THE IMPLICIT COOPERATION BETWEEN THE STRASBOURG COURT AND CONSTITUTIONAL COURTS: A SILENT UNITY?

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Abstract

The paper discusses the how Italian Constitutional Court (ItCC) considers the case law of the European Court on Human Rights (ECtHR) by focusing specifically on the parameters for constitutional adjudication. The analysis shows that in some cases, the ItCC considers the ECtHR precedents through Art. 117, par. 1, It. Const.—i.e. the obligation of the Italian legislation to respect international treaties—while in other cases, the ItCC prioritises constitutional rights, thus directly adopting an interpretation that is consistent with the ECHR. In this way, a silent cooperation between courts is executed. Next, this paper attempts to compare the French Constitutional Council's behaviour with Italy's approach to the ECHR. The analysis concludes that the ItCC's choice of parameter seems flexible and unpredictable. More specifically, the Italian approach lacks a well-established and coherent logical priority towards substantive constitutional violations instead of conventional violations. In times of fragility of the ECHR machinery, the application of the sole substantive constitutional parameter can be explained by constitutional patriotism, which pursues autonomy and diversity. However, this might also result in the increased legitimacy of the ECHR system, rooting it directly in the living Constitution.

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1. Introduction

This study addresses the supranational dimension of fundamental rights from the perspective of constitutional adjudication. Specifically, it considers decisions of the Italian Constitutional Court (ItCC) that follow a previous judgement by the European Court on Human Rights (ECtHR). The focus is on the parameters and legal reasoning of constitutional adjudication, to explore how the ECtHR case law is taken into consideration. The objective is to understand if the ItCC's behaviour can be viewed as a means of unity or plurality towards the protection of human rights.

In 2007, the ItCC identified Art. 117, par. 1, of the Italian Constitution as the 'ECHR article' and, more generally, as a provision that opens the Italian legal system to international human rights treaties[1]. Thus, the European Convention on Human Rights (ECHR) has an 'intermediate' status (norma interposta) between the law and the Constitution, in that a law violating the Convention is indirectly incompatible with Art. 117, par. 1, It. Const. and must

[1] Article 117, paragraph 1, It. Const.: 'Legislative powers shall be vested in the State and the Regions in compliance with the Constitution and with the constraints deriving from European Union law and *international obligations*'. Article 117 was reformed by Italian Constitutional Law no. 3 of 2001, introducing a specific reference to international obligations. Indeed, a principle of openness of the Italian Republic to the international legal order was already provided by Articles 10 and 11 It. Const., but no reference was made to international human rights treaties and the ECHR itself.

be quashed[2]. Thus, Art. 117, par. 1, It. Const. is the key that gives the ECHR and ECtHR case law access to the national legal order[3].

A lawyer studying the ItCC case law can probably search for Art. 117 It. Const. in a database to extract all ItCC judgements concerning the ECHR. However, the list of results would be incomplete. Many ItCC judgements recall the ECtHR case law without referring to Art. 117 It. Const. and directly incorporate the ECtHR reasoning in the substantive constitutional parameter, i.e. constitutional rights.

This study focuses on those cases in which the outcome is similar to the one ruled by the ECtHR but lacking a strict and formal reference to Art. 117, par. 1, It. Const. We will call them the 'silent cases'. We aim at understanding why the ItCC sometimes prioritises the substantive constitutional parameter instead of the 'ECHR article' and if this approach is useful in ensuring cooperation between the ItCC and the ECtHR.

The paper is organised as follows. Section 2 defines the term 'silence' in the context of this study. Sections 3 and 4 survey different models of the ItCC legal reasoning concerning the

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[2] The ECHR was signed by the Republic of Italy on 4 November 1950 and ratified on 26 October 1955; Italian Law no. 848 of 4 August 1955 incorporated the ECHR in Italian legal order with the force of ordinary law. In 1973, Italy recognised the competence of ECHR organs to receive individual applications. As of 1 July 2017, a total of 5,351 applications against Italy were pending before the ECtHR. In 2016, the ECtHR dealt with 2,730 applications concerning Italy, of which 2,695 were declared inadmissible or struck out. The ECtHR delivered 15 judgements, ten of which found at least one violation of the ECHR. For the country fiche on Italy, see *http://www.echr.coe.int/Documents/CP_Italy_ENG.pdf*.
This study does not consider the role of ECHR before the 'twin' judgements of 2007. See G. Martinico, O. Pollicino, *Report on Italy*, in G. Martinico, O. Pollicino (eds.), *The National Judicial Treatment of the ECHR and EU Law. A Comparative Constitutional Perspective* (2010), 271-299, 282-283; D. Tega, *The Constitutional Background of the 2007 Revolution. The Jurisprudence of the Constitutional Court*, in G. Repetto (ed.), *The Constitutional Relevance of the ECHR in Domestic and European Law. An Italian Perspective* (2013), 25-36, 26-27.

[3] For the Italian constitutional review of legislation model, see V. Barsotti, P.G. Carozza, M. Cartabia, A. Simoncini (eds.), *Italian Constitutional Justice in Global Justice* (2015), especially Chapter II. An English summary of more recent ItCC judgements is available at *http://www.cortecostituzionale.it/actionJudgment.do*. For an overview of the 2016 ItCC case law, see P. Faraguna, M. Massa, D. Tega, M. Cartabia, *Developments in Italian Constitutional Law*, in R. Albert, D. Landau, P. Faraguna, S. Drugda (eds.), *2016 Global Review of Constitutional Law*, I·CONnect-Clough Center (2017), 108-113.

implementation of the ECHR after 2007. Section 5 presents Italian silent cases. Section 6 attempts to compare the coordination undertaken by the ItCC and other forms of silent coordination executed by the French Constitutional Council. Sections 7 and 8 examine whether the Italian silent cases are a symptom of a unitary or disruptive approach in human rights adjudication. Indeed, the priority given to the substantive constitutional parameter may be a sign of patriotism—reaffirming the superiority of constitutional norms—or a sign of silent cooperation between courts. We argue that the ItCC's behaviour might strengthen, instead of weakening, the ECHR system, rooting its legitimacy directly in the Constitution.

2. Silence: the choice of parameter for constitutional adjudication

In the context of constitutional adjudication, the term 'silence' has been used with different connotations. Silence has been used to refer to the informal cooperation between courts effected through meetings, official visits and joint seminars. This form of cooperation might be meaningful to increase familiarity and share knowledge; however, its weight and influence on judicial activity cannot be easily measured. In a more formal perspective, which can be measured, we use the term 'silence' in the context of judicial decision-making, focusing on the argumentative tools through which the courts refer to each other.

In this variation, the concept of 'silent judgement' has already been used to describe a form of judicial cooperation. Daniel Sarmiento, for example, used the concept to portray how the ECJ and national courts communicate through a preliminary reference in the case of conflict on constitutional issues. Sarmiento identified three forms of silence: complete silence, wherein the ECJ renders no solution to the question posed by the national court; partial silence – a form of judicial minimalism, when the ECJ decides *in abstracto* on specific points of law, leaving the concrete answer to the referring court; and unheard replies, that is, when national courts

have a discretion to set aside decisions of superior national courts that quash referring orders[4].

