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EDITORIAL

ECONOMIC CRISES AND PUBLIC LAW

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Between 1980 and 2000, when the main political goal of the European Community were the achievement of the Single European Market and the creation of the Economic and Monetary Union, governmental activity directly affecting individual citizens and enterprises was carried out primarily by national and local authorities. Not surprisingly, the activities of the European Union that were subject to due process of law review were essentially those dealing with competition and other economic issues.

The terrorist threats, after 2001, have, if not reversed, changed the situation. The rules and decisions adopted by the institutions of the EU have shown an increasing activism in the field of justice and home affairs. But they have also determined an increase of due process claims. The association of governmental activism and due process litigation is particularly evident in the ruling of the European Court of Justice in Kadi (2008). Hence the conjecture that, as governmental activities of the Union began to expand in new areas and adopted new forms, the constraints on government have been adjusted and the rule of law, or at least its noyeau dur, has been guaranteed. Whatever the soundness of this conjecture, the question arises whether also the other fundamental pillar of liberal democracies, that is to say the democratic legitimacy of public institutions, has been strengthened.

This question is all the more serious after the emergence of the greatest economic and financial crisis after that of 1929. In a famous speech ("The End of the Laissez-Faire") given in Germany in

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1926, the English economist John Maynard Keynes had made a sharp critique of liberalism and capitalism, rejecting the free private ownership of the means of production. Both the Italian economist Luigi Einaudi and Ludwig von Mises, the leader of the Austrian School of economic thought, criticized Keynes, particularly on the grounds that protectionism had put several countries in the most difficult economic situation. However, European governors decided – unilaterally – that an extraordinary situation required extraordinary measures, including nationalization of banks and industries. The role of government changed, accordingly, and a new public law gradually emerged (and the same happened in the United States with the New Deal). But many European scholars refrained – as Massimo Severo Giannini, one of the leading Italian public lawyers of the twentieth century, observed critically some years later - from studying the new legal institutions, holding that they were transient, not permanent, and accordingly not worth studying from a theoretical point of view. Quite the contrary, those institutions lingered througout the following decades. However, public law doctrines divorced from their object for several years, though with some notable exceptions.

Significant changes seem to emerge in this period, too. In order to exit from the crisis, not only did most European States adopt extraordinary measures within their jurisdictions, nationalising banks, and thus inevitably increasing their public deficits, but they have also authorized the Union to intervene, by providing financial support to Greece, Portugal and Ireland. While some observers have merely affirmed that the States are compelled to play many roles, internally and externally, other voices have highlighted the potential conflicts between such roles. In Germany, in particular, the legality of the financial measures decided by the Union have been contested before the Constitutional Court, from the point of view of their implications for national principles and values, in particular the financial stability, strengthened by the recent constitutional reform.

Whatever the wisdom of the solutions adopted by that respectable judicial institution, a three-fold question arises with regard to the principles of law and the underlying values that are

common to the legal orders of EU countries. First, there is the problem of the model of market regulation. Are the new institutions, such as the EU agencies for the financial sector, and regulatory tools going to shape the relations between the market and public institutions, considered as a whole, in a new way or are they similar to the solutions adopted to cope with the great crisis of 1929? And are such regulatory tools going to endure? Second, and by no means less important, there is the problem of the discretion exercised by policy-makers, especially if national authorities will intensify their cooperation. Public law has always been concerned with constraints on power, and many solutions have been concerned with procedure. It remains to be seen whether, and the extent to that, EU courts, including national judges, will be able to elaborate and apply standards of judicial review that go beyond the recognition of the state of necessity, that is to say realpolitik. Last but not least, the question arises whether the political guidelines, general rules and administrative measures taken by the institutions of the EU are legitimate, from the point of view of the social groups that form the Union. In current legal and political discourses, the problem of democratic legitimacy is often equated with the role of the European Parliament. However, as Joseph Weiler and few other scholars have argued, for all its political significance, the European Parliament lacks financial legitimacy, because it does not decide on taxation. In other words, it is only a spending Parliament. It remains to be seen, therefore, whether the decisions taken by EU institutions can be legitimated indirectly, through national political processes and chains of legitimacy.

In conformity with its mission to discuss critically about public law, the IJPL will publish in the next issues some analyses of such problems, beginning with the treatment of non-EU nationals, and welcomes submissions by lawyers and experts of other social sciences.

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ESSAYS

THE FORMAL MEANING OF THE IDEAL OF THE RULE OF LAW*

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Abstract

The "rule of law" is an essentially contested concept. This concept (or ideal) has, however, at least in the Anglo-Saxon tradition, a core consisting in the almost banal fact that public authorities and citizens are «bound by and act consistently with the law». The aim of the article is to examine, from the specific perspective of the Italian doctrine of public law, the following two questions implied by the rule of law: a) to what extent we can say that the rule of law is a concept and to what extent it is an ideal; b) to what extent such an ideal is possible and therefore worth pursuing. The author seeks to answer these questions arguing that also in contemporary legal systems, complex and integrated, the rule of law remains a fundamental part both of our understanding of law and of the way in which we expect a legal system should work, provided that we are aware of the difference between a formal and a substantive conception of the rule of law.

*This essay has been developed from a report presented and discussed in the WorkShop: Il governo delle leggi. Riflessioni sullo Stato di Diritto, Jan 15th 2010, organized by the Italian Society of Analytical Philosophy at the "Cesare Beccaria" Department of the University of Milan.

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1. Staatsrecht and the Rule of Law

One of the few Italian scholars who has explicitly put the "rule of law" at the core of his research program wondered some years ago if «this old concept, which they still discuss abroad, if only to analyze its agony, and which in Italy does not even deserve an encyclopaedia entry, could be the key to rethinking the theory of public law», and he founded the new journal "Diritto Pubblico" on this question[1].

The aim of the "program" which sprang from this issue was to question the compatibility between public law (as a special system) and the rule of law, purporting the need for a "unique scientific order" of the State as a condition of human liberty. It was no coincidence that the slogan created to synthesize this program of implementation of the rule of law (especially towards the government-public administration institutions) was the following: «one subject, one law, one judge»[2].

Such a program involves the assumption of a point of view about the relationship between public authorities and the law, which is neither neutral nor banal, and which can be included among theories that assign a formal meaning to the rule of law. It is based, indeed, on the simple claim that if people must be

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[1] A. Orsi Battaglini, In limine, 1 Dir. Pubb. 7 (1995).

[2] Slogan remembered in a recent essay by R. Guastini, «Un soggetto, un diritto, un giudice». I fondamenti teorici di una giustizia non-amministrativa, 1 Dir. Pubbl. 29 (2008). On this subject see also L. Ferrara, Orsi Battaglini e la ricerca dell'unità, 3 Dir. e Soc. 503 (2008).

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guided by rules, it should be really possible to follow such rules. More to the point, what these theories stress is the factor of the stability of law, which depends on the generality of norms which the law is made up of. According to this idea, the law, among other social institutions, is normally one of those typically devoted to stability and not to change. This outcome is pursued, on the one hand, by putting human actions in wider categories (erasing differences) instead of trusting the individual discretion of people, and, on the other hand, by embracing the idea of authority: this gives more importance to what comes from certain sources insofar as they are only such: a book, a group of wise people, a particular court. We may or may not desire a social system like this, and we may or not believe it is achievable (to some extent), but it is difficult to conceive law as an autonomous social institution if we do not take these formal elements into account.

It is, however, doubtful that in using expressions like "rule of law" or "principle of legality" – of which the former is an implementation according to Bobbio[3] – we can grasp a core-meaning shared by legal culture. Even if we extend our view beyond national and continental European boundaries, where "rule of law" means a typical historically determined State organization (Rechstaat)[4], we realize that the "rule of law" (ROL), is an essentially contested concept[5]. This concept (or ideal) has,

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[3] N. Bobbio, Legalità, in N. Bobbio, N. Matteucci, Dizionario di politica, (1976) p. 518-9. There are some who sustain conversely that the principle of legality referring to the administration represents the implementation of the ROL connected to the non arbitrariness of government (R. Guastini, cit. at 2, p. 31).

[4] G. Palombella, The Rule of Law and its Core, in G. Palombella e N. Walker (eds.) Relocating the Rule of Law (2009) p. 19.

[5] J. Waldron, Is the Rule Of Law an Essentially Contested Concept (in Florida)?, 21 Law and Philosophy 137 (2002); Y. Hasebe, The Rule of Law and Its Predicament, 17 Ratio Juris 489 (2004). The syntagma "role of law" is able to express both a conceptual and a symbolic meaning. The ambiguity itself of the word 'rule' makes at least two different meanings possible. According to F. Schauer, Playing by the rules (1991) p. 315, it may represent both a system in which the practice of organized administration prevails and the kind of relationship that exists between a rule-based decision-making strategy and the decision-making process adopted by the institution designed by the term law. Naturally the term rule of law can assume different meanings in different contexts. For instance, S. Cassese, Le basi costituzionali, in Trattato di Diritto Amministrativo, t. I (2003) p. 213, uses the expression "rule of law" in opposition to "principle of legality" insofar as the latter, in the field of administrative law, is interpreted as a

however, at least in the Anglo-Saxon tradition, a core consisting in the almost banal fact[6] that public authorities and citizens are «bound by and act consistently with the law»[7].

As Scheuerman effectively wrote «the "centerpiece" of the rule of law has always been the idea that governmental action must be rendered calculable and restrained: it was the exercise of arbitrary power, of despotism as they dramatically labeled it, that worried liberals as diverse as the bourgeoisie Locke and the rabble-rousing Paine, the aristocratic Montesquieu and the state-building Madison»[8].

There are three objectives we may traditionally associate with the ROL: to protect against the Hobbesian war of all against all; to enable people to plan their business with reasonable confidence in the legal consequences of their actions; to guarantee at least against some kinds of officials arbitrariness[9].

What in my opinion remains interesting are the following two questions connected to the above mentioned "program": a) to what extent we can say that the ROL is a concept and to what extent it is an ideal; b) to what extent such an ideal is possible and therefore worth pursuing .

2. The roots of the del Rule of Law

One of the reasons why the ROL is an essentially disputed concept is that it entails apparently opposite instances.

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subjection of administrative authority only to the legislative acts of the Parliament. With regard to disagreements about values which support the ROL see P.P. Craig, Legislative Intent and Legislative Supremacy: A Reply to Professor Allan, 24 Ox. J. Legal Stud. 585-6 (2004). For a recent analysis of the ROL both from a historical and a political-legal point of view see B.Z. Tamanaha, On the Rule of Law (2004).

[6] Somehow «es plausible sostener que los sistemas juridicos, tal como los entendemos contemporaneamente, constituyen en alguna medida ejemplos de rule of law» (M.C. Redondo, Sobre Principios y estado de derecho, in M.C. Redondo, J.M. Sauca, P.A. Ibañez, Estato de derecho y decisiones judiciales, (2009) p. 9).

[7] B.Z. Tamanaha, The Rule of Law: an Elusive Concept?, in G. Palombella e N. Walker, cit. at 4, p. 3.

[8] W. Scheuerman, Between the Norm and the Exception: The Frankfurt School and the Rule of Law, (1994) p. 68-9.

[9] In this sense see R.H. Fallon Jr., "The Rule of Law" As a Concept in Constitutional Discourse, 1 Col. Law Rev. 7-8 (1997).

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In such an illustrious philosopher as Aristotle, considered the founder of the ROL tradition, we can already find the terms of the modern discussion, synthesized in the maxim about "government by law, not by humans" extracted from a famous fragment of "Politics": «It follows therefore that it is preferable that law should rule rather than any single one the citizens. And following this same line of reasoning further, we must add that even if it is better that certain persons rule, these persons should be appointed as guardians of the laws and their servants (…) Therefore he who asks law to rule is asking God and intelligence and no others to rule; while he who asks for the rule of a human being is importing a wild beast too; for desire is like a wild beast, and anger perverts rulers and the very best of men. Hence law is intelligence without appetition»[10].

Those who believe that law is something which deals with reason (including some ideal of fairness) will understand the requisite of the ROL implied in this fragment as an attitude of legal institutions to facilitate the use of reason. This requires a belief in the fact that it is reasonable to entrust oneself to the discretion of the decision-makers and not to the rigidness of rules[11]. Those who, conversely, consider law as a way to reduce risks of individual judgment, will interpret this fragment as the need to confer little, or if possible, no discretion, on decision-makers[12].

Such an opposition becomes clearer when we consider other statements by Aristotle. In the fragment quoted above, he says in hard cases the ROL could only limit itself to specify which subjects must have the legal responsibility of deciding the case through appropriate procedural rules[13]. In Nichomachean Ethics he adds that «all law is universal but about some things it is not possible to make a universal statement which shall be correct. In those cases, then, in which it is necessary to speak universally, but not possible to do so correctly, the law takes the usual case, though it is not ignorant of the possibility of error. (…) And this is the nature of the equitable, a correction of law where it is defective

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[10] Aristotle, The Politics, ch. III, ed. T.A. Sinclair, (1992) p. 226.

[11] L.B. Solum, Equity and the Rule of Law, in I. Shapiro, ed., Nomos XXXVI: The Rule of Law, (1994) p. 120.

[12] A. Scalia, The Rule of Law as a Law of Rules, 56 U. Chi. L. Rev. 1182 (1989).

[13] Aristotle, Politica, III, 1287.

owing to its universality. In fact this is the reason why all things are not determined by law, that about some things it is impossible to lay down a law, so that a decree is needed. For when the thing is indefinite the rule also is indefinite, like the leaden rule used in making the Lesbian moulding; the rule adapts itself to the shape of the stone and is not rigid, and so too the decree is adapted to the facts»[14].

In the Rhetoric he sustains, further, that the solution of all problems must be decided in advance, according to the widest extent, through general norms[15].

So, it is true that Aristotle's discourse points out an unavoidable tension between universalism and particularism, but, on the one hand, this doesn't necessarily threaten the ROL, on the other hand, it seems quite clear that Aristotle considers the universalism of law more desirable than case by case decision-making (particularism). This has not prevented us from developing a centuries old controversy «about whether judge-made law is to be regarded as the epitome of the Rule of Law or as part of the problem that the Rule of Law is supposed to solve»[16], starting from the unarguable authority of Aristotle in Western culture.

3. Formal and substantive conceptions of the Rule of Law

A necessary move to try to attenuate the above mentioned ambiguity is to consider the distinction between the formal and substantive conceptions of the ROL, or as other scholars prefer to say between legalistic or non-legalistic conceptions[17].

Non-legalistic or substantive conceptions are those which believe that the State should justify the treatment of individuals with reference to the common good, which should include, for example, basic freedom of thought, speech, conscience and association[18]. But, as Joseph Raz explains, rule of law is different

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[14] Aristotle, The Nichomachean Ethics, ch. V, ed. D. Ross, (1998) p. 133.
[15] Aristotele, Retorica, I, 1354.
[16] J. Waldron, cit. at 5, p. 142.
[17] N.W. Barber, Must Legalistic Conceptions of The Rule of Law Have a Social Dimension?, 4 Ratio Juris 474 (2004).
[18] N.W. Barber, cit. at 17, p. 481-2.

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from rule of good law[19]. In the latter meaning the ROL loses every specific function, while it becomes interesting if it indicates the conditions which the law must accomplish to fulfill its function of pivot in guiding human conduct[20]. The intuition at the basis of the concept is, therefore, that the law must be capable of guiding the behaviour of its subjects. It is precisely in this sense that the ROL must be a formal concept[21]. As Raz observes, Friedrich August von Hayek has provided one of the clearest and most powerful definitions of the idea of the ROL: «Nothing distinguishes more clearly a free country from a country under arbitrary government than the observance in the former of the great principles known as the Rule of Law. Stripped of technicalities this means that government in all its actions is bound by rules fixed and announced beforehand – rules that make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one's individual affairs on the basis of this knowledge. Thus, within the known rules of the game, the individual is free to pursue his personal ends, certain that the powers of government will not be used deliberately to frustrate his efforts»[22].

As for the above mentioned function of "pivot" there have been endless attempts to individuate requisites that a legal system should possess for this outcome. One of the most famous and influential lists is the one provided by Lon Fuller, according to which the law should undertake the seven following conditions: generality, adequate publicity, non retroactivity, intelligibility, non contradictoriness, stability, consistence (that is the practical possibility for a disposition to be followed), plus an eighth referring to the congruency between the behavior of officials and

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[19] J. Raz, The Authority of Law. Essays on Law and Morality, (1979) p. 211, who argues that the RoL has nothing to do with ideals such as democracy, justice, human rights, etc. We can find bad legal systems which deny human rights but which, however, perfectly accomplish the RoL.

[20] A. Marmor, The Rule of Law and Its Limits, 23 Law and Philosophy 5 (2004).

[21] J. Raz, cit. at 19, p. 214. V. B.Z. Tamanaha, On the rule of Law, cit. at 5, p. 91-101.

[22] F.A. Hayek, The Road to Serfdom, (1944) p. 54. It is to be said that the last part of the Hayek's sentence, in which he points out a connection between the ROL and political freedom, is not consistent, according to Raz, with the formal version of the ROL.

what rules establish[23]. To these requisites we can add some doctrines of the separation of powers, at least in the sense – implied by some of the conditions we have just listed – that organisms which respectively produce and apply the law are different from each other[24].

Fuller, like many others, points out that these criteria should be integrated in a system and that the implementation of each of them is a question of degree, as they do not all have the same importance[25]. They figure out a structure of a legal system which is in some respects even utopian, and which however poses a question of degree regarding the objectives indicated not only for their reciprocal importance but also for their practical achievability[26]. No legal system could effectively fulfill the above mentioned eight requisites and as a matter of fact none actually fulfils them.

Moreover these requisites constitute causes for disputes and disagreements. Some of these requisites are in fact vague: when is a statute reasonably stable? Some requisites may be in conflict with each other: for example the determinacy of norms with the stability and supremacy of the law over the decisions of judges[27].

Nonetheless, the ROL seems to remain an unavoidable concept from a theoretical point of view and an ideal continuously recalled by lawyers and non-lawyers. A more detailed analysis of the ROL's ingredients can explain the reason for this.

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[23] L.L. Fuller, The Morality of Law (1969), It. transl. La moralità del diritto (1986) p. 65 ss.

[24] See M. Jori, Interpretazione e creatività: il caso della specialità, Criminalia. Annuario di scienze penalistiche 218 (2010).

[25] Many lawyers have provided alternative lists, often similar to Fuller's list. According to T. Endicott, The Impossibility of the Rule of Law, 19 Ox. J. Legal Stud. 1-2 (1999), this ideal requires that: «laws must be open, clear, coherent, prospective and stable; legislation and executive action should be governed by laws with those characteristics; and there must be courts that impose the rule of law».

[26] J. Raz, cit. at 19, p. 222.

[27] We can think about the case of a vague rule written in a legislative act replaced by a clear rule created by courts, which, at the same time, fails to comply with the criteria of the supremacy of legislative law and the stability of law, but complies with the requisite of the determinacy of rules.

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4. The "ingredients" of the Rule of Law

The above mentioned requisites can be divided into two groups, respectively corresponding to the two fundamental faces of law: rules and their application.

The criteria of the first group are those related to the need that law is made up of directives designated to permit an actual guidance of action. We can say that the appropriate form for a norm to be a "rule" represents, from this point of view, an indispensable requisite of the ROL, and that this appropriate form consists of generality[28], completeness and definitiveness[29]. They are the properties of a rule suitable to achieve that basic need of a normative order consisting in correcting a lack of coordination, deliberative costs and mistakes due to inexperience which accompany a particularistic decision-making strategy[30]. In other words these properties allow for the allocation of decision-makers responsibility, choosing whether to adopt, through "serious rules"[31], a universalistic strategy (which we can associate with other values commonly connected with the ROL, such as predictability and equality of treatment[32]) or to rely on the sensibility of particular decision-makers.

One of the main functions of the ROL, as we said, is to foster the coordination of actions through the self-direction of people, also in cases in which the legal system establishes forms of control to respect the law, entrusted to the public administration.

We can consider the two following legislative rules. According to art. 4 of the legislative decree n. 152 of 2006, «the environmental evaluation of plan, programs and projects have the aim of guaranteeing the compatibility of human activities with the conditions for a sustainable development». According to art. 5 of the Ministerial Decree n. 1444 of 1968 «in new factories and similar constructions included in D zones, the surface which is to

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[28] Both from the subjective and objective point of view (see A. Marmor, The Rule of Law cit. at 20, p. 9-15).

[29] R.S. Summers, Form and Function in a Legal System. A General Study, (2006) p. 136-164.

[30] L. Alexander, Law and Formalism, 1 Revista Argentina de Teoría Jurídica, vol VI 21 (2005).

[31] L. Alexander, cit. at 30, p. 18.

[32] All things that «enable and facilitate efforts of citizens to rely on the law and to plan their lives accordingly» (R.S. Summers, The Place of Form in the Fundamentals of Law, 14 Ratio Iuris 123 (2001).

be destined to public spaces or collective activities, public gardens and parking places, cannot be less than 10% of the whole surface destined to such buildings».

It seems clear that the first rule does not pursue the objective of allowing people to coordinate their own reciprocal actions, applying the rule by themselves; while the second rule is much more consistent with the above mentioned objective. The first rule contains vague, ethically controversial or evaluative terms; so those who want to follow norms like this should look for a solution by themselves: as a matter of fact the norm does not provide a real help. In such a hypothesis the aim of the rule is, probably, not to guide conduct but to confer decision-making power – depending on different hypothesis – on judges or administrative officials, who, in turn, may use such power either in a case by case way or producing, albeit in an informal structure, more definite rules[33].

But the problem of vagueness and ambiguity of the terms of law is a part of law itself – since it is based on ordinary language – and a certain degree of unpredictability is nonetheless unavoidable.

However, vagueness in itself in not necessarily bad for the ROL, just as the discretion which derives from such vagueness, as in norms like those quoted above about the powers of administrative authorities, is not always bad[34]. Some controlled administrative discretion, in circumstances such as environmental evaluations of projects, can be considered more desirable than no discretion[35]. In this respect we should recall that there are two kinds of general rules deliberately aimed at posing limitations to the unpredictability caused by particular commands (especially administrative acts and regulations): those which grant the powers needed to emit lawful orders and those which instruct the decision-makers about how to use these powers.

[33] V. F. Schauer, cit. at 5, p. 345.
[34] T. Endicott, cit. at 25, p. 17; A. Marmor, cit. at 20, p. 14-15.
[35] J. Raz, cit. at 19, p. 222.

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5. Principle of legality in the public administration

The latter, as is well known, is a central theme of administrative law, concerning the meaning itself of the principle of legality. From the point of view of the Italian legislative system, scholars continue to debate on whether the Constitution has established, in addition to the "right of the Parliament to the last word", the right of the Parliament to the "first word"[36]: in other words if and how a formal legislative act must be the parameter for administrative power including regulatory power.

In this respect we can stress two main aspects.

The first deals with the connection between the rule of law (The State founded on law) and representative democracy. The latter is not a necessary ingredient of the ROL in a strict sense: however, from an historical point of view, it is undoubtedly true that parliamentary democracy and separation of powers have been the area in which the ROL has grown in the modern era. Moreover a political theory of the ROL is surely allowed to add further ingredients to the formal ones and also claim that they do not derive from a political theory but from the law system. There is, however, a common opinion among public law scholars that the value of legality is above all in its derivation from parliamentary legislation.

The second aspect deals with the content that is to be given to this legality. It is common to distinguish between a substantive and formal legality. Oddly in this context the substantive legality is such as to recall more the formal than the substantive conception of the ROL. In fact it requires that the norm which grants the administrative authority the power is not "blank", but it effectively constrains the power of administration to a great extent both from a material and procedural point of view. So this closes the technique of legality to the dominant way of conceiving the principle of "reserved to the law" ("riserva di legge")[37]. What further characterizes this doctrine is the search for an anchor for

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[36] M. Dogliani, Il principio di legalità dalla conquista del diritto all'ultima parola alla perdita del diritto alla prima, 1 Dir. Pubb. 13 (2008).

[37] With regard to these issues see R. Cavallo Perin, Potere di ordinanza e principio di legalità, (1990) p. 126, also for references to the literature about public law. See also G. Sala, Potere amministrativo e principi dell'ordinamento, (1993) p. 244.

the official legislation: especially the persuasion that such a requisite constitutes a legal necessity on constitutional grounds[38].

I would like to concentrate on the first aspect. According to an important doctrinal view the core of legality is in its connection with the principle of parliamentary sovereignty, insofar as it guarantees fundamental rights through the features of the procedures with which law is created. In particular the legislation has an axiological content of a guarantee of rights because it is an expression of the subject (democratically representative) which is able to solve conflicts of interests coming from society, insofar as it has certain typical requisites of the institutional bodies which directly represent the people. Such requisites are the dialectic between the majority and the opposition, the publicity of parliamentary procedures (versus the secrecy of governmental procedures), the inclusive and reversible character of legislation, fairness as a whole, the diachronic element of legislature, which is not relative to a single act[39]. As we noticed above - with some lexical complexity - this is the aspect which is defined as the law in a formal sense, that is as an act of the "representative body", in opposition to the substantive meaning of law, that is a cluster of legal norms[40].

This aspect is, therefore, directly connected to the representative democratic regime, the political system in which the principle of legality has developed in Western Society[41], but it does not affect, as we noticed, requisites, either formal or substantive, necessary for the ROL[42]. The two approaches are not necessarily compatible. Let us think, for instance, of the way in which the problem of administrative decision-like statutes ("leggi-provvedimento") is treated. According to the formal conception of

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[38] See Constitutional Court n. 32/2009. In the past, on the contrary, the Constitutional Court seemed to express a tendency towards the sufficiency of the formal legality (see for example Const. Court n. 201/1987).

[39] In this direction see M. Dogliani, cit. at 36, p. 15-16.

[40] For the formal conception of the ROL legal norms have requisites not only of generality and abstractness, but also of "precision" and they pursue multiple objectives: certainty, consistence, accountability, efficiency, justiciability (R.S. Summers, A Formal Theory of the Rule of Law, 2 Ratio Juris 131 (1993).

[41] For a view which aims to identify the historical-constitutional premises of the principle of legality in Italian legal system, see. A. Romano, Amministrazione, principio di legalità e ordinamenti giuridici, 1 Dir. Amm. 115 (1999).

[42] B.Z. Tamanaha, cit. at 5, 13.

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the principle of legality such statutes should be considered an infraction of the principle itself, while according to the democratic-representative approach to the ROL (primate of the Parliament) these statutes are fully consistent with the principle of legality (and this was the position of the Constitutional Court for a long time)[43].

It is just about this specific aspect of the principle of legality that we find the main divisions: for supporters of a full and clear implementation of the ROL it is above all important that norms come from a directly representative institution[44]; for others the element necessary and sufficient for the legality of administrative action is the pre-existence of a rule which outlines the decision.

Sabino Cassese, in an open dispute with the idea of the principle of legality as asking for a previous conferring power rule of the legislative power, observes that «the principle of legality has a limited value and simply expresses the need to respect the law, when there is a law […] When a legislative discipline is absent we ought to guarantee that the administration does not decide in a case by case fashion, so risking a violation of the principle of impartiality […] the principle of legality assumes, then, the meaning of a predetermination, through a legislative act or an administrative regulation, of the general criteria of administrative action»[45]. It must be said that – though not always in a coherent way – case law (not only administrative courts) seems to propend for the idea that a legislative act is not always needed to confer a power, as a non primary source of law would be sufficient[46].

In the direction indicated by Cassese, if, on the one hand, the principle of legality «has a more restricted range, on the other hand, it has a wider range, since it is referred to what that French call règle de droit […]»[47]. This "rule of law" has positive and

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[43] With regard to this M. Dogliani, Riserva di amministrazione?, Dir. pubbl. 675 (2000); for the prohibition of statute-like decisions, see S. Spuntarelli, L'amministrazione per legge, (2007) p. 132.

[44] See, for instance, A. Travi, Giurisprudenza amministrativa e principio di legalità, 1 Dir. Pubbl. 108 (2005); more recently N. Bassi, Principio di legalità e poteri amministrativi impliciti, (2001) p. 117.

[45] S. Cassese, Le basi costituzionali, cit. at 5, p. 202.

[46] A. Travi, cit. at 44, p. 108.

[47] S. Cassese, cit. at 5.

negative aspects. The second concerns the difficulty for general legislative norms to keep administrative decision-making under control[48]. The positive aspect is that the norms that guide administrative agencies are not only to be found in the legislature, but also in the Constitution, international treaties, European Union directives and regulations, and in secondary sources of law. In addition we can find these norms in the "general principle of law", some of which «are created by courts themselves that extract them either from the same norms … or from criteria of a more general kind»[49]. In this phenomenon the distinguished scholar glimpses an affinity with the "Anglo-Saxon tradition", that is with a prevalently case law legal system, in which doctrine takes part in the formation of law.

Is this approach compatible with the formal conception of the ROL? Yes, insofar as it considers both the need for a normative predetermination of public and private subject conducts and the need to limit the discretional privileges of administrative authorities – through a sort of cooperation between legislators and judges[50]. No, insofar as he puts on the same level every type of norm (rules, standards, principles)[51], without stressing that they

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[48] With regard to the discussion concerning the legitimacy of regulatory decisions of government, see R. Baldwin, Rules and Government, (1995) p. 60.

[49] S. Cassese, cit. at 5, 204.

[50] A very interesting field of investigation concerns the compatibility between the so called "regulation", which is increasingly entrusted to administrative authorities, and the values of the ROL. "Regulation", as has been said, «is an intimate, albeit not affectionate, process of negotiation, threat, bargaining, compromise, and confrontation that cannot be subjected to fixed, pre-established rules without becoming either excessively lax or excessively harsh» (M.M. Feeley, E.L. Rubin, Judicial Policy Making and the Modern State: How the Courts Reformed America's Prisons, (1998) p. 348). The point is that, apart from the kind of legal sources and procedures through which regulations are produced, «by focusing on the issue of whether or not the rule of law is constitutive of law, we can too easily miss the possibility that legislation of the sort Rubin considers may in fact be part of a regulatory regime which does, nonetheless, comply with rule of law requirements» (L. MacDonald, Positivism and the Formal Rule of Law: Questioning the Connection, 26 Austl. J. Legal Phylos. 125 (2001).

[51] Questioning about principles, especially principles like reasonableness or proportionality – putting at stake the balancing of interests or values – often causes a shift towards a substantive conception of the ROL. However, also those who think that this ideal must pragmatically take into account a number of approaches (among which the substantive one), sustain that there are at least two reasons for minimizing the commitments of a substantive theory of the

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are different from each other. This idea is, moreover, more suitable for a system characterized by a slight separation of powers as in the relationships between the State Members of the European Union, the Union itself and the "global order".

The issue of the deriving of powers from standards[52] – calling into question the creative role of courts – is, on the contrary, viewed with displeasure by those who adopt a substantive conception of the principle of legality (that is, apologizing for the linguistic confusion, a formal conception of the ROL), not only for the difficulty in acknowledging the conferring of power as coming from the representative body (that in some cases of standards written in a statutory act may be possible), but also because it weakens the strict legality of administrative power.

6. Application of Law

The theme of the application/creation of law allows us to go back to the Fullerian ingredients and particularly to those of the second group concerning the articulation[53] of the last condition, called "consistent application"[54], in a series of more defined criteria. These regard the guarantee that the machine created to have the law respected, fulfills this objective effectively and appropriately: the guarantee of the independence of courts, whose duty is to apply the law to the cases under their scrutiny (citizens can be guided by the law only if judges apply its norms faithfully, since judges are those who actually establish what the law in every single case,); fair trial; the role of courts limited to conformity to the rule of law, without powers of decision-making;

ROL. The first is the persistent fact of moral disagreements; the second is the lack of attractiveness of the ROL if it is not distinguishable from a theory of substantive justice (R.H. Fallon Jr., "The Rule of Law" As a Concept in Constitutional Discourse, cit. at 9, p. 53-54).

