup>70</sup> Constitutional Court, judgment, 6 June 1984, No. 180.

<sup>71</sup> Corte di Cassazione section I, 19-07-02, No. 10542; Corte di Cassazione, section I, 11-06- 2004, No. 11096; Corte di Cassazione, United Sections, 23-12-2005, No. 28507; Consiglio di Stato, section I, 9-4-2003, No. 1926.

European Union, it seems logical to provide the same constitutional protection to EU and ECHR law.

In other words, this brave new judicial approach interpreted the famous paragraph 16 of the landmark decision of the European Court of Justice in *Simmenthal*<sup>72</sup> as applying also to ECHR law by analogy.

By looking at how the Constitutional Court reacted the first time it had the opportunity to take the floor again in the debate, it is possible to imagine that it did not much like the period of its forced silence on the interpretation of the new Article 117 paragraph 1 of the Italian Constitution with regard to the relationship between national law and the ECHR.

The final output of the decisions being considered may be summarised as follows.

(a) Article 117, paragraph 1 of the Constitution is identified by the constitutional judges as the correct parameter to give the ECHR a higher status than domestic ordinary laws. This means that in case of conflict between the ECHR and a national statute subsequent to the statute (n. 848/1955) which gave the ECHR effect in the domestic legal system, the judge hearing the case must suspend it and request the intervention of the Constitutional Court.

(b) The Constitutional Court clearly specifies that the exact meaning of the ECHR can be ascertained only as it is interpreted by the European Court of Human Rights. In the cases under discussion, it is the right to property, provided by Protocol 1 and the right to a fair process, contemplated in Article 6, as 'living in the case-law of the European Court of Human Rights', that are taken as parameters to value the constitutionality of the domestic law under judicial scrutiny.

Each of the points mentioned deserves a separate analysis, with a special focus on the first one.

The Constitutional Court's adherence to the third thesis analysed above in relation to the meaning to be attributed to Article 117, paragraph 1 of the Constitution has a specific goal. It is in fact evident that, by identifying the latter provision as the

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<sup>72</sup> ECJ, 9 March 1977, *Simmenthal* C-106/77, in *ECR* I-62, para. 21, according to which: «Every national Court must in a case within its jurisdiction, apply Community law in its entirety and protect rights which the latter confers on individuals and must accordingly set aside any provision of national law which may conflict with Community law, whether prior or subsequent to the Community rule».

constitutional parameter which enables the Constitutional Court to ascertain a possible violation of the ECHR by a successive domestic statute, the Court has managed to halt the activist approach adopted in recent years by the ordinary courts. This approach involved putting aside the statutory law conflicting with the ECHR, applying by analogy that which the Constitutional Court finally authorized ordinary judges to do with statutes in violation of Community law, after 20 years of ‘bloody war’ with the European Court of Justice. In other words, with regard to the interpretation of the ECHR, the Constitutional Court is not willing to be bypassed by the ordinary courts. The first point of the constitutional judges – quoting the relevant decisions of *Corte di Cassazione*<sup>73</sup> – is therefore dedicated to correcting their (ordinary) colleagues, stating how the difficulty of identifying the ECHR role wrongly gave rise to the judicial attitude of directly setting aside any statute in conflict with the ECHR on the main basis of the asserted communitarisation of the ECHR through its reference contained in Article 6 EU.

All the remaining arguments of the Constitutional Court focus on trying to explain why this approach is not constitutionally correct.

The constitutional judges recognised that the consolidated case-law of the European Court of Justice has affirmed that the fundamental rights protected by the ECHR are part of the general principles of European law, and that this orientation has been codified in Article 6 of the Treaty of the European Union and extensively in the provisions of the European Charter of fundamental rights. Directly challenging the main grounds of reasoning used by ordinary judges, the constitutional judges argued, however, that it is nonetheless impossible to apply by analogy to ECHR law the same treatment as reserved to EC law.

This is because, according to the constitutional judges, the ECHR legal system has distinct structural and functional legal features as compared to the European legal order. This difference is confirmed, according to the constitutional judges, by the language of Article 117, paragraph 1, which distinguishes between the constraints deriving ‘from the European legal order’ and those deriving – only – from

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<sup>73</sup> As was specified above (*see* para. 4), the *Corte di Cassazione* supported the test of non-application to the case of the statutory law in conflict with the ECHR in decisions No. 672/1998 and especially No. 28507/2005.

‘international obligations’. On this point, the Constitutional Court draws an unconvincing distinction, to which we will return later, between «the EC provisions, which have direct effect, and the ECHR provisions, which are international law sources binding only States, without providing any direct effect in the internal legal order such as to make the national judges competent to put aside the national provisions in conflict with them».<sup>74</sup>

The fact that, in contrast with all other international Treaties, the ECHR legal system has attributed to a Court, to which individuals have access, the competence to interpret the ECHR dispositions and to condemn the States which are not respecting those dispositions, even if it has recognised by the Constitutional Court, is not enough to perceive any transfer of sovereignty in the terms provided by Article 11 of the Italian Constitution. In any case, the Constitutional Court adds, also quoting in this case the relevant case-law of Luxembourg,<sup>75</sup> that the fundamental rights of the ECHR enjoy the status of general principles of EC law only in relation to national rules that are within the scope of Community law. In other words, according to the Constitutional Court, in the situation under discussion, characterized by only a domestic relevance, the Court of Justice would have denied its jurisdiction to ascertain the eventual violation by national law of ECHR fundamental rights in their role of general principles of EC law.<sup>76</sup>

Even though the Constitutional Court is perfectly aware of the ‘schizophrenic’ nature of the ECHR in domestic law – ordinary law from a formal point of view and constitutional law in its substance<sup>77</sup> - it denies that the Convention deserves privileged constitutional protection with respect to ‘ordinary international law’.

Constitutional scholarship, as we seen, has proposed three possible interpretations in this regard: Article 10, Article 11 and Article 2 of the Constitution.

In relation to the first option, the Constitutional Court, confirming its previous case-law, argues that the privileged constitutional status enjoyed by the tenets of

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<sup>74</sup> Constitutional Court, judgment No. 348, para. 3.3.

<sup>75</sup> ECJ, 4-10-1991, C-159/90, *Society for the protection of unborn children*, in ECR I-4685; 29-5-1998, C-299/95, *Kremzow* in ECR I-2629.

<sup>76</sup> Constitutional Court, No. 349/2007, para. 6.1.

<sup>77</sup> Constitutional Court, No. 348/2007, para. 4.3.

international law as generally recognised is not extendable to international obligations based, like the ECHR, on an international treaty. A different conclusion is possible, according to the constitutional judges and this is a small opening to a pluralistic and values-based vision in a reasoning dominated by a formal hierarchical approach, only if the international Treaty in question «reproduces general consuetudinary principles of international law».<sup>78</sup>

With regard to the second interpretive option, the Constitutional Court states that only the European legal system has the character of an autonomous legal order which implies the transfer of a portion of sovereignty from the national to the supranational dimension under Article 11 of the Constitution. In order to support this statement, the constitutional judges, quoting the clearly established precedent mentioned above,<sup>79</sup> emphasised that the constitutional parameter (Article 11) used by the ordinary judges in order to give constitutional protection to EC law is not apt to obtain the same effect for the ECHR, because the latter, just as every international Treaty (irrespective of its subject-matter), cannot entail a limitation on sovereignty under Article 11. Therefore, according to the constitutional judges «the ECHR is “only” a multilateral international public law Treaty which does not entail and cannot entail any limitation on sovereignty in the terms provided by Article 11 of the Constitution».<sup>80</sup>

In relation to the possible identification of a constitutional basis for the ECHR in Article 2 of the Constitution, and with reference to inviolable constitutionally protected rights, the hope had been expressed that after a long silence on this subject, the Constitutional Court would finally follow the thesis of the speciality *ratione materiae* of the Treaties in the human rights area in relation to all other international Treaties.<sup>81</sup>

The truth is that, by basing the priority of the ECHR over conflicting national law on Article 2, the Constitutional Court would have shifted from a formal hierarchy to a

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<sup>78</sup> Constitutional Court, No. 349/2007, para. 6.1.

<sup>79</sup> Constitutional Court, No. 188/1980 quoted in judgment No. 349/2007.

<sup>80</sup> Constitutional Court, No. 348/2007, para. 6.1.

<sup>81</sup> Pinelli, C. “Sul trattamento giurisdizionale della CEDU e delle leggi con essa configgenti.” *Giurisprudenza costituzionale* (2008): 3475.



substantial one and, consequently, it would have legitimated the judicial trend, inaugurated by the ordinary judges, of setting aside domestic national legislation in conflict with the ECHR. This is exactly what the Constitutional Court wanted to avoid. The silence of the Court in relation to Article 2 of the Constitution is, then, not surprising. The second point in the decisions, as mentioned at the beginning of this section, concerns the importance that the constitutional judges have attributed to the interpretation of the ECHR by the European Court of Human Rights. According to the Constitutional Court, the ECHR provisions take shape in the interpretations of the European Court of Strasbourg, characterized as follows: «the constitutional scrutiny is not based on the text of the ECHR provision, but rather on the interpretation of the provision by the European Court of Strasbourg».<sup>82</sup>

This approach results in a circuit of judicial interpretations on two levels.

First the level of ordinary judges: before raising a question about the constitutionality of a national law in conflict with the ECHR, they are obliged to interpret the national law, insofar as it is possible, in conformity with the ECHR. It is an important reference to the interpretative role played by the ordinary judge as a decentralised ECHR judge who, for the first time in such a clear way, has been assigned a clear constitutional duty to interpret the domestic law in conformity with the international law of human rights.