The background of our analysis partly differs from that of Sarmiento. Firstly, here, silence refers to a specific part of the legal reasoning, i.e. the choice of the parameter for constitutional adjudication, and not to all argumentative tools developed by the courts. Second, the relationship between the ECtHR and ItCC differs from that between the ECJ and national courts. The ECtHR and national courts are yet to be connected by any form of preliminary reference[5]. In addition, Sarmiento adopts the framework of constitutional pluralism theory, in which both the ECJ and national courts claim final authority on issues of constitutional relevance such as fundamental rights and institutional autonomy and competences[6]. However, the ECHR

[4] D. Sarmiento, *The Silent Lamb and the Deaf Wolves. Constitutional Pluralism, Preliminary References and the Role of Silent Judgments in EU Law*, in M. Avbelj, J. Komárek (eds.), *Constitutional Pluralism in the European Union and Beyond* (2012), 285-317. The premise is that the preliminary reference is a flexible instrument, under which the ECJ grants wide discretion when facing interpretative queries. In addition, national Courts are more or less free to determine ways in which the ECJ answer can be used in the case at hand. In the Author's view, the case law's approach on issues of constitutional principle placed much importance in 'the way in which the answer is framed, the intensity of its normative content, the deference it grants to the referring Court, the need to uniformity and coherence … These factors are all balanced through a subtle and complex use of both language and silence, in a manner that would fit appropriately in a theory of judicial minimalism'. Some legal tools allow the ECJ to discard queries of national Courts when the condition required by Article 267 TFUE are not met, such as queries that go beyond the boundaries of European Union (EU) law; fictitious or hypothetical; not motivated or posed by authorities which do not fall under the Treaties' definition of 'jurisdiction'.

[5] Protocol No. 16 of the ECHR allows the highest courts and tribunals of a state party to request for the ECtHR's advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms defined in the convention or protocols thereto. The protocol was opened for signature on 2 October 2013. Its entry into force is scheduled on August 1, 2018.

[6] Constitutional pluralism is a descriptive and normative legal theory designed to resolve claims of authority on issues of constitutional relevance. The main descriptive results of the theory in the judicial context are reviewed by D. Sarmiento, cit. at 4, 289, as follows. Legal orders in the European Union operate under shifting *grundnorms*, depending on the scope of application of each one. Despite the separation among legal systems, the criteria for the resolution of constitutional conflicts must be found in mutually enhancing normative texts. Litigations find authoritative resolutions that are based on constructive

system does not claim any final authority; rather, it is based on subsidiarity, complementarity and minimum standards. Thus, the claim of final authority does not seem to be a valid descriptive or normative background to explain the relationship between the ECtHR and national Constitutional Courts[7].

Nevertheless, Sarmiento's conclusions could be useful in our scenario to understand the *rationale* of judicial cooperation. According to Sarmiento, the outcome of an ECJ silent judgement from a preliminary reference is 'complicity': laconic judgements and *in abstracto* or incomplete answers can protect national judicial autonomy and, eventually, the ECJ authority too. An incomplete and minimal way of reasoning gives all relevant actors a voice, enhancing collaboration and mutual trust: all courts can participate

communication over specific issues and not the competence of one judicial actor at play. The outcome is not a consequence of the primacy of national constitutions but a system of mutually dependent legal orders that maximise cooperation and allow courts to change the *grundnorm* when conflicts become unsolvable. Further, see N. MacCormick, *Beyond the Sovereign State*, 56 *The Modern Law Review* (1993), 1-18; M. Poiares Maduro, *Contrapunctual law: Europe's Constitutional Pluralism in Action*, in N. Walker (ed.), *Sovereignty in transition* (2003), 501-538; Id, *Three Claims of Constitutional Pluralism*, in M. Avbelj, J. Komárek (eds.), *Constitutional Pluralism in the European Union and Beyond* (2012), 67-84; and Id, *In Search of a Meaning and not in search of Meaning: Judicial Review and the Constitution in times of Pluralism*, Wisconsin Law Review 2 (2013), 541-563, especially 545-549, 556.

[7] Dealing with EU law, recently in judgement no. 269 of 14 December 2017, the ItCC seemed to reconsider the 'Granital' doctrine. Since the Granital judgement no. 170/1984, the ItCC has stated that every judge must apply the EU law with direct effect and not apply the national law in conflict. In no. 269/2017, the ItCC affirmed that when a violation of the EU Charter of fundamental rights is claimed, the judge must refer an order to the Court. The consequences of the judgement are not completely clear because the new doctrine was affirmed in an *obiter dictum*. Nevertheless, if the new doctrine is confirmed by the ItCC and followed by ordinary courts, the review of legislation under the grounds of fundamental rights will fall entirely within the centralised jurisdiction of the ItCC as an arbiter of human rights' violations. In fact, considering the mutual influences of both systems, the ItCC would better manage the interpretation of both ECHR and EU rights compared with constitutional rights. Nevertheless, differences remain, the ECHR system aiming at fixing a minimum protection standard under the subsidiarity principle, and the EU Charter being part of an order based on primacy and relevant only within the scope of EU law. Moreover, it is well-established in ItCC case law that ECHR norms must respect all constitutional provisions, while the EU law and the Charter may disregard constitutional norms, finding their limits in the constitutional supreme principles (the so-called 'counter-limits').

in a dialogue, safeguarding their jurisdictional role and their mission as a supreme interpreter of the respective *grundnorm*[8]. In the latter sections of this study, we discuss the *rationale* underpinning the ItCC's silent cooperation with the ECtHR.

3. ItCC case law after 2007: general trends

The Italian Constitutional Law no. 3 of 2001 introduced a specific reference to international obligations in Art. 117, par. 1, It. Const. After six years, in two landmark judgements, no. 348 and 349/2007, or the so-called ItCC 'twin' judgements, the ItCC relied on Art. 117, par. 1, to assign a new supra-legislative *status* to the ECHR. In decision no. 348/2007, the ItCC recognised the ECtHR's prominent role as an interpreter of the Convention; however, it had already affirmed that the ECtHR's precedents were not strictly binding for constitutional adjudication, given the needs for a 'fair balance' between respect for international obligations and the protection of constitutional rights and interests[9]. The principles displayed in the twin judgements, in some way, have been reshaped by the following constitutional jurisprudence[10], and the ItCC began using interpretative tools to justify the margin of discretion while implementing the ECHR[11].

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[8] Sarmiento, cit. at 4, considers silent judgements a useful devise to develop cooperation, but cautions that in a Europe of 27 states (at the time), they can allow judicial chaos, threaten coherence, and ignore the systemic consequences of decisions. Moreover, national courts could interpret silence to set aside EU law and reaffirm their national identities, giving place to 'an unashamed maladministration of EU law' in a manner that is far from mutual understanding and awareness. To avoid this risk, Sarmiento suggests revisiting the CILFIT criteria to balance the judicial national claim of authority and correct application of EU law.

[9] See point 4.7.

[10] Dealing with the parameters for judicial review of legislation, since decision no. 311/2009, the ItCC admitted that several rights guaranteed under the ECHR—i.e. the right to life under Article 2 ECHR and prohibition of torture under Article 3 ECHR—embody international customary law so that they can be directly applied by judges under Article 10, par. 1, It. Const.

[11] The ItCC's former Judge F. Gallo (*Rapporti fra Corte costituzionale e Corte EDU*, Bruxelles, 24 May 2012, at *http://www.cortecostituzionale.it/documenti/relazioni_internazionali/RI_BRUXELLES_2012_GALLO.pdf*, accessed May 8, 2018) enumerates four main differences between the ItCC and ECtHR methods, reasoning and judgements: relevance of

In decision no. 317/2009, the ItCC clarified the criterion of 'the greatest expansion of fundamental rights', that is, a comparison between the conventional and constitutional protection of fundamental rights must be conducted to obtain the greatest expansion of guarantees. The concept of the greatest expansion includes the requirement to weigh individual rights with other constitutional interests that may be affected by the expansion of individual protection. Thus, the impact of individual ECHR rules on Italian law must result in an increase in protection *for the entire system of fundamental rights*[12]. Consequently, first, the criterion of the greatest expansion of fundamental rights does not call upon the formal rank of norms (i.e. constitutional norms and supra-legislative norms as the ECHR), but the material degree of protection. Second, the ItCC itself strikes a fair balance between the rights and general interests in question[13].