[52] We can find an example of this approach in the case law of administrative courts about the so called "self made review" (the power of annulling and revising a previous decision without a judicial review), entrusted to administrative authorities – also in the absence of a written statute – starting from the principle of the inexhaustibility of administrative power (see. A. Travi, cit. at 44, 116).

[53] Made by J. Raz, cit. at 19, p. 216-218.

[54] «A very complex requirement which entails a whole range of principles and practices» (A. Marmor, cit. at 20, p. 7).

the exclusion of discretionary powers regarding criminal prosecution.

The first point is the most important, because it means that judiciary independence is a necessary condition for the correct application of law, even though it is not a sufficient condition for this.

The requisite of the exclusion of decision/making powers seems to be the consequence of the independence of courts, but also in this case we need to understand what such an exclusion really means: in fact, either we should accept a cognitive approach to the interpretation of law[55], or some kind of choice at the moment of application is in some cases unavoidable. It is a question of degree: on many occasions a full congruence between general norms and single decisions is possible, on other occasions this cannot occur (for instance when the relative rules are vague). In this second case we need to establish if the choice must be limited to the public administration or if it belongs to the court. And also this interpretive decision can depend on establishing to what extent the requisite of judicial independence is satisfied. Much can be said about this regarding administrative courts in Italy[56].

7. Decline of the ROL?

Those who claim that the ideal of the ROL is undesirable would be radically dissenting from most of what we have sustained so far, even though they would probably argue that the ROL is either conceptually inconsistent or empirically false. But in doing so they would probably attribute a series of features to the ROL which are quite far from its core. The many skeptical positions regarding the ROL in Italy share the conviction that we

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[55] A thing that entails a lot of conceptual and practical problems. Moreover, unlike what is generally believed, a cognitive approach to interpretation of law is not included among the necessary requisites of the ROL. An inclination towards certainty – that is towards the importance of text – does not entail at all an adherence to epistemologically fallacious theories, such as the ones according to which it is sufficient to take into consideration the words written in a statute to get the only right answer to a legal question.

[56] See A. Orsi Battaglini, Alla ricerca dello Stato di diritto. Per una giustizia «non-amministrativa» (Sonntagsgedanken), (2005) p. 60.

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should be aware of a "crisis" or deep decline of the concept at stake, even though - and I want to stress this point again - this "perception" is very often "polluted" by the prescriptive objective to shed discredit on the formal meaning of the ROL.

The fact that is principally purported as a symptom of the crisis of the ROL is the "normative mess", which deprives the legal system of the requisite of stability and certainty: confusion both between legal sources at state level and in the relationship between state legal sources and other sources at regional, local and supranational level (EU, global institutions); bad quality and too many legal rules; increasing appropriation by the government of Parliamentary prerogatives etc.

The issue would require a long and articulated exposition, but we can fix some points.

In a recent article a scholar used the term "critical facts" of the system of legal sources to refer to a series of "violations" grouped in three categories[57]. These factors of crisis of the principle of legality affecting the formal characteristics of the production of law are: a) violations of written rules regarding the production of law; b) violations of rules regarding the unwritten production of law (implied rules); c) deviations from an ideal pattern of a system of law sources. In this article each of these infractions is analyzed with reference to the different types of sources of law: ordinary legislation; urgent decrees by government; delegated legislation; simplification and normative rearrangement; annual simplification legislative acts and unified texts; regulations and other normative acts made by the government; orders of the Prime Minister; regulations of independent authorities.

The interesting thing which this analysis shows is that almost all the cases of violations regard either a «determined ideal pattern of the system of legal sources» or just a presumed (unwritten) rule. Some examples, limited to the legislative branch, give an idea of this. Let us think, first of all, of the violations regarding the technique used to make a legislative act, for instance, the statutes consisting of a few articles with hundreds of paragraphs. In such a case in order to identify the violation we

[57] See L. Geninatti Satè, I fatti critici del sistema delle fonti e la crisi del principio di legalità, 3 Dir. Pubbl. 885 (2005).

need to sustain that this praxis represents a betrayal of the purpose of art. 72 of the Italian Constitution, according to which legislative power is given to the parliamentary assemblies. This would mean that parliamentary assemblies must actually have the power to establish what the content of a statute is, but when a bill is prepared by the Government in a manner that hardly makes it possible to do so (as in the above mentioned cases of articles of enormous length), Parliament would be deprived of its own prerogatives. Then, we may wonder whether the violation of the principle of the action reserved for the public administration through decision-like statutes, may be really considered a violation, since the existence itself of a space of decision reserved for the public administration against the legislature is highly disputed. Let us also think of norms which establish the so called delegification and simplification of the legislation, which, according to many scholars appears to show a tendency towards a deep reform of the system of legal sources, such as requesting a revision of the principle of legality because of the erosion of boundaries between legislation and regulation. The author points out a clever consideration when he wonders whether to stressing these threats to ideal or presumed requisites of legality could turn in favor of critics of the idea itself of the ROL in a parliamentary regime.

When, in other words, someone moves from these remarks to a judgment of inadequateness (not of a particular cluster of legal norms) but of the principle of legality as such, he makes an improper leap from a descriptive to a prescriptive argument. The proof of this shift is in the circumstance that generally the claim about the inadequateness of the ROL, which should be founded on a very accurate and difficult empirical inquiry, is considered to be self evident. Actually, to establish the degree of distance or proximity of a legal system from the ROL in general terms, we need to examine every single aspect of legal phenomenology, also taking into account whether and to what extent decision-makers themselves adopt strategies aimed at creating more stable and certain rules than the ones promulgated by legislators.

As a scholar has recently observed, we can see a tendency to deduce negative judgments about law from claims about facts regarding its bad quality, implying that, on the contrary, in the times of the liberal State the laws were all perfectly intelligible,

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provided with the requisites of generality and abstractness, etc.[58] We meet standard arguments like the following: while the domain of the bourgeoisie of the XVIII Century would guarantee uniformity which allowed the functioning of a State based on the ROL, the pluralism of the contemporary State would cause such a conflicting social context, with the consequent legislative mess typical of the democratic system, leading to the necessity to give up the guarantees offered by written law in favor of different kinds of guarantees provided by institutions more suited to facing the challenges of a complex world.

As well as the aspect regarding the quality, function, structure, etc., of the written law there are also other factors of stress, such as the eclipsing of the division of powers; the affirmation of the "result-oriented" administration, also related to the increase in the activities of public service carried out by public bodies with a corresponding decrease in the action regulated according to "formal legality"; the questioning of the independence of courts also favoured by the "discovery" of the non mechanical nature of the application of the law[59]. They are all issues of great importance, but for which – as for the question of normative disorder – it is hard to believe that they have such a novel character as to undermine the ideal of the ROL.

The real threat to the conceptual and empirical sustainability of the ROL comes, instead, from the so called globalization, insofar as it seems to attack the overall historical and conceptual construction on which the ideal of the ROL has developed[60]. The problem is too complex to be mentioned in this

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[58] It is common to implicitly sustain that «judgments about values regarding the law, stated in the past by theorists of the ROL, were founded on judgments about facts (obviously dealing with facts which were very different from contemporary facts). It is the procedure which is incorrect (since a judgment about values cannot be deduced by an observation about facts) and it is the starting point which is misleading (that is that Orlando, Cammeo or Carré had a real world before them, which was absolutely different from the contemporary world, made up of an Olympian, general and abstract legislation). It is not true that administering through legislation, as a systematic and not episodic trend, is a recent phenomenon».

[59] With regard to all these profiles see R. Bin, Lo Stato di diritto, (2004) p. 67 and more recently M. Dogliani, cit. at 36, p. 18.

[60] See R. Bin, cit. at 59, p. 103, who entitled the last chapter of the book «the ROL without the ROL?».

work[61]. What we need to mention, instead, is the approach that aims to redefine the principle of legality according to elements and assumptions different from those which are usually associated with its core meaning, sustaining the existence of a ROL of the global system.

This idea is strictly connected to the emergence of a global administrative law, an unexciting name, as has recently been said[62], to mean certain processes in action in the global order, which consist of a set of procedural rules and normative standards promulgated outside the national institutions and, at the same time, not belonging to the international public law. Standards which are imported in this sphere of regulation are based upon administrative law principles such as transparency, participation, and justiciability. It is a kind of answer to the need to control globalization which has no regard for the need to govern globalization itself through democracy.

As regards this body of norms of various genres – «agreement-norms and unilateral norms; external imposed norms and norms developed inside global institutions; global norms and national norms which have been applied to global institutions (for instance, those of the country where the headquarters of the organization is); hard and soft law»[63] – the ROL is often invoked. According to Cassese «the great number of norms, the development of principles and rules, the settlement of courts, enables us to say that the administrative global system has a high degree of institutionalization (or legalization as the American scholars prefer to say). This is in direct relationship with the extension of the effectiveness of global decisions towards citizens, organizations and national companies (just think of tradable emissions regulated by the Kyoto agreement). Indeed the more the action of global organizations increases and goes beyond State boundaries and domestic public bodies, the more it becomes important to secure the respect of the rule of law, the principle of

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[61] For an approach to this issue and above all for some initial bibliographical references see S. Civitarese Matteucci, La forma presa sul serio, (2006) p. 110.

[62] S. Chesterman, Global Administrative Law (Working Paper for the S.T. Lee Project on Global Governance), in New York University School of Law - Public Law & Legal Theory, Research Paper Series, Working Paper no. 09-52, September 2009, http://ssrn.com/abstract=1435170, p. 4.

[63] S. Cassese, Il diritto amministrativo globale, 2 R. T. D. Pubbl. 337 (2005).

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participation, and the duty to justify every decision, in order to guarantee a protection for citizens, organizations and companies not only from the States and other national public powers, but also from new global public powers»[64].

As we can see it is a picture of a global order or system (which seems to be identified just thanks to the reference, albeit evocative, to the ROL), which uses a somewhat thin version of the ROL[65]. This version is so thin – from the point of view of requisites of the formal version of the ROL – as to induce the impression that even in this description there are prescriptive elements aimed at fostering the ideal, also useful in a domestic discussion, of a system founded on the principles-judges binomial, already expressed in the above mentioned argument of this author.

An issue only partially analogous concerns the ROL in the EU legal system. According to a recent opinion, this legal system appears to be quite far from the principle of legality even though the Court of Justice (since the Les Verts case) qualifies the EU as a «community based on law», and the Treaty of Maastricht has welcomed the principle of the ROL (art. 6.1 EUTr): «the failure of division of powers and the hierarchy of legal sources to become enrooted; executive powers entrusted to national administrations, and above all a remarkable "jurisdicialization" of the principle of

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[64] S. Cassese, Il diritto amministrativo globale, cit. at 63, p. 338.

[65] The version which R.H. Fallon Jr., cit. at 9, p. 30, calls The Legal Process Ideal Type, that is to say procedural fairness in creation and application of law; connection between the concept of law and reasonableness; a reasoned elaboration of connection between certain authoritative legal sources and certain rights and responsibilities in particular cases; judicial review. According to this author, however, this ideal type is compatible with the ROL only if it is accepted as a complementary or subsidiary instrument of the ideal types that he calls "historical" and "formal". About the role and the affirmation of due process law as a general principle of the "global public law", see G. della Cananea, Al di là dei confini statuali, (2010) 133 ss. It is quite clear, in other words, that these concepts are different even though somehow complementary. As the analysis of della Cananea shows perspicuously, procedural fairness is a fundamental resource in the complex and multifaceted legal relationships which arise beyond the State, and we would say that the more there are vague or no rules of conduct at all (as often in supranational level) the more procedural fairness is the very limit of arbitrariness of public and private powers. However, on a prescriptive ground, it does not affect the worth of pursuing the ideal of the formal rule of law as much as possible also in this present era of globalization.

"community based on law", entrusted to the strong creative role of the Court of Justice, have so far prevented this principle from being outlined according to the outcomes of the continental tradition of administrative legality. In the Charter of Nice, the right to a good administration and an equal and impartial treatment (art. 41), is specified through the right to be heard, have access, and give reasons, which without doubt evoke justiciability more than legality of administration»[66].

The warning is, in other words, to take into consideration the real meaning of the terms used, because the expression "rule of law" often refers exclusively to the submission of every act of application of the EU law to the control of a court[67].

8. Are we keeping dreaming?

Other scholars - sincerely worried about the above mentioned phenomena of abandoning the principles of the ROL have begun to look for new answers which do not betray the values of the ROL.

In a recent article it has been sustained that lawyers have four possible arguments to face the crisis of the ROL, some implying, however, a substantial and radical abandonment of it: a) nihilism; b) an anchorage to scientific rationality (as in the doctrine of law and economics); c) a return to natural law; d) a cautious historicism[68].

Putting aside the first three, we can briefly consider the latter, which is the approach the author recommends. Starting from a positive historical judgment of the Italian tradition of public law doctrine, he purports that we should rely on doctrine and case law because they are an expression of an objectivity responding to the regulative idea of the ROL: «an authoritative and elaborate law made by doctrine and courts can surely subsidize the dispersed legislation; so, as far as possible, a solid

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[66] B. Sordi, Il principio di legalità nel diritto amministrativo che cambia. La prospettiva storica, 1 Dir. Amm. 5 (2008).

[67] V. K. Lenaerts, The Rule of Law and the Coherence of the Judicial System of the European Union, in Common Mkt. L. Rev. 1625 (2007).

[68] M. Dogliani, cit. at 36, p. 22.

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and certain law, apt to "create limits" and bear the various functions of the principle of legality»[69].

This "recipe" may be only superficially considered a simple acknowledgment to the judge made law based on principles, an approach that cannot be associated with the idea of the ROL supported in this work. It is, on the contrary, an extreme attempt to defend the core of the ROL (to produce stability and certainty) giving up the aspect (conceptually unnecessary) of the creation of legal norms by legislative assemblies. The author invite us to be aware of the total ineptitude of Parliaments to make laws capable of guaranteeing that the legal system «is in a good state»[70], to go back to a sort of "sapiential law". It is clear that this solution requires the sharing of a positive ethical judgment about the corporation of lawyers and above all a commitment to the political legitimacy of such an appointment. But these are issues we cannot face here for reasons of space.

In the field of administrative law, there are even distinguished scholars who react to the tendency to forsake "the paths of legality"[71]. We are referring, firstly, to the recent theory according to which it is plausible to repropose apparently traditional patterns to contrast the factors of "deconstruction", viewed particularly in the practice of statute-like decisions and in the "escape" into "private law"[72]: the need for a more effective separation of powers and the return to the "construction" of administrative law rooted on the ROL conceived as a guarantee of the typicality of powers and the predictability of administrative decisions regardless of their content. Also in this case, therefore, we find an invocation of the role of the doctrine in recalling «patterns and principles of the ROL» to «contrast the anarchy of the legislator».

What in this approach appears original, and somehow countercurrent, is the identification of an impulse towards new configurations of the substantive legality coming from the EU law, which, almost paradoxically, would impose new normative standards against the domestic formal legality, but at the same

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[69] M. Dogliani, cit. at 36, p. 69.

[70] J.M. Finnis, Natural Law and Natural Rights, (1992) It. transl. Legge naturale e diritti naturali, (1996) p. 294.

[71] F. Merusi, Sentieri interrotti della legalità, (2007) p. 9.

[72] F. Merusi, cit. at 71, p. 27.

time guaranteeing fundamental rights and liberties coming from the erosion of discretional powers conferred on public administration by domestic law.

We can, finally, look at the "crisis" from a different perspective as well, which, starting from a full adherence to the ideals of the ROL, considers the latter as factors that must still produce their innovative effects on the Italian legal system (even in the new context of considerable integration among legal systems). The point is not to go back to broken paths, but to draw new ones. This is the perspective which takes us back to the beginning of this article. It aims to determine, through adherence to the ROL, the dissolution of public law as a special branch of the legal system and so a complete rewriting of the language of rights, the dynamics of public power, and the judicial review of administrative action. For this reason it has been recently noticed that the point of reference for this approach seems to be Albert Venn Dicey, one of the main historical figures of the ideal of the ROL[73].

9. (Without any) conclusion

There are no conclusions to draw. The only issue to stress is that the arguments about the ROL are essentially political ones. The important thing, in other words, is not to disguise precise choices about values as empirical facts.

Those who follows the ideal of the ROL claims that this has two different kinds of virtues[74].

The first concerns the conceptual side, actually the concept of law itself. With regard to this the effective image used by Raz is to compare law to a knife: a knife is not a knife if it is not able to cut, law is not law if it is not able to guide human behavior, albeit ineffectively[75]. This means that, although the ROL is also a political ideal and therefore among the premises that a lawyer should assume, there is a part of such an ideal that concerns a value rooted in the law as a law, insofar as it is an instrument to pursue social outcomes, a kind of social institution which is to be

[73] R. Guastini, cit. at 2, p. 33.

[74] The two different meanings of the term "virtue" referring to the ROL, which I speak about in the text, have been outlined by N.W. Barber, cit. at 17, p. 477.

[75] Raz, cit. at 19, p. 225-6.

used – like all devices – in the appropriate way. This inherent value is not a value in a moral sense, but just the value of the instrument as such, to be projected for the guidance of human conduct. Its specific virtue is to be morally neutral. This is, according to Raz, the virtue of efficiency, the virtue of the instrument as an instrument.

We cannot exclude, and this is the second aspect, the possibility to associate other virtues in the moral sense of this term with the ROL, although the ideal does not include all the virtues which a fair political system requires: for instance, impartiality, which can be better assured by general rules; public discussion and transparency, which can be fostered by an adequate publication of norms; more protection for the autonomy of citizens, which follows from a convinced adherence of courts to the ideal of the ROL; and we cannot exclude that sometime these virtues may also make it preferable to reduce the sharpness of the "knife"[76].

I shall end as follows. If the consistency between the rule of law and a single legal system is, after all, a question of degree (no law exists without a minimum amount, a full achievement of the ideal is not of this world), the extent to which a legal system is inspired by the ROL depends, mainly, on empirical factors. As has been argued, the "impossibility" of the ROL does not derive from conceptual or theoretical reasons, but more simply from the "infidelity" of officers in following the law and the incapacity (or convinced choice) of legislators to pursue the ideal[77]. But this does not mean that we should not keep on criticizing "unfaithful" judges and officers and that we should give up, for example, prescribing the use of a more appropriate and rigorous legal language to different legislators[78].

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[76] This is the thesis stated by A. Marmor, cit. at 20, p. 8, according to whom it is not true that if «the sharper the knife, the better it cuts», then «the more a legal system instantiates the conditions of the rule of law, the better it functions in regulating human conduct». We can think, for instance, of the case of a not clear rule, depending on a political compromise, that is better than no rule at all. Indeed this compromise has permitted the promulgation of the norm which limits, at least partially, the discretion of the decision makers.

[77] T. Endicott, cit. at 25.

[78] M. Jori, La pragmatica di Claudio, http://server.fildir.unimi.it/Jori_home.html.

TOWARDS A REAL CONSTITUTIONAL DIALOGUE: THE NEED FOR AN "INFRASTRUCTURE" OF THE EUROPEAN CONSTITUTION

Andrea Simoncini*

Abstract

This article aims at defining the legal infrastructure for the European constitutional dialogue. The path of progressive "constitutionalization" of the European Union today faces a dilemma: how to reconcile the Union's constitutional "form" with its pluralistic "substance". 2004 Constitutional Treaty and European Charter of Fundamental Rights represented, respectively, either "failed" or "partial" solutions to the dilemma. This article claims that the future of European constitutionalism will depend on the ability to provide reliable and effective "legal" forms (not just political or social) to this constitutional dialogue. In its second part, the article analyses three main dialogic dimensions (judicial, political and societal) with corresponding legal instruments, assuming the European Union as a "3-D" constitutional space. The final remarks are about the meta-legal conditions that make this dialogue effectively happen, that is, factors able to transform the "potential" infrastructure of a European constitutional space into an "actual" one.

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1. The gap between "experience" and "vocabulary" in the European constitutional doctrine

If we consider the "legal experience"[1] as it derives from the process of European integration, it seems clear that it can be neither understood nor adequately expressed without using "constitutional" terms. As a matter of fact, the conventional origin of the European Treaty and the "international law" labeling of the Community legal system did not prevent its transformation[2] into a "constitutional order".

Since the 1960s, the European Court of Justice (ECJ) had identified in its case-law a certain number of principles of "constitutional nature" and since the 80s, the same Court, therefore, hadn't hesitate to explicitly define the Treaty of Rome as the Constitution of the Community[3]. But we have to complete this "self-definition" offered by the ECJ with a further observation that we may deduce from "actual" legal experience. Aside from theoretical dilemmas that lawyers may be puzzled about, there are no doubts that today the EU regulatory system is deeply affecting—in an even more compelling manner—the life of European citizens and public

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[1] We use here the concept of "esperienza giuridica" (legal experience) originally elaborated by the Italian legal philosopher Giuseppe Capograssi - G. Capograssi, Studi sull'esperienza giuridica (1932) - and developed as "experience of law" by P. Grossi, A History of European Law, xiii ss. (2010).

[2] J. H. H. Weiler, The Transformation of Europe, 100 (1991).

[3] ECJ C-294/83 Les Verts.

institutions (either nation-states or sub-national public authorities). In conclusion, we live in a legal order that—in the areas set by the Treaties – concretely ties and shapes the sovereignty of European nations and defines the freedom of European citizens.

The key point is that this transformation of European law not only affected the practical functioning of the legal and institutional framework, but also had a deep impact on the cultural and methodological attitude of legal scholars. European lawyers—and especially constitutional lawyers—were, on one hand, greatly "challenged" by the extent of innovations on the regulatory and institutional level, but, on the other hand, found themselves faced with the compelling need to discover new legal concepts and categories apt to express such novelty[4].

The main hermeneutical difficulty for European legal science stemmed from the evidence that the idea of constitutionalism implied by the process of European integration does not coincide with the constitutional "narrative" hitherto either known or consolidated. A. Miguel Maduro's[5] acute image effectively summarizes this interpretive gap: there is "an emerging trend", says the Portuguese professor, "to agree with the use of the language of constitutionalism in the European integration without agreeing on the concept of constitutionalism which is behind this language". Therefore, present-day European constitutional lawyers are almost in the same condition as those living during the new-constitutions-making period that began with the end of Second World War.

If we consider the five-year period between 1946-1951, we see, on the one hand, the birth of three new constitutions (France 1946, Italy 1948, and Germany 1949), which set the new model for many subsequent European constitutions, and on the other hand, during the same years, the signing of some international instruments that, especially in their evolution, would reveal their distinctive constitutional "nature": the Universal Declaration of Human Rights

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[4] See, A. Pizzorusso, Il patrimonio costituzionale europeo (2002).

[5] M. P. Maduro, The Double Constitutional Life of the Charter of Fundamental Rights of the European Union, in Hervey and Kenner (eds), Economic and social rights under the EU Charter of Fundamental Rights: a legal perspective (2003), 270.

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(1948), the European Convention on Human Rights and Fundamental Freedoms (1950) and the first "stone" of the European Union building: the Treaty establishing the European Coal and Steel community (1951). During that period—just as in our day—something radically new was emerging in the European continent that the well-known vocabulary of old liberal constitutions was not able to express completely and correctly.

This sort of "evolutionary jump"—and the consequent necessity of rethinking all the basic constitutional categories—is the most relevant contribution of the process of European integration to the very idea of the post-World War II constitutional state.

2. The European constitutional taboo

The point of departure for our reflections is, therefore, that the legal order created by the European Treaty system is indeed a constitutional order[6]. But even this initial assertion can not be considered obvious or taken for granted. As a matter of fact, until today there is no such legal act that could be called a "European Constitution", and the attempt to provide the EU system with a formal "Constitutional" Treaty, as we know, failed with the 2005 French and Dutch referenda. As a consequence of this failure, a new amending process of the Treaties was started: the so called "Lisbon Treaty" was signed by the EU member states on December 13, 2007, and entered into force on December 1, 2009.

This reforming process of the whole European Treaty system has been based on the sharp rejection of any explicit constitutional qualification of the new treaties. The mandate approved by the Intergovernmental Conference that had the duty of defining the overall objectives of the future Reform Treaty, was extremely clear:

"The constitutional concept, which consisted in repealing all existing Treaties and replacing them with a single text called "Constitution" is abandoned. (...) The TEU and the Treaty on the Functioning of the Union will not have a constitutional character. The terminology used throughout

[6] U. De Siervo, La difficile costituzionalizzazione europea e le scorciatoie illusorie, in De Siervo (ed), La difficile Costituzione europea, 112 (2010).

the Treaties will reflect this change: the term "constitution" will not be used (...)"[7].

Therefore, somehow paradoxically, the most recent phase of European unification begins from the explicit denial of the "constitutional character" of this step. If anything was clear to all European member states negotiating the Lisbon Treaty, it was the consensus on banishing the word "constitution" as well as the adjective "constitutional" from the text of the treaties[8]. Thus the "Constitution" issue seems at the moment to be a "taboo" within the European political debate.

But is this enough to exclude this "quality"? And if so, how dare we say, as in fact we did at the beginning of these notes, that the European legal system must be considered a constitutional order? The most reliable doctrine on the subject[9] showed that, although Europe was born as a classic international organization, "in 1963 and then continuing in the 70s and beyond, the Court of Justice set in a series of historic decisions, four principles that shaped the relationship between Community law and the law of the Member States, in such a way that it becomes indistinguishable from that of a federal constitution"[10].

a) The principle of direct effect

EU rules that are sufficiently clear, precise and self-executing must be obeyed by European citizens and can equally be invoked by those citizens before national courts without the need for implementing laws or enforcement orders[11].

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[7] Note from the General Secretariat of the Council to Delegations: IGC 2007 Mandate n. 11218/07 del 26.6.2007 POLGEN 74

[8] J. Ziller, Il trattato modificativo del 2007: sostanza salvata e forma cambiata del trattato costituzionale del 2004, 27 Quad. cost., 875 (2007).

[9] E. Stein, Lawyers, judges, and the making of a transnational constitution, 75 Am. J. Int'l L. (1981); J.H.H. Weiler, The Community system: the dual character of supranationalism, 1 Yearbook of European Law (1981).

[10] J.H.H. Weiler, In defence of the status quo: Europeís constitutional Sonderweg, in Weiler and Wind (eds), European constitutionalism beyond the state, 45 (2003).

[11] ECJ C-26/62 Van Gend and Loos; with this doctrine the European law definitely abandoned all the classical either International law or International organizations conceptual schemes; it affirms the idea of EU as a "supranational" organization, on all these aspects see B. Beutler, R. Bieber, J. Pipkorn, J. Streil and J.H.H. Weiler,

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b) The principle of supremacy

Within the scope of Community law, any rule deriving from European institutions (whether treaty provisions themselves or secondary legal sources provided by the treaty) trumps any conflicting national rule, regardless of whether it had been issued (before or after the EU law), regardless its nature (judicial, administrative or legislative) and regardless of its rank (either secondary, legal or constitutional)[12].

c) The doctrine of implied powers

The first two above-mentioned theories were developed with reference to powers expressly conferred by the Treaties to European institutions. But from a fundamental decision of 1971[13], the ECJ began to state that European institutions are not only entitled to explicitly enumerated powers, but also to those powers which may be implicitly considered proper and necessary to achieve a legitimate aim pursued by the Treaties.

d) The protection of fundamental rights.

The original Treaties did not prescribe the protection of fundamental rights. Through a sequence of major decisions starting in 1969[14], the ECJ ruled that it would ensure respect for fundamental rights by Community measures, using as criteria for judgment the constitutional traditions common to the Member States and international conventions on human rights to which they had subscribed.

It is evident that all these principles are judicial principles; i.e. they were not established by virtue of a political decision or through

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L'Unione Europea, 34 ss. (2001); B. Rosamond, Theories of European integration (2000), 14; J. De Areilza, Sovereignty Or Management?: The Dual Character of the EC's Supranationalism-Revisited, in http://www.jeanmonnetprogram.org/papers/95/9502ind.html (1995). See the criticism of T. Schilling, The Autonomy of the Community Legal Order: An Analysis of Possible Foundations, 37 Harv. Int'l. L. J. (1996).

[12] ECJ C-6/64 Costa v. Enel "The law stemming from the treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed".

[13] ECJ C-22/70 Commission v. Council.

[14] ECJ C-29/69 Stauder, C-4/74 Nold.

a formal treaty amendment. The ECJ was definitely one of the most important "driver" of the constitutional transformation of Europe. In a lot of cases, the political decision taken by the Member States and the corresponding amendment to the Treaty simply followed the ECJ case law.

Obviously you cannot say that all the present day "constitutional" features of the European integration are due to the European Court's activity, but still it is, doubtless, one of the key dynamic factor in the new "European" constitutionalism[15] and designates the main difference from the previous European constitutional experiences—at least, from the "continental" ones.

Classical European constitutionalism (on the mainland) has been developing around foundational political choices that have eventually found their prescriptive projection in legal documents named as "Charters" or "Constitutions". As a matter of fact, the two archetypes among the theoretical founders of contemporary European constitutionalism—Carl Schmitt and Hans Kelsen—respectively emphasized these two different reasons as the proprium of a Constitution: according to the former, the supreme political choice, and according to the latter, the basic rule of the legal system. The political vs. normative[16] nature of the constitution are actually the two crucial positions in European constitutional theory.

To use an enlightening image of Pizzorusso[17], attempting to unify these two diverging perspectives, "the legal superiority—in terms of hierarchical value—of the post World War II "rigid" constitutions, has always been understood as an expression of the "greater intensity of political will" that they express with regard to ordinary laws. The kind of "constitutionalism" developed and practically used by the ECJ, on the contrary, presents a different DNA, of judicial—and not legal-political—origin.

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[15] E. Mancini, The making of a constitution for Europe, 26 C. M. L. Rev. (1989).

[16] "Normative" in Kelsenian terms, not in the American legal-moral theory use of the term.

[17] A. Pizzorusso, Delle fonti del diritto, in Scialoja and Branca (eds), Commentario al codice civile, 11 (1977).

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This means that in the field of human rights' protection—to take a highly sensitive area—legal reasoning is fully centered on interpretation rather than on sources, on meaning rather than on validity: all the legal principles regarding rights, no matter which source they derive from (treaties, national constitutions, soft law, customs, etc), can equally be utilized by the Courts to enforce protection through their interpretation[18].

Therefore, these kinds of constitutional principles do not express, first of all, a quid pluris in political or legal terms; they are, first and foremost, logical principles developed in an interpretive way and justified on the basis of eminently "technical" reasons. The four above-mentioned doctrines are simply means for the realization of a higher "meta-principle": the effectiveness of the European legal system. The ECJ is institutionally (together with the Commission) the guardian of the practical functioning of the EU and at the same time the guarantor of the Treaty's compliance by parties (states, institutions and individuals).

So far, the four "constitutional" doctrines are nothing more than "instrumental" principles necessary to ensure the effective enforcement of the Community legal system as far as the legal systems of member states are concerned. In this sense, the constitutional character of the European Union, although not based on the politics or the law (the typical values of a continental European constitutional tradition), is connected to another—still European—constitutional tradition, characterized by the absence of the constitution as a legal document, and by the presence of a judge-made law: the British constitution.