On a second level, if ordinary courts do not succeed, they are obliged to refer the matter to the Constitutional Court. The constitutional judges, if they themselves cannot solve the conflict by the consistent interpretation doctrine, must verify if the protection offered to fundamental rights by the European Court of Human Rights is equivalent to that guaranteed by the Italian Constitution.

By thwarting any attempt by the ordinary judges to set aside any national law in conflict with the Convention, the Constitutional Court clearly specifies that, on the one hand, the provision of the 'new' Article 117, paragraph 1, has determined the ECHR's passive strength<sup>83</sup> with respect to subsequent national ordinary statutes, but, on the other hand, it has the effect of giving the constitutional Court competence to

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<sup>82</sup> Constitutional Court, judgment No. 348/2007, para. 4.6.

<sup>83</sup> In the sense that the ECHR no longer runs the risk of being abrogated by a subsequent national statute law.

ascertain an eventual collision between the ECHR and national law. «The said collision, in fact, does not imply any problem of chronological succession of laws, neither a question of sources of law hierarchy, but rather issues of constitutional illegitimacy».<sup>84</sup> The Court rhetorically concludes that Article 117, paragraph 1 «now fills a constitutional gap that existed before its adoption».<sup>85</sup>

This gap arose from the conflict between the constitutional principle of openness to international law as embodied in Articles 10 and 11 (now also in Article 117, paragraph 1) of the Constitution and the unfortunate consequence of the status of treaty law in the Italian legal order, in particular of the ECHR, which ran the serious risk of being overtaken by subsequent ordinary domestic law.

Nevertheless, it is doubtful whether that gap has been filled; it could have been done in at least two alternative ways. The Constitutional Court, following the line emerging from its latest precedent (in case 388/1999, *supra*) could have taken a different, values-based approach, and, by recognising the substantial constitutional character of the ECHR, could have differentiated its status from that of ‘ordinary’ international Treaties. Instead, the Constitutional Court decided to follow an interpretation based on formal logic within the perspective of a hierarchy of sources of law according to which all international Treaties, the ECHR included, are a step higher in that hierarchy. They no longer have the same status as ordinary laws, but, as the Constitutional Court explained: «they are to a degree subordinated to the Constitution, but are intermediate between the Constitution and ordinary status».<sup>86</sup> This upgrade applies to *all* international Treaties ratified by Italy. Subject to the condition that they are not in conflict with the Constitution, they can then lead to the annulment by the Constitutional Court of *all* subsequent ordinary statutes in conflict with them.

The clarity of this formal hierarchically-based approach has a number of drawbacks. The first one we have already seen: the exclusion of any power for common judges to set aside national legislation in conflict with ECHR and the consequent risk of losing the effectiveness of ECHR law. It would be naïve to think, in this regard, that

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<sup>84</sup> Constitutional Court, judgment No. 348/2007, para. 4.3.

<sup>85</sup> Constitutional Court, judgment No. 349/2007, para. 6.1.2.

<sup>86</sup> Constitutional Court, judgment No. 348/2007, para. 4.5.

the *effet utile* is an exclusive prerogative of EC law. If it were possible to agree that the protection of fundamental rights must be assured in the domestic legal order in the most timely and direct way, then the same logic seems, *a fortiori*, applicable to domestic legislation conflicting with ECHR law. The second drawback is the unavoidable generalisation that every judicial approach based on a certain degree of simplification implies. Is it not quite confusing to put on the same level the ECHR and the ‘*Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies*’, only because they are formally both international Treaties ratified by Italy?

More problematically, the choice of putting all international agreements on the same level has the consequence that a hypothetical international treaty ratified by Italy after the ECHR and in conflict with it, because, for example, of a lesser guarantee of the freedom of expression, will have to be considered, by the mere application of chronological criteria, as prevailing over the protection accorded by Article 10 of the ECHR.

Even more problematic is that equating all treaties elevates international treaties concluded by the government in the so-called simplified form to the level of ordinary treaties. According to authoritative doctrine these treaties in simplified form are binding on the State when they are concluded on the international level, notwithstanding the absence of Parliamentary approval and ratification by the President.

Following the interpretation of the Constitutional Court, these treaties will be on the same level as ordinary treaties and will equally limit the normative powers of Parliament, with the little detail that, differently from the former, the latter have never received Parliamentary approval.

The truth is that behind the form, there is the substance, and in the case of the EHCR, the latter has a constitutional character, as the Constitutional Court itself has substantially admitted, when it noticed the ‘substantial coincidence’ between the principles contained in the EHCR and those included in the Constitution.<sup>87</sup>

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<sup>87</sup> Constitutional Court, judgments No. 388/1999, No. 129/1967, No. 7/1967.

The fact that the ECHR is accorded a higher value in the hierarchy of law sources than ordinary statutes does not mean that it occupies a level equal to that of the Constitution. On the contrary, the Constitutional Court clearly specifies that the status of the ECHR is intermediate, between ordinary law and the Constitution. It is for this reason that, in the judgments being discussed, the Constitutional Court, having established that ordinary law was in conflict with Article 6 and Protocol 1 of the ECHR, examined the question whether these provisions and the relevant case-law conformed to the Constitution, with a positive result.

The final step of the Constitutional Court's reasoning was then, as has been argued above, to declare the Law unconstitutional.

Then again, there is a difference of treatment with European law, which is considered to have constitutional status, and is thus consequently subordinated not to the entire Constitution, but only to its fundamental principles. The emphasis on the above-mentioned differentiation between the obligations stemming from the EU legal order and those deriving from the ECHR is perhaps the weakest point of the decisions. Instead of equating (under Article 117 paragraph 1) ECHR law to every other international law, the Constitutional Court could perhaps have looked better, not to the end, but to the beginning of the Constitution, in order to identify in Article 11 the adequate constitutional parameter for the ECHR, as it has done in the past with regard to European law, thereby adopting a substantial approach aimed at underlining the constitutional nature of the ECHR provisions. The reasons adduced by the Court to justify the exclusion from Article 11 are indeed not completely convincing, to be honest. The formalistic approach according to which, as we saw earlier, the ECHR, «as every international Treaty cannot entail any limitation on sovereignty in the terms provided by Article 11 of the Constitution», seems to forget several key 'small details'. When the Constitution was drafted, the Founding Fathers who wrote about limitations of sovereignty in Article 11 had Italy's entrance into the United Nations in mind. In this respect, it is possible to argue that, especially in the light of the latest reforms in ECHR judicial procedures, the latter has a greater impact on the limitation of national sovereignty than the United Nations. Moreover, it is possible seriously to doubt the Constitutional Court's qualification of the ECHR

as a «multilateral international public law Treaty», since the European Court of Human Rights has underlined the peculiar nature of the ECHR in relation to other Treaties,<sup>88</sup> defining it as ‘a constitutional instrument of European public order (*ordre public*)’.<sup>89</sup> Apart from this ‘self-qualification argument’, it should be objectively noted that it does not seem enough to cite, as the constitutional judges did, a 27-year old precedent,<sup>90</sup> pursuant to which the ECHR may not entail any limitations on sovereignty in the terms provided by Article 11 of the Constitution, in order to justify the exclusion of the constitutional protection provided by the said constitutional provision.

In 27 years many things have changed, thanks mainly to Protocol XI, which in 1998 made European Court jurisdiction compulsory over individual complaints, eliminated the jurisdiction of the Council of Ministers to decide complaints on their merits, suppressed the role of the Commission to filter claims, and made the hearing procedure entirely public (earlier, 95% of complaints were decided in a confidential way). In this sense, the Constitutional Court seems to forget that ECHR law, more than a legal act which could be statically ‘photographed’, is a dynamic process, a constitutional work in progress, which is constantly emerging, thanks mainly to the growing constitutional character of Strasbourg case-law, and which is slowly showing more of its constitutional nature.<sup>91</sup>

Another ‘historical’ component undervalued by the Constitutional Court is that, as has been noted, the Italian participation in the system of protection of fundamental rights provided by the ECHR might be considered more functional to the

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<sup>88</sup> In the decision *Ireland v. United Kingdom*, 18-1-1979 (para. 239), the ECtHR has clarified that that «Unlike international Treaties of the classic kind, the Convention comprises more than mere reciprocal engagements between contracting States. It creates, over and above a network of mutual, bilateral undertakings, objective obligations which, in the words of the Preamble, benefit from a “collective enforcement”».

<sup>89</sup> European Court of Human Rights, 23-3-1995. *Loizidou v. Turkey*, para. 75.

<sup>90</sup> Decision No. 188/1980, quoted in decision No. 349/2007.

<sup>91</sup> In relation to the emerging constitutional character in Strasbourg case-law, it is enough to recall the recent attitude of the Strasbourg Court of identifying in its judgments, where there was a finding of a violation of the Convention, of what it considers to be an underlying systemic problem and the source of that problem. In these cases, the Court, in order to assist the condemned State in finding the appropriate solution, *suggests* which are the appropriate general measures to adopt in order to solve the systemic problem. See European Court of Human Rights, 22-6-2004, *Broniowski*, ric. 31443/96. This new proactive approach was oriented towards Italy, for the first time, some months later, with the judgment of 10-11-2004, *Sejdicovic*, ric. 56581/00.

achievement of constitutional goals, embodied in Article 11, of the guarantee of peace and justice among nations, than the European Economic Community originally was, as it was oriented, at least directly, to economic-based goals.