In the following case law, the ItCC has presented various arguments to declare where a fair balance lies between rights and other constitutional interests. On the one hand, the ItCC occasionally refers to the ECtHR margin of appreciation doctrine, according to which national authorities enjoy a certain level of discretion in fulfilling their obligations under the ECHR. In fact,

concrete case; effects of decisions; use of comparative methods; and structure of decisions, including concurring and dissenting opinions. These differences render the 'judicial transplant' of the ECtHR case law to the ItCC case law far from mechanical given the need for coordination. The ItCC managed this coordination using different techniques: centralisation of the control of conventionality and recognition of the exclusive competence of the ECtHR while interpreting the Convention, thus maintaining a margin to balance conventional and constitutional rights for the ItCC itself. See O. Pollicino, *The European Court of Human Rights and the Italian Constitutional Court: No 'Groovy Kind of Love'*, in K. Siegler (ed.), *The UK and of European Court of Human Rights - A Strained Relationship?* (2015). Bocconi Legal Studies Research Paper no. 2668688 (at *https://ssrn.com/abstract=2668688*) surveyed three techniques applied by ItCC to increase its margin of discretion: the compliance with ECtHR case law 'essence (or the substance)', instead of the full judgements, quoting ItCC no. 317/2009; the distinguishing technique, quoting ItCC no. 236/2011; and the use of the margin of appreciation doctrine as a rhetorical tool to justify a self-made balance. In the text, we reference the same techniques in a partially different order.

[12] Judgement no. 317/2009, point 7.

[13] As A. Ruggeri, *Appunti per uno studio delle più salienti vicende della giustizia costituzionale in Italia*, Nomos 1 (2017), 1-15, 5, pointed out, the criterion is always of benefit to the Constitution and not to the ECHR norms.

since its early decisions, the ECtHR has stated that the Convention should leave the task of securing the rights and liberties it enshrines to each contracting state. Therefore, the ItCC uses the margin of discretion that the ECHR system, in principle, allows to shape its own fair balance between rights and general interest[14].

On the other hand, the ItCC resolves potential conflicts between constitutional and conventional norms using the distinguishing technique[15]. The same strategy is applied by the Supreme Court of Cassation. The ItCC often asks ordinary courts to distinguish their cases from the relevant precedents of Strasbourg. Legal scholars recognise that the technique of distinguishing is admissible because ECtHR has jurisdiction over the case facts. This technique also increases the dialogue between ECtHR and Italian courts, thus questioning if and in which circumstances a situation could entail a violation of the Convention. However, a superficial application of the technique could jeopardise the respect for Strasbourg precedents, threatening the principles of legal certainty, equal treatment and respect for legitimate expectations[16].

Moreover, the ItCC has reshaped the binding force of ECtHR precedents. In a more recent and highly controversial judgement, no. 49/2015, the ItCC ruled a question inadmissible because the principles laid down by the ECtHR in a single judgement against Italy were not sufficiently clear, well-established and deeply rooted in the ECtHR case law to become mandatory in Italian courts. In this way, the ItCC seems to leave behind strict obedience regarding

[14]See, for example, ItCC no. 1/2011 of 5 January 2011, for retrospective laws.

[15] For example, ItCC no. 236/2011 concerning the principle of *nulla poena sine lege*. The decision has been intended as a reply to ECtHR, Grand Chamber, 17 September 2009, *Scoppola v. Italy* (no. 2), application no. 10249/03. The ItCC stated that the Strasbourg precedent 'although aimed at establishing a general principle […], remains nonetheless linked to the concreteness of the case in which it was ruled: the fact that the European Court is called to assess upon a material case and, most of all, the specificity of the single case issued, are factors to be carefully weighed and taken into account by the Constitutional Court, when applying the principles ascertained by the Strasbourg Court at the domestic level, in order to review the constitutionality of one norm allegedly at odds with that principles'.

[16] A. Guazzarotti, *Strasbourg Jurisprudence as an Input for 'Cultural Evolution' in Italian Judicial Practise*, in G. Repetto (ed.), *The Constitutional Relevance of the ECHR in Domestic and European Law. An Italian Perspective*, cit. at 2, 55-68, 63.

the ECtHR interpretation and makes a selection of relevant precedents itself[17].

As a result of the reshaping by the ItCC, today, the ECHR *status* in Italian legal order can be summarised as follows: (a) the ECHR has a supra-legislative rank (b) all judges must implement conventional rights following the ECtHR case law; moreover, all judges must interpret domestic law, as much as possible, in conformity with the ECtHR living interpretation; when a consistent interpretation is not possible, courts must make a referral to the ItCC to evaluate the consistency in the internal norm with the ECHR (c) the judicial review of legislation on the ground on conventionality falls within the exclusive competence of the ItCC and (d) the ItCC recognises a prominent role in ECtHR interpretation, but eventually, the ItCC must strike a fair balance between all rights and general interests at stake.

4. Survey on the application of Art. 117, par. 1, It. Const.

In the above paragraph, we described some general trends in the ItCC case law dealing with ECHR. The ItCC case law can be categorised using different methods. We opted for a classification based on a formal criterion: the parameters to rule the question of unconstitutionality, and particularly, the application of Art. 117, par. 1, It. Const. As mentioned before, since the twin judgements of 2007, Art. 117, par. 1, It. Const. has assumed significance in the ECHR incorporation into the Italian legal order as an intermediate norm between law and the Constitution. *The assumption is that*

[17] ItCC judgement no. 49/2015 of 16 March 2015, concerning the ECtHR *Varvara v. Italy* case of 29 October 2013, on the imposition of a confiscation order despite the termination of criminal proceedings following an unlawful land development in breach of Article 7 ECHR and Article 1, Prot. 1. The case was strongly criticised by legal scholars because the ItCC differentiated between ECtHR judgements on the basis of procedural and substantive criteria (e.g. simple Chamber or Grand Chamber decision, 'novelty' of the principle applied by the ECtHR, and the existence of concurring or dissenting opinions), while ex Article 46 ECHR all judgements are binding for the respondent state. In fact, judgement no. 49/2015 seems to be isolated. In subsequent decisions, the ItCC analysed the coherence of the ECtHR case law to identify the exact meaning of the conventional norm (*chose interpretée*) and not undermine the binding force of judgements against Italy (*chose jugée*); see, for example, no. 184/2015, no. 36/2016 and no. 200/2016.

adjudication on the ground of Art. 117, par. 1, It. Const. might highlight an alleged violation of the ECHR[18]. However, an in-depth analysis of the legal reasoning demonstrates that the sole reference to Art. 117, par. 1, It. Const. is not meaningful to test compliance with the ECtHR case law. Therefore, we expanded the analysis to other referral orders in which a violation of Art. 117, par. 1, It. Const. is claimed, but the provision is not applied by the ItCC. The analysis resulted in three categories:

a. Concordant cases: cases in which Art. 117, par. 1, It. Const. is applied alone or together with another substantive constitutional parameter to provide an interpretation of constitutional rights *in line with* the ECtHR case law.

b. Discordant cases: cases in which Art. 117, par. 1, It. Const. is also applied; however, it is used to underline the constitutional subordination of the ECHR to the Constitution and the need for a new balance between conventional rights and other constitutional interests.

c. Silent cases: cases in which Art. 117, par. 1, It. Const. remains silent, the unconventionality being held on the sole grounds of substantive constitutional norms, for example Art. 2 or Art. 3 It. Const.