The comparison of the de facto European constitutional framework with the constitutional character of the United Kingdom

[18] Clearly reaches this conclusion, for example, A. Ruggeri, Corte costituzionale e Corti europee: il modello, le esperienze, le prospettive, in www.associazionedeicostituzionalisti.it/dottrina/...costituzionale/Ruggeri.pdf (2010) or O. Pollicino and V. Sciarabba, La Corte europea dei diritti dell'uomo e la Corte di giustizia nella prospettiva della giustizia costituzionale, in http://www.forumcostituzionale.it/site/images/stories/pdf/documenti_forum/paper/0206_pollicino_sciarabba.pdf (2010).

is, therefore, undoubtedly right[19]. The present-day European Union is one of the most meaningful examples of constitutional "hybridization" between British and continental European legal traditions and, in my perception, the new European Constitutional state is rising exactly at the confluence of these two legal traditions.

3. The European constitutional dilemma

The paradox of the birth of the new European constitutional State brings about a dilemma[20]. As we have seen, there are no doubts about the fact that the practical legal experience of the EU has a constitutional structure, even in the absence of an explicit qualification in the Treaties. And a great part of this result, we repeat, is due to the work of the ECJ; political institutions (Parliament, Council and Commission) have almost always followed the judicial path, simply "rubber stamping" the achievements of European Judges and consequently amending the Treaties[21].

The question is that this constitutional transformation occurred in the lack of any explicit provision in the European treaties. This absence represents both the strength and the weakness of the current constitutional structure of Europe, hence its dilemmatic nature.

As a matter of fact, on one hand, the existence of a judge-made "substantial" constitution is the only legal framework fitting and respecting the originality of European institutional experiment. "Europe will not be made at once and will not be made all together," Robert Schuman prophetically wrote in his historic declaration of 1950, and only an "incremental" constitution - such as a judiciary-led one - can

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[19] J.H.H. Weiler, The Constitution of Europe: "Do the new clothes have an emperor?" and Other Essays on European Integration (1999).

[20] For the idea of the "constitutional dilemma" see F. Sucameli, L'Europa e il dilemma della costituzione. Norme, strategie e crisi del processo di integrazione (2007).

[21] A clear example is the text of art. 6.3 TFEU – as amended by the Lisbon Treaty - which is the literal "transcription" the ECJ's doctrine on the rights' protection ("Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law")

provide a sound structure to this "step-by-step" approach to European process.

On the other hand, in this way, the whole dynamic of the EU Constitution is concentrated in the hands of the Court of Justice, which today, paradoxically, has no limitations to its "constitution-making" power; and this contradiction deeply challenges the very essence of European post world-war-II constitutionalism, born exactly to provide the "rule of law" principle of an effective protection against all kind of public powers (Courts included).

Let us take the field of human rights protection. The "genetic mutation" of the ECJ, transformed from a Treaty Court to a Rights Court (or from an international court to a constitutional court), is doubtless a big step toward more effective human rights protection as far as the acts of European Institutions are concerned[22]. But the same evolution of European jurisprudence raises many delicate problems as it goes up to review internal acts of the member states [23]. We do not intend here to go into details, but it suffices to recall some decisions which have aroused harsh controversies, such as the case Richards[24] or KB[25], the Tanjia Kreil[26] or the Tadao Maruko[27] case.

In all these cases, the ECJ scrutinized internal acts of the member states, and to the extent that these measures are direct implementation of European law obligations, nulla quaestio.

The questions arise when, through these rulings, the Court substantially (even if not formally) targets matters—like the civil status regime or the constitutional regulation of military service—that are clearly outside the reach of EU law. And there are no doubts about the fact that, for a last instance Court, such as the ECJ, the limitation of the "EU competences" is a very weak perimeter, given the large interpretive flexibility in the interpretation of those competences. Thus it is quite easy for the ECJ to demonstrate that a certain area, even if outside of the formal scope of EU Law as

[22] P.P. Craig and G. De Bùrca, EU law: text, cases, and materials, 381 (2008).
[23] Ibid., 396.
[24] ECJ C-423/04, Richards.
[25] ECJ C- 117/01, K.B.
[26] ECJ C-285/98, Tanja Kreil.
[27] ECJ C-267/06, Tadao Maruko.

delimited by the Treaties, has a "substantial impact on the EU competences".

In all these fields, the jurisprudence of the ECJ hits a rather awkward area, and the risk of clashes especially when issues are "constitutionally sensitive" is extremely high. The reaction to this ECJ judicial activism has been impressive.

In political terms, on one hand, the United Kingdom and Poland asked for (and obtained) an additional protocol to the Lisbon Treaty, according to which the European Charter of Fundamental Rights does not apply in their boundaries[28]. On the other hand, Ireland, after its initial rejection of the Lisbon reform Treaty, in order to turn its "no" into a "yes", equally obtained a number of guarantees stating that a relevant part of the European Charter (family law, education and religious issues) will not be enforceable on the Irish territory[29].

In judicial terms, an even more serious reaction is represented by the well-known decision of June 2009 of the German Bundesverfassungsgericht[30]; a reaction that patently shows how the process of European integration, when it reaches the constitutional level, cannot be conceived as a sort of permanent constitution-making power, but must find an effective and transparent connection with the different constitutional identities of the member states.

These three different "reactions" (the UK and Poland "opting out" Protocol, the Irish Guarantees and the German Supreme Court decision) are clearly not equal in terms of either political or legal effects; but, nevertheless, they all express a very problematic step (if not a pure "step-back") on the road to the European integration.

As a matter of fact, the reason for—and, at the same time, the peculiarity of—the European constitutional integration, lies properly in its "pluralistic" structure that we have so far argued. It is what

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[28] See the Protocol (N° 30) on the application of the charter of fundamental rights of the European Union to Poland and to United Kingdom.

[29] See the Annex 1 to the Conclusions of the European Council of June 18th and 19th, 2009, "Guarantees offered to Ireland by the other Member States in respect of the Lisbon Treaty"; http://ec.europa.eu/ireland/lisbon_treaty/lisbon_treaty_progress/index_en.ht

[30] BVerfG, 2 BvE 2/08 vom 30.6.2009.

Joseph Weiler named the principle of "constitutional tolerance", or what you might call "constitutional pluralism". In any case, it is openly demonstrated that "the value of European constitutionalism is precisely in its pluralistic form and the openness to dialogue that it establishes with the national constitutions" [31]. The European Constitution is therefore based on a plural structure of constitutional identities.

Thus we can summarize our argument as follows: the future of European constitutionalism will depend on the ability to provide reliable and effective "legal" forms (not just political) to this constitutional dialogue. We cannot see another possible way to resolve the constitutional dilemma. But before we continue to prove this hypothesis, we need to examine how, until now, the EU institutions have attempted to address and solve this dilemma.

4. Solutions to the dilemma

4.1 The failed "first best" solution: the Treaty establishing a Constitution for Europe

We have already seen that the Constitutional Treaty of Rome of 2004 seemed to the Member States the most immediate and – apparently – safe road to entangle again the "material" constitution of the European Union with the "formal" one: that is, approving a new Treaty and explicitly naming it "constitutional". During the negotiation and immediately after the formal adoption of the Constitutional Treaty, many scholars had raised numerous doubts about the real nature of such an Agreement[32]. But to dispel all doubts and to put a final word on the academic debates, the referendum by France and Holland rejected the new Treaty.

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[31] M. P. Maduro, How Constitutional Can the European Union Be? The Tension between Intergovernamentalism and Constitutionalism in the European Union, in Weiler and Eisgruber (eds), Altneuland: The EU Constitution in a Contextual Perspective, Jean Monnet Working Paper 5/04, www.jeanmonnetprogram.org/papers/04/040501.html, 39 (2004).

[32] For all, see O. Pfersmann, The new revision of the old constitution, in Weiler and Eisgruber (eds), Ibid.http://www.jeanmonnetprogram.org/papers/04/040501-10.html (2005).

4.2 The "second best" solution: the European Charter of Fundamental Rights

Once the "first-best" solution became unworkable, we turned out to a "second-best" choice. To minimize the risk of a limitless and boundless expansion of the ECJ's jurisprudence we decided to approve a specific European Charter of Fundamental Rights (ECFR). The Charter, as we know, is the outcome of a very special process, unprecedented in the history of the European Union. It was signed and proclaimed by the President of the European Parliament, Council and Commission, on behalf of their institutions on December 7, 2000 in Nice, and immediately triggered a harsh debate about the legal value of such a document[33]. Today these doubts have been hopefully removed by article 6 of the Lisbon Treaty, which establishes that "The Charter (...) shall have the same legal value as the Treaties"; the Charter has not been incorporated in the Treaties, according to the rejection of any possible constitutional qualification agreed during the 2007 IGC, but is equaled as legal force.

Returning, then, to our question: may the Charter be considered an effective tool to define the action of the ECJ and of the European Institutions, at least in the narrow but problematic field of fundamental rights? To avoid misunderstandings: I am not undermining the usefulness of the Charter itself, which like other international documents or acts aiming to improve the protection of fundamental rights, can only be positively welcomed. My question is more specifically related to the problem I am trying to tackle. Can the Charter be considered a good solution to the above defined European constitutional dilemma? In other words, may it be considered an effective way to secure both the positive acquisitions of the present de facto constitution and a new clear delimitation of the connection between the supranational constitutional structure and the national constitutional identities? I have some doubts that this can happen easily, for three reasons I would like to explain very briefly.

Firstly, as already mentioned, a somehow "de-regulated" expansion of the ECJ's role has created a strong political "suspicion"

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[33] A. von Bogdandy, The European Union as a Human Rights Organization? Human Rights and the Core of the European Unioní, 37 C. M. L. Rev., 37 (2000).

against the Charter. The most remarkable effect of this attitude was—as we know—the approval by all Member States of Protocol n.30 annexed to the Treaty of Lisbon "on the application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom" in which, surprisingly—given the purpose and nature of the Charter—it is stated that "the Charter does not extend the ability of the Court of Justice of the European Union or any other tribunal of Poland or the United Kingdom to find that the laws, regulations or administrative provisions, administrative practices or action of Poland or the United Kingdom are inconsistent with the rights, freedoms and principles that it reaffirms".

In the essence, the Charter has the same legal force as the Treaties and will be applied throughout Europe, but with two considerable exceptions—especially as matter of principle—UK and Poland.

And in addition to this Protocol, we have also the Guarantees annexed to the final adoption of the Lisbon Treaty, which Ireland required in order to approve it (after its initial rejection)[34]. For the Irish, "nothing in the Treaty of Lisbon attributing legal status to the Charter of Fundamental Rights of the European Union, or in the provisions of that Treaty in the area of Freedom, Security and Justice affects in any way the scope and applicability of the protection of the right to life in Article 40.3.1, 40.3.2 and 40.3.3, the protection of the family in Article 41 and the protection of the rights in respect of education in Articles 42 and 44.2.4 and 44.2.5 provided by the Constitution of Ireland".

The situation is consequently paradoxical: the Charter is fully recognized in all but three European countries, UK, Poland, and Ireland (with different degrees of non-application).

This state of affairs will have at least two major impacts.

Firstly, we are going to create a sort of "two-speed" Europe—and this is definitely not a novelty in the history of European

[34] See the Annex 1 to the Conclusions of the European Council of June 18th and 19th, 2009, "Guarantees offered to Ireland by the other Member States in respect of the Lisbon Treaty"; http://ec.europa.eu/ireland/lisbon_treaty/lisbon_treaty_progress/index_en.htm

integration[35]—but the bad news is that we are introducing this "double standard" with regard to fundamental rights and not monetary or foreign policy. Secondly, it's to be expected that the previous judicial doctrine of the ECJ on fundamental rights will find an extremely weak formal obstacle in these Protocols or Annexed Guarantees[36]. As we mentioned, the ECJ started to enforce the protection of fundamental rights in the absence of an express provision of the treaties, on the basis of the common constitutional traditions of the Member states and on the ground of the ECHR. It is thus very likely that it will keep on recognizing them even in spite of an express prohibition, considering also that all states that opted out are still parties within the ECHR Convention. We could barely imagine a mere "moral" influence.

There is also a more general reason to doubt that the ECFR can be considered an effective means of bordering the ECJ's reach—a reason that Marta Cartabia recently highlighted[37]. She demonstrated how the idea of a "Charter"—a written document with regulatory nature and designed to restrict judicial action—suffers from an illusion typical of the civil law tradition. In fact, when you give the judge a text to apply—inevitably drafted by broad and general phraseology as required by the same purpose of a fundamental Charter—even if he or she is expressly obliged to the most literal application, you end up with a further expansion of his or her sphere of action. These conclusions are the final outcome of a research conducted on the ECJ case-law before the entry into force of the Lisbon Treaty, so following the "mere proclamation" of the Charter of Nice. It is easy to predict, therefore, that art. 6 of the Lisbon Treaty will further strengthen those "legitimizing" and "hermeneutical" effects that the author attributes to the Charter in relation to the activity of the Court of Luxembourg.

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[35] Think about the application of the Euro as a common currency or to the "enhanced cooperation" provisions.

[36] M. Dougan, The Treaty of Lisbon 2007: Winning minds, not hearts, 45 C. M. L. Rev., 667 (2008).

[37] M. Cartabia, Europe and Rights: Taking Dialogue Seriously, 5 Eu. Const. L. Rev., 5 (2009).

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Finally, there is a last reason why it is difficult to think about the Charter as the actual solution of the "dilemma" and depends on the very aim to which it was drafted. Symptomatic of this scope is the description offered in the official website of the European Union: "The Charter of Fundamental Rights sets out in a single text, for the first time in the European Union's history, the whole range of civil, political, economic and social rights of European citizens and all persons resident in the EU"[38]. From this description emerges a claim to completeness, comprehensiveness, and exclusivity that openly clashes with the proprium of the European constitutional structure that we identify in its pluralism. The idea behind it is that "for the first time in history the Union", we succeeded in writing into a single text[39] the whole complex and multicultural heritage of "civil, political, economic and social rights" enjoyed by European citizens and by all those who are in any capacity within Member States.

Once again we run the risk of misunderstanding the deep meaning of the constitutional evolution that has led the process of European integration to the present day situation: an incessant and continuous relationship between different constitutional stories and narratives—a constitutional dialogue, not a monologue. Hence the undoubted utility of the Charter to "record" some of the results obtained in this dialogue and set the "cornerstones" in this reciprocal relationship, but without the pretension of completeness and exclusivity. Otherwise the benefits of the Charter in terms of law's certainty are outbalanced by the huge costs in terms of constitutional diversity.

We must not forget that rights—especially fundamental ones—are primarily expressions of values and ideals rooted in different and plural stories that are the constitutive texture of today's Europe[40], whose motto is "united in diversity". Rights express a very specific mindset and today it is not possible—even extremely dangerous—to establish a common (or even dominant) European anthropology. Just think about the "personalistic" and anthropologically relational

[38] http://www.europarl.europa.eu/charter/default_it.htm
[39] See C. Pinelli, Il momento della scrittura (2002).
[40] See A. Pizzorusso, Il patrimonio costituzionale…, cit. at 4.

foundation of a constitution such as the Italian and the more markedly individualistic matrix of the French constitutional tradition or the British one; or think about the different assessments of the religious factor in constitutions such as the Greek, the Dutch or the Irish ones.

We cannot reasonably think about a uniform codification of these traditions without providing a "dialoguing" regulatory and institutional structure, that is, one able to keep the unification process in motion, recognizing its historical and dynamic nature as a "process" oriented to a common purpose and not as an "act" that is defined and conclusive.

5. Coordinates for a "substantial" solution: actors and instruments for a European constitutional dialogue

We have seen that all the solutions so far suggested—the "first-best" Constitutional Treaty and the "second-best" Charter of Fundamental Rights—have failed or may not be fully adequate to the purpose. As a matter of fact, if the dilemma we are facing is, once again, how to preserve at the same time either the existing de facto constitutional structure or the pluralistic nature of this structure, the only effective solution is to establish and keep open a real dialogue between the actors of the European constitutional system[41].

We should, however, be clear on this point: our point of view is legal, not political nor sociological[42]. Therefore, when we speak about dialogue, we intend to deal with the existence of legal instruments (rules, institutions and procedures) to carry out an effective constitutional dialogue. We are fully aware that present-day Europe is characterized by a dense web of relationships among political actors, and it is equally clear that we can study the

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[41] Here I propose to extend the «dialogic» paradigm, typically used in the relationships among judicial actors, to all the key players in the European constitutional space [for a comprehensive proposal of considering the «judicial dialogue» as «the conceptual model for the ECJ's legitimacy in adjudicating fundamental rights» see A. Torres Pérez, Conflicts of Rights in the European Union, 5 (2009)].

[42] F. Snyder, New directions in European community law (1990).

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constitutive links binding the different cultural and political constituencies in Europe. Sociologists and political scientists can properly analyze the degree, intensity, and effects of such relationships, but the main concern of this paper is to investigate how and to what extent these political, social, and cultural networks developed (or did not develop) legal means of communication and, in particular, those of a "constitutional" nature.

5.1 Actors in the European constitutional "space"

In order to answer this question, we should start by identifying the actors in the dialogue.

The first crucial point is that in a real constitutional dialogue, the main actors cannot be only courts. We are not talking about a conversation that takes place only in the courtrooms. As previously said, no one can reasonably doubt the role played in the European constitutional integration by the ECJ, on the one hand, and by the national constitutional courts with all the lower courts, on the other. But it is also patent that today the "constitutional conversation", as it was defined[43], runs the risk to be in many cases either a "monologue" or, more precisely, a dialogue among "deaf people"[44]. The reason is that, in this fluctuating relationship between the courts, we are completely missing certain other crucial players in a plural multi-vocal integration process: the national parliaments.

One of the central arguments developed in the famous already mentioned "Lisbon Case" of the German Constitutional Court is focused exactly on this point: the more you increase the constitutional level of integration among European states, the more you should enhance the degree of participation of the national expression of the democratic principle.

Obviously, in this dialogue, the interlocutors of national parliaments are, first and foremost, the "political-regulatory"

[43] M. Cartabia, Europe and Rights…, cit. at 37, 23.

[44] B. De Witte, The Closest Thing to a Constitutional Conversation in Europe: The Semi-Permanent Treaty Revision Process, in Paul Beaumont, Carole Lyons and Walker (eds), Convergence and divergence in European Public law, 39 (2002).

institutions: the Council, the Commission, and the Parliament. Indeed, in the European constitutional regimes, the power that is mainly responsible for the concrete life of the Constitution (that is, of its application and enforcement) is not the constituent power (pouvoir constituant), which is by its nature episodic and exceptional. Rather, the day-by-day implementers of constitutional principles in public life are the parliaments and the governments, i.e., the organs entitled with the executive and the legislative powers. Obviously, the other primary guarantors are the Constitutional Courts, in charge of constitutional review of legislation and of public powers; but always with the function o3Df "external limitation" rather than of "stimulus".

Therefore, dialogue ought to happen not only among judiciary institutions, but also among political institutions.

But, stepping on the same lines, we can also ask ourselves whether, within the new European constitutional state today, we could confine the dialogue only to the two "classical" political law-making institutions without considering other fundamental stakeholders such as the so-called "civil society". A distinctive aspect of the most recent development in European constitutional history is the growing crisis of the representative bodies (parliaments) because of the corresponding crisis of the political parties—traditionally the constitutive elements of the parliamentary system. This crisis is increasingly emphasizing the representative role, as key factors of democratic quality[45], of new (or old) social organizations different from parties; think, for example, about the non-profit sector or the so called "social partners"[46].

Thus, the "extended" map of constitutional actors has three different "dimensions" (judicial, political and societal) and this gives the European constitution – to use a geometric image - a 3D "spatial" projection.

So, Europe in constitutional terms, is not a line nor a plane, it is a "space"; and European "constitutional space" includes, firstly, the Courts (whether Constitutional or not), secondly, the other political institutions, (such as legislatures and executives or similar bodies)

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[45] L. Diamond and L. Morlino (eds), Assessing the quality of democracy (2005).

[46] See Art. 152 TFEU.

and, finally, the civil society institutions, to borrow an interesting sociological formula[47].

The constant interaction among these different actors (we call it "dialogue"[48]) is the "engine" that produces a constitutional result.

5.2 Legal instruments

Are there, within the European treaties system, any legal instruments (rules, institutions or procedures) that allow this kind of effective dialogue at the constitutional level? In order to individuate these instruments, we will deal with the two main characters defining a dialogue: the procedural character (according to which communication happens through the power given to different actors to take part in the same procedure) and the institutional character (according to which communication happens through the power given to different actors to take part in the same decision-making body).

Obviously, our goal in this paper is simply to make a list of possible means of communication—"legal" conversation channels—through which dialogue can take place. Another issue, much more relevant but exceeding the aim of these notes, will be whether and to what extent these instruments have been actually used and, furthermore, if they have actually brought forth a real dialogue. In addition, it must be noted that the European Treaties established two Union advisory 3. Dialo –the Economic and Social Committee and the Committee of Regions – specifically dedicated to both procedural and institutional dialogue. We will consider these bodies as parts of the EU institutions

a) Dialogue among Courts

Given that we may have several "forms and patterns of judicial dialogue"[49], I would focus on three main legal instruments

[47] M. Magatti, Il potere istituente della società civile (2005).

[48] Following the definition of A.T. Pérez, Conflicts of rights…, cit. at 41 6 dialogue is an «argumentative communication based on the exchange of reasons (…) the most consistent form of interaction within a pluralist framework".

[49] See A. Rosas, The European Court of Justice in Context: Forms and Patterns of Judicial Dialogue, 1 Eu. J. L. S., 6 (2007).

that could play a key role in developing an effective constitutional "infrastructure".

a.1) The "procedural" instrument: "preliminary ruling"

The first and probably the most widely used instrument of dialogue between national courts and the ECJ is the preliminary ruling: a formal procedure provided by the Article 267 of the new TFEU. This procedure is one of the most significant factors in the success of the European system since it makes all national courts in some way tutors of the correct interpretation and application of Community law[50]. The main question, from our perspective, is when and how constitutional courts of member states use this instrument.

We are not saying that the preliminary ruling asked by lower courts has not, in its overall effects, a constitutional value, or does not substantially contribute to the general European dialogue. The point we would like to focus on is more specific: do constitutional courts (meaning, broadly, the courts or similar bodies responsible for the national observance of constitutional law) actually use this tool? And, secondly, has it produced a real constitutional dialogue?

As a matter of fact, until today the number of constitutional courts that have agreed to talk with the ECJ through the instrument provided by the art. 234 of the Treaty is still very low (especially if compared to lower Courts referrals)[51]. Among them are the British House of Lords, the Belgian Court of Arbitration, the Austrian, the Polish and the Lithuanian Constitutional Courts. Last on this list, but not least, is the Italian Constitutional Court with its Order No. 103 of 2008.

Therefore, remaining on purely quantitative grounds, the "preliminary ruling" instrument is certainly one possible means of communication between the national constitutional courts and the ECJ, even if the current state of affairs shows a very episodic and not widely-diffused application.

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[50] Bibliography on preliminary ruling M. Claes, The National Courts' Mandate in the European Constitution (2006).

[51] See A.T. Pérez, Conflicts of rights…, cit. at 41, 136 (note 181).

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a.2) "Interpretive" instruments: the "deference" and "margin of appreciation" doctrine

But besides the formal procedures, probably the most important area of judicial dialogue can be found within the judicial reasoning of the supranational Courts, when they decide to involve in their decisions State constitutional courts (or other State authorities).

A clear example of this interpretive method is the so called "margin of appreciation" doctrine[52]. As we know, this doctrine, originally developed within international law jurisprudence and widely applied by the ECtHR case-law, spilled over the rulings of the ECJ[53] in a way that, as noted by Aida Pérez, the margin of appreciation doctrine "may contain some lessons applicable to the interaction between ECJ and courts" [54].

As a matter of fact, in the Luxembourg Court jurisprudence, we may find some landmark decisions in which the Court expressly states 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"[55].

So doing the ECJ gives relevance in its reasoning to a national constitutional value (in the case, the protection of minors) to counterbalance a fundamental European constitutional principle (free circulation of goods), giving preference to the former.

But we have, indeed, to tune up our understanding of these doctrines. As a matter of fact, either the "margin of appreciation" or "deference"[56] could be interpreted in two different ways.

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[52] H.C. Yourow, The margin of appreciation doctrine in the dynamics of European human rights jurisprudence (1996).

[53] Y. Shany, Toward a General Margin of Appreciation Doctrine in International Law?, 16 Eu. J. Int'l L., 907-940 (2005); for the ECJ's jurisprudence see, among the others, Case C-83/94 Germany v Leifer, Case C-273/97, Sirdar.; see also the case-law analyzed in P. G. Carozza, Subsidiarity as a structural principle of international human rights law, 97 Am. J. Int'l L., 55 (2003).

[54] A.T. Pérez, Conflicts of rights…, cit. at 41, 30.

[55] ECJ C-36/02 Omega; on the same perspective see also, C-112/00 Schmidberger or C-244/06 Dynamic Mediens.

[56] A.T. Perèz, cit. at 41, 172.

On the one hand, it could be understood in a "rule vs. exception" fashion: so far, granting a State a certain margin of appreciation (or of discretion) as far as a European law principle or rule is concerned means that the same State can—under special conditions— "derogate" the rule (or principle), and this exception does not inactivate the rule but, while excepting, it somehow confirms the rule. This way of considering the margin of appreciation (closer to the "classical" international law doctrine) is "mono-directional" and creates, actually, a "double standard" constitutional system[57]: in one (most valuable) area the international Court fully applies the general principle (or the rule), and in the other, the degree of protection of the constitutional value is lowered (but sooner or later the rule will be applied also in the "exceptional" area).

Another way of understanding the "margin of appreciation" or the "deference" doctrine (closer to the European law tradition) is to consider that margin as the preferential area of constitutional dialogue. In this different perspective, as P.G. Carozza pointed out[58], the relation between the Courts (or between the European courts and the Member States) is not definable in a "rule vs. exception" mode, but more appropriately on a "subsidiarity principle" ground.

The European legal system recognizes different constitutional levels—different but integrated—that require to enforce the maximum extent possible of legal protection to fundamental rights[59], taking into account that each right has to be balanced with other constitutional rights according to the different national constitutional contexts.

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[57] For those reasons, a lot of scholars argue that the "Margin of Appreciation" doctrine "to a large extent compromise the universal aspiration" of international or supranational norms, see, for example, E. Benvenisti, Margin of Appreciation, Consensus, and Universal Standards, 31 NYUJ Int'l L. & Pol. (1998).

[58] Carozza maintains that the respect showed by the ECJ for the "margin of discretion" of the Member states in the field of Human Rights protection, is a clear evidence of the underlying "subsidiarity principle at work": P.G. Carozza, Subsidiarity as a Structural Principle of International Law…, cit. at 53.

[59] On the issue of constitutional principles as "optimization requirements" see R. Alexy, A theory of constitutional rights (2002).

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As recently pointed out in some Italian Constitutional Court decisions[60], it is exactly this type of balancing that could be better carried out by national courts (and parliaments) than by supranational courts when member States' internal acts and interplaying national constitutional rights are concerned.

The supranational courts (both ECtHR and ECJ) are surely better equipped for interpreting/enforcing the international/supranational constitutional tradition, but national constitutional courts (or similar) are reasonably the most reliable interpreters of the national constitutional tradition.

In this sense, the European constitutional ideal-type is not Federal (or quasi-Federal) but a Multidimensional Constitutional system committed to safeguard, on one hand, the "common constitutional traditions"[61] and, on the other, the European "constitutional diversity".

a.3) An "institutional" instrument: The Declaration on the dialogue between the ECJ and the European Court of Human Rights (ECtHR).

Another interesting example of dialogue—even if less emphasized than the previous two—is described in a Declaration annexed to the Lisbon Treaty[62]. The Declaration states that "The Conference agrees that the Union's accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms should be arranged as appropriate to preserve the specific features of Union law. In this regard, the Conference notes the existence of a regular dialogue between the Court of Justice of the European Union and the European Court of Human Rights, and this dialogue could be reinforced when the Union accedes to that Convention".

It is quite remarkable that while the European institutions and the member states are formally deciding—through the new art. 6 of the TEU—to allow the accession of the EU to the ECHR, and therefore, to accept the jurisdiction of the Strasbourg Court, they rise the question of how to preserve the "specific features" of Union law.

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[60] Ita Corte Cost. nn. 311 e 317/2009.

[61] That, I repeat, is not a static catalogue or a fixed Charter, but is a living and variable "space", susceptible of increasing or decreasing according to the results of the dialogue.

[62] N° A) 2, Declaration on Article 6(2) of the Treaty on European Union.

It is easy to predict that this new formal step in the EU-ECHR relationships will ignite a big dispute about the power of the "last word" between the two European constitutional Courts. This declaration annexed to the Treaty, whatever its formal value, is an explicit political recognition of the plural nature of the European constitutional structure that we have repeatedly invoked as far as the relations between European and National constitutions are concerned. When the EU itself becomes part of a broader constitutional order, it requires that the two "sovereign" courts of the two legal orders have a "regular dialogue". The existence of viable means of communication allowing a regular dialogue between the European constitutional courts is therefore a fundamental "network infrastructure" — borrowing this expression from communication sciences — of the new supranational constitutionalism.

If we would push beyond our thoughts turning to de jure condendo proposals, what this Declaration requires between the ECJ and the ECHR seems exactly what is necessary in the relations between national constitutional courts and the ECJ: some legally structured and formalized communications channels.

b) Dialogue among political institutions: the Protocols n. 1 and 2 (the role of national parliaments and of the principles of subsidiarity and proportionality)

As we said, the European constitutional game is not only played by courts but also — above all — by those non-judiciary institutions entitled to political and regulatory powers: European institutions (Council, Parliament and Commission) on the one hand, and national parliaments on the other.

To address the quest for a regular dialogue among these players, the new Lisbon Treaty supplied two annexed Protocols (on the role of national parliaments and the principles of subsidiarity and proportionality) with the scope of setting formalized channels of communication among different actors, firstly, to expand the role and participation of national parliaments in EU decisions and, secondly, to ensure in advance (given the difficulty of the ex post judicial review) a real implementation of the principles of subsidiarity and proportionality.

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We do not intend here to analytically examine the history of these protocols, both already annexed to the Constitutional Treaty of 2004 and revised with "significant improvements"[63] in the new text. We simply observe that they both aim to create a fixed procedural framework - primarily of informative nature - through which national parliaments can be more effectively involved in either general EU decision-making procedures or, more specifically, in decisions in which subsidiarity checks are to be performed.

What is important for our purposes is to emphasize that both protocols achieve this involvement, mainly, by entitling national Parliaments to a "right of direct information from the EU institutions"[64] and obliging the same institutions to express and communicate the reasons for the proposed acts; i.e., the grounds on which decisions are intended to be taken at the EU level, enabling in this way the institutions representing member states to "reply" and propose amendments included the so called "zero option", meaning that parliaments can obtain—under certain conditions—either the blocking of the decision[65] or the activation of a judicial review of the act from the ECJ[66].

In Protocol 1 we also have an embryonic attempt of "institutional" dialogue – and not simply procedural – where, in the Title II devoted to "inter-parliamentary cooperation", it's clearly affirmed that "the European Parliament and national Parliaments shall together determine the organization and promotion of effective and regular inter-parliamentary cooperation within the Union", and "a conference of Parliamentary Committees for Union Affairs may submit any contribution it deems appropriate for the attention of the European Parliament, Council and Commission. That conference

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[63] "Significant improvement can be found in the Protocol n.2 (…) National Parliaments, widely seen as the "loser" of Europeanization, become actors with a legal position laid down in primary law" J. Bast and A. von Bogdandy, The Federal Order of Competences, in Bast and von Bogdandy (eds), Principles of european constitutional law, 303 (2008).

[64] So, a direct way of dialogue, not channeled through the national governments; see Piris J., The Constitution for Europe, CUP, 116 (2006).

[65] Art. 7 With the so-called "yellow card" and "red card" system, see Piris J., ibidem.

[66] Art. 8 Protocol n. 2; see Piris J., ibidem.

shall, in addition, promote the exchange of information and best practice between national parliaments and the European Parliament, including their special committees", so keeping the formal recognition to the COSAC[67].