Most of all, the refusal of the Constitutional Court to assimilate the status of European law and ECHR law under the ‘common constitutional roof’ of Article 11 has the consequence of creating a double standard with the protection of the fundamental rights embodied in the ECHR, depending upon whether they apply only to domestic situations (in which case they have an intermediate level between ordinary statutes and constitutional law) or to situations of European law relevance (where, through their qualification as general principles of European law, they have a constitutional status). It is evident that, by creating a situation of reverse discrimination, this may lead to a violation of the constitutional principle of equality embodied in Article 3 of the Italian Constitution.

In the end, despite these criticisms, it would not be fair to underline only the negative sides of the path taken by the Constitutional Court with these decisions. Its main positive effects could be that now the Constitutional Court, qualifying itself as the only Tribunal competent in Italy to solve conflicts between ordinary laws and the ECHR, is forced to take up the challenge to become the arbiter of the protection of fundamental rights in that critical area in which the constitutional dimension encounters the supranational and the international ones. This could, perhaps, lead to an attenuation of the judicial hesitation which the Court has, up to now, shown, and to its taking an active role in the new season of European co-operative constitutionalism. It is not a coincidence that 4 months later, after 50 years, in the middle of February 2008<sup>92</sup> the Constitutional Court requested a preliminary ruling.

During the years following the decisions above commented, the Italian Constitutional Court had the opportunity to clarify the position taken in the judgments of 2007. The Italian Constitutional Court, in particular, found the way to react, in the decision n. 317/2009, to the new aggressive approach, commented above, of the European Court of Human Rights aimed always in a more intrusive way to disregard the margin of appreciation which should be granted to the

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<sup>92</sup> Ordinance 103/2008.

Contracting States. In particular, the Italian Constitutional Court underlined as «The reference to the national “margin of appreciation” – elaborated by the Strasbourg Court in order to temper the rigidity of the principles formulated on European level – is primarily manifested through the legislative function of Parliament, though it must always be present in the assessments of this Court, which is not unaware that the protection of fundamental rights must be systematic and not broken down into a series of provisions that are uncoordinated and potentially in conflict with one another..In summary, the national “margin of appreciation” can be determined having regard above all to the overall body of fundamental rights, the detailed and overall consideration of which is a matter for the legislature, the Constitutional Court and the ordinary courts, each within the ambit of its own jurisdiction». Not exactly a cryptic message sent to Strasbourg, in which it is made clear that the Member State are always in a better position to decide upon the right balancing between national and constitutional values and that the Constitutional Courts, within each Member State, are even in the best position to assess the said balancing.

The answer of the Italian State to the new aggressive and intrusive judicial approach of the Strasbourg the European Court of Human Rights is even more evident in the reaction of Italy to the Lautsi judgment of the European Court of Human Rights commented above.

### III.1. THE POLITICAL REACTION: THE ITALIAN GOVERNMENT APPEAL BEFORE THE GRANDE CHAMBER OF THE LAUTSI CASE AND THE (TOO) DEFERENT ANSWER OF THE EUROPEAN COURT OF HUMAN RIGHTS;

The Court’s Second Section decision caused a great uproar in Italy.<sup>93</sup>

Many declarations from various sources were made against the judgment. Basically, all political parties opposed the judgment, being the Radical Party and the Green the only parties supporting the ruling. The Italian government led by Silvio Berlusconi has expressed a unified opposition, and several ministers of the PDL-Northern

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<sup>93</sup> Bartole, S. “Simbolo religioso, simbolo passivo, simbolo civile: le metamorfosi forensi del Crocifisso.” *Diritti umani e diritto internazionale* (2010): 65 ss.; Ruotolo, M. “La questione del crocifisso e la rilevanza della sentenza della Corte europea dal punto di vista del diritto costituzionale.” [www.costituzionalismo.it](http://www.costituzionalismo.it); Alicino, F. *Costituzionalismo e diritto europeo delle religioni*. Padova: Cedam, 2011: 292 ss.; Colaïanni, N. “Il crocifisso tra Roma e Strasburgo.” [www.statoechiese.it](http://www.statoechiese.it), 2010.

League coalition expressed and promoted initiatives and petitions for the maintenance of the symbol in the classroom. Expressions of dissent against the ruling have also been expressed by the Democratic Party through its secretary, according to which are «old tradition as the crucifix is not offensive to anyone». Massimo Donadi (Italy of Values) said that «the Strasbourg ruling is not a good answer to the question of the secular State, although it is legitimate and acceptable». The Protestant churches and the Jewish Unions praised the ruling as did the Atheist and Agnostic Association. On the contrary, the Muslim community preferred to keep a low profile.

The decision has been strongly criticised as disregarding not only the Christian roots of the Italian State but the margin of appreciation which should be left to the single Member State, furthermore because of its intrusiveness against state sovereignty and national values which should be regulated and protected at national level.

However, the ruling of the Section II of the European Court of Human Rights has provided the opportunity to discuss the principle of secularism in the Italian scientific debate.

The Italian Government didn't accept the ECHR ruling, and it subsequently filed an appeal<sup>94</sup> to the Grand Chamber to review the decision of 3 November 2009 in which the European Court of Human Rights found that the display of crucifixes in public school classrooms violated art. 2 of Protocol 1 of the European Convention on Human Rights, viewed in conjunction with art. 9 protecting freedom of thought, conscience and religion.

On 28 January 2010 the Government asked for the case to be referred to the Grand Chamber under art. 43 of the Convention and rule 73. On 1 March 2010 a panel of the Grand Chamber granted that request and the hearing before the Grand Chamber took place on 30 June 2010.

Along with the Italian Government, ten countries, 33 MEPs (jointly) and several NGOs were authorized as third parties to present written observations.

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<sup>94</sup> Appeal prepared by Corrado Bile, magistrate clerk as an expert in the Department of Legal and Legislative Affairs of the Prime Ministers, in [www.governo.it/presidenza](http://www.governo.it/presidenza).



According to the Italian Government, the Court's decision appears to have created confusion and dismay. The Court held that the neutrality in religious matters is a state's duty and that the obligation of the crucifix (symbol of the Christian confession) exposure limits not only the right of parents to educate their children according to their beliefs, but also the right of students to believe in other faiths or in no belief at all.

In support of its appeal, the Government has made the following considerations:

- a) The findings of the case are in clear contradiction with the Court's precedents in religious matters. As the Court itself has recognized, due to some differences of approach to the issues of religion and of religious symbols at European level, the regulation at national level have to prevail;<sup>95</sup>
- b) With regard to the special consideration given by the European Court in the regulation of religious matters at the national level and the lack of a European consensus on the scope and practical application of the principle of state secularism, it should be noted that in the relations between state and Church, the situation in Europe is very diverse. Even if it exist an European consensus on the principle of state secularism, that does not mean that national authorities are not undisputed holders of a large discretion in such a complex and delicate issue, closely linked to culture and history: the margin of appreciation, in particular, was not only ignored, but neither mentioned in the decision. Thus, the Government remembers the persistent difficulties of interpretation at an European level on the practical implications of applying the principle of state secularism, and here reference is made to the margin of appreciation granted to individual states, because of differences in approach to the religious theme.
- c) The contested decision significantly expands the scope of rights, ruling that can be protected the potential risk of being emotionally disturbed and that this risk is sufficient to produce a violation of religious freedom and freedom of education. This ruling is highly subjective and imprecise, and, if confirmed

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<sup>95</sup> See the ruling *Leyla Sabin v. Turkey*, November 10, 2005 in relation to the regulation of the Islamic veil.

by the Grand Chamber would create legal uncertainty and would have the effect of ensuring a right to protection of the emotions.

- d) The low number of citations and references to case law than the average in the usual case is important evidence for the newness of the subject examined by the Court's Second Section.
- e) The conclusions reached in the Court in favor of the assertion of State neutrality in religious matters does not coincide with the principles of equality and equal distance, approved by the Court and universally accepted, requiring non-identification of the state in a particular religion, but also (and especially) a further effort intended to balance the diverse religious needs of its citizens. A further cause for censure, concerns the interpretation of the concept of neutrality of the state that is not resolved in the adoption of an agnostic or atheist approach towards religious symbols, but involves the effort to combine the best religious differences.
- f) The need to balance the diverse religious needs can not be met in the reasoning of the Court, because of the mistake affecting the final verdict: in the case was not, in fact, the department's management school to decide to keep the crucifix in the classroom, as indicated in the decision (§§ 7-8), but a poll was held democratically, after an appropriate discussion among interested parties, namely parents of students and teachers. According to some precedents of the Court, also a reconstruction of factual error may warrant referral to the Grand Chamber (see *Perna v. Italy*, May 6, 2003).
- g) Finally, this inconsistency of the decision itself and in relation to previous arrests and the misinterpretation of the new right to education and religious freedom can produce immediate, serious consequences for the interpretation and application of the Convention, as well as negative consequences for individuals of many Member States.

The core of the appeal of the Italian Government is the margin of appreciation. In the EU there is a widespread consensus to allow several ways of conceiving the relationship between States and Churches and, at the same time, it is recognized that the principle of neutrality can not ignore these ways. This, in particular, is also

recognized by the Court, because the existence of some differences of approach to the issue of religious symbols, leads one to believe that the regulation at national level should prevail. Moreover, it is not possible to discern throughout Europe a uniform understanding of the significance of religion in society (*Otto-Preminger-Institut v. Austria*, decision of 20 September 1994, § 50) or of the impact of acts corresponding to public expression of religious faith; usually they are not the same in different times and different contexts. The legislation will therefore vary from one country to another depending on national traditions and the demands imposed by the protection of the rights and freedoms of others, and in view of maintaining public order.