The first and second sets of cases share an explicit application of Art. 117, par. 1, It. Const., while the third set comprises cases in which Art. 117, par. 1, It. Const. is not formally considered, which are the so-called 'silent cases'. Cases in the first category have the feature of harmony in common between constitutional and conventional norms; that is, the ItCC and ECtHR rulings are consistent. The consistency occasionally involves a broad application of ECHR principles to circumstances that the ECtHR is yet to consider. Thus, we call them 'concordant cases'[19].

[18] It must be clarified that the selection of parameters for constitutional adjudication depends on the referral order. The ItCC may enlarge the parameter, but the grounds on which the issue of constitutionality arises are identified by the referring judge. See note 3.

[19] See, for example, the numerous ItCC judgements quashing Italian legislation on criminal proceedings which did not provide for a public hearing under Article 6, par. 1, ECHR (right to a fair trial): ItCC no. 93/2010 of 12 March 2010; no. 135/2014 of 21 May 2014; no. 97/2015 of 5 June 2016; no. 109/2015 of 16 June 2015, all following ECtHR, *Bocellari and Rizza v. Italy*, 13 November 2007, no. 399/02; *Perre and others v. Italy*, 8 July 2008, no. 1905/05; *Leone v. Italy*, 2 February

By contrast, cases in the second category include a deviation from the ECtHR statements[20]. In those cases, Art. 117, par. 1, It. Const. is used to *mark the subordination of the ECHR norms to the Constitution*. Thus, they are called 'discordant cases'. From a generic viewpoint, discordant cases are fewer than concordant ones. Furthermore, in both sets of cases the ItCC performs a strong analysis of ECtHR precedents, explaining their arguments and outcomes. The next paragraph explores the third category, silent cases.

First, for a comprehensive view, it is useful to focus on a well-known 'discordant case' in which the control of conventionality has been autonomously ruled under Art. 117, par. 1, It. Const. We use the so-called '*Maggio* case', ItCC judgement no. 264/2012, which followed ECtHR, *Maggio and others v. Italy* judgement of 31 May 2011[21]. A law of authentic interpretation had reset the calculation system for the pensions of Italian workers employed in Switzerland, which caused their pensions to be lower than that estimated before. Under Art. 1 Prot. 1 ECHR, the ECtHR stated that the control of public expenses and determination of

2010, no. 30506/07; *Bongiorno and others v. Italy*, 2 February 2010, no. 4514/07; *Paleari v. Italy*, 26 July 2011, no. 55772/08; *Capitani and Campanella v. Italy*, 17 May 2011, no. 24920/07; *Pozzi v. Italy*, 26 July 2011, no. 55743/08, on public hearing in proceedings concerning the application of preventive measures; and *Lorenzetti v. Italy*, on public hearing with the Court of Appeal for unfair detention. Impressively, the ItCC used the same words as those of the ECtHR to describe the *rationale* underpinning public hearings and considered the identical requirements, that is, the degree of technicality of the proceedings and the entity of rights at stake. In conclusion, in the words of ItCC, the conventional norm does not contradict the protection granted by the Constitution but is in harmony with it (literally, 'sostanziale assonanza'). See also ItCC no. 184/2015 of 23 July 2015 on the length of proceedings; no. 196/2010 of 4 June 2010 on administrative sanctions and the prohibition of retrospective law; and no. 210/2013 of 18 July 2013 on the *lex mitior* principle consistent with the *Scoppola* case of 2009. Even in the concordant cases, an effort is made by the ItCC to shape conventional norms as more general principles shared by the Constitution and other international human rights treaties. For example, public hearing is defined as a principle rooted in all democratic systems.

[20] See ItCC no. 264/2012 on a retrospective law concerning the calculation of pensions and no. 49/2015, quoted above, on confiscation measures following unlawful land development.

[21] See ItCC no. 264/2012 of 28 November 2012. However, instead of the issue of retrospective laws, ItCC no. 191/2014 of 20 May 2014 is an example of a concordant case.

pensions to secure social justice are legitimate aims and the margin of appreciation enjoyed by national authorities in implementing socioeconomic policies is broad. Nevertheless, the ECtHR held that there had been a violation of Art. 6, par. 1, ECHR because the Italian law had retrospectively set the pension level and settled, once and for all, the terms of disputes pending before the ordinary courts to which the state was party. Following the ECtHR *Maggio* judgement, the Court of Cassation made a referral order to the ItCC, challenging Italian legislation on the ground of Art. 117 par. 1, It. Const., that is, Art. 6, par. 1, ECHR, as interpreted by the ECtHR in *Maggio*. The ItCC ruled that the applicants had no legitimate expectations of a pension in line with the previous calculation system since the contested provisions were an expression of the principles of equality and solidarity prevailing within the balancing test of rights and interests at stake. The ItCC employed rhetorical tools to identify a margin of discretion in line with the ECtHR precedent, that is, the 'great expansion of fundamental rights' criterion and the previously mentioned margin of appreciation doctrine.

However, more deeply, the ItCC explicitly differentiated its role from that of the ECtHR. It stated that the protection of fundamental rights must be systemic, not fragmented: 'the ECHR norm, while entering into the legal order through the first paragraph of Art. 117 Const. as an intermediate norm, is subject to a fair balance settled with the interpretative tools ordinarily used by this Court'[22]. In another part of the judgement, the ItCC affirmed that while the ECtHR is charged with the protection of single rights in a fragmented manner, it is for the ItCC to consider rights and

[22] ItCC, no. 264/2012: 'At the end, if, as the Court said (judgements no. 236, no. 113 and no. 1 of 2011, no. 93 of 2010, no. 311 and no. 239 of 2009, no. 39 of 2008, no. 349 and 348 of 2007), the Constitutional Court cannot substitute its own interpretation of a ECHR norm to the one given by the ECtHR applying that norm to the single case, crossing the boundaries of its competences in violation of a binding obligation taken by the Italian State through the signature and ratification, without reservation, of the Convention, anyway the Court must consider if and how the application of the Convention by the ECtHR enters into the Italian constitutional legal order. The ECHR norm, while entering into the legal order through the first paragraph of Article 117 Const. as an intermediate norm, is subject to a fair balance settled with the interpretative tools ordinarily used by this Court… This setting is not aimed at affirming the primacy of national order, but at integrating the protection of rights' (point 4.2.).

general interests as a whole in a systemic and not isolated perspective. In this way, the ItCC justified a balance that differed from the one struck by the ECtHR, ruling that the claim of unconstitutionality was unfounded. At same time, the ItCC aimed at preventing a clear clash with the ECtHR, affirming that 'This setting [the fair balance between ECtHR rights and other constitutional general interests] is not aimed at affirming the primacy of national order, but at integrating the protection of rights'. Despite these prudent words, a conflict erupted. Following ItCC judgement no. 264/2012, the ECtHR ruled on similar Italian cases, holding again a violation of Art. 6, par. 1, ECHR and, for the first time, a violation of Art. 1 Prot. 1 ECHR given the level of reduction in pensions to less than two-third[23].

5. Silent cases

For the purpose of this study, the ItCC decisions have been considered examples of silent cases when the cases adjudicated at supranational and national level are similar and the 'similarity' between cases concerns their underlying facts; the referral order to the ItCC quotes the ECtHR case law; and the ItCC adjudicates the case in accordance with the ECtHR, although avoiding any reference to Art. 117, par. 1, It. Const.