We are fully aware that today the degree of constitutional dialogue performed by national European parliaments and European political institutions is still in its infancy. This is partially due to the still existing lack of a real European public opinion able to generate a real European political debate and also due to the increasing weakness of the legislature in front of the growing role of the executive. But, as pointed out by some empirical studies, the creation or implementation of formal procedures involving member States' legislatures in European decisions may represent in some cases the way through which the same legislatures regain a central role (or, at least, a less peripheral one) in their respective institutional systems and internal political debates[68]. Most of recent analyses on this issue show, anyhow, that national parliaments are improving their constitutional, legal and statutory instruments in order to make Lisbon Treaty innovations in decision-making mechanisms effective and the number of subsidiarity checks is – even if slowly - increasing[69].

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[67] Artt. 9 and 10 of the Protocol n.2., The history of the cooperation between national parliaments started in the 80s' through the inter-parliamentary "Conference of Community and European Affairs Committees" (called COSAC). The Amsterdam Treaty (1997) introducing the Protocol on the role of national parliaments gave formal recognition to the Conference. See COSAC, Thirteenth Bi-annual Report: Developments in European Union Procedures and Practices Relevant to Parliamentary Scrutiny, May 2010.

[68] See, for the Italian case, M. Armanno, Gli strumenti di garanzia democratica dell'ordinamento italiano nel processo di integrazione comunitaria, in Cartabia and Simoncini (eds), La sostenibilità della democrazia nel XXI secolo, 223 (2009).

[69] See Joint CEPS, EGMONT and EPC Study, The Treaty of Lisbon: A Second Look at the Institutional Innovations, September 2010, 107 ss.; COSAC, Thirteenth Bi-annual Report…, cit.; P. Kiiver, The Treaty of Lisbon, the National Parliaments and the Principle of Subsidiarity, in http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1417242; R. Passos, Recent developments concerning the role of national parliaments in the European Union, in ERA Forum, 9:25–40 (2008).

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c) The dialogue with civil society: associations, churches, philosophical and non-denominational associations

In conclusion, we also want to mention two articles of the Lisbon Treaty (already present in the Constitutional Treaty) that aim to build channels of dialogue with the outer social environment. We refer to Art. 11 TEU and 17 TFEU in which European "institutions shall, by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action". The underlying principle is that "the institutions shall maintain an open, transparent, and regular dialogue with representative associations and civil society." The same goes for churches, associations, or communities of religious (and equally for philosophical and non-confessional) denominations. Even with these social formations –to use the wording of the Italian Constitution—"the Union shall maintain an open, transparent and regular dialogue". Obviously, here we are dealing with nothing more than a sort of embryonic structure, but the principle stated is relevant[70].

6. Conclusions. The potential vs. actual infrastructure of the European constitutional space and its meta-legal conditions

This dialogue, defined by the treaties as open, transparent, or regular, is, in short, the infrastructure of a "pluralistic" and "tolerant" constitutionalism.

Of course, the conclusions reached in the second part of this paper are only potential; in other words, we are here affirming that today all the key constitutional actors (Courts, Parliaments, European institutions, civil society), especially after the entry into force of the Treaty of Lisbon, do have tools to communicate and to play out their different constitutional identities.

This is a critical point of our thesis.

The very fact that the Lisbon Treaty provides channels for "3-D" constitutional relations (judicial, political and societal)

[70] For some reflections on the implications of these two articles see F. Margiotta Broglio, Confessioni e comunità religiose o "filosofiche" nel Trattato di Lisbona, in corso di pubblicazione su Rivista di Studi sullo Stato, disponibile in www.unifi.it/rivsts/dossier/lisbona/Margiotta.pdf.

demonstrates that there is a potential infrastructure for a "constitutional dialogue", having the above-mentioned characters.

On a theoretical ground this is a non-obvious conclusion; as a matter of fact, we reject the idea that the judicial dialogue could be considered neither the sole nor the main constitutional dimension of European integration. We want to point out – as far as constitutional theory is concerned – that either the political or the societal dimension, shares the same constitutional value as the judicial.

Under this aspect, this conclusion might be considered as a part of a broader doctrinal approach that considers the European system as the result of a complex relation between legal structure and political process[71]; our specific contribution is to emphasize the "multidimensional" character of that relation.

This conclusion, however, doesn't imply that the potential infrastructure is also an actual one for the following reasons.

First of all, each of the three dimensions doesn't have the same degree of legal formalization within either the Treaties – as normative texts – or the European practice – as institutional praxis -.

We move from highly institutionalized channels (as the judicial dimension) to nothing more than an embryonic structure (as the societal dimension).

But - we insist - this is only the result of a lacking awareness of the new constitutional dimensions of the European integration and not a good reason for saying that only the judicial dialogue has a constitutional dignity.

Secondly, to identify a potential infrastructure – assuming it is legally formalized – doesn't mean that the infrastructure is really appropriate.

This is the case of what we called the "societal dimension". In the existing European system this relationship is narrowed to the

[71] See J. Weiler, Supranational law and supranational system: legal structure and political process in the European community (1982); Id., Il sistema comunitario europeo (1985).

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dialogue with "associations, churches, philosophical and non-denominational associations"[72].

It's clear that in this case the infrastructure is not only potential but also inadequate.

The normative principle - "the Institutions shall maintain an open, transparent, and regular dialogue with representative associations and civil society" – is perfectly right in its textual definition and the wideness of the formulation shows its constitutive (if not constitutional) character. But the concrete application of the principle is still too poor and weak. Here we have a potential channel, but not really appropriate.

On this perspective, the "societal dimension" of the European constitutional space is undeniably one of the most promising new areas of study and research on one hand, and of institutional improvement, on the other.

Thirdly, to identify a potential infrastructure – assuming it is formalized and appropriate - does not mean that this infrastructure is actually used.

This is clearly the case of the dialogue among parliaments and EU institutions, not yet really implemented[73].

Finally, to identify a potential infrastructure – assuming it is formalized, appropriate and actually used - does not mean that this infrastructure is able to produce an effective dialogue.

This is the case of the judicial dimension of the constitutional dialogue. As a matter of fact, in Europe Courts' dialogue is definitely the most formalized, appropriate and used within the European space.

As we noted previously, the preliminary ruling procedure on one hand, and the interpretive dialogue among Courts, on the other,

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[72] Consider that today the entire administrative task outlined by the Art. 17 of the Lisbon Treaty (the dialogue with associations, churches, philosophical and non-denominational associations) is carried out by a single office within the Bureau of Policy Advisers (http://ec.europa.eu/bepa/about/index_en.htm) an Advisory Commission of the Presidency of the European commission.

[73] P. Craig & G. De Burca, EU Law, 103-104; 155-156 and footnotes at the above paragraph 5.2., lett. c).

demonstrate that this dimension of the dialogue is doubtless the most advanced.

It is a completely different question to assess if this infrastructure during the last decades has actually generated a "constitutional dialogue", that is, a mutual understanding and improvement of the different European constitutional identities.

Nevertheless, we can clearly say that in the present-day European system, we can identify many legal tools allowing and aiming at a real communication among the constitutional actors—and not only informal or soft-law channels.

On this perspective, there are two examples from recent European institutional history which deserve further reflection: the 2004 reform in the system of enforcement of the European antitrust law and, secondly, the creation of the European System of Central Banks and of the ECB. Taking, of course, due account of the wide diversity of such subjects, it is yet worth to observe how the EU moved in these areas counteracting its natural tendency to centralize power and, instead, effectively applying the subsidiarity principle, without superimposing European institutions (and excluding all conflicting national institutions on the matter), but on the contrary, promoting the creation of institutional networks (the System of Central Banks[74] or the network of National Competition Authorities[75]).

These reforms are samples of a formalized systems of communication (either in procedural or institutional terms) established in order to perform an effective dialogue among the networking terminals.

Therefore, we can say that today within the European legal system there is a potential communication infrastructure.

But what is the factor that ignites the passage from potential to act?

We need today a new "evolutionary jump", as the one we mentioned above, speaking about the "constitutionalization" of the ECJ jurisprudence.

And we must be equally aware that this crucial step, in our opinion, depends essentially on a "meta-legal" condition, that is,

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[74] http://www.ecb.int/ecb/orga/escb/html/index.en.html.

[75] http://ec.europa.eu/competition/ecn/competition_authorities.html.

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prior to the logic of legal reasoning and regulation. The various subjects we have identified, in order to actually use the various available communications tools to dialogue, must share the same language.

Obviously we are not addressing the issue of language in a "linguistic" sense—although the linguistic diversity is not entirely irrelevant in respect of the functioning of European institutions[76]. We are raising the question of the cultural language of the European constitutional actors, understood as that code of shared signs and meanings enabling a bidirectional communication. In this sense, the key prerequisite either to establish an effective dialogue among European lower and higher courts and among national parliaments and EU institutions, or to achieve a really fruitful exchange of information and assessments with representatives of the civil society, is to bring their "cultural linguistic codes" closer. In this perspective, the most effective role is played by actors' legal and political education.

Treaties—or their reforms—may provide and improve legal instruments allowing different actors to communicate. But this effort could be completely ineffective if people are unable—or unwilling—to use these channels, for lack of real knowledge of the peculiarities of each partner. Take the already-considered example of the European Charter of Fundamental Rights. It is undoubtedly an important attempt to produce an exhaustive catalog of European rights; it has been conceived as (at least a part of) the shared constitutional linguistic code of European rights. But is it really so?

Remaining within the linguistic metaphor, we all know that language is formed—lawyers would say—in a customary way, mainly by using it. Indeed, grammar is an ex-post discipline trying to describe and define linguistic rules, created and living through concrete practice. Thinking about the scope of the European Charter—"to rule completely and comprehensively all the European language of fundamental rights"—is as if we were trying to create a new language, by "stipulating" a new grammar and then applying it to

[76] See the noteworthy remarks of S. Cassese, "Eclissi o rinascita del diritto"? in P. Rossi (ed.) Fine del diritto?, 29 (2009), about still existing problems using English as common language for European jurists.

our communication. It is an easy prophecy to say that the Charter will be much more effective as a new grammar of European rights only for those parts already shared and abided by as a legal tradition. It will have a much less "constitutive" effect where definitions or values are not already rooted in those traditions.

The existence of a common language, then, is the basic "meta-legal" requirement for a dialogue, but this requirement cannot be artificially produced. It depends more on the culture and education of people living in institutions, rather than on legal regulation and enforcement.

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ARTICLES

THE EUROPEAN CONVENTION ON HUMAN RIGHTS IN THE ITALIAN SYSTEM: FROM A RIGHT APPROACH TO A STRATEGIC LITIGATION

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Abstract

The article analyzes the impact of the European Convention on Human Rights and of its Court's judgments in Italy, ranging from a legal perspective to a political and social one. In fact, after decades of scarce cultural impact of the ECHR and its jurisprudence, in the last few years the Italian system passed from an individual right approach to a strategic implementation of the Convention.

In the first part, the article resumes the systematically stronger role of the ECHR in Italy from the legal and institutional point of view. In the second one, it examines the case-law against Italy and some classes of judgments (prohibition of torture and mass expulsion, immunity of parliamentarians, freedom of religion, ill-treatment by law enforcement officers) where it is possible to find an increase in the use of the ECHR as a legal instrument for political and cultural challenges.

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1. Introduction: the significance of supranational judicial reviews of human rights in Italy

1.1 The judicial protection of human rights in Italy

Italy is considered, broadly speaking, a Western democracy where human rights have been protected and guaranteed since its foundation. Already in the Fundamental Law prior to the Constitution (Statuto Albertino)[1] there was a catalogue of rights, although only from a liberal and not a welfare perspective. The Constitution in force, approved in 1948 after the Second World War, provides for both a catalogue of rights and for the system necessary for their recognition[2]. People living in Italy could claim such protection before the judiciary, that has to be independent

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[1] G. Rebuffa, Lo Statuto Albertino (2003).

[2] The two parts interact and must be read as a complete and unique text, cfr. M. Luciani, La Costituzione dei diritti e la Costituzione dei poteri. Noterelle brevi su un modello interpretativo ricorrente, in AA.VV., Scritti in onore di Vezio Crisafulli, vol. 2 (1985).

from other institutional actors and subjected only to law (Art. 101, 104 Const.). Judgments could be appealed twice, but the second time only for reasons regarding the application of the law, and not the merit. Separate from the judicial system, the Constitutional Court has been evolving as a Court of human rights. In its original concept, its role was to void Acts or portions of Acts in conflict with the Constitution, guaranteeing the application of Kelsen's hierarchical criteria. For this reason, the Italian Constitution does not allow people to claim directly to the Constitutional Court. There are only two ways to generate a decision by the Constitutional Court: judges, during proceedings where the Act that is allegedly unconstitutional could be enforced, can ask if the Act is unconstitutional or not (ricorso in via incidentale); Regions and State can contest the legitimacy respectively of a regional or state Act, in the two months after their publication (ricorso in via principale). So, according to the Italian Founding Fathers, the Constitutional Court should act as court of human rights only indirectly, in a different way from Spain or Germany, for example, where people are able to address claims directly to the Tribunal Constitutional and the Bundesverfassungsgericht. But the evolution of the role of the Constitutional Court should be seen as moving in the direction of protection of constitutional rights. The doctrine is quite homogeneous in recognizing a specific role of the 15 judges of the Constitutional Court in promoting a culture of human rights both in specific and in general cases[3]. When it acts, it does not forget the specific case hidden in the ricorso in via incidentale, and often it suggests to the ordinary judge the way to solve the case. Moreover, systematically it tends to review the reasonability of legislation, especially regarding the egalitarian principle[4].

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[3] L. Carlassare, I diritti davanti alla Corte costituzionale: ricorso individuale o rilettura dell'art. 27 L. n. 87/1953 (1997); R. Romboli, Ampliamento dell'accesso alla Corte costituzionale e introduzione di un ricorso diretto a tutela dei diritti fondamentali, in A. Anzon, P. Caretti, S. Grassi (eds.), Prospettive di accesso alla giustizia costituzionale, 631-643 (2000); U. De Siervo (ed.), 1956-2006: cinquant'anni di Corte Costituzionale, spec. V (2006); V. Onida, La Corte, i diritti fondamentali e l'accesso alla giustizia costituzionale, 1797-1807; L. Califano, Corte costituzionale e diritti fondamentali (2004); P. Bilancia, E. De Marco (eds.), La tutela multilivello dei diritti (2004); L. Califano (ed.), Corte costituzionale e diritti fondamentali (2004).

[4] V. Boncinelli, I valori costituzionali fra testo e contesto: regole e forme di razionalità del giudizio costituzionale (2007); G. Zagreblesky, Corte costituzionale e principio

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2.1 The impact of international judicial reviews of human rights

Such an indirect judicial review of human rights has been supported by the communitarian and international system. The EU system, in whose foundation Italy played a central role, has created a very strong system of protection of rights thanks to the jurisprudence of the European Court of Justice and the legislation on new rights (such as environment and privacy, that do not appear expressly in the Italian Constitution). In spite of its restricted competence on economic matters, the EU has been growing more and more as a system that protects human rights in a wider sense.

But, in theory, the revolution in the review of human rights for Italians is represented by the European Convention on Human Rights (hereinafter the ECHR) and its jurisprudence. In fact, the reform in adjudicating the European Court of Human Rights (hereinafter the ECtHR) by individuals represents in the Italian system the first case of direct claim for individuals. Nevertheless, the impact of the ECHR is quite ambiguous and unclear, and its application by the domestic judiciary has not been immediate and univocal. We will try to explain why.

Italy was among the ten countries that founded the Council of Europe in 1949. The ECHR was signed by the Republic of Italy on 4 November 1950 and ratified in 1955. Since 1973, when Italy made declarations under Art. 25 and 46 acknowledging the right to individual petition to the European Court of Human Rights, an impressive number of applications against Italy have been deposited at the Court, the majority of which have focused on administration of justice.

But the real impact of the ECHR has been confined for a long time to a limited number of matters, and only in sporadic but new cases it deals with other issues.

Only in the last years a strategic approach to the ECHR is arising, moving from litigations concerning individual claims to litigations that are able to challenge the political and social structure.

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d'uguaglianza, in N. Occhiocupo, La Corte costituzionale tra norma giuridica e realtà sociale, 103-120 (1978); AA.VV, Il principio di ragionevolezza nella giurisprudenza della Corte costituzionale: atti del Seminario svoltosi in Roma, Palazzo della Consulta nei giorni 13 e 14 ottobre 1992 (1994).

This paper will focus on such a shift toward a more intentional use of the ECHR as a juridical instrument for changing the political and cultural system.

2.3 The problematic role of the ECHR in the domestic system

The first reason why the ECHR has been for a long time almost ignored by everyone except lawyers and public agents is the problematic role of the Convention in the internal system[5]. The reason rests mainly in the fact that the Italian Constitution does not provide for the automatic reception of international treaties and does not specify the status they acquire, once ratified, in the hierarchy of norms.

International agreements cannot be applied domestically until they are introduced into internal law by means of a specific Act of Parliament authorising the ratification of the treaty and containing an "order of execution" of its provisions. As the Italian Constitution lacks an explicit provision which regulates the hierarchical position of international agreements once they are ratified, it was deemed that they assume in the domestic system the same rank as legislative Acts which provide for their ratification and execution. For this reason, ECHR has been considered as a common international agreement, that – as any other – carries the force of ordinary law providing ratification and execution (Art. 72 Const.)[6].

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[5] On that point, the doctrine is quite enormous. See among others M. Cartabia (ed.), I diritti in azione: universalità e pluralismo dei diritti fondamentali nelle Corti europee (2007); V. Starace, La Convenzione Europea dei Diritti dell'Uomo e l'Ordinamento Italiano (1992); G. Brunelli, A. Pugiotto, R. Bin, P. Veronesi, All'incrocio tra Costituzione e CEDU (2007); B. Randazzo, Le pronunce della Corte Europea dei Diritti dell'Uomo: effetti ed esecuzione nell'ordinamento italiano, in N. Zanon (ed.), Le Corti dell'integrazione europea e la Corte Costituzionale italiana (2006); A. Guazzarotti, La CEDU e l'ordinamento nazionale: tendenze giurisprudenziali e nuove esigenze teoriche, in Quaderni costituzionali, 3 (2006); F. Donati, La Convenzione europea dei diritti dell'uomo nell'ordinamento italiano, in A. Pisaneschi, L. Violini (eds.), Poteri, garanzie e diritti a sessanta anni dalla Costituzione. Scritti per Giovanni Grottanelli De' Santi, 965 ss. (2007).

[6] Art. 11 provides that Italy can dismissed part of its sovereignty to international systems in order to promote peace and justice. Such article has been used to explain, constitutionally speaking, the participation to CEE before, and to CE and EU now. But it seems it does not fit to explain the participation

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Since the entry into force of law no. 848 of 4 August 1955 (ratification and execution of the European Convention on Human Rights) the ECHR constitutes an integral part of the Italian legal system. The Italian courts, however, have for a long time been reluctant to apply the Convention immediately, considering its provisions as merely programmatic[7].

Jurisprudence tended to give the Convention a certain primacy over ordinary law, implicitly recognizing its "quasi-constitutional" rank. Given that the Convention does not per se possess primacy over ordinary legislation, the question has arisen whether it is subject to the rule of the lex posterior derogat legi priori and whether its provisions can be derogated by subsequent statutory norms.

Only recently have both the Constitutional and Supreme Court of Cassation solved the question stating expressly that the Convention's provisions cannot be derogated or abrogated by means of subsequent ordinary laws. In judgment no. 10 of 1987, the Constitutional Court stated that the Convention's provisions "derive from an atypical competence of the State, as such unsusceptible to being abrogated or modified by means of ordinary law"[8]. The Supreme Court of Cassation, in 1993, in the case of Medrano[9], recognizes in the Convention's provisions a

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to the ECHR. As the Constitutional Court said recently in judgments nos. 348 and 349/2007 (interpreting Art. 11 Const. in a contested manner) ECHR is not a real international system erected to promote peace, so it can not be justified by Art. 11 Const. See E. Cannizzaro, Gerarchia e competenza nei rapporti fra trattati e leggi interne, in Rivista di diritto internazionale, 351-372 (2007).

[7] In 1989, the Supreme Court of Cassation solved the internal dispute on the issue, stating the immediate applicability of those norms of the ECHR which are self-executing, or complete in all their elements (Cass. Sez. Un. November 23, 1988, Polo Castro). Notwithstanding the importance of this decision, it should be noted that it can be undermined by the fact that it is up to the judges themselves to decide the self-executing nature of the Convention's specific provisions (it is likely to find opposite conclusions of the jurisprudence concerning the nature self-executing or not of the same Convention's rule. In this sense see Cass., Sez. IV, October 11, 1968, Biadene; Cass. Sez. I, April 3, 1973, Cavallero; Cass. Sez. I, 20 July 1979, Papale).

[8] The Court referred as well to the rules contained in the UN Human Rights Covenants of 1966.

[9] Sentence of July 10, 1993. In the specific case, the Supreme Court of Cassation found a contrast between the expulsion of a stranger, decided in accordance

"particular force of resistance" with respect to ordinary subsequent laws, due to the nature of "the general principles of the legal system" they possess. According to the Supreme Court, this particular nature can be deduced from the Italian Constitution itself[10] as well as from the jurisprudence of the European Court of Justice which recommends that national courts apply the ECHR's provisions as part of communitarian law[11]. Moreover, the Court of cassation said in 4 judgments on a same day in 2004 that Strasburg's jurisprudence has an homogenising role as living law. In a decision of January 25, 2007, the same Court said that the effects of the Court's decisions are constitutive; they generate

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with D.P.R. 9 October 1990 related to drugs, and Art. 8, par. 2 of the ECHR, relating to the right to privacy and family life.

[10] Art. 2 Const: "The Republic recognizes and guarantees the inviolable human rights, be it as an individual or in the social groups expressing their personality [...]" as well as the principle of pacta sunt servanda expressed in Art. 11 "Italy [...]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".

[11] Especially after the inclusion of Letter F within the Maastricht Treaty (1992) which stated: "The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law". Now, the Article 6 of the Treaty of Lisbon say, more strongly, that "The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms [...] Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law". See S. Catalano, Trattato di Lisbona e "adesione" alla CEDU: brevi riflessioni sulle problematiche comunitarie e interne, in P. Bilancia, M. D'Amico (eds.), La nuova Europa dopo il Trattato di Lisbona, 233-242 (2009). The integration between the ECHR and the European Union highlights the question of the dialogue among Courts (ECJ, ECtHR and Italian courts). On that point, see among others Barbera, Augusto, Le tre Corti e la tutela multilivello dei diritti and V. Onida, La tutela dei diritti davanti alla Corte costituzionale e il rapporto con le corti sopranazionali, both in P. Bilancia, E. De Marco (eds.), La tutela multilivello dei diritti, cit.; T.E. Frosini, Brevi note sul problematico rapporto fra la Corte costituzionale e le Corti europee, in Id., Teoremi e problemi di diritto costituzionale, (2008); S. Panunzio, I diritti fondamentali e le Corti in Europa (2005); P. Falzea, A. Spadaro, L. Ventura (eds), La Corte costituzionale e le Corti d'Europa (2003); N. Zanon (ed.), Le Corti dell'integrazione europea e la Corte costituzionale italiana: avvicinamenti, dialoghi, dissonanze (2006).

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rights and obligations even within the national system. That means that judges must decide in conformity to the Court's jurisprudence, even when this implies reopening proceedings that have been already concluded[12]. Notwithstanding the importance of these decisions[13] in terms of domestic reception of the Convention, it seemed that the Italian judiciary was still in search of interpretative criteria to affirm the primacy of the Convention vis à vis ordinary legislation[14].

But we must draw attention to a recent and very significant overruling on such an issue.

A constitutional reform of 2001 (the biggest since the entry into force of the Constitution) revised, among others, Art. 117 Const., specifying that the legislator must legislate in compliance with the constraints deriving from international obligations[15]. Thanks to the cited amendment, the Constitutional Court has changed its traditional position and has given to the ECHR's norms a constitutional significance[16]. In fact, judgements nos. 348 and 349/2007 have definitely settled the hierarchical position of

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[12] Such a Court said that such a continuous inertia constitutes a violation of Art. 46 ECHR and to a denial of justice in our national system (Dorigo case, see para. 4).

[13] Other recent decisions of the Court of Cassation confirm this view: Cass. I sez. civ. no. 10542 of 19 July 2002; I sez. civ. no. 28507 of 23 December 2005.

[14] Legal scholars have sustained the Convention should be accepted as lex specialis thereby securing its provisions a superior status over subsequent conflicting legislation: lex posterior generalis non derogat priori specialis. See B. Conforti, Diritto Internazionale, 316 (2007).

[15] "Legislative powers shall be vested in the State and the Regions in compliance with the Constitution and with the constraints deriving from EU-legislation and international obligations."

[16] E. Cannizzaro, La riforma 'federalista' della Costituzione e gli obblighi internazionali, in Rivista di diritto internazionale, 921 ss. (2006); A. Guazzarotti, I giudici comuni e la Convenzione alla luce del nuovo art. 117 della Costituzione, cit., 25 ss.; C. Pinelli, I limiti generali alla potestà legislativa statale e regionale e i rapporti con l'ordinamento internazionale e con l'ordinamento comunitario, in Foro italiano, V (2004); B. Caravita, La Costituzione dopo la Riforma del Titolo V (2004); F. Pizzetti, I nuovi elementi "unificanti" del sistema italiano: il "posto" della Costituzione e della leggi costituzionali ed il "ruolo" dei vincoli comunitari e degli obblighi internazionali dopo la riforma del titolo V della Costituzione, S.L. Rossi, Gli obblighi internazionali e comunitari nella riforma del titolo V della Costituzione, both in Il nuovo Titolo V della parte II della Costituzione, 161-194 and 293-305 (2002).

the Convention[17]. With a highly controversial motivation, the Court established that, since the entry into force of revised Art. 117 Const., any international agreement occupies a median position between the Constitution and ordinary legislation. Referring to the ECHR, the Constitutional Court also said that the ECtHR is the only subject legitimated to interpret its articles, but the Constitutional Court remains the guardian of the supreme principles of the national system.

A second legal reason for the ambiguous role of the ECHR is its overlap with the established and reasonably efficient system of protection of human rights. An influential doctrine underlines that fundamental rights are regulated more in detail in the Italian Constitution, while they are more generally addressed in the ECHR[18], and in general the perception of legal professionals is that Italy has already a high level of protection of human rights. On this subject, the same Constitutional Court, regarding proceedings in absentia, recently noted that "the European Convention on Human Rights does not recognize higher guarantees than Art. 111 Const."[19] Such a consideration must be read in conjunction with the subsidiary role of the ECtHR, that constitutes a strong filter for plaintiffs, who have to appeal to national judges prior to the ECtHR. Such a deduction could in part be confirmed by the analysis of legal issues under the scrutiny of the ECtHR. It so happens that Italian cases before the ECtHR concern areas where there is a gap in the Italian system and there is a chronic violation of rights that are not provided for in the Italian Constitution (length of proceedings, expropriations, administration of justice).

Nonetheless, the fact that Italy is sensitive to the discourse of fundamental rights hides some areas where human rights are compromised or their recognition is in doubt.

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[17] D. Tega, Le sentenze della Corte costituzionale nn. 348 e 349 del 2007: la CEDU da fonte ordinaria a fonte "sub-costituzionale" del diritto, in Quaderni costituzionali, 1 (2008); A. Ruggeri, La CEDU alla ricerca di una nuova identità, tra prospettiva formale-astratta e prospettiva assiologico-sostanziale d'inquadramento sistematico (a prima lettura di Corte cost. nn. 348 e 349 del 2007), http://www.forumcostituzionale.it.

[18] See A. Pace, La limitata incidenza della C.e.d.u. sulle libertà politiche in Italia, in Diritto pubblico, 1-32 (2001).

[19] Constitutional Court no. 89/2008.

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Above all, ill-treatment by police, renditions of individuals suspected of terrorism, mass expulsions without sufficient guarantees for legal and illegal immigrants, freedom of religion – which we will focus on – constitute an alleged failure of Italian legislation and practices that is challenged by claiming the ECHR in a strategic way, more than in an individualistic approach[20].

2. Infringements of the ECHR by Italy

Italian case-law at Strasbourg focuses on violations which reflect structural deficiencies of the domestic legal system, such as length or fairness of proceedings, right to an effective remedy, conditions in prisons, property rights.

These issues are so relevant that the First Report to Parliament of implementation of EctHR decisions submitted by the Government takes into account only cases of expropriation, length of proceedings and fair trial[21]. Moreover, the Report for the year 2008 revealed that the 62% of the Italian infringements regards the violation of Art. 6[22].

Starting from 1973, when Italy made a declaration under Art. 25 accepting individual complaints, contentious cases have dealt almost exclusively with the guarantees of a fair trial stated in Art. 6 of the Convention. In particular, the vast majority of applications as well as judgments against Italy have been related to the reasonable length of proceedings implicitly guaranteed by Art. 6 of the ECHR. The Capuano case[23] – in which a just compensation was awarded to the applicant in consequence of the violation of Art. 6 – inaugurated an interminable series of

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[20] See the annual reports of Amnesty International, The situation of human rights in Italy, 2008, 2009 and 2010.

[21] Presidenza del Consiglio dei Ministri, Dipartimento per gli affari giuridici e legislativi, Ufficio contenzioso e per la consulenza giuridica, L'esecuzione delle pronunce della Corte europea dei diritti dell'uomo nei confronti dello Stato italiano, First Report to the Parliament ex law no. 12/2006 for the year 2006.

[22] Presidenza del Consiglio dei Ministri, Dipartimento per gli affari giuridici e legislativi, Ufficio contenzioso e per la consulenza giuridica, L'esecuzione delle pronunce della Corte europea dei diritti dell'uomo nei confronti dello Stato italiano, Third Report to the Parliament ex law no. 12/2006 for the year 2008.

[23] ECtHR, Capuano v. Italy (no. 9381/81), 25 June 1987.

judgments delivered against Italy[24], which finally led to the configuration of an "Italian problem" within the Convention system[25]. Indeed the Court, risking collapse due to an inundation of complaints presented against Italy under Art. 6, stated in 1999 the "excessive length of proceedings incompatible with the Convention"[26]. The Council, on the other hand, has adopted a series of resolutions putting Italy under surveillance and pressing authorities to adopt necessary reforms. Apart from excessive length of proceedings, observance of Art. 6 has been questioned before the Court with respect to the right to an effective defense[27] and of the institute of trial in absentia (processo in contumacia)[28].

Also the number of petitions relating to property rights has become considerable. Hundreds of petitions question the lawfulness and the conformity to the Convention of the institute of constructive expropriation (occupazione acquisitiva or accessione invertita), which has permitted the Italian public administration to take possession and property of lands without respecting the formal procedure for expropriation[29].

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[24] Among this, see the ECtHR, Ciricosta and Viola v. Italy, 19753/92, 4 December 1995. In its sentence of December 4, 1995, the Court, although not founding in the specific case a violation of Art. 6, elaborated a set of criteria to determine the reasonable length of proceedings and what is due as just compensation.

[25] See V. Esposito, Il ruolo del giudice nazionale per la tutela dei diritti dell'uomo, in C. Zanghi, K. Vasak (eds.), La Convenzione europea dei diritti dell'uomo: 50 anni di esperienza. Gli attori e i protagonisti: il passato e l'avvenire, 223 (2000); F. Raia, La durata ragionevole dei processi nel dialogo tra giudici nazionali e Corte di Strasburgo, in Quaderni costituzionali, 4 (2006); G. Verde, Giustizia e garanzie nella giurisdizione civile, in Rivista di diritto processuale, 2 (2000).