The Italian Government underlines also another important issue, the one of the neutrality of the State in religious matters. This is considered to be a sort of chimera, because the State still can not avoid taking a position on the diverse needs of its citizens. Indeed, any legislation on religious matters may offend, in many different ways, the sensibilities of a number of people with different religious beliefs, as recognized by the Court (see § 10). Thus, in this case, people of faith might feel equally offended by the fact that they can not see their religious symbol on the wall. On this issue, prof. Weiler<sup>96</sup> has written: «In a society where one of the principal cleavages is not among the religious but between the religious and the secular, absence of religion is not a neutral option. ... But in the conditions of our societies, the naked public square, the naked wall in the school, is decidedly not a neutral position, which seems to be at the root of the reasoning of the Court. It is no more neutral than having a crucifix on the wall». The Government denies the idea of religious neutrality because every choice in religious matters is never neutral, and very often regulatory requirements are the result of a long and complex historical process marked by compromises among different points of view.

Then the appeal discusses the role of religious symbols in public. First, the crucifix is considered to be a passive symbol. Whatever its evocative power is, the image of a passive symbol is not comparable to the effects of the acts, such as, for example, the active indoctrination (methodical, every day, and prolonged in time). Thus, there is no proof on how the mere presence of a symbol on the wall could actually affect the

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<sup>96</sup> *Lautsi: Crucifix in the Classroom Redux*, in [www.ejltalk.org/lautsi-crucifix-in-the-classroom-redux](http://www.ejltalk.org/lautsi-crucifix-in-the-classroom-redux).

religious freedom of students and that of their parents in relation to religious education that are going to choose. Indeed, the presence of a sign shall not require the student to follow the religion to which the sign belongs. Second, require a State to remove the religious symbol that already exists and whose exposure is justified by the tradition of the country implies a negative value against what this symbol represents and does violate religious freedom. Third, it can not be reasonably argued that the mere presence of this symbol in the classroom may significantly reduce the ability of parents to educate their children according to their belief. Finally, the meaning of religious symbols can not be defined precisely, because the perception of their meaning is very subjective.

Following these considerations, the Italian Republic, though secular, has freely decided to maintain a tradition that dates back almost a century ago and, therefore, to keep the crucifix in classrooms (the administrative provisions providing for the exposure of the crucifix in the classrooms are the royal decrees of 1924 and 1928) and this choice was made taking into account the national identity. Moreover, as recognized by the Court, the national authorities have considerable discretion in such a complex and delicate matter, closely linked to culture and history. The exposure of a religious symbol is permitted in conjunction with a legal mechanism for resolving potential conflicts in this area, but it certainly does not go beyond the margin of discretion and appreciation left to states.

Another key point of the appeal is, according to the Italian Government, the misunderstanding of the relationship between positive and negative religious freedom. While religious freedom includes the freedom not to believe, it is not however appropriate to extend this negative freedom to the point of considering a value the absence of religious symbols as a corollary of denying the right to religious symbol.

On 18 March 2011 the Grand Chamber of the European Court of Human Rights announced its decision, reached by 15 votes to 2, overturning the ruling of the lower Chamber. The Grand Chamber did not confirm the 2009 ruling, which condemned the compulsory presence of crucifixes in classrooms of public schools. According to the Court, the presence of the crucifix is not incompatible with the right of parents to have their children educated secularly. A crucifix as such does not amount to

indoctrination and is therefore permissible. The Court held that «by prescribing the presence of crucifixes in State-schools classrooms - a sign which, whether or not it is accorded in addition a secular symbolic value, undoubtedly refers to Christianity - the regulations confer on the country's majority religion preponderant visibility in the school environment». Furthermore, «it is not in itself sufficient, however, to denote a process of indoctrination on the respondent State's part and establish a breach of the requirements of Article 2 of Protocol No. 1» and «a crucifix on a wall is an essentially passive symbol and (...) cannot be deemed to have an influence on pupils comparable to that of didactic speech or participation in religious activities».

The judges of the Grand Chamber in their reasoning followed these logical steps:

- 1) there is no common concept of secularism in Europe and even more it lacks in relation to the issue of religious symbols (§§ 26-28 and § 68);
- 2) therefore the maintenance of a tradition providing for the display of the crucifix falls within the margin of appreciation of the State (§ 68);
- 3) the Court respects the margin under the principle of subsidiarity and intervenes only when the State constitutes forms of indoctrination at the expenses of minorities (§§ 69-72).

Applying such reasoning, the Court overrules its "embarrassing" decision of 2009, thus renouncing to the policy of "white wall" (as defined by Weiler<sup>97</sup>).<sup>98</sup>

As it was for the Italian appeal, the margin of appreciation, the discretion granted to the State, was the core of the reasoning of the Court.<sup>99</sup>

The *Grande Chambre* makes as a preliminary consideration that the obligation imposed by art. 2, Protocol 1, ECHR towards the member States to respect the right of parents to ensure education and teaching to children according to their religious and philosophical convictions has to be considered as a *lex specialis* to art. 9 ECHR, insofar as it imposes on States a "duty of neutrality and impartiality" (*Folger and Others*

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<sup>97</sup> In *Lautsi: Crucifix in the Classroom Redux*, cit.

<sup>98</sup> Fiorillo, V. "La sentenza della Grande Camera sul crocifisso: il margine di apprezzamento ritorna "a scuola" dopo un'assenza ingiustificata, 2-4-2011." [www.forumcostituzionale.it/site/images/stories/pdf/documenti\\_forum/giurisprudenza/corte\\_europea\\_diritti\\_uomo/0013\\_fiorillo.pdf](http://www.forumcostituzionale.it/site/images/stories/pdf/documenti_forum/giurisprudenza/corte_europea_diritti_uomo/0013_fiorillo.pdf)

<sup>99</sup> Schillaci, A. "L'ultima sentenza Lautsi: margine di apprezzamento, principio maggioritario e libertà di coscienza, 23-3-2011." [www.diritticomparati.it/2011/03/lultima-sentenza-lautsi-margine-di-apprezzamento-principio-maggioritario-e-libert%C3%A0-di-coscienza.html](http://www.diritticomparati.it/2011/03/lultima-sentenza-lautsi-margine-di-apprezzamento-principio-maggioritario-e-libert%C3%A0-di-coscienza.html).

*v. Norway*) with regard to freedom of thought, conscience and religion, including the freedom not to belong to a religion. However, according to the Court, given the diversity of practices and situations of national contexts, States enjoy a wide margin of appreciation in imparting education and teaching of religious or philosophical beliefs, so that parents can make no objections to the provisions in the curriculum. At the same time the respect of the right of parents in the education of their children consist on the provision of an objective, critical and pluralistic curriculum in order to enable pupils to develop, particularly in regard to religion, a critical approach. This means that the State is forbidden to pursue an aim of indoctrination that might be considered disrespectful of the religious and philosophical convictions of parents. This is the limit that the Member shall not exceed.<sup>100</sup>

Here, the Court links the margin of appreciation to the preservation of traditions related to religious and symbolic universe, reserving the power of reviewing the internal consistency and reasonableness of the statutory provisions and state practices in light of the respect of the Convention, with reference the protection of religious freedom. The preservation of the tradition and the identity of the Member State is permissible only with a very strict control on the solution adopted by the State affecting the religious freedom of individuals. The margin of appreciation goes together with European supervision. The existence of discretion is supported gtrby the alleged absence of a "European consensus" on this issue. The Court grounds the margin of appreciation in the notion of respect (§ 61) and respect is a matter of consensus; thus as a consequence of the lacking of respect, States enjoy a wide margin of appreciation.

As stated above, the limit of the national discretion in the religious sphere is, according to the Court, represented by activities aimed at indoctrination or proselytizing. The Court, despite, acknowledging that the exposure of the crucifix gives visibility to the predominant religion and admitting that the crucifix in schools cannot be noticed (§ 71), considers that the imposition of the duty to display the crucifix does not go further indoctrination of students (§ 71) and therefore does not

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<sup>100</sup> Pinelli, C. "Esposizione del crocefisso nelle aule scolastiche e libertà di religione (Oss. a Corte europea dei diritti dell'uomo - Grande Chambre, Lautsi contro Italia, 18 marzo 2011)." *Osservatorio sul rispetto dei diritti fondamentali in Europa* ([www.europeanrights.eu](http://www.europeanrights.eu)) 10 maggio 2011

compress the religious freedom of individuals (§ 74), because it is not associated with compulsory teaching about Christianity and Italy opens up the school environment in parallel to other religions. In addition to the relief that the presence of the crucifix is not associated with compulsory teaching of the Catholic religion, the *Grande Chambre* notes that in Italian schools pupils are not prohibited from wearing Islamic headscarves or other clothing from the religious connotation, there is often celebrated the beginning and the end of Ramadan, with nothing inducing the authorities to recognize students intolerance towards other religions. This conclusion is in itself very serious, because lowers the minimum standard of protection of religious minorities, which are now forced to tolerate any religious that does not spill in an explicit attempt at indoctrination.<sup>101</sup> Moreover, the Court says it is not in possession of data that prove unequivocally that the presence of crucifixes in school interferes with the sphere of consciousness of the students. This is because the crucifix is an «essentially passive religious symbol» (§ 72), different, it is assumed, to other symbols (active?) pernicious to the conscience of the children who are exposed to them. What constitutes this difference is not clear, because "active" and "passive" are not adjectives that usually characterize the religious symbols. Moreover, although the exposure of the crucifix grants to the religion of the majority a huge visibility, it is not enough to set up a process of indoctrination and therefore does not constitute a violation of the requirements prescribed by art. 2, Protocol 1.