[23] See ECtHR, *Stefanetti and others v. Italy*, 15 April 2014, no. 21838/10 and other 7, for a declaration of a violation of both Article 6, par. 1, and Article 1 Prot. 1; *Biraghi and others v. Italy*, 24 June 2014, no. 3429/09 and other 21, and *Cataldo and others v. Italy*, 24 June 2014, no. 54425/08 and other 5, for a claim on the violation of the sole Article 6, par. 1. In the *Biraghi* and *Cataldo* judgements, each applicant was awarded a sum of €6.000–47.500, depending on the circumstances of the case, and a non-pecuniary damage of €10.000. The ECtHR stated that 'Contrary to the case-law of the Italian Constitutional Court, there existed no compelling general interest reasons justifying a retrospective application of the Law no. 296/2006, which was not an authentic interpretation of the original law and was therefore unforeseeable' (§65 *Stefanetti* judgement). In *Stefanetti*, the ECtHR considered that the question of compensation for pecuniary damage was not ready for a decision. In the following judgement of 1 June 2017, Italy was condemned to pay a total amount of €874.962 and €5.000 *conjointement* to applicants, plus legal interests. The panel of the Grand Chamber rejected the request of Italian Government to refer the decision. Following *Stefanetti*, ItCC no. 166 of 2017 confirmed the solution adopted in decision no. 264/2012 and ruled the question non-admissible, but recommended the intervention of the legislative.

We consider three pairs of cases. The first couple deals with knowledge of personal information, the second with the transmission of surnames and the third with the use of embryos for scientific research. The three pairs partially differ from each other. They have all been decided on the grounds of substantive constitutional parameters. However, in the 'one's origin case' and 'the surname case', the referring judge claimed a violation of *both* substantive constitutional rights *and* the ECHR—the latter through Art. 117, par. 1. Thus, the ItCC was able to choose the parameter between the ones identified by the referring judge. In contrast, in 'the embryos case', the referral order did not account for the ECHR. The referring tribunal set the issue on the sole ground of substantive constitutional rights. The ItCC freely chose to broaden the parameter to the ECtHR case law[24]. The third couple could signify deeper cooperation between courts, given that the ECHR was not even invoked by the referral order.

In detail, the first couple addressed the confidentiality of information concerning a child's origins. We discuss the ECtHR judgement *Godelli v. Italy* of 25 September 2012[25] and ItCC judgement no. 278 of 18 November 2013. Italian law guaranteed the right to keep a child's origin a secret when the mother asked for anonymity at the time of birth; the mother had the absolute right to have her wish respected. In the *Godelli* case, an Italian woman, who was abandoned at birth by her mother, made attempts to source the details of her origin but her request was denied. Under the ECtHR case law, Art. 8 ECHR protects the right to identity and personal development, which involves establishing the truth about one's origins. The *Godelli* case called into question the mother's interest in preserving her anonymity, the child's interest in learning about her origins, and the general interest of preventing illegal abortions and giving birth in appropriate medical conditions. Relying on a precedent related to France, more specifically, the *Odièvre* case, the ECtHR held that the Italian system failed to strike a fair balance between the competing interests because total and definitive preference was given to the sole wish of the birth mother. In contrast with the French law, the Italian law did not provide a

[24] This is clearly stated by the ItCC, affirming that the conventional parameters had not been involved in the pending judgement; see ItCC no. 84/2016 of 22 March 2016, point 10.

[25] ECtHR, *Godelli c. Italy*, 25 September 2012, no. 33783/09.

mechanism to disclose the mother's identity with her consent. Therefore, the ECtHR held that there had been a violation of Art. 8 ECHR.

Following the *Godelli* case, an Italian ordinary court made a referral order to the ItCC in a similar case concerning the desire of an adopted woman to know her mother's identity. The referring judge challenged the unconstitutionality of the Italian law on the grounds of certain constitutional norms: Art. 2 It. Const., in which the right to personal identity is incorporated; Art. 3 It. Const. on the principle of equality; Art. 32 It. Const. on the right to health because the denial of parental identity would prevent the applicant from possible screenings for genetic diseases; and Art. 117, par. 1, It. Const. The ItCC overruled its precedent no. 425 of 2005 (in the Court's words, a 'fully analogous case' in which the question of unconstitutionality was judged as clearly unfounded) and quashed the Italian legislation. It is surprising that ItCC judgement no. 278 of 2013 broadly refers to the ECtHR case *Godelli*, but the declaration of unconstitutionality has been made on the sole grounds of Artt. 2 and 3 It. Const.[26].

The second pair of cases concerns equality between spouses regarding the transmission of surname to their children: ECtHR judgement of 7 July 2014, *Fazzo and Cusan v. Italy*, and ItCC judgement no. 286 of 21 December 2016. The Italian legal order mandated a rule by which legitimate children were given their father's surname at birth. Despite an agreement between the spouses, the mother was unable to give her family name to the baby. The father's surname rule was implicit from a number of articles in the Italian Civil Code considered together. All domestic remedies were exhausted and the married couple applied to ECtHR, alleging a violation of Art. 8 ECHR, alone or taken together with Art. 14 ECHR on the prohibition of discrimination and Art. 5 Prot. 7 ECHR concerning equality between spouses. In line with its previous case law, the ECtHR held that the decision to name a child according to the transmission of the father's surname entailed discrimination on the ground of parents' sex because the father's

[26] The wish for coordination with the ECtHR and, at the same time, autonomous evaluation and assessment of the constitutional rights in question in the *Godelli* case is discussed in the 'University of Macerata - Alberico Gentili Lessons' by ItCC Judge G. Amato, *Corte costituzionale e Corti europee. Fra diversità nazionali e visione commune* (2015), 61-89.

name rule allowed for no exceptions, irrespective of the spouses' alternative joint wish[27]. It followed that there had been a violation of the principle of non-discrimination under Art. 14 taken together with the right to respect private and family life under Art. 8 ECHR.

Subsequent to the ECtHR judgement, *Fazzo and Cusan*, the ItCC ruled on a referral order in a similar case. The referral order was an antecedent to the *Fazzo and Cusan* judgement and relied on Italian Constitution's norms: Art. 2 It. Const. protecting personal identity; Art. 3 and Art. 29, par. 2, It. Const. on equality and equal dignity of the spouses between them and in relation to their children; and Art. 117, par. 1, It. Const. mentioning the consistent ECtHR case law previous to the *Fazzo and Cusan* case. The ItCC fixed the flaw in the national legal system and as a result, child can be entered in the register of births with both the father's and the mother's surnames. The outcome is broadly similar to that of the ECtHR[28]; however, the judgement was formally based on national constitutional substantive norms, and particularly, the right to the child's personal identity and principle of equality. While the violation of Art. 117, par. 1, It. Const. was not considered, a clear reference to the *Fazzo and Cusan* statements was made to define the scope of the constitutional right to personal identity.

The third pair of cases deals with embryo donation for scientific research stemming from *in vitro* fertilisation. For the first time, in the *Parrillo case*, the ECtHR was asked to rule on the question whether Art. 8 ECHR could encompass the right to donate embryos placed in cryopreservation for scientific research. In a long and complex decision of 27 August 2015[29], the ECtHR Grand Chamber held that Art. 8 was applicable because the exercise of a conscious choice on the fate of embryos concerns an intimate aspect of personal life and is related to the right to self-determination. Nevertheless, the ECtHR held, by sixteen votes to one, that there had been no violation of the provision as there was no European consensus on the subject, with some states permitting human

[27] See ECtHR, *Burghartz v. Switzerland*, 22 February 1994, no. 16213/90; *Ünal Tekeli v. Turkey*, 16 November 2004, no. 29865/96; and *Losonci Rose and Rose v. Switzerland*, 9 November 2010, no. 664/06.