[26] Bottazzi v. Italy, no. 34884/97, 28 July 1999; A. P. v. Italy, no. 35265/97, 28 July 1999; Di Mauro v. Italy, no. 34256/1996, 28 July 1999; Ferrari v. Italy, no. 33440/96, 28 July 1999.

[27] See Artico v. Italy, (no. 6694/74), 13 May 1980, where the Court condemned Italy for having not assured the effectiveness of the right to free legal assistance (gratuito patrocinio).

[28] Such a trial is held when the accused, after being duly summoned, does not appear at the hearing and neither requests nor agrees that it take place in his absence. In Colozza v. Italy, no. 9024/80, 12 February 1985 – the leading case on the subject – the Court stated that even in this trial the accused must be effectively informed on the fundamental acts of the trial.

[29] Law no. 85/1978 permits authorities to start building before formal expropriation. Once a scheme has been declared to be in the public interest and the plans adopted, authorities may make an expedited possession order. After the land has been possessed, a formal expropriation order must be made and

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Respect for property rights is also consistently invoked before the Strasbourg Court concerning the procedure for enforcement of evictions on the basis of expiration of lease (sfratto per finita locazione). In the pilot case of Spadea and Scalabrino[30], the Court rejected the applicants' view that the Government's housing policy reflected a breach of Art. 1 Prot. 1, since the "means chosen were appropriate to achieve the legitimate aim pursued". On the other hand, in subsequent similar cases, the Court found violations of Art. 1 of Prot.1 and Art. 6 of the Convention, not due to the measures of suspension and the staggering of evictions per se, but in consideration of the excessive length of the enforcement procedures and of the difficulties in accessing justice[31].

With respect to the civil rights, a conspicuous case relates to the civil freedoms of detainees and of those declared bankrupt. A very limited number of cases relate to freedom of expression and freedom of association but in any case not involving serious violations of human rights.

The vast majority of cases filed under Art. 8 relate to the alleged violation of the right of respect for correspondence and/or privacy and family life in connection with the applicants' involvement in bankruptcy procedures. Applicants contested the conformity of the Bankruptcy Act (Royal Decree no. 267 of 16 March 1942), regulating the cited procedure, alternatively or simultaneously on two different grounds: censorship of

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compensation paid. During the 1970s, a number of local authorities took possession of land using the expedited procedure but failed subsequently to issue an expropriation order. The Italian courts were confronted with cases in which the landowner had de facto lost use of the land as it had been possessed and building works in the public interest had been undertaken. They elaborated the constructive expropriation rule. Under the rule, public authorities acquire title to the land from the outset before formal expropriation if, after taking possession of the land and irrespective of whether such possession is lawful, the works in the public interest are performed. For some comments, see P. Bilancia, I diritti fondamentali come conquiste sovrastatali di civiltà; il diritto di proprietà nella CEDU (2002); M.L. Padelletti, La tutela della proprietà nella Convenzione europea dei diritti dell'uomo, (2003); F. Buonomo, La tutela della proprietà dinanzi alla Corte europea dei diritti dell'uomo (2005).

[30] Spadea and Scalabrino v. Italy, no. 12868/87, 28 September.

[31] See Immobiliare Saffi v. Italy, no. 22774/93, 28 July 1999. The Court found that the applicant, given the suspension of the enforcement procedure, had been left for eleven years in a state of uncertainty as to when they would be able to repossess their apartment.

correspondence and alleged violation of privacy which derive from the civil incapacities connected with bankruptcy status. As far as the first case is concerned, the Bankruptcy Act (Art. 48) establishes the monitoring of all correspondence from or to the bankrupt person in the interest of creditors. Considering that the measure is applied during the entire procedure and that the latter can last many years, the Court has found the provision as violating the right to secrecy of correspondence as "not proportionate" within the meaning of Art. 8 of the ECHR to the general interest pursued in the provision. On the other hand, the same Bankruptcy Act has been contested as violating private and family life in section 50 where it provides that those declared bankrupt cannot exercise certain professional or commercial activities (such as administrator, lawyer, commercial advisor, notary, tutor) until the conclusion of the bankruptcy procedure.

The Court, in consideration of the fact that the interdiction to exercise the above activities applies automatically, after the inscription in the bankruptcy registry, with no judicial review of the measure, states that the provision is "not necessary in a democratic society" according to the meaning of Art. 8 of the ECHR. Outside the scope of Art. 8, the same provisions are alleged to violate Art.3 of Protocol 1 for civil incapacities (including the right to vote) automatically connected to the bankruptcy status.

The Court found a violation of Art. 8 also in several cases concerning persons convicted for serious crimes[32] whom secrecy of correspondence is compromised by the Italian legislation. Art. 8 was also infringed, in the opinion of the Court, when the censorship of prisoner's correspondence was decided as a consequence of the implementation of the "41bis" special regime of detention (see Labita, Ospina Vargas, Messina, Argenti, Bastone, Leo Zappia, Moni, Musumeci, Salvatore)[33].

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[32] Starting from Calogero Diana v. Italy, no. 15211/89, 15 November 1996, Domenichini v. Italy, no. 15943/90, 15 November 1996, Rinzivillo v. Italy, no. 31543/96, 21 December 2000, Madonia v. Italy, no. 55927/00, 6 July 2000, Messina v. Italy (3), no. 33993/96, 24 October 2002, Di Giovine v. Italy, No. 39920/98, 26 July 2001.

[33] Labita v. Italy, no. 26772/95, 6 April 2000, Ospina Vargas, no. 40750/98, 14 October 2004, Messina v. Italy (2) , no. 25498/94, 28 September 2000, Argenti v. Italy, no. 56317/00, 10 November 2005, Bastone v. Italy, no. 59638/00, 11 July 2006, Leo Zappia v. Italy, no. 77744/01, 29 September 2005, Moni v. Italy, no. 35784/97, 11 January 2000, Musumeci v. Italy, no. 33695/96, 11 January 2005,

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It should be added that the Prison Administration Act has been frequently contested under different profiles. As far as the special regime of detention is concerned, applicants have alleged a violation of their right to family life as a consequence of the limitation to family visits. The Court has always rejected this view. On the other hand, the Prison Administration Act has been contested as entailing the violation of other rights guaranteed in the ECHR, ie. the prohibition of torture and inhuman or degrading treatment (Art.3[34], no violation found); the right to an effective remedy against the limitations carried out (Art. 6 and Art. 13).

Apart this "traditional" cases[35], in the last years is emerging a series of claims that demonstrates that even the perception of the ECHR is changing, moving from a further jurisdictional step to redress individual damages to a jurisdictional instrument able to challenge the political, civil and cultural status quo.

This still few cases can be considered as an emerging strategic litigation, which could inaugurate a political debate for the implementation of general measures in the matter involved.

It is not to say that judgments until now emitted in the traditional issues are not relevant from the perspective of the protection of human rights. More simply, claims are becoming more variegated and are increasingly seen as instruments for some cultural, social and political challenges in the hands of vulnerable people or minorities.

We will summarise briefly how Italy assesses the implementation of the ECtHR rulings in the most relevant infringements from a quantitative point of view, and then we will focus on the "new" claims driven by a more strategic approach.

3. Assessing implementation and policy impact of ECtHR rulings

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Salvatore v. Italy, no. 42285/98, 6 December 2005. The art. 41bis regime applies only to prisoners prosecuted or convicted for specific offences – such as in those linked to mafia activities – and empowers the judge to suspend application of the ordinary prison regime in whole or in part (art. 41 bis, Law no. 354/1975).

[34] See Labita v. Italy, cit.

[35] Statistics of the ECHR's organs show this that, since 1959 to 2009, 60% of judgments regards the length of proceedings, 15% the protection of property, 12% the right to a fair trial, 6% the right to respect for private and family life and 7% other matters (see ECtHR, Country Statistic on 1 January 2009).

3.1 Actors and institutions involved in the implementation of the ECHR

Since the entry into force of law no. 12/2006 (Disposizioni in materia di esecuzione delle pronunce della Corte Europea dei Diritti dell'Uomo, the so called Azzolini law) and its executive order of 1 February 2007, the first actor involved in the implementation of ECtHR decisions is the Prime Minister, although the Department of legal and legislative affairs of the Presidency of Counsel is responsible for the practical execution of judgments.

Such a choice has, above all, a strong symbolic meaning. The principle behind the law is the direct responsibility of the Prime Minister and his Office to comply with the ECHR, in order to give importance and priority to compliance with the Convention, even if, in practice, there is no higher level of compliance.

The Azzolini law regulates a new information channel between, on the one hand, the Prime Minister as responsible for governmental activity in foreign affairs and international treaties and as the representative of the Italian State before the ECtHR, and, on the other, Parliament, as a first actor involved in implementing international obligations on human rights.

Using this argument, Act no. 12 tends to testify the Government's attention to applying the ECHR in order to improve its reputation[36] as well as to ensure the best way to protect human rights by the highest organs of the State.

The law defines relations between the major actors involved in executing the Strasbourg judgments. It specifies the Prime Minister's tasks and states that he is now responsible for enacting all the governmental duties in; for communicating judgments to Parliament in due time, so that they can be examined by the competent parliamentary commissions; for presenting

[36] In the words of Government, the implementation of Court's decisions is "a prominent objective because of direct effects on the credibility of national system protection of human rights" (Presidenza del Consiglio dei Ministri, Dipartimento per gli affari giuridici e legislativi, Ufficio contenzioso e per la consulenza giuridica, L'esecuzione delle pronunce della Corte europea dei diritti dell'uomo nei confronti dello Stato italiano, First Report to the Parliament ex law no. 12/2006 for the year 2006, 20).

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every year a report on the state of implementation of judgments[37]. The law is intended to permit Parliament to be regularly informed about judgments and to rapidly adopt legislative measures as they become necessary. After this law, the government asked for permanent representation coagents and the State Lawyers Office (Avvocatura dello Stato), to cooperate with the State, marking a starting point, almost in theoretical terms, of a new era of dialogue between Strasbourg and Italy.

Apart from the crucial role of the Prime Minister and his Office, other institutional actors involved in Italy are the Ministry of the Economy, Ministry of Justice, the two Parliamentary Chambers as well as their permanent Commissions. A special Commission for the protection and promotion of human rights is also established in the Senate. Moreover, since 2005 a Permanent Observatory on the judgments of the ECtHR (Osservatorio Permanente delle sentenze della Corte Europea dei Diritti dell'Uomo) within the lower Chamber of Parliament (Camera dei Deputati) has been established. Since 2006 this organ has regularly collected decisions delivered against Italy and gives legal support both to the Italian delegation to the Parliamentary Assembly of the CoE and to the competent sub-organs in the Lower Chamber. It is worth noting, concerning the role of Parliament, that three letters from the Speakers of both Chambers (published between 2005 and 2006) recalled the obligation to evaluate the compatibility of a new law with the ECHR. The Direzione generale del contenzioso e dei diritti umani, a department of the Ministry of Justice, is competent to collect information from each cases; to act as intermediary between Italian institutions and permanent representation of Italy; to manage criminal records; to keep Italian jurisdictional institutions informed about judgments; to communicate systematic violations to the Legislative office of the Ministry of Justice.

Of course a prominent role is played by the ordinary courts, that can judge in a consistent manner with the ECtHR's jurisprudence and can even counterbalance the legislator's inertia. Such a role will likely be improved thanks to the cited integration

[37] Art. 5 par. 3 of law no. 400/1988 as modified by the mentioned law no. 12/2006. For a positive comment on the law see: G. Raimondi, Nuove disposizioni in materia di esecuzione delle sentenze della Corte Europea: una buona legge, in Diritti dell'Uomo. Cronache e Battaglie (2006).

of the ECHR into the European law, that is in a large manner directly applied by the national judges[38].

The CSM (Supreme Counsel for the Administration of Justice in Italy) has a relevant training role, which has grown in the last few years. It decided to include the subject of human rights and the ECtHR's case-law in the curricula of all initial training courses for junior judges, in the annual programme of in-service training and in that of decentralised training courses. Furthermore it promoted the organisation of seminars, both at national and local level, aimed at training people working in the field of family law on the requirements of the ECHR, as interpreted in Strasbourg case-law in this field.

The Permanent representation of Italy is charged with the spreading of information on the Court's jurisprudence and Court's decisions, it acts as a bridge between the Council of Europe and Italy, and, finally, it promotes professional training of lawyers.

The Azzolini law can be seen as an effort to link the functions of different branches of the Italian administration in implementing ECtHR jurisprudence, in line with a more open attitude of the Italian institutions towards the Convention system.

This approach is confirmed by recent national case-law.

We have already quoted the two Constitutional Court's judgments on the role of the ECHR in the Italian system (nos. 348 and 349/2007), but we can note in its activity an increasing reference of the ECtHR jurisprudence in the last years, sometimes just in order to strengthen the opinion of the Constitutional Court[39]. This systematic use of the ECHR as a parameter for its opinion is also an effect of its previous decisions nos. 348 and 349/2007. The recognition of the ECHR as norma interposta, i.e. as

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[38] The role of the judges, at any level, has been essential for the integration of the ECHR into the national system. See, among others, AA.VV., Il giudice italiano di fronte alla Convenzione europea dei diritti dell'uomo: atti della Tavola rotonda tenuta in Roma il 13 dicembre 1972 (1972); B. Randazzo, Giudici comuni e Corte europea dei diritti, in La Corte costituzionale e le Corti d'Europa, cit., 261 ss.; D. Tega, L'emergere dei nuovi diritti e il fenomeno della tutela multilivello dei diritti tra ordinamenti nazionali e Corte dei diritti di Strasburgo, cit.; G. Zagrebelsky, I giudici nazionali, la Convenzione e la Corte europea dei diritti dell'uomo, in La tutela multilivello dei diritti: punti di crisi, problemi aperti, momenti di stabilizzazione, cit.

[39] See for example no. 33, 39, 87, 173, 274, 435/2008; 11, 24, 239, 262, 266, 317/2009; 265/2010. As doctrine, see D. Tega, La CEDU nella giurisprudenza della Corte costituzionale, cit., 2.

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an act that the ordinary legislation cannot contravene unless the violation of Art. 117 Const., generate a case law where the Court must judge the compatibility of an Act with the Constitution via the compatibility with the Convention[40].

Apart from that, the judiciary also pays more attention to the ECHR, as interpreted by the Court of Strasbourg. Ordinary judges apart, both the Supreme Court of Cassation and the Council of the State are more familiar with the Convention system and more frequently refer to ECHR Articles, as interpreted by the Court[41].

This is due probably also by the fact that lawyers and lower courts are more used than before to refer to the ECHR respectively in their defence and in their judgments. In that way, when the case goes under the scrutiny of the Court of Cassation or the Councile of the State, they are obliged to refer to the Convention. Another reason is also the already mentioned accession of the European Union in the ECHR system, and therefore the integration of the European Convention among the bill of rights of the European Union.

On the topic of the judiciary, the role of judges has been fundamental during this years. First of all, as we already noted in the first para., they have compensated for the lack of clarity regarding the role of the ECHR. Secondly, especially in the last year, they have been progressively more open to judge in a manner that is consistent with the ECHR, giving importance also to the decisions of the ECtHR.

A "physiological" gap remains regarding the knowledge of the Convention system among ordinary judges (especially those acting in peripheral fora) and the highest Courts. It is quite hard still to find quotations of the ECHR system at the lower level of jurisdiction.

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[40] Constitutional Court, no. 1/2011: "In more occasions this Court affirmed that the ECHR rules, in the meaning given by the ECtHR […] integrate, as norme interposte, the constitutional parameter expressed by Art. 117, where it provides for the respect of the limits set by international obligations (judgments nos. 348 and 349/2007, 311 and 317/2009, 93/2010)". See also nos. 103, 191 and 196/2010).

[41] Just as example, see Court of Cassation, Judgements nos. 14, 677, 1354, 3927, 6026, 4428, 3716, 4603, 17408, 5172, 9328, 9152/2007; nos. 15887, 23844, 7319, 5136/2008; Council of State, no. 303/2007.

This brief overview on the competence of implementing ECtHR's decisions shows that the traditional three branches of Government are involved. In fact, Italy lacks an independent commission or national institution dedicated to promoting human rights, although Resolution no. 48/134 of the General Assembly of the United Nations has demanded its creation. A bill by the former government (April 4, 2007) has so far come to nothing because of the change of government after the election of April, 2008.

Apart from the general considerations we can draw from the activities and the official statements of the main actors and institutions involved in implementing the Convention, it may be useful at this point to make some reflections that emerge from the interviews conducted[42].

We attempted to contact lawyers, judges, members of national Parliament, professors, members of the Constitutional court, members of the parliamentary Committee on human rights, agents of the Ministry of the Interior and Justice, members of the European Parliament, agents of the Italian representation in Strasbourg.

Members of the national Parliament and the agents of the Ministry of the Interior did not answer when we called back, after initially showing willingness to talk to us. Members of the European Parliament said they are unable to help us, because of the difficulty and the complexity of the interviews we proposed.

However, we were able to talk to one professor of international law, two leading criminal judges, two lawyers not directly engaged in protecting human rights and two Italian agents at the EctHR, one lawyer directly involved with ECtHR and one NGO.

The interviews with Italian agents in Strasbourg and national judges show a positive attitude toward the ECHR system

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[42] In detail, interviews are conducted in 2008 with Amnesty International, Italian Division, a President of an Italian Court of Assize, a judge on criminal matters in a forum of the North Italy, a Member of an Italian Court of Assize, a judge on criminal matters in a forum of the South Italy, a Lawyer of the forum of Rome engaged in the protection of fundamental rights, two lawyers not directly engaged in the protection of fundamental rights in the forum of Ancona, a professor of international law, in Rome, two agents of the Italian representation in Strasbourg.

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and a greater confidence in the implementation and integration of ECHR within the national system.

Although they consider the knowledge of the Convention rules to be too scarce among lawyers and even among judges and surely among plaintiffs in national proceedings, they believe that in the last years efforts by the CSM, by lawyers' and judges' associations are helping people to become more sensitive and familiar with the Convention mechanisms.

Among the positive evaluations, both the Italian agents in Strasbourg and judges consider the indirect efficacy of judgments to be an adequate instrument, they see the mechanism of control of judiciary executions as being effective, they are looking closely at the Constitutional Court's judgments no. 348 and 349/2007. Negative evaluations regard the use of friendly settlement (used only in a matter of expropriation), the impact of the Pinto law on the length of proceedings, the continued complaint about not executing the ECtHR judgments. The two agents in Strasbourg have different opinions on the role of the Italian Representation at the Council of Europe and at the Parliamentary Assembly, while judges ignore them and their activity.

A different opinion regards the articles that are the object of ECtHR proceedings: while the Italian agents in Strasbourg know the entire map of violation, judges refer only to Art. 6. For all of them, it is too early to talk about the effects of a few new laws in matters of criminal procedure (the law regarding the transcription in the casellario giudiziale), of simplification in compensation procedures (budget law of 2007), and the Azzolini law.

Judges report some problems in translating the Court's decisions, in explaining them to lower justices, in interpreting the Italian norms in a manner that is consistent with ECHR when a conflict arises between them and the Convention, in knowing cases pending before the Court.

Finally, the common hope of the Italian agents in Strasbourg and the judges is for greater and deeper education and training in such a European question, because all of them are persuaded that ECHR is a necessary system of guarantee for individual rights (only one agent notes that the Italian system already offers an exhaustive protection).

A real distance between the daily lawyers' activity and the Convention mechanisms becomes apparent through the

interviews with the two lawyers contacted. They testified to significant ignorance among their colleagues in this field, denying the use of and the familiarity with the Convention's rules and its jurisprudence. In all events, they are very confident in the ECHR as a guarantee above all against internal deficiencies of the administration of justice. They are conscious of the fact that ECtHR jurisprudence can promote legislative reforms, and they hope for reform on the administration of justice.

The professor in international law interviewed reported poor dialogue between the Italian courts and the ECtHR, a scarce influence of its jurisprudence in parliamentary activity (while national judges pay more attention to it). He stated a high level of confidence in the ECHR as a system for promoting the protection of human rights, especially in countries, like Italy, where there is not a direct claim to constitutional courts, and as a system stimulating necessary reforms at national level. He is convinced that in Italy most claims hide a strategic litigation, and that a deeper dialogue is needed between jurisdictional actors.

Finally, the NGO stressed – unsurprisingly – the capital importance of the Saadi case, hoping for a new era in relations between internal jurisdiction and ECHR.

3.2 Assessing implementation in the domestic system

As we have stressed more than once, categories of judgment under the Court's scrutiny are quite homogeneous (due process, length of proceedings, infringements of property rights) and so the Court often repeats the same conclusion. Until now, the Committee of Ministers has concentrated on monitoring execution and implementation of judgments relating to infringements of the adequate length of proceedings[43], the functioning of the judicial system in Italy[44], the flat owners' rights to peaceful enjoyment of their possessions by failure to enforce judicial eviction orders[45],

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[43] Final Resolutions (1992)26, (1995)82 and (1994)26, Interim Resolutions (2000)135, (2005)114, (2007)2, M/Inf/DH(2008)42 (Bilan des mesures adoptées par les autorités italiennes pour la période 2006-08 concernant la durée excessive des procédures judiciaires), Interim Resolutions CM/ResDH(2009)42 and (2010)224.

[44] Resolutions (97)336, (99)437, (2000)135, (2005)114 and (2007)2.

[45] All the judicial decisions in these cases (Immobiliare Saffi and others, cit.) have been executed and the applicants have been able to take possession of their

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the unfairness of criminal proceedings[46], the inadequate guarantees to secure the lawfulness of emergency expropriations and excessively restrictive compensation rules[47].

Judgments under the supervision of the Committee of Ministers can be gathered under two headings. On the one hand, there are isolated cases. Regarding them, the Committee of Ministers is not demanding a legislative reform, instead it is insisting on a restitutio in integrum or a just compensation. Responsibility for execution is held by the Presidency of the Council of Ministers (especially for violations of Art. 1, Prot. 1) and the Ministry of Justice (especially for violation of Art. 6) for the most part, and to a lesser extent the Ministry of Interior and other Ministries.

From the other side, general measures can be decided both at national level, with the involvement of the executive and legislative powers, and at European level, under pressure from the Committee of Ministers. The latter often directly suggests the measures to be taken when infringement of ECHR is reiterative.

In spite of an indirect coercing value of the Court's judgments, even in Italy there is a growing mobilization to make the national system conform to ECHR. There are two reasons for this: firstly, Italy does not want and cannot afford to lose credibility in the international context; secondly, States cannot tolerate the costs of condemnations to compensate a violation of a protected right. This second problem is indirectly confirmed by the political will to modify the Pinto law, because of its costs[48]. So, Italy followed the Committee of Ministers' recommendation, in preparation for general and preventive measures of execution. Nonetheless, half of the cases in the agenda of the Committee of Ministers concerns Italy and less than half of demands of friendly settlement is successful.

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property, so no further measure is, in the opinion of the Committee of Ministers, therefore necessary.

[46] Resolutions (99)258, (2002)30, (2004)13, (2005)85; (2007)83; Resolution of the Parliamentary Assembly (2006)1516.

[47] Interim Resolution (2007)3.

[48] The Cabinet of former Ministry of Justice had proposed the need of revising such a law, see the Annual Report 2007 of the Ministry of Justice. Also the Minister in charge considers that the Pinto law is not a final solution of the problem (see the speech before Parliament during the opening of the judiciary year 2010, 20 and 21 January 2010).

Maybe it is useful to summarise the general measures taken,

Propertyrights

Violation of property rights proclaimed by Prot. no. 1, Art. 1 is found when public administration expropriates some part of property from individuals, in a way that, in the Italian perspective, is legitimate. In order to solve this with a general measure, the Code on expropriation which came into force in 2001 minimizes the range of legitimate cases of indirect expropriation and allows an total damage compensation, in harmony with the jurisprudence of Strasbourg. The ratio of such reform is expressly the need to make Italian law conform on expropriation with the Court's view on property rights, as the Council of State has shown in its expressed opinion on the bill of this law. In the same way we can read the Council of State's decision no. 2 of 29 April 2005. Moreover, the budget of 2007 introduced the direct accountability of local administrations to compensate for damages consequent to an expropriation.

In spite of these general measures, there is still incompatibility in the views of property rights between the national system and the European system, due to the different provisions of ECHR and Art. 41 of the Italian Constitution, where property rights could be limited due to their social function. The recent judgments of the Constitutional Court no. 348 and 349 do not solve the problem, because they have stated a compatibility between the Italian vision of property rights (ex Art. 42 Const.) and the ECHR provision of Art. 1 Prot. no. 1.

Bankruptcy

Following the Resolutions of the Committee of Ministers[49], Italy finally adopted the Legislative Decree n. 5 of January 2006, which contains measures aimed on the one hand at speeding up the procedure and, on the other hand, at eliminating the bankrupt individual's civil incapacities – limitations to electoral rights, freedom of circulation and secrecy of correspondence – as was laid down in previous Arts. 48 and 49 of the Law on Bankruptcy Procedure. The Committee of Ministers welcomed such a reform

[49] See Resolution ResDH (2002)58 adopted on April 2002.

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and its immediate effect in erasing many of the restrictions on rights and freedoms criticised in the Court's judgments[50].

Lengthofproceedingsanddueprocess

As is well known, the vast majority of appeals against Italy and almost all of its decisions regard judicial matters. There are numerous new norms which have been introduced to have the administration of justice conform to Strasbourg's decisions. At constitutional level, we have seen the "constitutionalization" of the principles of due process through the new Art. 111 Const., which practically contains all the judicial guarantees safeguarded in Art. 6 of the Convention. Concerning judicial guarantees, a sensitive issue still standing is the need to foresee the revision of criminal trials in consequence of a judgment by ECtHR[51]. On the other hand, different procedures were adopted during the years, for a quick resolution of arrears accumulated, and in the perspective of a deeper and more systematic reform. Measures have included an increase in the number of magistrates with the institution of the "Justice of Peace" (giudici di pace) and honorary judges competent for minor civil and criminal litigations (law no. 374/1991); the restructuring of the judicial offices of the court of first instance; the introduction of the so-called abridged sections (sezioni stralcio), which have the duty of defining outstanding litigations; a reform of civil process has been in force for 3 years; the extension of special and quicker procedures in more cases (law n. 80/2005); a more rapid ruling for some administrative proceedings (law n. 205/2000). But, in spite of that, proceedings are still too much lengthy.

Nor can the Pinto law be seen as a good solution: under pressure from Strasbourg's organs, Parliament issued Law no. 89 of 2001 on the "Measures for speeding up judgments and expectations for a fair compensation in case of violation of the

[50] Interim Resolution CM/ResDH(2007)27.

[51] In this regard, there are several bills pending before the Parliament on the reopening of proceedings, that give the possibility to reopen proceedings yet concluded when a judgement of the ECtHR has ascertain a violation of principles of due process (Art. 6.3 ECHR). One of them is presented by the Minister of Justice (bill no. S1440). It is worth to note that from several years the Italian Government is seeking to introduce such a reform in order to fill a gap in our system, as proofs the previous bill presented by the former Minister of Justice n. S1797.

'reasonable term' of the trial" (Legge relativa all'equa riparazione del danno in caso di irragionevole durata di un procedimento giudiziario), called the Pinto law. It introduces a compensative remedy providing the possibility to appeal to national courts – specifically the competent Court of Appeal (Corte d'Appello) – in order to obtain a just compensation in cases of excessive length of proceedings. Since this year, appeals before Court in Strasbourg have diminished, thanks to the principle of subsidiarity, because the Pinto law introduces a mechanism of internal appeal for compensation. But, as already said, such a law cannot be seen as a final solution, as monetary compensation represents an excessive cost for the State and does not solve the problem of length[52].

The way of the reform of the administration of the justice is still long and seems permanent.

In matter of criminal proceedings, the law decree no. 92/2008, converted into the law no. 125/2008, provides for an acceleration of the proceedings; similar reasons are at the basis of the law decree no. 112/2008, converted into the law no. 133/2008. Instead, the law n. 69/2009 provides for some reforms of the civil proceedings.

A bill (no. S1082) is currently pending before Parliament, which specifically aims to expedite the processing of civil cases by a broad reform of the civil procedure with an underlying strategy of reducing the number of trials and of encouraging alternative dispute resolutions. Also measures aimed at improving the structural organisation of the judiciary were adopted by the law decree no. 143/2008 and some courts have already and spontaneously achieved excellent results in this issue, like the Tribunal of Turin[53].

As for the implementation of judicial guarantees, Italy has tried to attenuate its non-fulfillments with the introduction of a

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[52] Note that the Pinto law, thanks to the flexible reference to the Court's interpretation of Art. 6, introduces in a coercive way the jurisprudence of the Court on Art. 6 in the Italian system (see also for such an opinion Court of Cassation n. 13162/2004 and 8604/2007). The European Court as well finds that the late payment of compensation to the applicant does not afford adequate redress and considers the applicant continued to be a victim of a breach of the "reasonable-time" requirement (see Interim Resolution CM/ResDH(2009)42).

[53] See on the best practice of Turin S. Sileoni, Imprevedibilità dell'ambiente normativo e lentezza della giustizia, in P. Falasca (ed.), Dopo! Come ripartire dopo la crisi (2009).

new penal code in 1989. Art. 2 of the law providing the Government the power to issue a new code (Legge di delega al Governo per l'emanazione del nuovo codice), expressly stating that the new legislation had to conform with the country's international commitments in the field of human rights, and particularly the Convention. The major legislative measure is represented by Art. 175 of the criminal procedure code. It allows the reopening of cases where due process has been violated and a party was absent. Now, as said above, the government is preparing a more complete bill on this question, while the Court of Cassation and the Constitutional Court have stressed that the Italian system needs a legislative intervention that is more general than Art. 175, that provides only for the proceedings where a party is absent[54].

Detainees'condition

Following the Strasbourg Court's decisions and also the Committee of Ministers' resolutions[55], the Italian Parliament amended the Prison Administration Act in law no. 95/2004 to prevent further violations of the ECHR. New Art. 18ter introduces clear grounds for the measures; explicit exemption from the monitoring of correspondence with the ECHR organs; judicial review to cover the monitoring or restriction of prisoners' correspondence[56].

Othernormativemeasures

A government decree imposes on the Minister of justice to include in criminal records the abstract of the Court's decisions for each person involved (d.P.R. 28 November 2005, no. 289). Moreover, the budget for 2007 has simplified the procedure for compensation and has introduced direct accountability of local government in case of violation of ECHR.

The last important normative measure to mention is the reform of real estate leasing by law no. 240/2004 (confirmed by laws no. 86/2005 and no. 23/2006).

Such reforms stressed once again that Strasbourg jurisprudence has influenced Italian policy, determining

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[54] See Dorigo case, para. 4.

[55] Measures of a general character ResDH(2001)178 and Case of Calogero Diana against Italy and six other cases, Resolution ResDH(2005)55.

[56] In condemnations from 2004 the Court gives account of the new legislation, adding that it does not apply retroactively to facts committed before its entry into force.

legislative and administrative reforms, in the field of due process, length of proceedings, infringements of property rights, bankruptcy, special detention, but, until now, not in issues that are generated a wide and suffered national debate also in the public opinion.

4.The Italian legal culture vis à vis the ECHR system

It is quite hard to define the roles held by different subjects, whether institutional or non institutional, involved in the implementation of the ECtHR jurisprudence. Neither the activities of NGOs and lawyers' associations, nor the answers to our questionnaires improved our insight into the cultural and political (in a broad meaning) impact of the ECtHR. The fact that politicians and agents of the Ministry of the Interior did not reply to our questionnaires may be interpreted as a first deduction of indifference vis-à-vis the ECHR system. If this is so, compliance with ECtHR judgments could be appreciated as an obligation of national institutions to avoid pecuniary condemnations, and not to be wholeheartedly intent on conforming to the ECHR. At a political level, in spite of a rough distinction between conservatives (who are wary of international systems such as ECHR) and liberals (who appear more open to them), there are no real differences in the legislative measures of compliance with the ECHR system. In fact, in both electoral programs for the last parliamentary elections proposed by the left and the right wing one can read the same objective to reduce length of proceedings and to reform the procedural rule in trials. So, declared intentions apart, reforms necessary for Italian legislation to conform have been stated by both liberal and conservative governments, simply under pressure from European institutions like the Committee of Ministers.