Finally, the Court considers the exposure of the crucifix in relation to the parents' right to educate their children (§ 75-77). According to the judges, parents retain their full rights as educators of their children. It seems that the Court mixes up the issue of the case, because Mrs Lautsi is not concerned about her ability to educate her children in private, but she is interested in the presence of the crucifix in the public sphere.<sup>102</sup> Furthermore, the Court, despite admitting that the exposure of a religious symbol on the wall of a classroom does not influence or affect students whose

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<sup>101</sup> Mancini, S. "Lautsi II: la rivincita della tolleranza preferenzialista." [www.forumcostituzionale.it/site/images/stories/pdf/documenti\\_forum/giurisprudenza/corte\\_europea\\_diritti\\_uomo/0015\\_mancini.pdf](http://www.forumcostituzionale.it/site/images/stories/pdf/documenti_forum/giurisprudenza/corte_europea_diritti_uomo/0015_mancini.pdf).

<sup>102</sup> Zucca, L. "A comment on Lautsi, 25-3-2011." [www.diritticomparati.it/2011/03/jesus-can-be-left-hanging-a-pontius-pilate-like-strasbourg-court-decided-not-to-remove-him-from-the-cross-pardon-from-t.html](http://www.diritticomparati.it/2011/03/jesus-can-be-left-hanging-a-pontius-pilate-like-strasbourg-court-decided-not-to-remove-him-from-the-cross-pardon-from-t.html).

beliefs are still forming, considers it understandable that the applicant consider this exposure a lack of respect for her right to secure an education and a teaching philosophy consistent with her beliefs. However, this is, in the Court point of view, only a subjective perception of the applicant, therefore not sufficient in itself to constitute a breach of Article 2 Protocol 1.<sup>103</sup>

In its ruling, the Court marks a significant shift in the interpretation of the principle of a secularism: the centrality of the self-determination of young students in matters of religion is abandoned in favour of an institutional perspective, focused on the relations between the different religious faiths and between them and the State.<sup>104</sup> Behind the shield of the margin of appreciation, the Court marks an embarrassing return to the majority principle in the regulation of fundamental rights.

As a conclusion, at a first glance, the two rulings seem to share some points despite the reasoning is developed in a complete opposite way. Concerning the common points. First, the lure at beginning, based on previous case law, to the prohibition of proselytizing or indoctrination as the ultimate limit for the States in order to with the provisions on freedom of religion. Secondly, the reference to the obligation of neutrality of the school environment as well as of the curriculum. Finally, the qualification of the crucifix as a symbol fundamentally religious, in response to a claim put forward by the Italian government that it symbolizes civil values.

Moreover, the differences between the two rulings do not concern only the interpretation of the Convention text, but even the role that International Human Rights Court is called upon to perform. The most important thing is not the fact that the *Grand Chambre* has restored the use of the margin of appreciation, but the different modulation of the parameters invoked by the applicants, unless the principle of non-discrimination, the examination of which is absorbed by the thought of others in both rulings. However, the ruling has to be considered a bit deferent towards the appeal of the Italian Government and the margin of appreciation accorded to States in applying the Convention. The national provisions have been

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<sup>103</sup> Pinelli, C. "Esposizione del crocefisso nelle aule scolastiche e libertà di religione (Oss. a Corte europea dei diritti dell'uomo - Grande Chambre, Lautsi contro Italia, 18 marzo 2011)", cit.

<sup>104</sup> Schillaci, A. "L'ultima sentenza Lautsi: margine di apprezzamento, principio maggioritario e libertà di coscienza." cit.



justified by the Court in light of the peculiar socio-religious reference in the Italian context.<sup>105</sup>

The objectives of the common reference to the prohibition of proselytism as a watertight border for the member States are also different. In the first ruling, it simply serves to demonstrate the violation committed by Italy, whereas in the second one it is used in order to examine the extent of the margin of appreciation of national authorities. In so doing, the grounds of the *Grand Chambre* follow the usual trend in the Court case law, whereas that of Section II differ significantly. The Second Section, despite not saying it expressly, limits itself holding that the display of crucifixes in classrooms constitutes an act of proselytism, with no interest in seeking if there is a consensus among the member States neither the national margin of appreciation.

In many places the Second Section's ruling refers to both the general right of parents to educate their children according to their religious and philosophical convictions and the right of students to believe and not believe, whereas the *Grande Chambre* identifies rather in the respect of the right of parents in art. 2, Protocol 1, the parameter to consider the matter, as a *lex specialis* of art. 9, thus excluding a breach of art. 9. Moreover, the duty of neutrality imposed on the State in setting the school environment finds in the first ruling a twofold textual foundation, whereas the second it may be referred to only as "respect" of "religious and philosophical convictions" of the parents, either directly or through examining the consequences of exposure of the crucifix on the pupils.

According to some scholars, the doctrine of margin of appreciation is based, theoretically, on the need to reconcile universalism and diversity, therefore it is a very delicate alchemy, in which the Court should reach after careful consideration of several factors. As pointed out by Susanna Mancini, the reality is that *Lautsi* is placed on a line of continuity with the case-law of Court of Human Rights, seeking to legitimize important restrictions to basic rights in order to safeguard the freedom of the Christian majority (*Otto Preminger, Wingrove*), and very less benevolent towards

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<sup>105</sup> Ratti, A. "Crocifisso, ultimo atto, 22-3-2001." in [www.diritticomparati.it/2011/03/crocifisso-ultimo-atto.html](http://www.diritticomparati.it/2011/03/crocifisso-ultimo-atto.html)

ideological and religious minorities, in particular the Islamic one (*Karandum, Dabab, Sabih, Doğru, Kervancı*).<sup>106</sup>

#### IV. THE UK CONTEXT: THE RELATIONSHIP BETWEEN THE EUROPEAN CONVENTION OF HUMAN RIGHTS AND THE DOMESTIC LEGAL ORDER BEFORE AND AFTER THE HUMAN RIGHTS ACT

Prior to the enactment of the Human Rights Act, Britain was almost alone amongst Western democracies in not having a positive guarantee of human rights. Prior to the Human Rights Act Britain did not have a bill of rights in the American sense of the term: guarantees designed to protect the individual against the tyranny of the majority. Historical declarations of rights, such as the Magna Carta (1215) or the Bill of Rights (1689) were considered “not so much ‘declarations of rights’ in the foreign sense of the term, as judicial condemnations of claims or practices on the part of the Crown, which are thereby pronounced illegal”.<sup>107</sup> In this way, the protection of rights was not shaped by “constitutional statutes”, but rather by the Diceyan theory of rule of law and its corollary of residual rights, whereby it is possible to do everything that is not forbidden by the law.

The Convention was drafted with significant input from English lawyers and the United Kingdom was the first country to ratify the Convention in 1951.

However, only after 15 years, in 1966, were two important optional clauses recognized: the individual right of petition granted under Article 25 of the Convention and the acknowledgment of the jurisdiction of the European Court of Human Rights provided for under Article 46.

Thus, between 1966 and 1997, the Convention had the status of an international treaty that was not incorporate in the “law of the country”. This is a clear expression of the dualistic principles of the English Law according to which international treaties ratified by the UK Government, such as the Convention, do not have legal effect domestically until they are incorporated into domestic law by an Act of Parliament.

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<sup>106</sup> Mancini, S. “Lautsi II: la rivincita della tolleranza preferenzialista.”, cit.

<sup>107</sup> Dicey, A. V. “Introduction to the Study of the Law of the Constitution.” Ed. Roger E. Michener. Indianapolis: Liberty Fund, 1982.

After the 1966 acknowledgment, the United Kingdom was involved in a remarkable number of cases, due to the initiatives of other States and individuals.<sup>108</sup> This significant judicial activity concerning breaches by the UK of the European Convention of Human Rights brought about several changes in Britain's primary legislation, e.g.: homosexuality in Northern Ireland (Dudgeon, 1981), telephone tapping (Malone, 1984) and immigration rules (Abulaziz, Cabales & Balkandali, 1985).<sup>109</sup> Of course, this scenario supported theories hypothesising the full incorporation of the ECHR<sup>110</sup> or those calling for a modern written internal Bill of Rights<sup>111</sup> or even a written constitution.

Moreover, the Convention provisions were directly mentioned in some famous cases before the domestic courts. In fact, on the strength of the Convention's ratification, the courts relied on Convention provisions in order to resolve interpretative issues relating to primary legislation, for example, in the fields of the retroactivity of the criminal law,<sup>112</sup> illegal immigration,<sup>113</sup> religious freedom and foreign status.<sup>114</sup> On the contrary, there were cases in which the courts refused to find support in the Convention because this would have implied placing legislative power was in the hands of the Government rather than in the hands of Parliament.<sup>115</sup> More generally, the guarantee of rights such as the right to privacy<sup>116</sup> was not founded on the Convention provisions.

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<sup>108</sup> Starting from *Republic of Ireland v. United Kingdom*, (1978) 2 E.H.R.R.

<sup>109</sup> For a complete list of the primary legislation amended after a Strasbourg ruling, see *Research Paper*, 98/24, 15 ff.

<sup>110</sup> See Lester, A. *Democracy and Individual Rights*. London: Fabian Society, 1969 and also Zander, M. *A Bill of Rights?* London: Sweet and Maxwell, 1979, II ed.; Lord Scarman. *English Law - the New Dimension*. London: Stevens, 1974.