[28] The ECtHR sanctioned the inability of parents to have their child enter the register of births under the mother's surname. The ItCC, on the other hand, stated that the child should have been registered *also* with the mother's surname.

[29] ECtHR, GC, *Parrillo v. Italy*, 7 August 2015, no. 46470/11.

embryonic cell lines, others expressly prohibiting it and some others permitting research only under strict conditions. In addition, the donation of embryos raised delicate moral and ethical questions. For these reasons, the Italian law on assisted reproduction did not overstep the wide margin of appreciation enjoyed by national authorities in the matter. In the meanwhile, the ItCC was referred with an order concerning an analogous case. The aim of cooperation is evident considering that the referral order challenged the Italian law on the grounds of the sole substantive constitutional parameters and did not refer to Art. 117, par. 1, It. Const.[30]. However, the ItCC adjourned the case and postponed the date of the public hearing in anticipation for the ECtHR judgement. Even if Art. 117, par. 1, It. Const. was not mentioned, the ItCC broadly relied on the ECtHR *Parrillo* case to argue that a general consensus on the issue did not exist. Finally, the ItCC held the question inadmissible because it is for the legislative to strike a fair balance between the fundamental values in question.

In conclusion, in the selected pairs of cases the ECHR rights and their interpretation were considered to define the substance of constitutional rights, under which the national law is interpreted and if ever quashed. However, they are not separately managed to sanction that law under Art. 117, par. 1, It. Const.

As mentioned at the beginning of the paragraph, a further categorisation can be made. In the first two cases, following *Godelli* and *Fazzo and Cusan*, the ItCC could choose between different parameters: the substantive constitutional norms and procedural norm of Art. 117, par. 1; in the last case, concerning *Parrillo*, the referring judge did not mention Art. 117, par. 1. This means that in the first two cases, the ItCC *gave logical priority to substantive constitutional norms*, while in the third case, the reference to ECtHR case law was made *ex officio*.

In the final part of the study, we will discuss the *rationale* underlying such legal reasoning.

[30] ItCC no. 84/2016 of 22 March 2016. The order claimed for unconstitutionality on the grounds of Artt. 2, 3, 9, 13, 31, 32, 33, par. 1, It. Const.

6. Comparative perspective: silent cases in the French experience

To better understand ItCC trends, a comparative perspective could be useful. This perspective is examined in limited terms, with only some preliminary remarks, while the issue needs a more comprehensive study.

The French and Italian models of judicial review of legislation entail significant variations in the ECHR implementation. First, France is a monistic system, while Italy is a dualistic one. In detail, following Art. 55 Fr. Const., international treaties have a formal supra-legislative rank in the hierarchy of norms[31]. However, as Keller and Stone have demonstrated, there is no causal linkage between *ex ante* monism and dualism and the reception of ECHR. The way the ECHR is incorporated is an outcome of the reception process which in turn, will impact reception *ex post*[32]. Thus, a comparison between monistic and dualistic systems can be performed.

Second, even if in both countries, constitutional adjudication is centralised under a Constitutional Tribunal, the control of conventionality is managed differently. Since the well-known decision of 1975, *IVG*, the French Constitutional Council (FrCC) has stated that international treaties are not part of the *bloc de constitutionnalité* and the conventionality control falls entirely and exclusively within the jurisdiction of common courts[33]. The reasons

[31] Article 55 Fr. Const.: 'Treaties or agreements duly ratified or approved shall, upon publication, prevail over Acts of Parliament, subject, with respect to each agreement or treaty, to its application by the other party'. France signed the ECHR on 4 November 1950, but ratified it only on 3 May 1974; the right to individual petition was recognised only on 2 October 1981.

[32] H. Keller, A. Stone Sweet (eds.), *A Europe of Rights: The Impact of ECHR on National Legal Systems* (2009), 685-686. The point accepted that some states, including Italy, found it difficult to precisely confer a supra-legislative rank on the ECHR because of their dualistic natures, although there is a great deal of variation even in this small group. Dualistic countries tend to incorporate through a statute, whereas monist states do so through judicial decisions. A monistic constitutional structure could provide the judiciary with more leeway in the reception process. In dualistic countries, where a powerful Constitutional or Supreme Court defends national human rights, the authors observed reticence among judges to base their rulings on the ECHR as an independent source of rights.

[33] FrCC no. 74/54 DC of 15 January 1975, *Loi relative à l'interruption volontaire de la grossesse*.

that have led to this statement vary. On the one hand, under the French *a priori* model of judicial review of legislation, the non-conformity of the law with the Constitution has a permanent character and the violation of the Constitution prevents the law's entry into force. By contrast, the FrCC held that a law inconsistent with an international treaty should not be applied in the case; however, it does not need to be quashed or disappear from the legal system. Therefore, if there are changes in the execution conditions for the Treaty, the law can produce the effects again. Thus, while the control of conventionality is relative and temporary, that of constitutionality is absolute and definitive. On the other hand, under Art. 55 Fr. Const., the binding force of treaties is subject to their application by the other parties. Therefore, the FrCC considered the application of international norms to be contingent on reciprocity, while the application of constitutional norms is not. This argument has been critically discussed by scholars for a long time given that the condition of reciprocity does not fit international human rights treaties. By contrast, human rights treaties are sources of a general and objective obligation to protect the human rights of all people within the jurisdiction of the member state, irrespective of the human rights standards ensured by other states. To this effect, many scholars have advocated the overruling of the *IVG* principles and centralisation of the control of conventionality because laws adopted in violation of an international treaty are contrary to Art. 55 Fr. Const.[34].

Although there are differences between the French and Italian control of conventionality, silent cases also exist in the FrCC case law. Indeed, before the entry into force of the *a posteriori* judicial review of legislation in 2008, or the so-called '*question prioritaire de constitutionnalité/QPC* reform', the FrCC found a way to implicitly verify the conventionality of laws, that is, review the legislation under the ECHR and ECtHR case law *without mentioning them*.

On the one hand, the FrCC considered that a law on asylum was not contrary to the Constitution provided 'in the silence of the questioned law', the law is interpreted in compliance with an

[34] See D. Rousseau, *Droit du contentieux constitutionnel* (2013), 111, quoting, for a critical approach on *IVG* principles, J. Rivero, Actualité juridique. Droit administrative (1975), 134; F. Luchaire, ivi, 137.

international convention on refugees ratified by France. Such legal reasoning is called the 'neutralisation technique'. Art. 55 Fr. Const. is not a formal component of the constitutional adjudication reasoning, but the respect for international obligations is imposed through a binding interpretation of the law[35]. On the other hand, the FrCC interpreted the constitutional right of defence using the same words of the ECtHR but without mentioning it[36].

During the discussion concerning the introduction of the *a posteriori* judicial review of legislation, scholars suggested the centralisation of conventionality control together with the *ex post* control of constitutionality, although this suggestion was not implemented. Following the *QPC* reform, in 2010, the FrCC held again that the control of conventionality, as well as compliance with the EU law, falls entirely under the jurisdiction of ordinary and administrative courts[37]. However, here as well, the scholars remark that the interpretation of constitutional rights often incorporates ECtHR interpretation[38].