From a jurisdictional perspective, the traditional reluctance on the part of the judiciary to give the Convention a predominant domestic position, different from any other international treaty, may be partly explained by the fact that the ECHR's provisions overlap to a great extent with those of the fundamental human rights already protected by the Italian Constitution. As said, provisions on civil rights enshrined in the domestic Constitution. Although there is no provision on privacy, Art. 14 states that "the

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domicile is inviolable", Art. 15 affirms the inviolability of "correspondence and any other form of communication", and Art. 29 recognizes family rights. In fact we have seen that Art. 8 was mainly used in specific cases such as for detention and bankruptcy. The right to freedom of thought and conscience (Art. 9 of ECHR) as well as the right of expression (Art. 10 of ECHR) are safeguarded by Art. 21 of the Constitution, stating that "everyone has the right to freely express his or her own thought". The freedom of religion and worship of Art. 9 of the ECHR is protected by Art. 19 of the Constitution, stating the right of everyone "to freely express his religion or beliefs […] in any form, individually or with others, to promote them, and to perform rites in public or in private", and by Art. 8 which recognizes that "all religious confessions are equally free before the law". The rights to freedom of assembly and freedom of association (Art. 11 of ECHR) are granted respectively by Art. 17 and 18 of the Constitution. Concerning the prohibition of discrimination (Art. 14 ECHR), Art. 3 of the Italian Constitution affirms that "all citizens are equal before the law, without any distinction of sex, race, language, religion, political opinions, personal and social conditions". Paragraph 2 of the same article provides that "it is the duty of the Republic to remove the social and economic obstacles which limit the freedom and equality of citizens and prevent the full development of their personality […]".

Although the civil and political rights granted by the Convention generally correspond to those enshrined in the Italian Constitution, some differences between the two texts can be found. For example, apart from various literal divergences concerning some rights as the freedom of religion, thought and conscience[57], that the Italian Constitution does not have any express recognition of the right to privacy or the right to the healthy environment[58].

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[57] As for the freedom of religion, Art. 19 of the Italian Constitution does not include the right to change religion; concerning freedom of thought, Art. 21 Const. protects the right to freely express thoughts and not the freedom of thought per se; similarly, freedom of conscience per se is not contemplated in the Constitution. Nevertheless the same rights are broadly recognized in the jurisprudence of the Constitutional Court.

[58] This had concrete consequences: in two cases (Guerra and Others v. Italy, no. 14967/89, 19 February 1998 and Giacomelli v. Italy, no. 59909/00, 2 November

Anyway, we have to recognize the previously mentioned effort of the Court of Cassation and the Constitutional Court to integrate the ECHR provisions into the domestic system, and to assign a higher position with respect to the ordinary law. Such effort has generated a deeper awareness among judges of the importance of the ECHR, and they more frequently quote and recall ECHR's provisions and jurisprudence. In fact, the annual report on activities by the Ministry of Justice for 2007 stresses the most frequent derogation to Italian norms in judgments, when they are in conflict with the ECHR principles as interpreted by the ECtHR. They do, in fact have a binding value for national courts (see Court of Cassation 19.7.2002, no. 10542; 15.2.2005, no. 3033, Court of Appeal, Florence, 14.07.2006, no. 1402).

But the relevance of the Court of Cassation and Constitutional Court can be appreciated also in an other way: more systematically, they push Parliament to assume full responsibility in implementing the ECtHR's decisions by means of general measures, when they show a patent and reiterative violation of the same rights.

This is an illuminating example the Dorigo case.

In 1998 the European institutions established a violation of Art. 6 of the Convention for unfair trial[59], especially regarding the sentencing to imprisonment on the basis of evidence collected without warranty for the accused. The opinion was emitted on the basis of the claim made by Dorigo, a person convicted of terrorism on the basis of testimony that was not confirmed during the criminal hearing. Problems arose in the execution of the Strasbourg opinion, because the Italian system lacks any provision consenting renewal of proceedings after a declaration of infringement of ECHR provisions. This Italian lack has been repeatedly denounced by the European institutions[60], as a violation of Art. 46 ECHR.

2006) the right to respect for home, private and family life ex Art. 8 has been invoked in relation to environmental issues. So in these cases a significant appeal was made to the ECHR as a supplementary system of justice, due – among other things – to the lack in our system of a specific recognition of rights of privacy and a healthy environment.

[59] EComHR, Dorigo c. Italia, no. 33286/96, 9 September 1998.

[60] Cfr. ResDH (99)258; ResDH (2002)30; ResDH (2004)13; ResDH (2005)85; ResDH (2007)83 and, in general, ResDH(2000)2 on the reopening of internal

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Before the approval of an act by the Italian Parliament amending the criminal code and adding a special case for renewing "unfair" proceedings, both the Court of Cassation and the Constitutional Court were involved in the Dorigo case.

Following the steps of the case, after the ECtHR condemnation, Mr Dorigo demanded a declaration of unfairness of imprisonment from the judge and the consequent illegality of his detention. Following the judge's refusal, based on the lack of relative legal provision, Dorigo appealed to the Court of Cassation. The judgment[61] has become a major contribution to the definition of Italian obligations with regard to the ECHR system. Overturning the conclusions of the preceding judge, the Court affirmed the faculty of judges to declare the enforceability of sentencing when the Strasbourg Court had declared that the sentence had been passed on the basis of an unfair trial, even if the legislator had omitted to introduce specific means to reopen the trial. On the contrary, the Italian attitude could be considered, in the opinion of the Court, as violating Art. 46 of the Convention. Such a revolutionary declaration, all told, is the signal of the willingness of judges to counterbalance Parliament's inertia, if necessary to comply with the ECHR's obligation.

Meanwhile, the Court of Appeal of Bologna was asked by Mr Dorigo to reopen the trial on the basis of the Court's judgment. The Court remitted to the Constitutional Court the question of compatibility of Art. 630 of Criminal code (in the cases justifying the renewal of trials, the fact of the Court's judgment is not included) with the ECHR provisions, as interpreted by the Strasbourg Court[62]. The judgment n. 129/2008 is the answer to the Court of Appeal of Bologna. Such an answer could be deemed surprising and unexpected, at first reading, because the Court rejected the question of incompatibility between the absence of a special provision of the renewal of proceedings and the Italian compliance with the ECHR, with respect to Art. 3, 11 and 27 of the Constitution. In fact, the Court threw out the Court of Appeal's arguments, saying that the constitutional parameters invoked are erroneous and that the incompatibility between the obligation to

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proceedings; Press release of the Committee of Ministers, October the 19th 2006; Resolution of the Parliamentary Assembly (2006)1516, 11.1.

[61] Cass. Pen., Sez. I, 1 dicembre 2006, no. 2800.

[62] Corte di Appello di Bologna, ord. no. 337/2006, March 22.

reopen proceedings after a Strasbourg judgment and the lack of instruments in the Italian system must be solved by the legislator, and not by the judiciary. Certainly, the Constitutional Court should have emitted a judgment and should itself have added such a special case of revision of trials. But it seemed to prefer to leave the problem to the legislator, and did no more than stress the urgency of a legislative reform of the criminal code. In short, we see here an example of judicial self-restraint, in spite of a contrary tendency of the Court of Cassation in the same affair, probably due to two facts: the wide discretion in choosing the most appropriate mechanism of reopening proceedings (that suggests a legislative reform more than a corrective intervention by the judges) and the call Parliament to act in the ambit of its responsibilities[63].

So, broadly speaking, politicians generally seem to underestimate the impact of the ECHR in the Italian legal culture and legislation: traditionally, there are no significant political debates on such issues, nor is there a genuine intention to comply with the ECtHR decisions, as the example of inertia of Parliament and the judiciary's substitution of Parliament can prove, nor are there any significant differences between the two political coalitions in their attitude towards ECHR. A similar indifference could be seen until recently in the media's attitude.

This notable absence, until now, of cases that directly affect the legal culture and the main characteristic of the society – i.e. cases concerning cultural pluralism, minorities and people "different" from the majority – shows how marginal the impact is of the ECHR in building a pluralistic culture in the Italian system.

Such a conclusion can be explained by several factors: a strong cultural identity and homogeneity of society that derives from a common language, a pre-eminent religion and a common Weltanschauung; a basic protection of human rights, both for citizens and foreigners; a society's automatism in considering the ECtHR as an ulterior judge for exactly the same questions.

Regarding the first factor, the Italian society only in the recent years is confronting with minorities and pluralism. Only

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[63] A third reason could be the fact that in Parliament was pending, at the time of this judgment, more than one bills on such issue, the last of them submitted by the Government on September 2007 (Bill n. S1797). See supra footnote 53.

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"historical" minorities are acknowledged and protected by the Constitution – in Art.6 – and by special regional laws, which have the force of the Constitution[64]. Measures for their integration include: the possibility for them to use their mother tongue in legal proceedings and before the public authorities; bilingual education; quotas in public institutions. As said, the protection mentioned is afforded only to the so called "historical" minorities, that is minorities living in border areas of the country having a strong link with the territory (mainly French-speaking, German and Slovenian communities).

Just in the 80s "new minorities" began to settle and live in the country. They were mainly immigrants from the poorest countries of North Africa and the Mediterranean. In the year 2008, there were more then 4.000.000 of immigrants in Italy, with an annual increasing of 458.644 persons (plus 13,4% in respect to the previous year). If in 2005 the legal immigrants were 2.670.514, such an amount has double in the last three years, with (4.330.000). For the first time, in 2008 Italy has been over the European average regarding the impact of foreigner residents on the total population[65]. At the beginning of 2010, they stay in Italy 4 .235.000 immigrants, with a esteem of 1 immigrants per 12 inhabitants[66].

The presence of these new minorities has ushered in far-reaching changes from a sociological point of view. For the first time since the creation of the Italian state, the society has become pluralistic, and values and lifestyles have begun to diversify considerably.

From a legal point of view, resident aliens enjoy the fundamental rights enshrined in the national Constitution, with the exception of a few rights and freedoms reserved for citizens, such as the right to vote. In general their integration in the social and political life seems to be far from established, but this is more

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[64] Regions with special Statute are Valle d'Aosta, Trentino Alto Adige, Friuli Venezia Giulia, Sardegna, Sicilia.

[65] Data extracted from the XIX Report on immigration elaborated by the Caritas/Migrantes, Immigrazione, Dossier Statistico 2009.

[66] Data extracted from the XX Report on immigration elaborated by the Caritas/Migrantes, Immigrazione, Dossier Statistico 2010.

a sociological and economic problem than a legal one[67]. In fact, they do have access to justice as every citizen, enjoying also legal aid if disadvantaged from an economic point of view. So, the same filter of internal remedies prior to going before the ECtHR also applies to aliens and immigrants. In those few cases where they do not have sufficient administrative or jurisdictional remedies they seek justice from the ECtHR, such as in matters concerning mass expulsions or expulsions for terrorist threats. As we will see more deeply, some recent decisions in cases of mass expulsions of immigrants to Lybia and refoulement of individuals who risk ill-treatment and torture in their country represent a starting point for the ECtHR jurisprudence on minorities and vulnerable groups in Italy.

Immigration and secularization are bringing also in a homogeneous society like Italy the problem of pluralism, common to the other Western democracies.

This growing pluralism has another set of consequence on religious matter and multiculturalism. Also in this case we can noun a couple of ECtHR's judgments very relevant even at the cultural and political level.

We have already explain the importance of the second factor.

In relation to the last one, it may explain why, for example, non-istitutional actors as activists, interest groups and religious, cultural or other associations are so inert. In fact, there is no specific system or structure of legal support for individuals seeking to address rights claims in Strasbourg. The only way is to pay a lawyer (or to turn to legal aid with the right to gratuito patrocinio). Although we are seeing the rise of lawyers associations specialised in the protection of human rights and, in general, NGOs who work to improve the promotion of the defence of disadvantaged people, such efforts are still at an early stage.

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[67] Committe of United Nation for the elimination of racial discrimination on March 2008 talked of "factual segregation" of Roma (CERD7ITA/CO/15). A further evidence of the lack of integration is given by the high rate of aliens in prison. They represent 30,15% of detainees; while more frequent convictions relate to exploitation of prostitution and drug trafficking. See FIDH, Rapporto sull'Immigrazione, ibidem.

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This consideration can justify the near absence of claims concerning minorities and immigrants, as well as the proliferation of claims that constantly regard the same issues.

But, as anticipated, one can note a growing applications submitted in a strategic litigation that are challenging also the Italian legal culture, besides the legislation and administration. These applications show a deeper interest by civil society on matters regarding the ECHR.

If we read the relevance in the media of the cases that we are going to analyze, in proportion to the other cases, and in conjunction with the activism of some NGOs and lawyers in these rulings, we can conclude that there is a development of a strategic litigation in claims before the ECtHR.

5. Mobilizing European human rights law in Italy: From a right approach to a strategic litigation

In the opinion of the Italian government there are three reasons for the increasing number of applications to the ECtHR: a more sensitive "rights approach" and a deeper knowledge of concrete possibilities of justice; the pathological dysfunctions of the internal system; a non-genuine exploitation of the Convention system[68].

Each one of these reasons is credible and useful in clarifying the strategies underlined in Italian cases. The above-mentioned traditional cases can be explained in a "rights approach" perspective, more than as strategic claims in order to change the legal and cultural status quo. Plaintiffs are more interested in demanding an individual measure, than in changing laws or political attitudes.

The fact that most cases concern the same issues means that there is an instrumental use of and a right approach to the ECHR and that Italian lawyers and the professional class are somewhat relaxed in their attitude to traditional issues where they expect to win the case. Applicants, acting individually in most cases, are motivated above all by the expectation of monetary compensation,

[68] Presidenza del Consiglio dei Ministri, First Report to Parliament ex law no. 12/2006 for the year 2006, cit., 25.

and in minor cases by the hope of improvement of personal conditions.

The absence of a culture of strategic litigation could be deduced also from some data.

Traditionally, the most claims approached in a strategic perspective has been defended by lawyers. Most of them come from the same jurisdiction as the plaintiffs, apart from some exceptions where claimants choose specialised lawyers. As we will see, only recently a third party or parties, mainly representing a NGO, intervened in order to support the plaintiffs in his or her strategic claim.

Regarding the nationality of plaintiffs, a scarce minority are foreigners, but in general their cases do not concern foreign status matters. Only cases regarding mass expulsions or extraditions, as we are going to see, was brought by a foreigner and concerns a real foreign matter.

Until recently, most of the appeals are made by individual plaintiffs, and is hard to find as main actor an association[69] or a collective claim[70].

Instead, recent initiatives can be interpreted as strategic litigations directed at changing legislation and challenging the cultural context on minority issues, immigration, cultural pluralism. In these cases, the applicants have sometimes been defended by a specialist lawyer, there are collective applications, there are third party in support of the reason of one main party, and, more in general, public opinion, NGOs, political institutions pay a great attention to them.

These claims can be read in a perspective of strategic litigation because, more or less intentionally, they have generated significant participation by national associations of lawyers or NGOs, as well as political parties and the media, seeking to better promote the protection of fundamental rights in specific sectors.

Such recent cases may be the signal of an evolution in the perception of the ECHR system in the Italian legal culture, although they are still isolated cases, and very marginal with

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[69] Grande Oriente d'Italia di Palazzo Giustiniani v. Italy, no. 35972/97, 2 August 2001 and Grande Oriente d'Italia di Palazzo Giustiniani v. Italy (2), no. 26740/02, 31 May 2007.

[70] Guerra and others, cit.

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respect to traditional cases concerning the administration of justice.

It denotes, in fact, that a culture of ECHR rights is hardly emerging, and people claiming in Strasbourg do that only in the few matters that lawyers are able to deal with.

The situation has partially changed thanks to the commitment of leading lawyers and scholars and the legislative reforms (Azzolini law above all[71]) aimed at spreading Strasbourg case law and procedure. Jurists associations (among which we signal for its strong commitment the Unione Forense per la Tutela dei Diritti dell'Uomo) have the merit of having promoted strategic litigations with the aim of recalling the attention of Strasbourg institutions and the Italian government to the dysfunctions of the domestic judicial system. Jurists' human rights associations have multiplied over the years: a Consultative Organ for European Justice (Consulta per la giustizia europea dei diritti dell'uomo) reuniting 29 different associations (including the Unione forense) was constituted in 1986 with the aim of bringing the instruments for the protection of human rights to the attention of lawyers' and magistrates' associations.

A premise is necessary before analyzing the claims that represent an evidence of a strategic approach toward the ECHR.

The relevance of the applications that we are going to examine is not due to their effective impact. We do not refer to them in the perspective of their concrete findings, but under the preliminary aspect of the willingness of the applicants to use the instruments of the claim before Strasbourg as a way to challenge the legal culture and the administration of the country, or, vice verse, their broad effect in introducing a political and cultural debate in the national context.

6. The prohibition of torture, the prohibition of mass expulsion, the immunity of parliamentarians, the ill-treatment and excessive force by law enforcement officers, the freedom of religion: a new era for the ECHR integration into the national system?

[71] See para. 3.1.

The claims before the ECtHR that we come to analyze have in common only the fact that they represent, from a strategic point of view, a challenge to the legal, political and cultural context in Italy.

They are very different from each other: they regard asylum matter, immigrants' rights, parliamentarians' immunity, freedom of religion and the abuse of power by the police, but in every case they are seen as a starting point or a step among others to mobilize public opinion and political actors in some sensitive matters.

6.1 The cases concerning the prohibition of torture as consequence of extradition

Firstly the cases on prohibition of extradition represent a new approach to the ECHR on the part of Italian lawyers, moving from an 'individual' slant to strategic litigation. Before discussing the impact of such cases, we will describe them briefly.

The Saadi case is the first judgment on asylum matters against Italy.

This pivotal case has been followed by other nine identical judgements, emitted just one year after[72]. All the cases involve Tunisian citizens living in Italy, convicted by an Italian or a Tunisian (military, in the most cases) court and therefore expelled in their country in order to pay for some crimes (mostly related to terrorism activities) and in order to remove from the Italian territory persons considered dangerous. In front of the risk to be detained in a country that, on the basis of the reports of governmental and non governmental institutions (Human Rights Section, U.S. Department of State, International Red Crux, Amnesty International, Human Rights Watch), does not guarantee the protection of prisoners from torture, the applicants demanded in the most cases asylum to the Italian authorities. The latter, not only rejected the demand or ignored the interim measures taken by the Court ex art. 39, but also continued in expelling them. As in these nine cases the Court's opinion was inspired by the Saadi judgment and recalled it, we can focus only on this first case.

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[72] Ben Khemais v. Italy, no. 246/07, 24 February 2009; Abdelhedi v. Italy, no. 2638/07, Ben Salah v. Italy, no. 38128/06, Bouyahia v. Italy, no. 46792/06, C.B.Z. v. Italy, no. 44006/06, Hamraoui v. Italy, no. 16201/07, O. v. Italy, no. 37257/06, Soltana v. Italy, no. 37336/06, all of them emitted on 24 March 2009.

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Nassim Saadi, a Tunisian living in Italy on the basis of a residence permit, was arrested on suspicion of involvement in international terrorism (Article 270 bis of the Criminal Code), among other offences, and was placed in pre-trial detention. In a judgment of 9 May 2005 the Milan Assize Court took the view that the acts of which he was accused did not constitute international terrorism but criminal conspiracy. It sentenced the applicant to four years and six months' imprisonment for criminal conspiracy and for the offence of forgery. The applicant and the prosecution appealed. In the meantime, on 11 May 2005, two days after the delivery of the Milan Assize Court's judgment, a military court in Tunis sentenced the applicant in his absence to twenty years' imprisonment for membership in a terrorist organisation operating abroad in time of peace and for incitement to terrorism. On August 8, 2006 the Minister of the Interior ordered him to be deported to Tunisia, applying the provisions of law decree no. 144 of 27 July 2005 (entitled 'Urgent measures to combat international terrorism' and later converted to law no. 155 of 31 July 2005). On 11 August 2006, the deportation order was confirmed by a judicial order. On the same day, the applicant requested political asylum. He alleged that he had been sentenced in his absence in Tunisia for political reasons and that he feared he would be subjected to torture and 'political and religious reprisals'. In a decision of 16 August 2006 the head of the Milan police authority (questore) declared the request inadmissible on the ground that the applicant was a danger to national security. On 15 September 2006 the Milan police authority informed the applicant orally that as his asylum request had been refused, the documents in question could not be taken into consideration.

On 14 September 2006 the applicant asked the ECtHR to suspend or annul the decision to deport him to Tunisia, alleging that deportation to Tunisia would expose him to the risk of inhumane treatment contrary to Article 3 of the Convention and to a flagrant denial of justice (Article 6 of the Convention). In addition, it would infringe his right to respect for his family life (Article 8 of the Convention). He also claimed that the court's decision had disregarded the procedural safeguards laid down in Article 1 of Protocol no. 7 to the Convention.

The Italian government denied the "substantiality" of the risk of torture in Tunisia, stressing the international treaties that

this country had entered into and the diplomatic assurances by the Tunisian authorities that the rights of the accused would be respected upon his return. In fact, the prohibition of non-refoulment ex Art. 3 ECHR has been interpreted to ban extradition of individuals to States where there is a real risk of torture, and inhuman or degrading treatment.

From the Soering[73] and Chahal[74] cases, the concept of the "real risk" has become the criteria to permit or prohibit the transfer of an individual to a country. Especially the Chahal case represents a cornerstone on this matter.

The case concerned a Sikh activist who had entered the UK illegally but subsequently benefited from a general amnesty for illegal immigrants. After having been charged with conspiracy to kill the Prime minister of India, a deportation order was issued. But he claimed the deportation would violate Art. 3 ECHR because of the lack of guarantees from the risk of torture.

Expressly, in this case the Court affirmed the "real risk" doctrine, stating that, "whenever substantial grounds have been shown for believing that an individual would face a real risk of being subjected to treatment contrary to Article 3 if removed to another State, the responsibility of the Contracting State to safeguard him or her against such treatment is engaged in the event of expulsion […]. In these circumstances, the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration. The protection afforded by Article 3 is thus wider than that provided for by Articles 32 and 33 of the United Nations 1951 Convention on the Status of Refugees" (par. 80).

This doctrine has been used also in the Saadi affaire, also in order to proof the non existence of a real risk in this case. This was the argument hold by the UK as third party intervened in the proceedings.

In fact, unlike the traditional Italian cases before the ECtHR, in Saadi there was a third party involved in the proceedings. The UK chose to intervene in order to defend a relative value of the prohibition of torture, as it did in the Chahal v. United Kingdom and Ramzy v. Netherlands cases. In accordance with Italy, it claimed

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[73] Soering v. the United Kingdom, no. 14038/88, 7 July 1989.

[74] Chahal v. United Kingdom, no. 22414/93, 15 November 1996.

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that the climate of international terrorism called into question the appropriateness of the ECtHR's jurisprudence on States' non-refoulement obligation under Art. 3 of the ECHR. The UK opinion was highly controversial, because it recalled that the prohibition on torture must be balanced against the right to life of innocent civilians in an age of increasing international terrorism, and in consequence an absolute prohibition on torture is something different from an absolute prohibition on refoulment and, when national security is implicated, the standard of evidences should be raised from a substantial risk to a more-likely-than-not test (par. 122).

In substance, while the Italian government insisted in the "diplomatic assurances" provided for the Tunisian authorities, the UK government asked the Court to overturn the Chahal judgment, in part because of the new international threat of terrorism, in part because of the rigidity of the standard imposed in the Chahal case, which, in its opinion, "had caused many difficulties for the Contracting States by preventing them in practice from enforcing expulsion measures" (par. 117).

The ECtHR rejected the entire arguments provided for the two governments.

Firstly, it rejected the statements regarding the "diplomatic assurances", saying that they may not be sufficient, if there is evidence of cruel treatments. To obtain such evidence, the Court used reports from Amnesty International and Human Rights Watch. In the opinion of the Court, in fact, diplomatic assurances are not per se a sufficient guarantee of the ban on torture, but it has to be proved by their practical application, and the reports from ONG affirm the contrary idea of the practice of torture in Tunisia.

Secondly, the Court reaffirmed the Chahal opinion and insisted the absolute nature of the prohibition on torture and, subsequently, the absolute nature of the prohibition on refoulment. With its words, "[s]ince protection against the treatment prohibited by Article 3 is absolute, that provision imposes an obligation not to extradite or expel any person who, in the receiving country, would run the real risk of being subjected to such treatment. As the Court has repeatedly held, there can be no derogation from that rule[…] It must therefore reaffirm the principle stated in the Chahal judgement […] that is not possible to weigh the risk of ill-treatment against the reasons put forward for

the expulsion in order to determine whether the responsibility of a State is engaged under Article 3, even where such treatment is inflicted by another State" (par. 138).

In sum, while the Court acknowledged the challenge in protecting societies from terrorism, it reaffirmed the absolute concept of prohibition of inhuman or degrading treatment or punishment, that "enshrines on of the fundamental values of democratic societies" (par. 127) and must be maintained even in times of emergency, war or terrorism.

Therefore, on 28 February 2008 it concluded that there was strong evidence that Saadi, after his expulsion to Tunisia, would be tortured and it reaffirmed its existing jurisprudence about Art. 3 on the absolute value of prohibition of torture, noting that the serious threat represented by the non-extradition of the convicted "does not reduce in any way the degree of risk of ill treatment": "the argument based on the balancing of the risk of harm if the person is sent back against the dangerousness he or she represents to the community if not sent back is misconceived. The concepts of 'risk' and 'dangerousness' in this context do not lend themselves to a balancing test because they are notions that can only be assessed independently of each other. Either the evidence adduced before the Court reveals that there is a substantial risk if the person is sent back or it does not […] For that reason it would be incorrect to require a higher standard of proof, as submitted by the intervener, where the person is considered to represent a serious danger to the community, since assessment of the level of risk is independent of such a test" (par. 139).

In spite of this judgment, Italy seems to be proceeding with refoulement of persons convicted for terrorist crimes to countries where they will probably suffer cruel and unusual punishment.

While the Saadi case has not challenged national practices and legislation, it is nevertheless very relevant in the Italian context from the perspective of mobilisation of civil society. For the first time, NGOs followed the proceedings, as they later did in the case of mass expulsions to Libya. In fact, contrary to the opinion of the United Kingdom and the Italian government, a wide mobilisation of NGOs arose to defend Mr. Saadi. Amnesty international, AIRE Centre, the International Commission of Jurists, Interights and Redress were engaged in a strong press campaign. Although the ECtHR did not agree to include their

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written submissions in the trial, NGOs attended the 11 July 2007 hearing with a report signed by them. They also applauded the final judgment, as reported, among others, by the CIR and Amnesty International.

6.2 The cases of mass expulsion to Lybia

The other relevant case concerning the protection and rights of immigrants is the case of mass expulsions to Lybia[75].

Italian law no. 189/2002 states that illegal immigrants should be kept in centres pending their identification with a view to being granted asylum – whenever the conditions are met – or to being expelled from the country. Asylum seekers and immigrants are deprived of their personal liberty and held for weeks in centres pending their identification or waiting for their expulsion. The centres are generally overcrowded and do not offer appropriate sanitary and hygienic conditions. In spite of some efforts by the Italian institutions[76], the CPTAs' conditions were criticized by the United Nations Committee against torture[77], the International Federation of the League of human rights, Amnesty International, the Commissioner of European Council for human rights. Cases of serious mistreatment of people staying in these structures by the police and social workers have been reported[78]. After such pressure from international organizations, the former government decided to establish an independent commission with a mandate to find solutions on the issue.

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[75] For a comment on these cases and on the Saadi case see S. Sileoni, Proctecting Individuals from Non-Majoritarian Groups in Italy, in Protecting Individuals from Non-Majoritarian Groups in the European Court of Human Rights: Litigation and Jurisprudence in Nine Countries, in D. Anagnostou, E. Psychogiopoulou (eds.), Leiden, Martinus Nijhoff/Brill (2009); Id., Italy's treatment of immigrants toward the European Convention on Human Rights: some recent developments, in Journal of Immigration, Asylum & Nationality Law, 24 (2010).

[76] Order of the Ministry of the Interior Linee guida per la gestione dei centri di permanenza temporanea e assistenza (CPT) e dei centri di identificazione (CID), 27/11/2002; establishment of the Committee for the protection of foreign minors ex Art. 33, legislative decree no. 286/1998; establishment of the UNAR (National office against racial discrimination) under the Presidency of the Council of Ministers, ex legislative decree no. 215/03.

[77] CAT/C/SR/777 and CAT/C/SR/778.

78 For a complete overview of the issue see FIDH, Rapporto sull'Immigrazione, cit, 8.

One of the violations of fundamental rights that international institutions, NGOs and some politicians denounced in the CPT came before the ECtHR. Several immigrants who landed in Lampedusa were detained in the CPTA and then were expelled to Lybia, in compliance with confidential agreements between the Italian and Libyan governments and without any guarantee for the individuals affected. A confidential report of the European Commission obtained by an Italian journalist, Fabrizio Gatti[79], stressed that, between August 2003 and December 2004, the Italian government sent back to Lybia 5,688 Lybian immigrants. After the inspection by the UN delegate appointed to migrant affairs in June 2004 of the Lampedusa CPTA, in October two Italian MEPs submitted a question in Parliament on expulsions from Lampedusa. The Parliamentary Assembly of the Council of Europe approved a declaration on June 2005 where it expressed a strong concerned about the respect for asylum proceedings in Lampedusa. While the European Parliament passed a resolution against the mass expulsions from Lampedusa[80], the Court of Strasbourg on May 10, 2005 passed an interim resolution to stop the expulsions of 11 out of 79 plaintiffs, represented by the lawyer Anton Giulio Lana, from the Unione forense per la tutela dei diritti dell'uomo and three days later it demanded that the expulsion of the other 79 immigrants be stopped.

One year later, with a decision emitted on May 11, 2006, the Court declared as partially admissible four applications by a group of aliens who arrived in Lampedusa in March 2005, detained for some weeks in the island's CPTA and finally expelled to Libya[81]. The Court examined these applications on the merits claims under Arts. 2, 3[82] ECHR, Art. 4 of Protocol 4 (prohibition of

[79] The news was done in the review Espresso on 7 October 2005, Io clandestino a Lampedusa.

[80] Resolution n. P6_TA (2005)0138.

[81] Hussun and others v. Italy, no. 10171/05, Mohamed v. Italy, no. 10601/05, Salem and Others v. Italy, no. 11593/05, Midawi v. Italy no. 17165/05. Decision of 11 May 2006.

[82] For having been expelled to Lybia, a country not member to the Geneva Convention on refugees and which does not offer sufficient guarantees for the protection of fundamental freedoms.

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collective expulsions of aliens)[83], Art. 13 (right to an effective remedy)[84], Art. 34 (right to individual recourse to the Court)[85].

Among the applicants, 57 were unknown, while 14 had been expelled to Libya.

The ECtHR rejected the claims and their referral, due in part to the impossibility to get in contact with almost all the applicants concerned[86].

While the applications must still discussed before the Court, the Italian government inaugurated in May 2009 a new strategy of expulsions, stopping the immigrant's boat before their arriving in the Italian territory, on high seas.

In view of the seriousness of these allegations, UNHCR emitted a press release requesting to the Italian government information on the treatment of people returned to Libya and asking that international norms be respected[87].