<sup>111</sup> *Ex plurimis*: Sir. Joseph, K. *Freedom under Law*. London: Conservative Political Centre, 1975 ; Jaconelli, J. *Enacting a Bill of Rights: The Legal Problem*. Oxford: Clarendon Press, 1980; Lester, A. *A Bill of Rights for Britain*. London: Charter 88, 1991; Mount, F. *The Recovery of the Constitution*. London: Charter 88, 1992; Lester, A. *The Crisis Facing Human Rights in Europe : Does the British Government Really Care?* London: Charter 88, 1993; Klung, F. *Reinventing Community : The Rights and Responsibilities Debate*. London: Charter 88, 1996.

<sup>112</sup> *R. v. Miah* (1974) 1 W.L.R. 683 (H.L.)

<sup>113</sup> *Birdi v. Secretary of State for Home Affairs*, 11-2-1975 ; *R. v. Secretary of State for Home Department*, ex 1 W.L. R. 979 (C.A.)

<sup>114</sup> *Ahamad v. ILEA* (1978) Q.B. 36 (C.A.)

<sup>115</sup> *Ex plurimis* see *Kaur v. Lord Advocate* (1980) 3 C.M.L.R. 79.

<sup>116</sup> E. g.: *Malone v. Metropolitan Police Comr* (1979) Ch 344, *Kaye v. Robertson* (1991) FSR (62) (C.A.) and *R. v. Khan* (1996) 3 All ER 620.

There were frequent decisions in which the courts mentioned the Convention in order to underscore divergences between the internal law and the Convention provisions asserting that the former prevail over the latter.<sup>117</sup>

Is noteworthy that the first group of cases mentioned above is not so far from the Italian scenario described previously (Germany too is very similar), where the Convention *de facto* assumes a sub-constitutional position within the hierarchy of norms.<sup>118</sup>

The Human Rights Act was tabled in the House of Lords<sup>119</sup> on 23 October 1997 on the basis of the well-known white paper *Rights Brought Home*.<sup>120</sup> All aspects of the bill were scrutinized in detail by Parliament. The Lord Chancellor emphasized first and foremost that breaches of the Convention by the UK – confirmed by the Court – had been growing over the years and that this growth should be reduced by filtering cases through the British courts.<sup>121</sup>

The rich debate between the scholars on the rulings establishing rights and freedoms was also revisited; accordingly, the opinion that some readings of the Convention would substantially grant access by the latter to British domestic law – through a *de facto* “transfusion” or a kind of “backdoor incorporation”<sup>122</sup> – was carefully considered. In other words, on the one hand, there was an acknowledgment of the growing inadequacy of the traditional doctrine of residual rights. On the other hand, there was an awareness of the risk that the Convention would in any case manage to find its own space within the Britain legal system.

<sup>117</sup> *R. v. Secretary of State for Home Department, ex p. Phansopkar* (1976) Q.B. 606 (C.A.)

<sup>118</sup> See *inter alia*: Favoreau, L. *La protection juridictionnelle des droits de l'homme au niveau interne. Le droits européens latins*, in *Judicial Protection of Human Rights at the National and International Level*. Milano: Giuffrè, 1991, 105 ss; Robertson, A.H., Merills, J.G. *Human Rights in Europe: A Study of the European Convention on Human Rights*. Manchester: Manchester UP, 1995, III ed.; Gearty, C. A. *European Civil Liberties and the European Convention on Human Rights*. The Hague: Kluwer Law International, 1997; Luciani, M. “La crisi del diritto nazionale.” *Storia d'Italia, Annali*. Torino: Einaudi, 1998, XIV.

<sup>119</sup> H.L. bill 38

<sup>120</sup> London, H.M.S.O, Cm 3782, 20-10-1997.

<sup>121</sup> H.L. Deb., vol. 582, c. 1228, 3-11-1997 ; the same opinion is exposed by the Lord Chancellor Lord Irvine of Lairg, *The Development of Human Rights in Britain under an Incorporated Convention on Human Rights*, (1998) *Pub. L.* 221 ss.

<sup>122</sup> *Ex plurimis*, F. Klug, K. Stamer, *Incorporation through the backdoor*, (1997), *Pub. L.* 232.

From this perspective, the reappropriation of the cultural, historic and legal meaning of the rights appeared reasonable.<sup>123</sup>

It is evident that the HRA challenges the Diceyan idea of the Sovereignty of Parliament, according to which: “that Parliament ... has, under the English constitution, the right to make or unmake any law whatever: and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament”.<sup>124</sup> From this starting point, the issues raised by the HRA regarding the parliamentary sovereignty are not merely those in which there is an overlap between the judiciary and legislature, but also those characterized by tensions between the UK institutions and the ECHR system.

The “emphatic adjuration”<sup>125</sup> in the field of the interpretative obligation provided by section 3 of the Human Rights Act, affirms that “so far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights». Moreover, the application of section 3 «does not affect the validity continuing operation or enforcement of any incompatible primary legislation”.<sup>126</sup>

Thus section 3 has the power to “rewrite”<sup>127</sup> statute law – with obvious consequences on the division of powers – a point also underlined in various cases arising over recent years. Lord Steyn, in the *R. v. A* case,<sup>128</sup> showed the full innovative potential of section 3 in this regard in affirming that: “in accordance with the will of Parliament as reflected in section 3 it will sometimes be necessary to adopt an interpretation which linguistically may appear strained. The techniques to be used will not only involve the reading down of express language in a statute but also the implication of the provision”. Under this approach, there is no need for ambiguity in order to

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<sup>123</sup> See Ferrari, G.F. “La Convenzione europea e la sua “incorporation” nel Regno Unito.” *Dir. pubbl. comp. eur.* (1999): 125 ss.

<sup>124</sup> Dicey, A. V. *Introduction to the Study of the Law of the Constitution*. cit.

<sup>125</sup> *R. v. DPP, ex parte Kebilene* [2000] 2 A.C. 326, per Lord Cooke who held in particular that “When the whole Act comes into force, the new canon of interpretation will be that, so far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights. This is a strong adjuration”.

<sup>126</sup> Section 3(2)(b)

<sup>127</sup> See in this sense Nicol, D. “Gender Reassignment and the Transformation of the Human Rights.” *Law Quarterly Review* 120 (2004): 194. Also H. Fenewich speaks about a “an extremely creative fashion” in *Civil Rights: New Labour, Freedom and the Human Rights Act*. Essex: Pearson Education Ltd, 2000.

<sup>128</sup> *R v. A (No. 2)* [2002] 1 A. C.

interpret on the basis of section 3: “The interpretative obligation under section 3 of the 1998 Act is a strong one. It applies even though there is no ambiguity”.<sup>129</sup>

From this perspective, it is also worth considering the case *Ghaidan v. Mendoza*.<sup>130</sup> The question concerned the concept of “spouse” in paragraph 2 (2) of Schedule 1 to the Rent Act 1977, and specifically whether it could be read to include same-sex partners.<sup>131</sup> On the grounds that Parliament’s intention in enacting section 3 was to enable a court to modify the meaning of statute law,<sup>132</sup> the House of Lords read and give effect to the legislation in question in a manner that was compatible with the Convention. In this, and in similar cases,<sup>133</sup> the Sovereignty of Parliament was respected, as Lord Nicholls held in paragraph 33: “Parliament ... cannot have intended that in the discharge of his extended interpretative function the courts should adopt a meaning inconsistent with a fundamental feature of legislation. That would be to cross the constitutional boundary section 3 seeks to demarcate and preserve. Parliament has retained the right to enact legislation in terms which are not Convention-compliant”.

At any rate, it is clear that there is a Rubicon which the courts may not cross.<sup>134</sup> According to the cases mentioned above, the dividing line between section 3 and section 4 could be fixed on the basis of the “fundamental feature” of legislation, since it is not a fixed element and is strictly related to the particular case examined by the courts. In other words, there is no easy way of defining a general rule in order to

<sup>129</sup> *R v. A (No. 2)* [2002] 1 A. C. [44]. For many scholars this approach is too “radical”, *ex plurimis*: Rose, D., Weir, C. “Interpretation and Incompatibility: Striking the Balance.” *Delivering Rights: How the Human Rights Act is Working*. Eds. J. Jowell, J. Cooper. Oxford: Hart Publishing, 2003; Bonner, D., Fenwick, H., Harris-Short, S. “Judicial Approaches to the Human Rights Act 1998.” *International and Comparative Law Quarterly* 52 (2003): 549. Also in *R v. Lambert* [2002] 2 A.C. 545 is possible to find a “strong approach” to section 3. In this case their Lordships concluded that according to section 3 it is “possible ... to read the words ‘to prove’ as if the words used in section 28 (2) [of the Misuse of Drugs Act 1971] were ‘to give sufficient evidence’”, see Kavanagh, A. “Constitutional Review under the UK Human Rights Act.” Cambridge: Cambridge University Press, 2009. In this sense see also *R v. The Commissioner of Police of the Metropolis* [2011] UKSC 2.

<sup>130</sup> *Ghaidan v Godin-Mendoza* [2004] 2 AC 557.

<sup>131</sup> Paragraph 2 of Schedule 1 to the Rent Act 1977 provides: “2(1) The surviving spouse (if any) of the original tenant, if residing in the dwelling-house immediately before the death of the original tenant, shall after the death be the statutory tenant if and so long as he or she occupies the dwelling-house as his or her residence. (2) For the purposes of this paragraph, a person who was living with the original tenant as his or her wife or husband shall be treated as the spouse of the original tenant”.

<sup>132</sup> *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 [33], *per* Lord Nicholls.

<sup>133</sup> In the same sense see also: *B (a minor) v Director of Public Prosecutions* [2000] 2 AC 428, Lord Steyn affirmed that «Parliament legislates against the background of the principle of legality» (par. 470).