There are two preliminary conclusions. First, in both the French and Italian experience, some form of silent cooperation is performed, irrespective of the monistic or dualistic relationship between national and international order. In both systems, the constitutional judge maintains a level of compliance with the ECHR. However, the silent cases of the FrCC differ from those concerning the Italian experience because the FrCC generally tends to not mention the ECHR, while the ItCC broadly refers to the ECHR and ECtHR case law. In the Italian experience, the reference to ECtHR has become explicit and the silence concerns the alternative of adjudication (even) on basis of Art. 117, par. 1, or the sole grounds of substantive constitutional norms.

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[35] See FrCC no. 86/216 DC of 3 September 1986, Revue française de droit administrative (1987), 120, note of B. Genevois; the same technique is applied in FrCC no. 92/307 DC of 25 February 1992, *ivi*, 1992, note of B. Genevois.

[36] See, for example, FrCC 89/260 DC of 28 July 1989. The FrCC directly applied the ECHR in electoral disputes, in which it rules as an ordinary judge (see FrCC 21 October 1988, applying Article 3 Prot. 1 ECHR; FrCC 8 November 1988, on the holding of a public hearing under Article 6 ECHR, quoted by D. Rousseau, cit. at 34).

[37] FrCC 2010/605 DC of 12 May 2010.

[38] B. Mathieu, *Les décisions du Conseil Constitutionnel et de la Cour européenne des droits de l'homme: Coexistence, Autorité, Conflits, Régulation*, 32 Nouveau Cahier du Conseil Constitutionnel (2011), 11.

Second, the *rationale* of implicit cooperation depends on the features of each system. In France, the confirmation of the *IVG* principles is an expression of concern to maintain a well-established relationship with the national Supreme Courts, Court of Cassation and Council of State more than the desire to set a relationship with the ECtHR itself. In Italy, the justification of silent cooperation may differ. Nevertheless, in both systems constitutional law scholars have suggested an explicit reference to ECHR for similar reasons, that is, to counteract marginalisation and self-exclusion of the constitutional judge from the 'network' of European Courts to avoid the risk of external imposition of rights that do not fit local sociocultural traditions and ensure its active contribution to the 'shaping' of human rights[39].

7. Search for the *rationale* behind Italian silent cases

We now refer to the ItCC behaviour concerning ECHR. From our perspective, the ItCC case law concerning ECHR involves both explicit cases, in which Art. 117, par. 1, It. Const. is formally applied and silent cases, in which Art. 117, par. 1, It. Const. is not considered. Both explicit and silent cases make a clear reference to ECtHR case law. However, in silent cases, the ItCC ruled on internal laws potentially inconsistent with the ECtHR case law on the grounds of substantive constitutional norms, such as the right to personal identity or principle of equality. The outcome is similar to that ruled by the ECtHR, but it lacks a strict and formal reference to Art. 117, par. 1, It. Const. Therefore, an explicit violation on the ground of the ECHR is not autonomously mentioned. This section aims to analyse the *rationale* underpinning this manner of reasoning.

[39] For the period before the *QPC* reform, see G. Carcassone and B. Genevois, *Faut-il maintenir la jurisprudence issue de la décision 74-54 DC du 15 janvier 1975 ?*, Les Cahiers du Conseil constitutionnel 7 (1999), 93-100 and 101-108. As for condition after the *QPC* implementation, particularly about the potential FrCC risk of losing control on constitutional human rights adjudication, see D. Rousseau, cit. at 34, 112-113. See *Contra*, B. Mathieu, cit. at 38, 13 of the draft given that the ECtHR would become a Supreme Court in a system that is not federal. In the author's opinion, the FrCC should continue interpreting constitutional rights in compliance with the ECHR without overruling the *IVG* principles but by making clear reference to ECtHR jurisprudence.

Indeed, a silent cooperation between the ItCC and ECtHR already existed before the landmark decisions of 2007, when the ECHR did not have a formal supra-legislative rank yet. The cooperation included referring to the ECHR to confirm and reaffirm the interpretation of constitutional rights[40]. This form of silent cooperation persists after 2007. However, the meaning of silence somehow changed thereafter. In fact, since 2007, the position of the ECHR in national legal order, as well as the tasks of ordinary judges and the ItCC performing the control of conventionality, has been clearly defined.

In general, it appears that the ItCC's choice of parameter is flexible and unpredictable. The case law does not follow a guiding principle that clearly explains why the ItCC applies both substantive constitutional norms and Art. 117, par. 1; the sole Art. 117; or the substantive constitutional parameter. In other words, *no well-established and coherent logical priority is given to substantive constitutional violations instead of conventional violations*.

Having said this, the 'substantive constitutional favour' can be explained in different ways. On the one hand, the focus on a substantive constitutional parameter could depend on the involved rights as an expression of rooted sociocultural traditions. Since the topic at hand is sensitive and controversial issues, such family matters or medical procreation, relying on a substantive constitutional norm instead of a conventional parameter can increase public acceptance of the outcome. The priority given to substantive constitutional rights suggests that the solution from Strasbourg was *already* set out in the Constitution, that is, the Constitution is able to independently answer social questions and these answers must be accepted because they rely on and belong to the evolution of our legal, social and cultural tradition.

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[40] See M. Cartabia, *Of Bridges and Walls: The 'Italian Style' of Constitutional Adjudication*, this Review 1 (2016), 37-55, 50: 'While, at the beginning of the European adventure, the Italian Court considered its supranational and foreign counterparts as aliens, a period of informal reciprocal influence then followed, during which the Italian Constitutional Court – while avoiding all formal reference to the case law of the two European Court – was actually well aware of the case law developed in Luxembourg and Strasbourg. ... However, long before opening up to direct dialogue with the European Courts [with the two judgements of 2007], the Italian Constitutional Court maintained an implicit and silent, although influential, attention to their decisions'.

On the other hand, such behaviour could aim at preserving the supremacy of national constitutions, regardless of the issues at stake, and reaffirming the prominent role of national constitutional courts. If so, there is room to suspect 'patriotism'. In fact, priority might be given to constitutional rights as the only true source of fundamental rights. In this framework, the ItCC plays a central role, thus having the final say in constitutional human rights adjudication. If this is true, silent cases are underpinned by a claim of autonomy and could be perceived by scholars as a potential symptom of increasing irreconcilable diversities.

Moreover, if the focus is placed on predictability and legal certainty as core values of judicial adjudication, it could be argued that the explicit analysis of ECtHR jurisprudence on the grounds of Art. 117, par. 1, It. Const. would serve as clarity. This would further allow the comparison of constitutional rights as interpreted by the ItCC with conventional rights as understood by the ECtHR. By contrast, the incorporation of the ECtHR case law in substantive constitutional parameters could increase judicial discretion. In this way, slight divergences between constitutional and conventional case law could be easily hidden. These considerations suggest that the lack of reference to Art. 117, par. 1, It. Const. could break cooperation between courts.

Nevertheless, in our opinion, this conclusion does not fit the case law analysis. As seen before, the sole reference to Art. 117, par. 1, It. Const. is insufficient to evaluate the level of compliance between jurisprudence. Thus, other considerations must be taken into account.

In our silent cases, the ItCC and ECtHR case law are consistent. Despite the sole reference to substantive constitutional rights, the ItCC legal reasoning deeply analyses the ECtHR arguments and their outcome. In principle, and with certain nuances, the silent cases show a strong commitment to the ECtHR case law. In addition, from a substantive viewpoint, the reference to the sole constitutional parameter seems a way to stress that unconventionality results in unconstitutionality. Such reasoning is coherent with the ItCC general trends reported in the second section of this research. In judgement no. 317/2009, while holding that there must be a comparison between the ECHR and Constitution to obtain the greatest expansion of fundamental rights, the ItCC made the commitment to develop '*the potential inherent in*

the constitutional norms which concern the same rights'. Indeed, in the silent cases, the comparison between conventional and constitutional rights is performed *within* constitutional provisions. The ECHR, and ECtHR interpretation, does not interact with national law as a separate and autonomous parameter, which calls for an external comparison with constitutional norms, although it *internally* shapes the meaning of constitutional norms. Hence, the lack of reference to Art. 117, par. 1, It. Const. cannot be seen as a sign of 'patriotism' *per se*.