In fact, according to the Human Rights Watch report, on 6 May 2009 for the first time after the Second World War Italy gave the order to its Navy to intercept and refoul boats of immigrants on high seas, without any identification nor evaluation if some of them needed humanitarian intervention[88], in accordance to a treaty signed by the Libyan and the Italian government on August 2008[89]. Such a treaty was highly controversial. For the Italian government, the State is faced with a serious problem of illegal immigration from North Africa and need to fight it[90]; on the other

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[83] The Italian authorities have undertaken the expulsion without considering personal conditions of the applicants.

[84] The applicants have been denied to enter in contact with lawyers and to seek asylum; Furthermore, they had no remedy at their disposal to stay the order of expulsion.

[85] The applicants have been expelled pending at the Court the request for temporary suspension of the expulsion.

[86] The Court struck down the application with a decision of 19 January 2010.

[87] Press release of 7 May 2009.

[88] See the Human Rights Watch report Scacciati e schiacciati, l'Italia e I respoingimento di migranti e richiedenti asilo, la Libia e il maltrattamento di migranti e richiedenti asilo, 4 (2009).

[89] Trattato di amicizia, partenariato e cooperazione tra la Repubblica Italiana e la Grande Giamahiria Araba Libica Popolare Socialista, signed on 30 August 2008.

[90] In the opinion of the UNHCR, the number of illegal immigrants arriving in Italy from North Africa has arisen from 19.900 in 2007 to 36.000 in 2008 (plus 89,4%); the number of asylum demands was grow up from 14.053 in 2007 to

side, there is a strong criticism due to the lack of any guarantees from the Libyan authority about the treatment of immigrants.

On 14 July 2009, the UNHCR spokesperson intervened at the press briefing at the Palais des Nations in Geneva, denouncing that UNHCR staff in Libya have been carrying out interviews with 82 people who were intercepted by the Italian Navy on high seas on July 1 about 30 nautical miles from the Italian island of Lampedusa. They were transferred to a Lybian ship and later transported to Libya. Based on subsequent interviews, it does not appear that the Italian Navy made an attempt to establish nationalities or reasons for fleeing their countries. From interviews conducted by the UNHCR in Libya, it emerged that 76 persons came from Eritrea. Based on UNHCR's assessment of the situation in Eritrea, it was clear that a significant number of these persons was in need of international protection.

Some days later, from 27 to 31 July, a delegation from the European Committe for the prevention of torture of the Council of Europe visited Italy questioning the practice of intercepetion and refoulement of irregular immigrants.

From their side, NGOs were mobilised: Human Rights Watch published a report denouncing this practice[91] and Amnesty International did a mission in Libya in order to investigate on the fate of refouled immigrants.

In the meantime, the Unione forense per i diritti dell'uomo submitted a new application[92] for violation of Arts. 3 (prohibition of torture), art. 4, Prot. 4 and Art. 1 (the fair proceedings and the prohibition of collective expulsion), and Art. 13, on behalf of 24 immigrants stopped on the sea before the Sicilian isle.

The UNHCR submitted a third party intervention in order to address the practice and justification of the "push-back" operations by the Italian government, the conditions for reception and seeking asylum in Libya and the extraterritorial scope of the principle of no-refoulement and pursuant legal obligations concerning the rescue and interception of people at sea.

31.164 in 2008 (plus 122%) (see www.unhcr/org/pages/412d406060.html and www.unhcr.org/49c796572.html.

[91] HRW, Repoussés, malmenés: L'Italie renvoie par la force les migrants et demandeurs d'asile arrivés par bateau, la Libye les maltraite, 21 September 2009.

[92] Application no. 27765/09, Hirsi et autres c. Italie.

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This new application, deposited at Strasbourg by the same lawyer of the previous Lampedusa case, demonstrates that the use of the Convention in order to protect vulnerable groups challenging the national institutions and policies is no more isolated, but, from the Saadi case and the case of expulsions from Lampedusa, it has been inaugurated a new era in the protection of fundamental rights in Italy, where NGOs, legal associations, political parties and also individuals use international instruments to promote them.

The claim of immigrants returned to Libya will likely based on the violation of the due process clause, in its widest concept, and on the violation of the principle of non-refoulement.

Regarding the first principle ex Art. 4, Prot. 4, in the cases under scrutiny there likely was any guarantee of identification of immigrants. As the Italian Supreme Court stated, "the guideline of the European Court on the concept of prohibition of collective expulsion of aliens ex Art. 4 Prot. IV of the ECHR, is aimed to comprehend the expulsion adopted against a group of aliens when there is not for everyone a reasonable and objective examination of their cases and claims before the competent authority [… Art. 4] intends to avoid that the reasons of expulsion of a "group" absorb the examination of single positions, with regard to the objectivity and legitimacy of the motivation of the expulsion".[93]

Regarding the prohibition of non-refoulment, as already said, Art. 3 ECHR bans extradition to States where there is a real risk of torture, in its widest concept. But this principle is also a cornerstone of international law. It is part of the international law on refugees, and in this sense it is provided for by the Refugees Convention of 1951[94]. It is also part of the EU law, as it is provided for by the directive 2004/83/CE, whom Art. 21.1 establishes that member States respect the principle of non-refoulment in accordance to international obligations[95]. But the principle of non-refoulment is also part of the broader international law on human

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[93] Cass. Civ., Sez. I, no. 16571/2005.

[94] Convention relating to the Status of Refugees, 189, U.N.T.S. 150, entered in force on 22 April 1954, ratified by the Italian State on 15 November 1954. See art. 33.

[95] Such a provision has been introduced in the Italian system by the legislative decree no. 251/2007.

rights, in the wider mean that no one can be send in countries where he will likely suffer tortures or inhuman and cruel treatments. Such a perspective of the principle is foreseen by Art. 3 of the Convention against torture[96] and by Art. 7.1 of the International Covenant on Civil and Political rights.[97]

The practice to intercept immigrants' boats on high seas is a sort of escamotage attempted by the Italian government. It likely derives from the opinion of the Italian government that the non-refoulment obligation must not be applied outside the sovereign territory, but this is a quite isolated interpretation[98]. The opposite opinion is expressed by many other institutions. Firstly, by the UN ones, who are confirmed in several cases the opposite interpretation[99]. Secondly, even the ECtHR has already stated that

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[96] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted on 10 December 1984, G.A. res. 39/46, annex, 39 U.N. GAOR Supp. (no. 51) at 197, U.N. Doc. A/39/51(1984), entered in force on 26 June 1987, ratified by the Italian State on 12 January 1989.

[97] International Covenant on Civil and Political Rights (ICCPR), adopted on 16 December 1966, G.A. Res. 2200A(XXI), 21 U.N. GAOR Supp. (no. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered in force on 23 March 1976, ratified by the Italian State on 15 September 1978. The Human Rights Committee, i.e. the Office responsible on the ICCPR execution, clarified that States must respect and guarantee the rights provided in the Covenant to any person subjected to their jurisdiction, also when he is outside the national territory (General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant, 29 March 2004). See also the European Convention on Extradition, the European Convention on Terrorism. Some doctrine says that this principle can be considered as international customary law (see IHF, Anti-terrorism Measures, Security and Human Rights – Developments in Europe, Central Asia and North America in the Aftermath of September 11 (2003).

[98] See on that respect the US Supreme Court opinion in Sale v. Haitian Centres Council, 509 US 155, 156 (USSC 1993).

[99] Unhcr, Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol, 26 January 2007, para. 24; Id., Unhcr Background Note on the Protection of Asylum-Seekers and Refugees Rescued at Sea, 18 March 2002, par. 18; Id., The Principle of Non-Refoulement as a Norm of Customary International Law, Response to the Questions Posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in Cases 2 BvR 1938/93, 2 BvR 1953/93, 2 BvR 1954/93, 31 January 1944, par. 33; Id., UN High Commissioner for Refugees responds to U.S. Supreme Court Decision in Sale v Haitian Centers Council, International Legal Materials, 32, 1215 (1993); Id., Comments on the Communication from the Commission to the Council and the European Parliament on the Common Policy on Illegal Immigration COM (2001) 672 Final, 15 November 2001, par. 12; UNHCR

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the ECHR can be applied also to governmental actions taken on high seas[100].

6.3 The immunity of parliamentarians

The immunities of Italian parliamentarians are named as "prerogatives", is said as instruments that protect the free exercise of legislative functions putting a difference on the parliamentarian's status and this of common people.

One of these prerogatives is the absolute immunity from being persecuted and processed for opinions given during the parliamentary activity (Art. 68.1 Const). The border between an adequate tool for the independence and the liberty of any parliamentarian on one side, and the unequal treatment in respect of common people is quite evident: in theory, a member of the Parliament can not persecuted for defamations even when he acts and speaks during the exercise of his functions, but the enforcement of this rule has largely protected parliamentarians even when they were acting more as politicians than as member of the Parliament. In fact, is the Parliament that can oppose the immunity as a preliminary question, preventing the judicial proceedings[101].

Since the years '70, the doctrinal debate has enriched an impressive number of conflicts before the Constitutional court between the judiciary and Parliament, where, in substance, the guarantees for parliamentarians not to be persecuted and judged were normally confirmed in the name of the absolute immunity[102].

Amicus Curiae Brief in Sale, 21 December 1992. See also: Executive Committee of the High Commissioner's Programme, 18th Meeting of the Standing Committee Interception of Asylum Seekers and Refugees: The International Framework and recommendations for a Comprehensive Approach, EC/50/SC/CRP.17, 9 June 2000, par. 23; EXCOM Conclusion no. 82 (XLVIII) (1997); EXCOM Conclusion no. 85 (XLIX) (1988), EXCOM Conclusion no. 53 (XXXIX) (1981); EXCOM Conclusion no. 22 (XXXII), (1981).

[100] Women on Waves and Other v. Portugal, no. 31276/05, 3 February 2009.

[101] See the law no. 140/2003 for the execution of Art. 68 Const.

[102] C.P. Guarini, L'ordine delle competenze di Camere e autorità giudiziaria in materia di insindacabilità parlamentare (1998); M. Midiri, Autonomia costituzionale delle Camere e potere giudiziario (1999); S. Panunzio, Interrogativi sulla insindacabilità dei parlamentari per le opinioni da essi espresse e il nesso funzionale, in AA.VV., Immunità e giurisdizione nei conflitti costituzionali, 285-297 (2001); G. Azzariti,

Only the intervene of the ECtHR could challenge what is perceived by the common people as an abuse of this prerogative[103].

The ECtHR had found in various cases a violation of the Art. 6 of the ECHR, relating to the impossibility to condemn a parliamentarian for his/her offensive statements[104].

But two recent similar cases, brought before the Court by the general secretary of one of the major Italian trade-union federation, mark in a more significant manner a challenge to the rules on absolute immunity.

The general secretary, Mr Sergio Cofferati, was indicate in two interviews released by two parliamentarians as connected with the murder of a Government consultant, committed by Italian terrorists.

Cofferati, who considered that the interview damaged its reputation, brought two different proceedings in the tribunal of first instance, but the Chamber of Deputies decided that the statements in question had been uttered in the course of a parliamentary debate and that, consequently, the interviewed

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Cronaca di una svolta: l'insindacabilità dei parlamentari dinanzi alla Corte costituzionale, in Id., Le Camere dei conflitti, 199-251 (2001); C. Martinelli, L'insindacabilità parlamentare: teoria e prassi di una prerogativa costituzionale (2002); M. Midiri, Recenti tendenze in materia di conflitti di attribuzione tra poteri: i conflitti di attribuzione relativi all'insindacabilità parlamentare, in E. Bindi, M. Perini (eds.), Recenti tendenze in materia di conflitti di attribuzione tra poteri dello Stato, 89-130 (2003).

[103] The infringement of the ECHR was foreseen by A. Pace, L'insindacabilità parlamentare e la sentenza n. 1150 del 1988: un modello di risoluzione dei conflitti da ripensare perché viola la Costituzione e la C.E.D.U., in Poteri, garanzie e diritti a sessant'anni dalla Costituzione: scritti per Giovanni Grottanelli De' Santi, cit., 521-536.

[104] First of all, Cordova v. Italy(1) and (2), nos. 40877/98 and 45649/99, 30 January 2003, De Jorio v. Italy, no. 73936/01, 3 June 2004, Ielo v. Italy, no. 23053/02, 6 December 2005. Especially the Ielo case had a strong political impact, also because it followed a decision of the Constitutional court (no. 417/1999), diverging from the opinion of such a Court. T.F. Giupponi stresses the importance of the Ielo case in respect to the other one: Il "caso Ielo" in Europa: Strasburgo "condanna la Corte italiana in material di insindacabilità?, in www.forumocostituzionale.it. See also N. Purificati, L'insindacabilità dei parlamentari tra Roma e Strasburgo, in Quaderni costituzionali, 2 (2007); B. Randazzo, Prerogative parlamentari: il giudice di Strasburgo "bacchetta" la Camera dei deputati e sembra smentire anche la Corte costituzionale, in forumcostituzionale.it.

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were covered by parliamentary immunity. Both the tribunals raised two different conflicts against Parliament before the Constitutional Court, which declared the conflicts inadmissible[105].

Consequently, Cofferati toke two legal actions before the ECtHR[106], relying on Art. 6.1 (right to a fair hearing) and complaining his inability to sue the two parliamentarians for defamation in the national courts.

The Court found in its judgments that the applicants had been deprived of the possibility of obtaining any form of compensation, which had resulted in an interference with their right of access to a court. Although this interference had pursued a legitimate aims because it was designed to protect members of Parliament from partisan complaints, ensuring a full freedom of expression during their mandate, not every statement is covered by the immunity, and those under the scrutiny of the Court could be appreciated as statements made outside the context of the parliamentary debate, and therefore without a clear connection with the parliamentary activity.

In sum, in a highly sensitive fact which involved famous political representatives (one of the parliamentarian was also Minister) and which has been widely followed by the public opinion, the ECtHR confirmed which has to be the approach on the balance between the legitimate aim of the interference and the fundamental rights of person damaged by declarations made by a parliamentarian, included the right to a fair hearing. Only this approach belonging from an international court seems able to challenge, more effectively than any other effort done in the national context, the parliamentarians' prerogative. This is a democratic result that is relevant not only in the legal context, but also in the political arena[107].

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[105] Constitutional Court 2007, nos. 305 and 368/2007.

[106] CGIL and Cofferati v. Italy, no. 46967/07, 24 February 2009, CGIL and Cofferati (2) v. Italy, no. 2/08, 6 April 2010.

[107] Another ECtHR's judgment brought into question Parliament as self-governed body: is the decision emitted on 28 Avril 2009, on applications nos. 17214/07, 20329/05, 42113/04 Savino and others v. Italy, concerning the issue of whether the judicial committee and judicial section of the Italian Chamber of Deputies can be classified as a "tribunal".

6.4 The "Genoa" case

In July 2001, Genoa hosted the G8 summit.

During the days of the summit, some authorised demonstrations degenerated in extremely clashes between anti-globalisation militants and police. These event occupied for months the Italian and foreigner newspapers and provoke deep consequences at political level, like the dimissions of the Minister of Interior.

The extreme positions went from charging some militants to have seriously undermined the public order to accusing the police for having violate fundamental rights by the abuse of their powers.

A number of criminal investigations was initiated by the Italian judicial authorities[108], while a parliamentary committee of inquiry was established[109] and the European Parliament passed a report demanding the respect of fundamental rights and freedoms during public demonstrations[110].

The Italian public opinion was highly impressed by the facts of those days, especially because of the death of a demonstrator, Carlo Giuliani, shouted by a law enforcement officer during one of the violent conflict.

The echo of his dead is still vibrating in the media and in the public discourse. For several months the debate around this

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[108] These include inquiries relating to the fatal shooting of Carlo Giuliani on 20 July; instances of alleged use of excessive force on the streets; alleged ill-treatment and excessive force by law enforcement officers during the raid on the Genoa Social Forum premises (Scuola Pertini-ex Diaz premises) in the early hours of 22 July, and alleged ill-treatment and cruel, inhuman and degrading treatment by law enforcement and prison personnel in detention facilities, including Bolzaneto. Criminal investigations were also opened both by the Public Prosecutor's office in Ancona and by the Public Prosecutor's office in Patras, Greece, concerning the alleged ill-treatment of Greek citizens en route to Genoa on 19 July.

[109] On 1 August 2001 the Italian Parliament decided to open a fact-finding investigation (indagine conoscitiva), with no judicial powers, rather than a full ad-hoc parliamentary commission of inquiry (commissione d'inchiesta), possessing full judicial powers. See the final document of the Senate sull'indagine conoscitiva svolta dalla 1a Commissione permanente "sui fatti accaduti in occasione del vertice G8 tenutosi a Genova, Doc. XVII, no. 1.

[110] Committe on Citizens' Freedoms and Rights, Justice and Home Affairs, Report on the human rights situation in the European Union (2001), (2001/2014(INI)), 12 December 2002.

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fatal accident, as a symbol of the violent and tragic Genoa days, has been heated, and it is still now so. The parliamentary group of Rifondazione comunista dedicated its office at the Senate to the young boy, his mother began a political career, while not only newspapers, but also movies, documentaries and songs talk about this episode. An association created under the name of Carlo Giuliani enlarged its initial aim in a broader purpose to fight for the right to life and free expression[111].

The Giuliani's death, in sum, arises as a symbol used by activist and some political groups belonging from the left against the abuse of the force by public agents and policemen[112], and in that way it arrived at the ECtHR.

The family of the boy alleged that Carlo Giuliani's death had been caused by excessive use of force and that the organisation of the operations to maintain and restore public order had been inadequate. They also argued that the failure to provide immediate assistance amounted to a violation of Arts. 2 and 3 of the ECHR. They complained as well that there had not been an effective investigation into the boy's death, in violation of Arts. 2, 6, and 13.

The Court found the Italian government not responsible for violation of the Convention on grounds of excessive use of force and for violation of the obligation to protect life, but condemned the Government for violation of Art. 2 only in its procedural aspect, because the investigation was not adequate in that it did not seek to determine who had been responsible for the situation.

Aspects on the legal ground apart, the Giuliani case has been object of an intense debate in Italy. An immense quantity of articles and reports in newspapers, books and every kind of media followed the case, using the Court's arguments both in the sense of denounced the abuse of violence by the State and in the sense of delegitimize the no-global activism.

The cultural and political fight is not ceased, as both the Government and the applicants take recourse against the judgment. The referral is now under scrutiny of the Grand Chamber.

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111 See the activity of the Comitato Piazza Carlo Giuliani O.N.L.U.S.

112 See in that sense the document of Amnesty International, Italy: G8 Genoa policing operation of July 2001, 1 November 2001.

6.5 Freedom of religion

Since the pre-republican era, there is a rule in Italy requiring that public place (public hospitals, schools, tribunals) display the catholic crucifix in each room.

Regarding the schools, the royal decrees nos. 965/1924 and 1297/1928 survive to the entry into force of the Italian Constitution in 1948 and the constitutionalisation of the principle of separation of Church and State.

Such an exposition of a religious symbol in public places did not provoke any sense of offence until the Italian society was generally supporting the catholic faith.

A pluralistic evolution of the Italian people due both to the general secularization of the contemporary societies and the phenomenon of immigration, that is quiet new for Italy, brought a vivid and troubled debate on this matter that across the entire society and institutions at every level.

One of the first cases brought to the national courts concerned the display of the crucifix in the public place during the electoral vote[113].

Yet, it is from a case concerning the display of the crucifix in a kindergarten that the public debate became very heated.

The founder of the Union of Muslim, Abel Smith, objected to the symbol of a particular religious faith being featured in his child's classroom, but he referred also to crucifix as "small cadaver [... whom] morphology is nothing but a corpse that could scare children". The judge of first instance found in Smith's favour stating in a temporary order that Italy is living a cultural transformation and calling the display of the crucifix an offense to the freedom of religion[114].

Apart the reaction of the Catholic clergy, also the major institutions disagreed with the judge: even the President of the Republic argued that "the crucifix has always been considered [...] a symbol of the values that are at the base of our Italian identity"[115].

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[113] Cass. Pen., sez. IV, no. 4273, 1 March 2000. For a comment see G. Di Cosimo, Simboli religiosi nei locali pubblici: le mobile frontier dell'obiezione di coscienza, in Giur. cost., 1130 (2010).

[114] Trib. L'Aquila, 23 october 2003.

[115] C.A. Ciampi, Il crocifisso simbolo di valori condivisi, reported by the newspapers "Repubblica" and "Il Corriere della Sera" on 28 October 2003.

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The final judgment of the first instance void the temporary order arguing that it is incompetent on such a matter[116].

Two years later, a first instance judge, Mr Luigi Tosti, refused to act in his courtroom until the crucifix, appealed the administrative tribunal, was displayed and was suspended from the bench and convicted of refusing to perform his duties[117]. While the dispute arose in a nationwide debate, the Constitutional court was involved by Mr Tosti, but the claim was rejected as he was not entitled to raise in court the issue[118].

Meanwhile, a Finnish woman filed a suit demanding the removal of the crucifix in the her children's school. The woman, Ms Soile Lautsi, since 2002 pressed the school to remove the crucifixes in the classrooms. In May 2022, the school's governing body decided to leave them and the Ministry of State education adopted a directive recommending such an approach[119].

The case of the Finnish woman arrived to the Administrative Tribunal, that threw out the case, arguing that the crucifix is not a religious symbol, but – as anticipated by the President of the Republic – a symbol of the values which underlie and inspire the Constitution and the Italian way of life[120]. Also the Constitutional court was requested to examine the constitutionality of the royal decree, but it held that it did not have jurisdiction, because the royal decree was not a law[121].

From another side, the Council of State on 2006 emitted an advice[122] that, in conformity with another advice of 1988[123], insists on the nature of the crucifix as symbol of the values of freedom, equality, human dignity and religious tolerance that do not undermine the principle of laicité of the State.

After having tried all the domestic remedies, Ms Lautsi claimed the ECtHR on behalf of her children, alleging that the display of the crucifix in the State school was contrary to her right

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116 Trib. L'Aquila, 19 November 2003.

117 TAR Marche, sez. I, 22 March 2006.

118 Constitutional court, no. 127/2006.

119 Ministero dell'istruzione, Direttiva 3 ottobre 2002 and Nota 3 ottobre 2002.

120 TAR Veneto, sez. III, 17-22 marzo 2005.

121 Const. Court, no. 389/2004.

122 Council of the State, 15 February 2006: Esposizione del crocifisso nelle aule scolastiche.

123 Council of the State, 27 Avril 1988: Insegnamento della religione cattolica ed esposizione dell'immagine del Crocifisso nelle sue aule scolastiche.

to ensure their education and teaching in conformity with her religious and philosophical convictions, within the meaning of Art. 2, Prot. 1, and was contrary also to her freedom of conviction and religion, ex Art. 9 ECHR. The Greek Helsinki Monitor intervened as third party in support of the Lautsi's arguments.

According to the Court, the crucifix could easily be interpreted by pupils as a religious sign and they would feel that they were being educated in a school environment bearing the stamp o a given religion. Disagreeing from the Italian position, the Court hardly could imagine that the crucifix, as more than a religious symbol, could serve the educational pluralism. Unanimously, it found that there had been a violation of Arts. 2, Prot. 1 and Art. 9 of the ECHR.

The proceedings was alertly followed by the people, the Vatican, the other Churches and the institutions, in a great mobilisation of the public opinion that putted in charge of the opinion of the Court both the preservation of the religious and cultural tradition and, from the opposite side, the challenge to the strong link between the Catholic Church and the State.

Such a rely upon the Court's decision can explain how deep was the impact of the judgment in the public opinion, testified by the impressive attention dedicated to this case by the media, also foreigners, that call for a flare-up between Italy and the Court[124]: the decision provoked "a real thunderstorm", among "the reaction of the national media and the counter-reactions to the judgment by local authorities" [125]. In fact, a large number of them approved municipal decrees in order to avoid the enforcement of the judgment. Politics reacted submitting to Parliament three bill regulating the exposition of the crucifix and recognising its value as a universal symbol of the Italian culture, aside from its religious meaning[126].

In march 2010, the Grand Chamber accepted the referral request submitted by an Italian Government which is firmly defending the crucifix's display. The Grand Chamber has already

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[124] So the article Will Crucifixes Be Banned in Italian Schools, in "Time.com", 5 November 2009.

[125] P. Annicchino, Is the glass half empty or half full? Lautsi v Italy before the European Court of Human Rights, in "Stato, Chiese e pluralismo confessionale", 8 (2010).

[126] Bills nos. S1900, C2905, S1856, deposited on November 2009.

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authorised the Governments of Armenia, Bulgaria, Cyprus, Greece, Lithuania, Malta, Monaco, Romania, the Russian Federation and San Marino, 33 members of the European Parliament, the Greek Helsinki Monitor, the Associazione nazionale del libero pensiero, the European Centre for Law and Justice, Eurojuris, the International Commission of Jurists joint with Interrights and Human Rights Watch, the Zentralkomitee des deutschen Katholiken joint with the Semaines socials de France and the Associazioni cristiane lavoratori italiani to present written observations[127].

In its judgment released on 18 March 2011, the Grand Chamber overruled the first one, stating that there has been no violation of the right to education. In fact, even if the crucifix is a clear symbol of the Christianity, there is no evidence that the display of such a symbol on classroom walls could influence pupils. The subjective perception of the applicant on that is not sufficient to conclude for a lack of respect on the State's part for her right to ensure education to her children in conformity with her personal philosophical convictions.

It is also worth to note that the Grand Chamber include on the margin of appreciation the States' decision whether or not to perpetuate what the Italian Government shows as a tradition, i.e. the display of the crucifix in the State-school classrooms. The argument of the lack of an European consensus allow the Grand Chamber to avoid to take a position regarding the domestic debate among the courts (especially, the Council of the State and the Court of Cassation) on that, since the presence of the crucifix in the classes' walls is not an evidence a process of indoctrination of a State's religion, but it is only a passive and not offensive symbol.

Ironically, for now the findings of the case have been, in some way, a conservative reactions, which are exacerbated a dispute that seems far from being settled.

Besides the reactions outside national boundaries[128], the cultural élite, all the Churches and all the political parties are

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[127] See the press release issued by the Registrar on the hearing hold on 30 June 2010.

[128] Above all, the written declaration of some members of the EP On the freedom to display religious symbols representative of a people's culture and identity on public premises, no. 64/2009, 23 November 2009.

participating, sometimes in a fierce manner, to the debate[129]. The claim of Ms Lautsi is so evolving in the apical and crucial point of a very sensitive question which is animating a debate that is overtaking the individual interest of Ms Lautsi. Or, more realistically, Ms Lautsi decided to take upon herself one of the major challenge to the Italian cultural traditions since its foundation[130].

7. Conclusion: Toward a strategic litigation in Italy?

Major conflicts between the ECHR and the Italian system regard chronic deficiencies in certain fields, especially the administration of justice.

Until the middle of first decade of 2000, no relevant judgments relating issues crucial in the political and cultural debate were emitted. But the Saadi case, the case of mass expulsions to Lybia and the other ones here examined probably marked a starting point for a strategic litigation aimed at challenging policies and legislation which contrasts in areas were the political discourse is controversial.

The delay of the Italian State in accounting for such issues is due to several factors.

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[129] For an account of the large and deep debate see, apart P. Annicchino, cit., L.P. Vanoni, I simboli religiosi e la libertà di educare in Europa: uniti nella diversità o uniti dalla neutralità?, in Rivista dell'Associazione Italiana dei Costituzionalisti (2010).

[130] Another case concerning the freedom of religion is Lombardi Vallauri, no. 39128/05, 20 October 2009: Mr Lombardi Vallauri is a professor at the Catholic University of Milan. The University decided to not renew his contract because of his views clearly opposite to catholic doctrine. Relying on Art. 10, 6.1, 9, 13 and 14 of the ECHR, Mr Lombardi Vallauri complained, in brief, that the decision of the University had breached his right to freedom of expression, for which no reasons had been given and which had been taken without any genuine adversarial debate. The Court stated that the procedural guarantees have been not guaranteed and that the interference with Mr Lombardi Vallauri's freedom of expression had not been "necessary in a democratic society". Although this case was quite followed by the Italian public opinion and it has a concrete impact in the secularization of the Italian society, it does not appear has included in a strategic litigation more than in a right approach. For a first comment, see M. Massa, Lombardi Vallauri c. Italia: due sfere di libertà ed un confine evanescente, in www.forumcostituzionale.it.

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From a legal point of view, Italy had to solve the problematic role of the ECHR in the internal system. After decades of ambiguity, only in November 2007 the Constitutional Court called a halt and clarified the relationship between the ECHR and national norms. Moreover, an already stable system of protection of human rights, added to a subsidiarity role of the EctHR, gives another legal reason for the lack of judgments regarding vulnerable groups.

In any case, as we have seen, a sort of evolution in ECHR rights' culture has been growing in recent years, also thanks to the most recent judgments by the Constitutional Court and the Court of Cassation, that have focused their attention on the ECHR.

It seems that an emerging strategic litigation is growing, where NGOs, politicians and further international organisations have become main players in challenging state legislation and practice, when an infringment of fundamental rights is alleged.

The attitude of some politicians and of the highest courts, research projects and academic monographs as well as some legislative initiatives (like that culminating in the Azzolini law) emphasize an improved knowledge and consideration of the ECHR, not only in traditional issues such as length of proceedings, fair trial, expropriations and so on, but also in the general system of the Convention.

The cases here summarised, although they are different on the merit, they are in common the fact that the proceedings before the ECtHR is inscribed in a broader national debate, as one of the instrument to challenge the law and also the legal culture of the country.

The same applicants sometimes seem to file the suit before the ECHR not only in their individual interests, but also with the aim to challenge a law, an administrative practice or even a legal culture. This is so for the Lautsi case, the case of mass expulsions and also the Giuliani case.

A confirmation of that conclusion belongs from two other cases, one of them still under scrutiny, the other declared inadmissible by the Court.

The first case moves from 17 applications against the Italian electoral law[131].

The applicants act in quality of voters against the electoral law no. 270/2005, that provides for the elections at Parliament. Such a law impedes to voters to express their preference on single candidates: they vote only for a political party or coalition, but they do not decide on the name of the candidates, that are chosen by the political parties. This system has been far and wide contested by citizens, besides almost all the political actors. While there were approuved three referendum for the abrogation of the law, some individuals filed a suit before the court and tried to involved the Constitutional court[132].

With a very naïve initiative, a voter appealed the Constitutional court for conflict among State powers, qualifying himself as state power because of "member of electoral body". This legal action was obviously attempted in a provocative way, as it is a clear and undoubted principle that "in any case […] a single citizen can […] consider himself invested with a task that is constitutionally relevant so much that he can raise a conflict among state powers"[133].

After the Constitutional court's declaration of inadmissibility, the applicants alleged the violation of the freedom of thought, conscience, expression and association and the right to an effective remedy ex Art. 6, 13, 1, 5, 9, 10, 11, 14, 16 and 3, Prot. 1 of the ECHR. It appears clear that such applications imply general interests directly related to the democratic structure of the society, and not individual interests of the applicants. They are brought to the ECtHR, in sum, as an instrument of a collective political challenge that regard every Italian citizens.

The other case concerns the right to die.

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[131] Applications nos. 11583/08, Saccomanno et autres, 11929/08, Anetrini et Alessio, 15726/08, Arato et autres, 16155/08, Malena, 20223/08, Zurzolo, 20225/08, Deleo, 20598/08, Dova, 20671/08, Versolato, 35953/08, Bozzi et autres, 39854/08, Zampa, 49434/08, Dell'Acqua et autres, 49512/08, Critelli et autres, 49519/08, Pullano et autres, 49538/08, Raffaelli et autres, 49545/08, Arcuri et autres, 49548/08, Cosco et autres, 29218/09, Marrari.