<sup>134</sup> *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 [49], *per* Lord Steyn.

identify cases in which an interpretation under section 3 is more appropriate than a declaration of incompatibility under section 4.<sup>135</sup>

Usually the courts have limited their powers and prefer to issue a declaration of incompatibility under section 4. Lord Nicholls made such a finding in *Re S*:<sup>136</sup> “A meaning which departs substantially from a fundamental feature of an Act of Parliament is likely to have crossed the boundary between interpretation and amendment. This is especially so where the departure has practical repercussions which the court is not equipped to evaluate. In such a case the overall contextual setting may leave no scope for rendering the statutory provision Convention compliant by legitimate use of the process of interpretation. The boundary line may be crossed even though a limitation on Convention rights is not stated in expressed terms”.<sup>137</sup>

Another leading case in this sense is *Bellinger v. Bellinger*,<sup>138</sup> in which the House of Lords refused to interpret the Matrimonial Causes Act 1973 with the meanings of “male” or “female” and opted for a section 4 declaration of incompatibility.<sup>139</sup> The milestone of the ruling was the fact that their lords refused to interpret the legislation on the ground that problems of great complexity, such as same sex marriage, must be left to the Parliament.<sup>140</sup>

These continuous tensions between courts and Parliament obviously undermine Parliament Sovereignty, and the interpretative activity of the courts – adopted in accordance with the section 3 of the HRA – may compromise the central role of Parliament within the UK’s constitutional architecture. According to some scholars, thanks to the constant interaction between sections 3 and 4, the HRA stimulates dialogue between courts and Parliament, thereby providing evidence of the notion of a

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<sup>135</sup> For the “fundamentals features” as a limit on section 3, see Kavanagh, A. *Constitutional Review under the UK Human Rights Act*, cit. P. 37 ss.

<sup>136</sup> *Re S, Re W* [2002] 2 A.C. 291.

<sup>137</sup> *Re S, Re W* [2002] 2 A.C. 291 [40]. See also paragraph 30 where Lord Bingham held: “To read section 29 [ of the Crime Act 1997] as precluding participation by Home Secretary, if it were possible to do so, would not be judicial interpretation but judicial vandalism: it would give the section an effect quite different from that which Parliament intended and would go well beyond any interpretative process sanctioned by section 3 of the 1998 Act ...”.

<sup>138</sup> *Bellinger v Bellinger*, [2003] 2 AC 467.

<sup>139</sup> According to section 11(c) of the Matrimonial Causes Act 1973 a marriage is void unless the parties are “respectively male and female”.

<sup>140</sup> See. Hickman, T. *Public Law after the Human Rights Act*. Oxford and Portland: Hart Publishing, 2010: 89 ss. See also *International Transport Roth GmbH v. Secretary of State for the Home Department* [2002] 3.

bipolar Sovereignty shared between courts and Parliament.<sup>141</sup> However, it is remarkable that in this continuous dialogue it is Parliament that has the last word: the HRA reserves the right to amend primary legislation (including in breach of the Convention) to Parliament, thus preserving the (Diceyan conception of) Sovereignty.<sup>142</sup>

#### 4.2 THE SAGA OF THE RIGHT OF PRISONERS TO VOTE BETWEEN LONDON AND STRASBOURG

Another perspective from which to analyze the issue of Sovereignty over this first decade of the HRA is the reaction of UK institutions to the rulings of the ECHR.

Contrary to the position for declarations of incompatibility under section 4, there is a legal obligation on the UK Government to implement ECHR judgments.<sup>143</sup>

However, there is a question as to what happens when the Government does not take action in order to implement a judgment? This scenario is not so far removed from the reality of the present days. As the *prisoners saga* shows, the democratic dialogue built up through more than 60 years of implementation of the European Convention may be interrupted, with the consequences of bringing about a dissipation of sovereignty in the UK.

The disenfranchisement of prisoners in the United Kingdom was originated in the 19<sup>th</sup> century and was related to a idea of “civic death”, enshrined in the Forfeiture Act of 1870 which denied offenders their citizenship rights.

Subsequently, the Representation of the People Act 1969 introduced an explicit provision: convicted persons were legally incapable of voting during their period of

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<sup>141</sup> See Young, A. *Parliamentary Sovereignty and the Human Rights Act*. Oxford and Portland: Hart Publishing, 2009 who argues that “paradoxically, the dialogue introduced by sections 3 and 4 may undermine the accuracy of Dicey’s conception of parliamentary sovereignty”. For the idea of a bipolar sovereignty before the HRA entrance into force, see Sedley, S. “Human Rights : A Twenty-first Agenda.” *Public Law* (1995): 386, 389 and *The Making and Remaking of the British Constitution*. London: Blackstone Press: 1997.

<sup>142</sup> *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 [33], *per* Lord Nicholls (*supra*) and also in *In re S* [2002] 2 AC 291, 313, par. 33.

<sup>143</sup> As known, the Committee of Ministers of the Council of Europe is responsible for ensuring that judgments are implemented by state concerned. Article 46 (1) of the Convention provides on this point that: “The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties”. For the implementation of the judgments by the UK Government see the *Government Response to the Joint Committee on Human Rights. Fifteen Report of Session 2009-2010*, July 2010, available at the following URL: <http://www.official-documents.gov.uk/document/cm78/7892/7892.pdf>



imprisonment in a penal institution after the Criminal Law Act 1967. Then, these provisions were shaped in the Representation of the People Act 1983, which provides in Section 3<sup>144</sup> that “A convicted person during the time that he is detained in a penal institution in pursuance of his sentence is legally incapable of voting at any parliamentary or local government election”.<sup>145</sup>

In 1999 the Home Office Working Party on Electoral Procedures (chaired by the then Home Office minister George Howarth) recommended that a distinction be drawn between convicted prisoners and those held on remand who had not been convicted. These recommendations were enacted in the *Representation of the People Act 2000*.<sup>146</sup> However, the Act did not mention convicted prisoners, who remained subject to the electoral ban provided for under section 3 of the *Representation of the People Act 1983*.

The political and legal turmoil arose, as is well known, from the decision in *Hirst v. the United Kingdom* handed down by the European Court of Human Rights on 30 March 2004.<sup>147</sup> Briefly, John Hirst – a prisoner serving a life sentence for manslaughter at Rye Hill Prison in Warwickshire – challenged the ban on prisoner voting. He first filed a claim with the High Court in 2001, but his application seeking a declaration of incompatibility under the Human Rights Act 1998 was dismissed by the High Court, which ruled that the ban was compatible with the European Convention, and that prisoners could lose the right to vote.<sup>148</sup>

Then in March 2004, the European Court of Human Rights unanimously held that the UK government was in breach of Article 3 of Protocol I to the European Convention on Human Rights, which guarantees the right to vote. The Court held

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<sup>144</sup> As amended by the Representation of the People Act 1985,

<sup>145</sup> Section 3(2)(a) of the Representation of the People Act 1983 provides that “‘ convicted person’ means any person found guilty of an offence (whether under the law of the United Kingdom or not), including a person found guilty by a court-martial under the Army Act 1955, the Air Force Act 1955 or the Naval Discipline Act 1957 or on a summary trial under section 49 of the Naval Discipline Act 1957, or by a Standing Civilian Court established under the Armed Forces Act 1976, but not including a person with a committal or other summary process for contempt of court”.

<sup>146</sup> Section 5(2) in Part I of the Representation of the People Act 2000 provides that “A person to whom this section applies shall be regarded for the purposes of section 4 above as resident at the place at which he is detained if the length of the period which he is likely to spend at that place is sufficient for him to be regarded as being resident there for the purposes of electoral registration.”

<sup>147</sup> For a general overview of the saga see I. White, *Prisoners’ voting rights*, 27 April 2011, available at: <http://www.parliament.uk/documents/commons/lib/research/briefings/snpc-01764.pdf>.

<sup>148</sup> *J. Hirst v. Attorney General* (2001) *EWHC Admin* 239.

that “The fact that a convicted prisoner is deprived of his liberty does not mean that he loses the protection of other fundamental rights in the Convention”, such as the right to vote that is considered by the Court “the indispensable foundation of a democratic system”.

The UK government appealed to the Grand Chamber, which was discussed on 27 April 2005 and published only on 6 October 2006. The Grand Chamber rejected the appeal because “There is no question ... that a prisoner forfeits his Convention rights merely because of his status as a person detained following conviction. Nor is there any place under the Convention system, where tolerance and broadmindedness are the acknowledged hallmarks of democratic society, for automatic disenfranchisement based purely on what might offend public opinion”.

Therefore, although the situation was improved by the 2000 Act, which for the first time granted the right to vote to persons held on remand, Section 3 of the 1983 Act was considered to be a “blunt instrument”. In particular, the Court maintained that the blanket restriction applied automatically to all convicted prisoners held in prison, irrespective of the length of their sentence as well as of the nature or seriousness of their offence and individual circumstances. Thus, “[s]uch a general, automatic and indiscriminate restriction on a vitally important Convention right had to be seen as falling outside any acceptable margin of appreciation, however wide that margin might be, and as being incompatible with Article 3 of Protocol No 1”.<sup>149</sup>

Following that decision, the Government initiated a two-stage consultation process in order to decide how to implement the judgment. The first stage was completed on 14 December 2006 with a paper that set out the possible options<sup>150</sup> for enfranchising prisoners.