This conclusion is clear if we explore the execution of ECtHR judgements before the Committee of Ministers. Indeed, during the execution of the *Godelli* judgement, following the obligations under Art. 46 ECHR, the Italian Government referred to the ItCC judgement no. 278 of 2013 as a general measure to avoid similar violations[41]. It is noteworthy that even if the ItCC formally quashed the law under substantive constitutional norms, its judgement ensured compliance with the ECtHR and it was explicitly used by Italian authorities to prove compliance.

In sum, silent cases underline substantive compliance with the ECtHR case law. Returning to the Sarmiento's analysis, in our framework, silent cases are also a means of 'complicity'. However, there is a key difference. ECJ's laconic answers avoid conflicts, while in the ItCC case law on ECHR, when there is a clash between conventional and constitutional rights, there is no silence. And the ItCC speaks through Art. 117, par. 1. In fact, the 'discordant cases' clearly mention Art. 117, par. 1, It. Const. In this sense, the previously quoted *Maggio* case is significant. In principle bound by the ECtHR *Maggio* judgement, the ItCC lent itself to a balancing exercise, considering that other opposing constitutional interests prevailed in the case's circumstances. The foregoing considerations suggest the final remarks presented in the following section.

8. Conclusions

The ItCC case law following a previous ECtHR judgement shows that the choice of parameters for constitutional adjudication is flexible. The analysis of silent cases, in which an explicit reference

[41] See the action report Dh-DD(2015)999, Committee of Ministers 1243 meeting, 8-10 December 2015, Communication from Italy Concerning the Case of *Godelli* against Italy.

to Art. 117, par. 1, is lacking, demonstrates that their legal reasoning and outcome are consistent with those of the ECtHR case law. The incorporation of ECHR and ECtHR case law into the constitutional rights parameter means that ECHR norms *are* constitutional *in substance*. Despite the formal sub-constitutional rank of ECHR in the hierarchy of norms, in silent cases conventional norms are managed *as* constitutional ones. Thus, this type of reasoning maximises the degree of ECHR's integration into national legal system. In other words, silence is a means to unity.

Instead, ECHR's formal rank emerges when the interpretation, that is, the fair balance, of the two courts is diverging. Therefore, *Art. 117, par. 1, It. Const. is the procedural norm to stress the subordination of ECHR to the Constitution*. Thus, the explicit reference to Art. 117, par. 1, parameter is a means to plurality. In other words, when the outcome is consistent with the ECtHR rulings, reference to Art. 117, par. 1, remains *optional*; however, when the constitutional balance and ECHR balance differ, Art. 117, par. 1, becomes necessary. If this is true, the construction of a dialogue that preserves the constitutional heritage of each state does not pass through silence but through the explicit differentiation between the constitutional parameter and conventional norms and the clear explanation of the reasons for a diverging interpretation[42].

On the other hand, when there is consistency and the use of Art. 117, par. 1, is avoided, the question on 'substantive constitutional favour' still stands, that is, whether the silent cases can be explained differently from constitutional patriotism. The answer is hypothetical because the evidence is not supported by the strict analysis of judicial legal reasoning or case law outcomes.

First, focusing on the constitutional substantive parameters, silent cases underline a theory of constitution 'as a whole, as a system, avoiding the fragmented interpretation of a single

[42] G. Martinico, *La giurisprudenza della disobbedienza. Il ruolo dei conflitti nel rapporto tra la Corte costituzionale e la Corte europea dei diritti dell'uomo*, in A. Bernardi (ed.), *I controlimiti. Primato delle norme europee e difesa dei principi costituzionali* (2017), 407-444, argues that what we call 'discordant cases', or judgement no. 49/2015, could be a way of 'functional disobedience' in so far as they imply a mutual recognition between courts. These cases entail a form of cooperation if the reasons of dissent are clear and well-explained, thus allowing scholars and the public opinion to control legal reasoning.

provision removed from its contextual relationship with the other principles, rules and rights enshrined in the Constitution'[43]. This opinion reflects a general path for cooperation and coordination together with the desire to maintain and protect the Italian constitutional core values and traditions.

Second, the answer may not be as simple when adopting the legitimacy perspective. As previously mentioned, in principle, silent cases could serve a defensive approach, prioritising the national constitution even when its interpretation complies with the ECHR. However, the defensive approach may play in the opposite direction, protecting the ECHR itself.

In recent years, there have been growing opinions across different states, suggesting an exit from the ECHR system and reaffirming a constitutional supremacy. Voices have been heard in the United Kingdom, following the conservative proposal to abolish the Human Rights Act, the law incorporating the ECHR into British legal order, and restore the Parliament's sovereignty over British law. These voices have escalated to public opinions[44]. In France, some civil servants and intellectuals have proposed to make the binding force of ECHR less stringent[45]. Although minor opinions, these are signs of a disbanding involving not only populist parties seeking to address ordinary people with anti-

[43] M. Cartabia, *Of Bridges and Walls: The 'Italian Style' of Constitutional Adjudication*, cit. at 40, 52.

[44] See, for example, the campaign launched in 2011 by The Telegraph under the slogan 'End the Human Rights Farce' following cases in which foreign criminals used 'the right to a family life under Article 8 ECHR to avoid deportation'. Other cases, such as giving prisoners the right to vote, have caused emotive reactions. In 2015, a Manifesto of the Conservatives aimed at abolishing the Human Right Act and introducing a British Bill of Rights, wishing to break the formal link between British Courts and ECtHR and make the Supreme Court the final arbiter in matters concerning human rights in the United Kingdom; the campaign remains on-going. Recently, The Telegraph affirmed that the United Kingdom's plans to 'scrap' the Human Rights Act have been shelved until after Brexit (*http://www.telegraph.co.uk/news/2017/01/26/theresa-may-preparing-abandon-plans-british-bill-rights-sources/*, accessed May 8, 2018).

[45] See the Manifesto of the so-called 'Groupe Plessis', pseudonym for a group of French high-level officers, suggesting the exit of ECHR: 'Cour européenne des droits de l'homme: pourquoi en sortir est un impératif démocratique' (*http://www.lefigaro.fr/vox/politique/2016/06/21/31001-20160621ARTFIG00149-cour-europeenne-des-droits-de-l-homme-pourquoi-en-sortir-est-un-imperatif-democratique.php*, accessed May 8, 2018).

European rhetoric but also high-level officials. In this context, silent cases may serve another objective. Focusing on the Constitution and converting an ECHR violation into a substantive constitutional one, they could be a means to prevent the perception, in public opinion, of an unreasoned importation of judicial solutions. Thus, the incorporation of ECtHR interpretation directly into the substantive constitutional parameter is a way to protect the ECHR machinery itself. In times of mistrust, it is possible that the European human rights adjudication needs, today more than in the past, to be rooted in constitutional norms and have legitimacy from a constitutional background. In sum, implicit cooperation can grant and preserve the unity of the European transnational system of human rights protection. In fact, through their own parameters, national courts aim at complying with ECtHR jurisprudence, assuring the same level of protection, while rooting the legitimacy of European integration directly into their living Constitution.