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<sup>149</sup> See Clayton R. and Tomlinson, H. *The Law of Human Rights*. 2nd. ed. Oxford: Oxford University Press, 2009: p. 314 according to whom the margin of appreciation “Refers to the latitude allowed to Member States in their observance of the Convention ... The doctrine has ... been defined as the line at which international supervision should give way to the state’s discretion in enacting or enforcing its laws”. In other words this means that the Convention should not “impose *uniform* rules across the states which contract to it. Instead, the Convention prescribes standards of conduct and leaves the choice of implementation to the states themselves”. See also De la Rasilla del Moral, I. “The increasingly Margin Appreciation of the Margin-of-Appreciation Doctrine.” *German Law Journal* 61 (2006): 611ss.

<sup>150</sup> *Voting rights of convicted prisoners detained within the United Kingdom-the UK Government’s response to the Grand Chamber of the European Court of Human Rights judgment in the case of Hirst v. the United Kingdom : consultation paper*. Department for Constitutional Affairs, 14 December 2006, available at

The second stage was published in a document edited by the Ministry of Justice on 8 April 2009.<sup>151</sup> In this second paper the Labour Government concluded that in order “to meet the terms of the [ECHR] judgment a limited enfranchisement of convicted prisoners in custody should take place, with eligibility determined on the basis of sentence length but acknowledged that the final decision on the extension of the franchise to convicted prisoners must rest with Parliament”. In particular, the document set out four options: 1) prisoners sentenced to less than one year’s imprisonment; 2) prisoners sentenced to less than two years’ imprisonment; 3) prisoners sentenced to less than four years’ imprisonment; 4) prisoners sentenced to less than two years’ imprisonment and, in addition, prisoners jailed for between two and four years, but only if a court grants permission to vote in their specific case.

This non-compliance – resulting from a delay due to the consultation process – precipitated chaotic and complex turmoil between the UK Government and the ECHR institutions.

Briefly, the Strasbourg’s perspective was to press the UK to implement the Hirst case. More precisely, there are several resolutions of the Committee of Ministers<sup>152</sup> in which it expressed its serious concern that the substantial delay in implementing the judgment would give rise to a significant risk that the next general election (June 2010) would be held “in a way that fails to comply with the Convention”. In the same resolution, the Committee urged the respondent State “to rapidly adopt the measures necessary to implement the judgment of the Court”. Similar warnings have been adopted during the years by the Committee Ministers meetings.<sup>153</sup>

A crucial moment of the *prisoners saga* came with the judgment in *Greens and M.T. v. United Kingdom* on 23 November 2010.<sup>154</sup> Briefly, the case concerned *Robert Green* and

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<http://www.dca.gov.uk/consult/voting-rights/cp2906.pdf>. In short, according to paper the options set out are: a) enfranchise prisoners sentenced to less than a specified term; b) allow Courts to decide on withdrawal of the franchise; c) enfranchise all tariff-expired life sentence prisoners; d) proposal specific to convicted prisoners found guilty of election offences; e) proposal specific to non-convicted and convicted offenders detained in mental hospitals.

<sup>151</sup> *Voting rights of convicted prisoners detained within the United Kingdom : second stage consultation*. Consultation Paper CP6/09, Ministry of Justice, 8 April 2009. Available at <http://www.justice.gov.uk/consultations/docs/prisoner-voting-rights.pdf>.

<sup>152</sup> See Interim Resolution CM/ResDH(2009)1601, adopted on 3 December, 2009.

<sup>153</sup> 2-4 March 2010, 1-3 June 2010 and 2 December 2010.

<sup>154</sup> *Greens and MT v United Kingdom* [2010] ECHR 1826 (23 November 2010)

M.T., two prisoners whose registration as voters was refused by the Electoral Registration Officer. They challenged the refusal under Article 3 of Protocol No 1 to the ECHR. The Court held that the denial “was due to the United Kingdom’s failure to execute the Court’s Grand Chamber judgment in *Hirst v. the United Kingdom No 2*”. Having received 2,500 similar applications, the Court applied its pilot procedure,<sup>155</sup> giving the UK Government six months, starting from the final decision in *Greens and M.T.*, to introduce legislative proposals bringing the law in line with the Convention.

It is noteworthy, that the Court did not mention how the Government should eliminate the dysfunction; on the contrary it noted that “the Court’s role in this area is a subsidiary one: the national authorities are, in principle, better placed than an international court to evaluate local needs and conditions and, as a result, in matters of general policy, on which opinions within a democratic society may reasonably differ, the role of the domestic policy-maker should be given special weight”. However, at the end of the six-month deadline, the Court held that there was no justification to analyze every application concerning Section 3 of the Representation of the People Act. Thus, the Strasbourg judges decided that they would not examine cases analogous to *Hirst* and proposed that those already registered be struck out once legislation has been introduced.<sup>156</sup> Recently, on 11 April 2011 the Grand Chamber of the European Court of Human Rights rejected the Government’s request for an appeal in *Greens and M.T. v UK*.

However, the British perspective is not linear. On the one hand, there is the opinion of the Joint Committee on Human Rights (expressed in its reports for 2006-07, 2007-08 and 2008-09), according to which the Government’s delay is unacceptable, and for this reason the Committee itself recommends that the Government urgently resolve the issue. On the other hand, there are the continuous reactions of the

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<sup>155</sup> As is well known, under Article 46 of the Convention, all Member States are obliged to implement appropriate measures to protect rights that the Court finds to have been violated. In order to facilitate this process, the Court may adopt a “pilot judgment procedure”, allowing it to: determine whether there has been a violation of the Convention in the particular case; identify the dysfunction under national law that is at the root of the violation; give clear indications to the Government as to how to eliminate this dysfunction; bring about the creation of a domestic remedy capable of dealing with similar cases (including those already pending before the Court awaiting the pilot judgment) or at least bring about the settlement of all such cases pending before the Court. See *Greens and MT v United Kingdom* [2010] ECHR 1826 (23 November 2010) 111.

<sup>156</sup> CHR press notice 23 November 2010.

Government, which may be summarized in the recent words of the Minister Harper:<sup>157</sup> “We have to meet our legal obligations, but we want to go no further than that. Secondly we want to ensure that the most serious offenders are not given the right to vote. That is why we did not say that there would be no line, that the limit would be entirely up to judges. We want to ensure that there is a line, so that anyone above that length of sentence would not be able to vote. We recognise that the most serious offenders should not be able to vote”.

The resolution of the political and legal turmoil is still an open question and it is up to the UK Government to put an end to it. At the moment many issues remain controversial: the consequences of the Government’s grant of partial enfranchisement; the possibility for the Government simply to ignore the ruling or to refuse to provide a remedy for the current situation; and the possibility for the UK to derogate from the Convention or to enter a reservation and thereby circumvent the ruling or to withdraw from the Convention and/or jurisdiction of the Court altogether.<sup>158</sup>

Regardless of how the saga ends, it certainly represents a strong test for the relationship between the UK and the Convention and, of course, for the power of the Strasbourg Court.

## V. FINAL REMARKS

Italian judges tend to overstate the openness of the Italian legal system to international law or at least to Human Rights treaties or conventions and therefore to use ECHR law (es EC law before) as an instrument of correction of domestic iniquities or of remedy to suffered abuses or inefficiencies of internal legislature or administrative. They do not conceive of “defending” the domestic system from the penetration (invasion) of the external law. The awareness of law quality of legislation make them feel authorized to use any supranational law to trigger the evolution or transformation of the interpretation of domestic law, even forcing the (even constitutional) rules governing the relationship between internal and external sources of law. This is possible also due to the fact that the constitutional provisions

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<sup>157</sup> Westminster Hall debate on prisoners’ rights on 11 January 2011, HC Deb 11 January 2011 c22WH.

<sup>158</sup> Miller, V. “European Court of Human Rights rulings : are there options for governments ?” *House of Commons Library* 18 April 2011

concerning the relationship between State and non-domestic sources have not been constantly adopted.

With regard to the first issue, whilst Italian judges tend to overstate the openness of the Italian legal system to international law, or at least to Human Rights treaties or conventions, and therefore to use ECHR law as an instrument for correcting domestic iniquities or remedying abuses suffered or inefficiencies within national legislative or administrative activities, the British courts follow a very different approach: they tend to protect their domestic system from an excessively wide or sudden penetration of external sources. It may be that the framework of rules governing the hierarchy of sources is cleaner, it may be that the tradition of parliamentary supremacy is more deeply rooted, or it may be that political differences are less severe. Any of these factors can account for why the attitude of the judiciary elsewhere is more respectful of general rules governing the relationship between political institutions.

British judges have used the two stage scrutiny prescribed by section 4 of the HRA with extreme deference to the legislative power, and have used section 3 to prevent overly frequent and strong collisions between EC law and UK law.

On the other hand, the legislative power has almost always complied with the ECHR obligations.

To the contrary, Italian (ordinary and administrative) judges – almost between 2001 and 2007 – have tried to use the new instrument offered by the art. 117, c. 1, in order to favor the integral implementation of the ECHR obligation through: a) the analogical application of the conflict settlements rules governing the collision between the EU law and domestic law; b) the vindication of the power of single judges to set aside a statute conflicting with the Strasbourg interpretation of the ECHR; c) the recognition of the semi constitutional ranking to ECHR law or at least of the same ranking already (after *Simmenthal*) granted EU law according to the primacy doctrine. In others words the enter cling theory, that in Britain has been put forward by a small sector of public law scholarship, in Italy was shared by a significant part of the judiciary, before the formalizing intervention of the Constitutional Court in the 2007.

By the way the prisoners saga shows a stress of these defensive approach that could modify that Democratic Dialogue between the Strasbourg and the UK courts which substantially characterized this eleven years of the Human rights Act.