[132] See TAR Lazio, 27 February 2008, and Council of the State, 11 March 2008.

[133] So the Court rejected the claim on the basis of its constant jurisprudence, decision no. 284/2008.

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The bioethical debate on the right to die is one of the most high and pitched in Italy at the moment. Despite herself, Eluana Englaro becomed the paladin of the libertarian positions[134].

Ms Englaro was a comatose woman at the centre of a euthanasia debate that has divided Italy, even sparking a constitutional crisis. She died after a long fight of his father and guardian to remove her life support after 16 years of vegetative state, in accordance with what she have wished when she was in full possession of her faculties.

Her father began to have got the authorisation to discontinue his daughter's artificial nutrition and hydration in 1999. After a very troubled judicial events, in 2008 the Milan Court of Appeal granted the requested authorisation on the bases of the criteria laid down by the Court of Cassation for this case. The case was so crucial from a political point of view that Parliament raised a conflict of powers against the judiciary before the Constitutional Court, but the Court rejected it[135]. Finally, the Court of Cassation dismissed an appeal on points of law by the Milan public prosecutor's office against the decision of the Court of Appeal.

The case has shocked the public opinion and divided Italians in prolife activists and people claiming the right to freely choice on own life.

Also in this case, the European Convention has been used in this political and ethical discourse.

Some individual applicants, represented by their guardians, and some associations whose membership consists of the relatives and friends of disabled persons and of doctors and lawyers who assist the persons concerned and a human rights association complained of the adverse effects that execution of the decision of the Milan Court of Appeal in the Englaro case was liable to have on them, alleging the violation of Arts. 2 and 3[136]. The ECtHR declared inadmissible the claims, because of the lack of direct interest. Reading the declaration of inadmissibility from the opposite perspective, one can conclude that in these case the

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134 As the «Times» remembers, Ms Englaro was called "Italy's Terri Schiavo" ("Right to die" coma woman Eluana Englaro dies, 10 February 2009.

135 Constitutional Court, no. 334/2008.

136 For a comment of this ethical and legal problem see A. Simoncini, O. Carter Snead, Persone incapaci e decisioni di fine vita (con uno sguardo oltreoceano), in Quaderni Costituzionali, 7-34 (2010).

applicants, both individuals and associations, addressed the Court not for their individual interests, but in order to push the political debate toward the prolife arguments. In other words, they did not demand justice for themselves, but they sought to introduce a prolife argument belonging from the ECHR in a very sensitive issue.

These cases may be the most evident proof of an incoming strategic, and in some way suffered, approach toward the ECHR in Italy.

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OBSTACLES TO CONVERGENCE IN ADMINISTRATIVE LAW: LESSONS AND QUESTIONS FROM THE BRAZILIAN EXPERIENCE

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Abstract

In the last decades, Italian Administrative Law has been going through significant changes related to a variety of topics such as the citizens' protection vis-à-vis the public administration, and liberalization, privatization and regulation of public utilities. A great deal of these changes is part of larger transformations that are taking place in Europe, and most (if not all of them) have been spearheaded by the European Union. One aspect of this phenomenon seems to deserve special attention by comparative administrative law scholars. As Giacinto della Cananea has suggested, these changes recommend that a comparative legal analysis has to consider not only commonalities and differences among national legislation in European countries, but should also consider commonalities and differences between national and supranational legislation and principles. The purpose of this article is to discuss how comparativists could include this new dimension in their analyses by using a non-European country as a point of contrast. The country that will be analyzed here is Brazil, which has some similarities to Italy and other European countries.

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Introduction

In the last decades, Italian Administrative Law has been going through significant changes related to a variety of topics such as the citizens' protection vis-à-vis the public administration,[1] and liberalization, privatization and regulation of public utilities.[2]A great deal of these changes is part of larger transformations that are taking place in Europe, and most (if not all of them) have been spearheaded by the European Union.[3]

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[1] G. Pastori, Recent Trends in Italian Public Administration, 1 I.J.P.L. 1-27 (2009).

[2] G. della Cananea, The regulation of public services in Italy, 1 Int'l Rev. Adm. Sci. 81-102 (2002).

[3] C.J. Bennett, Understanding Ripple Effects: The Cross-National Adoption of Policy Instruments for Bureaucratic Accountability, 3 Governance 213-33 (1997). C Hood et al. Regulation Inside Government (1999). C Knill, The Europeanisation of National administrations (2001). M Green Cowles et al, (eds.) Transforming Europe (2001). D Pretis, Italian Administrative Law Under The Influence Of European Law, 1 I.J.P.L. (2010).

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From the point of view of public law scholars, these changes raise a series of important questions.[4] Are these changes desirable? Are they legitimate? What are their implications for other areas of the law, such as constitutional law? Another set of interesting questions raised by these changes is relevant for comparative law scholars. Are we observing a convergence of administrative law throughout the European Union? What are the existing commonalities and differences between national systems? Are these changes only formal, or are they also modifying practices and institutional culture in European countries?

There is, however, one aspect of this phenomenon that seems to deserve special attention by comparative administrative law scholars. As Giacinto della Cananea has suggested in a paper recently published in this journal, these changes suggest that a comparative legal analysis has to consider not only commonalities and differences among national legislation in European countries, but should also consider commonalities and differences between national and supranational legislation and principles. In other words, a new dimension – the European Union – has been added into the picture, and it needs to be included in comparative legal scholarship also.[5]In Giacinto's words:

[New regional institutions] override the concept of national borders, thereby reshaping administrative law. (…) All this, it is argued, adds a new dimension to the study of administrative law. The comparative method should not be used only to identify the distinctive features of a specific legal order or to elaborate general theories. Comparative legal analysis should also be used to identify those general principles of administrative law that reflect common traditions and may therefore be applied throughout the European

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[4] There is a vast literature on this topic. For an overview of the literature, see M Lodge, From Varieties of the Welfare State to Convergence of the Regulatory State? The 'Europeanisation' of Regulatory Transparency, ESRC Centre for Analysis of Risk and Regulation, Queen's Papers on Europeanisation No 10/2001. For one of the most recent edited volume covering a number of these questions see D Oliver, T Prosser, R. Rawlings, The Regulatory State: Constitutional Implications, (2010).

[5] G. della Cananea, Administrative Law In Europe: A Historical And Comparative Perspective, 2 I.J.P.L. 209-210 (2009).

legal space, in the absence of explicitly contrary national provisions. (…) In any case, not only the distinctive features, but also the similarities require further analysis. Whether at least some general principles common to European legal orders may be considered as shared by most, if not all, other legal orders, is still another fascinating question."[6] (footnotes omitted)

The purpose of this article is to discuss how comparativists could include this new dimension in their analyses by using a non-European country as a point of contrast. The country that will be analyzed here is Brazil, which has some similarities to Italy and other European countries: it has a civil law system, and it is trying to implement reforms that do not always match with the existing legal culture in the country. Thus, some of the challenges and obstacles in this process may be similar. However, the most relevant reason to include Brazil in this piece is the contrast between the Brazilian experience, where reforms are not being implemented in the context of supranational authorities and regional integration, and European countries' experiences in implementing reforms in the context of the European Union. Because of this contrast, Brazil is a useful case to illustrate what kind of questions comparative law scholars could be asking if they are to emphasize the importance of this supranational dimension in the process of legal convergence.

The article is divided in three parts. I start by identifying some concepts and ideas that may be of interest to comparative administrative law scholars concerned with the phenomenon of convergence. The second part analyzes a series of reforms in a non-European country – i.e. outside of the context in which supranational institutions play an important role in the creation and implementation of these reforms. By using the case of Brazil I intend to show how this dynamic may take place outside of the European Union, and identify what kind of questions would be raised if we were to include a new dimension in the picture, as suggested by Giacinto della Cananea. In conclusion, the article discusses some of the theoretical implications and risks of the analysis proposed here.

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[6] Id.

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I. Obstacles to Convergence in Administrative Law Reforms

Comparative law scholars can engage either with a static or a dynamic analysis of legal systems in different jurisdictions. A static analysis takes a snapshot of a particular legal issue and compares it across systems. A dynamic analysis, on the other hands, tries to account for changes that occur in a system over a period of time. This dynamic analysis can compare a system with itself overtime, but it can also compare the changes that have taken place in different systems over time, searching for commonalities and differences. It is the latter that I am most interested here.

Recently, different countries have engaged in significant regulatory reforms. These have started in Europe, particularly the U.K., and have quickly spread to other countries, becoming what some now regard a global phenomenon. This has led many authors to argue that there is a great deal of convergence among countries in their administrative law provisions.[7] Some argue that these countries have increasingly gravitated towards what became known as the "Regulatory State".[8] Some have gone one step further and claimed that these legal changes are just one aspect of a multifaceted trend on the global political economy called "Regulatory Capitalism".[9] Others have associated these changes with specific economic and social reforms, such as privatization or consumer protection.[10] For the latter, legal convergence would be happening as a result of policy convergence, i.e. agreements around a particular set of policy reforms that require a unique set of legal tools to operate.

The idea that national legal systems may converge, however, has generated some disagreement in the academic literature. One

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[7] Supra n. 4.

[8] G. Majone, From the Positive to the Regulatory State – Causes and Consequences from Changes in the Modes of Governance, 17:2 J. of Public Policy 139-67 (1997). G. Majone, The Regulatory State and its Legitimacy Problems, 22:1 West European Politics 1-24 (1999).

[9] D. Levi-Faur, The Global Diffusion of Regulatory Capitalism, 598:1 The Annals of the American Academy of Political and Social Science 12-13 (2005).

[10] G. della Cananea, The regulation of public services in Italy, cit at 2.

illustrative example revolves around privatization reforms.[11] One could suggest that the privatizations in the 1980s and 1990s worldwide were a result of policy convergence. This argument could be supported by the fact that such reforms were taken up both by left and right wing governments around the globe during roughly the same period. Despite this "policy convergence", however, there have been significant differences in the manner in which privatization has been implemented and played out. These divergences often manifest themselves in the regulatory reforms that accompany the privatization process and can be attributed to at least three causes: the effect of the broader institutional environment, conflicting policy goals, and resistance of interest groups. Cognizant of its limitations, I will rely on the example of privatization reforms to provide examples of each of these obstacles.

a) Broader Institutional Environment

Privatization can be defined as the sale of state-owned companies and has been argued to be a strategy to solve two problems at once: reduce the government's fiscal deficit by generating revenues, and improve the efficiency and quality of services delivered by transferring state-owned companies to private hands.[12]The advocates of privatization also claimed that successfully pursuing these goals largely depends on credible commitments by the government. Thus, governments were advised to assure private investors that there would be no subsequent expropriation of private investments. If there was no such commitment, efficiency would be negatively affected because investors would not improve services, expand the network or bring new technologies. This commitment was also considered relevant for the goal of raising revenues – without a credible commitment against expropriation, investors

[11] As Cananea indicates, regulatory reforms are not only associated with nor exclusively linked with privatization. Id. Indeed, privatization has largely fallen out of favour nowadays, but it provides an illustrative example for the purposes of this analysis.

[12] J. Vickers & G. Yarrow, Economic Perspectives on Privatization, 5:2 J. Econ. Persp., 111, 118 (1991).

would apply a discount rate and pay less for the companies.[13] In this regard, the broader institutional environment (political system, independent judiciary, etc.) largely determined a country's ability to provide a credible commitment against expropriation to investors.

What was regarded as necessary to secure credible commitments? At the time of privatization reforms, the literature pointed to the enforcement of contracts and protection of property rights, the two pillars of the credible commitment for private investment in general. In the specific case of infrastructure sectors, where a great deal of privatization happened, there was another layer of protection required: stability of the regulatory framework. This meant that in addition to not breaching concession contracts opportunistically or taking control of companies by fiat, governments needed to offer guarantees that they would not change regulations that determined utility rates or statutes governing taxes in regulated sectors just to please consumers when election time approached. In this regard, an important aspect of the reforms to secure credible commitment to investors was for the Executive branch to delegate its regulatory powers to independent regulatory agencies (IRAs).[14]

The assumption was that IRAs[15] enjoy "autonomy" from elected politicians, thereby reducing the risks of expropriation, political manipulation, or short-term considerations related to the electoral cycle that could adversely affect private investment

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[13] D. Newbery, Privatization, Restructuring, And Regulation Of Network Utilities 62, 73 (2001) (noting that the "costs [of prívate ownership] may take the form of a high rate of return required to reward investors for the high perceived regulatory risk").

[14] For an exploration of the idea of regulatory commitment, see Newbery, id; B. Levy & T. Spiller (eds.), Regulations, Institutions and Commitment: Comparative Studies of Telecommunications (1998); P. T. Spiller, Institutions and Regulatory Commitment in Utilities' Privatization, 2 Indus. & Corp. Change 317 (1993); P T. Spiller, A Positive Political Theory of Regulatory Instruments: Contracts, Administrative Law or Regulatory Specificity?, 69 S. Cal. L. Rev. 477 (1996). See also, J. Elster, Constitutional Courts and Central Banks: Suicide Prevention or Suicide Pact?, E. European Const. Rev. 66-67 (1994); M. A. Melo, A Politica da Ação Regulatória: Responsabilização, Credibilidade e Delegação [The Politics of Regulation: Responsibility, Credibility and Delegation], 16 Revista Brasileira de Ciencias Sociais 55–68 (2001).

[15] The terms IRAs, agencies, and regulatory agencies will be used interchangeably in this paper.

incentives in relevant sectors.[16] As a result, the creation of IRAs became one of the central institutional issues in the context of privatization reforms worldwide.[17] In fact, the World Bank and the Organization for Economic Cooperation and Development (OECD) recommend that countries promoting regulatory reforms and privatizations should create IRAs.[18] Advocates of these reforms believed that IRAs could create credible regulatory commitments, thereby increasing the value of the state-owned companies to investors and attracting more private investment.

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[16] G. Majone, From the Positive to the Regulatory State: Causes and Consequences of Changes in the Mode of Governance, cit. at 8, 152–55.

[17] See generally J. Jordana & D. Levi-Dafur, The Diffusion of Regulatory Capitalism in Latin America: Sectoral and National Channels in the Making of a New Order, cit. at 19. (analyzing the "restructuring of the state in Latin America and the consequent institutionalization of a new regulatory order").

[18] See, e.g., Org. for Econ. Cooperation & Dev. [OECD], The OECD Report on Regulatory Reform: Synthesis (1997) (recommending regulatory reform and setting forth the reasons for this solution). Also, see OECD, The OECD Report on Regulatory Reform: Volume II: Thematic Studies (1997); OECD, Regulatory Policies in OECD Countries: From Interventionism to Regulatory Governance (2002); World Bank, Concession for Infrastructure: a Guide to their Design and Award: World Bank Technical Papers N. 399 (1998), online: <http://rru.worldbank.org/Documents/Toolkits/concessions_fulltoolkit.pdf>; World Bank, "The World's Bank Role in the Electric Power Sector: World Bank Policy Paper" (1993), online: <http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/1999/09/17/000178830_98101911183588/Rendered/PDF/multi_page.pdf>; OECD, Independent Regulators in South East European Countries (2003), online: <http://www.investmentcompact.org/pdf/9thPTMtgIndependentRegulators.pdf> ; World Bank, "How to Strengthen Regulatory Framework/Agencies", Document presented at the Water Forum (2002), online: <http://siteresources.worldbank.org/EXTWSS/Resources/337301-1147283821774/0508_framework.pdf>; World Bank, "Regulatory Governance Background", Note presented at the African Forum for Utility Regulation (2002). At quite an early stage in the debate, the idea was also supported by WTO. World Trade Organization [WTO],"Negotiating Group on Basic Telecommunications: Reference Paper" (Apr. 1996), online: <http://www.wto.org/english/tratop_e/serv_e/telecom_e/tel23_e.htm>.

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During the 1990s, United States-style IRAs were adopted in many European and Latin American countries,[19] becoming one of the primary means of regulatory governance worldwide.[20]However, in many countries these agencies did not perform as expected. For instance, in Brazil, the design of the IRAs was inspired by the American experience, but the effectiveness of IRA guarantees of independence in Brazil (to insulate IRAs from political influence) was very different from the United States. One of the reasons for that is the fact that there is a different institutional environment in Brazil. Because of that the guarantees of independence performed differently from the way they performed in their country of origin, the United States. More specifically, the institutional features that were meant to guarantee the financial autonomy of agencies were not as effective in Brazil as they are in the United States, as I discuss in greater detail later (Part II). As a result, institutional guarantees that characterize IRAs in other countries, especially the United States, were not enough to insulate Brazilian IRAs from the political and legal sphere.[21]

The Brazilian case illustrates the need to adapt transplants to the local conditions and particularities of the reforming country, and the difficulty in doing so. The differences in the broader institutional environment may offer obstacles to convergence, and may be a reason for policy makers and reformers to deviate from the policy consensus. In other words, a particular narrow set of reforms may be not feasible if the appropriate institutional environment is not in place, generating either dysfunctional institutions or incentives for reforms to deviate from the reform consensus in order to reach certain policy outcomes.

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[19] J. Jordana & D. Levi-Faur, Hacia Un Estado Regulador LatinoAmericano? La Difusión de Agencias Reguladoras Autónomas por Páises y Sectores [Towards a Latin American Regulatory State? The Diffusion of Independent Agencies in Countries and Sectors] (2005); G Majone, The Rise of the Regulatory State in Europe, cit. at 8.

[20] See OECD, Regulatory Policies in OECD Countries: From Interventionism to Regulatory Governance cit. at 18; (One of the most widespread institutions of modern regulatory governance is the so-called independent regulator).

[21] M. M. Prado, The Challenges and Risks of Creating Independent Regulatory Agencies: A Cautionary Tale from Brazil, 41:2 Vanderbilt Journal of Transnational Law (2008). Available at SSRN: http://ssrn.com/abstract=983807.

b) Conflicting Policy Goals

As mentioned earlier, privatization was perceived to be a solution to fiscal deficits and inefficiencies in the delivery of public services. Sometimes these two goals could be pursued simultaneously without significant tradeoffs. However, in certain cases the goals of promoting efficiency and raising revenues could not be pursued simultaneously. In these cases, policymakers needed to deal with significant tradeoffs: raising more revenues could come at a cost of undermining efficiency, and vice-versa. The most basic example, and a rather simplistic one, is the government that needs to choose between either privatizing infrastructure sector companies as monopolies to maximize the sale price, or breaking up the company and creating competition that improves the quality of the services delivered, though potentially reducing the revenues collected by the state at the time of the sale.

A more complex example is provided by Sunil Tankha, who argues that privatization policies were seriously flawed in their design.[22] He dismisses the idea that political resistance served as an impediment to the proper implementation of these policies, and concludes that it was a problem of incompetence, not on the side of developing countries but rather on the side of the international institutions that design these policies, such as the World Bank. Using the Brazilian electric power reforms as a narrative tool, Tankha shows that "many privatization policies and the economic stabilization programmes within which they were embedded were not mutually reinforcing in the way that policymakers had expected".[23]

By calling attention to the fact that the goals of privatization policies may conflict with the goals of other policies, Tankha's article calls attention to a fact that is often neglected in the academic literature on privatization. Many privatization processes were motivated by three core goals: raising revenues to reduce fiscal deficits, increasing efficiency in the delivery of infrastructure services, and macroeconomic stabilization. In these cases, policymakers often

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[22] S. Tankha, Lost in Translation: Interpreting the Failure of Privatization in the Brazilian Electric Power Industry, 41 J. Lat. Amer. Stud., 59-90 (2009).
[23] Id.

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faced significant tradeoffs, and faced significant obstacles in coordinating these policies due to conflicting policy goals. In the Brazilian case, the macroeconomic policies influenced the privatization process in ways that were detrimental to the other two objectives of increasing efficiency and raising revenues. As Tankha states, "macroeconomic concerns underpinning most large scale infrastructure privatization programmes inevitably subordinate sectoral concerns and create tensions between citizens and investors that are difficult for policymakers."[24]

These conflicting policy goals are another reason why convergence may not happen. When confronted with tradeoffs, reformers are forced to choose their preferred outcome and the choice will not always be the same. Thus, these conflicting policy goals may serve as another obstacle to convergence.

c) Political Resistance

Policymakers are likely to face resistance to reforms from interest groups that benefit from the status quo. Depending on which groups are resisting and the strength of their resistance, different reforms may take place. Indeed, divergences in privatization across countries have been attributed to groups of interest that have resisted reforms.[25]For instance, in Latin America civil society resisted the reforms proposed by the government,[26] politicians resisted the reforms proposed by technocrats,[27]and unions resisted reforms proposed and supported by economic elites.[28]

Why do interest groups resist reforms? Some analysts suggest that self-interest may guide resistance to or support for reforms,

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[24] Id.

[25] M. V. Murillo, Political Bias in Policy Convergence: Privatization Choices in Latin America 54:4 World Politics, 462-493 (2002).

[26] B. Morgan, Comparative Regulatory Regimes in Water Service Delivery: Emerging Contours of Global Water Welfarism? Comparative Research in Law & Political Economy 4:7. Research Paper 33/2008 (2008).

[27] M. V. Murillo, Political Bias in Policy Convergence: Privatization Choices in Latin America cit. at 25.

[28] M. Riethof, Changing Strategies of the Brazilian Labor Movement: From Opposition to Participation. 31 Latin American Perspectives 31-47(2004).

indicating how groups' preferences are determined by the fact that they may incur in significant costs (or at least they think so), or accrue significant benefits as a result of the reforms.[29] Others suggest that there may be also ideological opposition to reforms, as certain groups have diverging views about the role of the state in the economy and especially the role it should play in the delivery of public services.[30] Finally, there may be technical resistance, in which certain groups do not believe that the proposed reform is the best solution to the shortcoming in the delivery of public services, and may even claim that reforms can make matters worse. It is important to note that this typology is oversimplified[31] and is not meant to suggest that the

[29] G. S. Becker A Theory of Competition Among Pressure Groups 98 Quartely Journal of Economics 371-400 (1983). D. G. Hartle, M. J. Trebilcock, R. S. Prichard & D.N. Dewees The Choice of Governing Instrument Study prepared for the Economic Council of Canada. Economic Council of Canada, Ottawa (1982).

[30] M.V. Murillo, Political Bias in Policy Convergence: Privatization Choices in Latin America, cit. at 25. But Trebilcock manifests skepticism towards the idea that ideological shifts can motivate policy changes, i.e. be the reason behind a government's decision to privatize or not. M. J. Trebilcock Journeys Across the Divides in F. Parisi, C.K. Rowley (eds.) The Origins of Law and Economics: Essays by the Founding Fathers 436 (2005). M. Shirley, Institutions and Development 112 and ff (2008) (showing how such beliefs had an impact on water system reforms around the world).

[31] Each of these reasons can be broken down into sub-types or sub-categories. For instance, self-interest can be used to describe politicians seeking electoral benefits with the reforms, but it may also include corruption. While the first manifestation of self-interest is not illegal, the second one is, although both can be described as self-interested reasons to resist reforms. By the same token, ideological resistance can take many different forms. Politicians may have strong beliefs about the size of the state and the relationship between state and market (some support a minimalist government, whereas others do not) and this may influence the implementation of reforms M.V. Murillo, Political Bias in Policy Convergence: Privatization Choices in Latin America, cit. at 25. This is one form of ideological resistance. Another form is rights-based resistance, which can be found in the processes of water privatization. Some civil society groups often claim that access to water is a human right, as it is essential to life. Therefore, it should either be freely provided, or at very low prices. M. Shirley, Institutions and Development cit. at 30.

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reasons mutually exclusive: they can simultaneously influence the resistance of one single interest group.[32]

Brazil offers an interesting example of the relevance of the domestic political resistance as an obstacle to convergence. At the time of privatization, there was significant bureaucratic resistance to regulatory reforms in the electricity sector, while there was considerable bureaucratic support for reforms in the telecommunications sector. These different reactions had important consequences for the design of regulatory agencies and the sequencing of privatization vis-à-vis regulatory reforms.[33]This illustrates that this type of resistance will not only serve as an obstacle to convergence among different countries, but it may also serve as an obstacle to convergence among different sectors within the same country.

II. Case Study: Obstacles to Convergence Outside the European Context

The previous section analyzed potential obstacles to legal convergence, bringing examples of a somewhat dated but still illustrative case, privatization of public utilities. Building on the Brazilian example, this section will discuss in greater detail what kind of questions a comparative analysis of reforms outside of the European context could potentially bring to illuminate the changes

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[32] Murillo provides an interesting example about the reasons why politicians resisted privatization reforms in Latin America. On the one hand, electoral incentives could have been driving the politicians interested in obtaining political benefits from privatization. On the other hand, politicians could have also been guided by ideology, i.e. beliefs on the relationship between state and market. Murillo suggests that each of these reasons influenced the resistance regarding different aspects of the reforms. M.V. Murillo, Political Bias in Policy Convergence: Privatization Choices in Latin America, cit. at 25.

[33] M M Prado, Bureaucratic Resistance to Regulatory Reforms: The Contrasting Experiences in Electricity and Telecommunications in Brazil, Paper prepared for the project Understanding the Rise of the Regulatory State in the South, coordinated by Navroz Dubash and Bronwen Morgan, May 16, 2011 (unpublished manuscript, on file with the author).

that are happening in European countries in general, and in Italy in particular.

a) Isolated versus Integrated Institutional Reforms

Between 1996 and 2002, the Brazilian government established independent regulatory agencies (IRAs) for electricity, telecommunications, oil and gas, transportation, and other infrastructure sectors as part of a very ambitious privatization program.[34] Following the formulae advocated internationally, Brazilian IRAs were designed to have fixed terms of office for commissioners, Congressional approval of presidential nominations, and alternative sources of funds to ensure their financial autonomy.[35] These and other institutional features were implemented to guarantee that these agencies were not subordinated to the President's directive authority or to any other branch of government. These features aimed to provide a high level of independence to Brazilian agencies.[36]

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[34] In this period, nine regulatory agencies were implemented in Brazil: Agência Nacional de Energia Elétrica – ANEEL (Electricity); Agência Nacional do Petróleo – ANP (Oil and Gas); Agência Nacional de Telecomunicações – ANATEL (Telecomunications); Agência Nacional de Vigilância Sanitária – ANVISA (Sanitary Vigilance/ Health Inspectors); Agência Nacional de Saúde Suplementar – ANS (Private Health Care Services); Agência Nacional de Águas – ANA (Water); Agência Nacional de Transportes Aquaviários – ANTAQ (Water Transportation); Agência Nacional de Transportes Terrestres – ANTT (Ground Transportation); Agência Nacional do Cinema – ANCINE (Cinema).

[35] See W Smith, Utility Regulators – The Independence Debate, Pub. Pol'y Private Sector 3 (World Bank Group, Oct. 1997), online: <http://rru.worldbank.org/documents/publicpolicyjournal/127smith.pdf> (providing a summary of the "strong consensus on the formal safeguards required [by independent agencies]").

[36] See G Oliveira, Desenho Regulatório e Competitividade: Efeitos Sobre os Setores de Infra-Estrutura [Regulatory Design and Competition: Impact on Infrastructural Sectors] (2005), online: <http://www.eaesp.fgvsp.br/AppData/GVPesquisa/P00338_1.pdf> (designing an index to measure the independence of agencies, and indicating that Brazil has one of the highest levels of independence in the world).

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However, things did not go as planned, for a series of reasons that I have discussed in greater detail elsewhere.[37]What I want to emphasize here is the financial autonomy of agencies, an institutional feature that was designed to guarantee the independence of agencies, but ended up not being effective in the Brazilian context due to the broader institutional environment in which these agencies were operating. If the Executive branch can control the agency's budget, the President may be able to politically influence the agency. The power to undermine an agency's financial stability and viability might be analogous to the power to dismiss the agency's directors. Thus, at the time of privatization, there was some consensus around the face that one of the institutional guarantees of the IRAs' independence was alternative sources of income, which are not part of the Executive fiscal accounts.[38]

Following the international consensus, the financial autonomy of Brazilian agencies was guaranteed by alternative sources of income. Brazilian agencies' main sources of income come from supervising fees and fines paid by regulated companies.[39] These funds are earmarked, meaning that the law forbids the use of these funds for purposes other than those related to the sectors in which

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[37] M M Prado, The Challenges and Risks of Creating Independent Regulatory Agencies: A Cautionary Tale from Brazil, cit. at 21.

[38] A Estache & D Martimort, Politics, Transaction Costs, and the Design of Regulatory Institutions 23 World Bank Policy Research, Working Paper No. 2073, (1999), available at http://www.worldbank.org/html/dec/Publications/Workpapers/wps2000series/wps2073/wps2073.pdf ("Relying on budgetary transfers decided by politicians is often viewed as a threat to the independence of the regulators since an easy way to reduce the effectiveness of a regulator would be to cut its budgetary allocation."); see also K S Johannsen, Regulatory Independence in Theory and Practice: A Survey of Independent Energy Regulators in Eight European Countries 60 Pub. Util. Research Ctr. 48 (2003). Available at http://www.regulationbodyofknowledge.org/documents/031.pdf. ("[I]t is generally assumed that an external source of funding is more stable than government funding").

[39] See, e.g., Lei No. 9.472, art. 47, de 16 de julho de 1997, D.O.U. de 17.7.1997. (Brazil) (authorizing ANATEL to collect regulatory fees); Lei No. 9.427, arts. 11–13, de 26 de dezembro de 1996, D.O.U. de 27.12.1996. (Brazil) (authorizing ANEEL to collect regulatory fees).

these companies operate.[40] The alternative funding mechanism has the potential to guarantee independence if the amount collected is sufficient to cover all the agency's operational costs.

However, this guarantee turned out to be ineffective because in Brazil the alternative sources of income are distributed through an appropriations process that is controlled by the Executive branch. Like all the expenditures made by Executive branch bodies, the use of an IRA's funds has to be previously authorized by the federal budgetary appropriations.[41] As a consequence, the Brazilian President has substantial control over the IRAs' budgets due to his power to interfere significantly in the federal appropriations process. That process culminates with a statute that defines the actual budget allocations for one particular fiscal year (Lei Orçamentária Anual – LOA).[42] The process to formulate the LOA starts with a budget proposal that is sent to Congress by the President.[43] This proposal is formulated by the Secretary of Federal Budget (Secretaria do Orçamento Federal–SOF), an Executive branch department that receives information from all agencies and offices of the Executive branch and analyzes and reviews this information.[44]After review by the SOF, the IRA's budget is incorporated in the presidential budget that is sent for congressional approval.[45]The preparation of this proposal is the first moment at which the President can influence the

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[40] For instance, the President cannot use the fees collected from the electricity sector to invest in education or health.

[41] Constituição Federal art. 165, para. 5 (Braz.) (indicating that indirect administration, which includes regulatory agencies, is subject to the same rules as the direct administration, such as ministries and non-independent agencies).

[42] The LOA is preceded by two statutes. One establishes a plan for budgetary appropriations for a period of four years (Plano Plurianual—PPA) and the second defines the principles and guidelines for the public budget in one particular fiscal year (Lei de Diretrizes Orçamentárias—LDO). C.F. art. 165.

[43] Id.

[44] J M Sultani, Autonomia Financeira e Orçamentária das Entidades Autárquicas em Regime Especial, Universidade Federal do Estado do Rio de Janeiro, Institution de Economia 28(2005), available at http://www.cvm.gov.br/port/public/publ/ie_ufrj_cvm/Leonardo_Jose_Mattos_Sultani.pdf.

[45] Id.

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agencies' budgets through the appropriations process.[46]In 2003, for instance, the 202 million reais requested by the electricity regulator (ANEEL) was reduced to 162 million by a presidential proposal that was later approved by Congress.[47]Consequently, despite the IRA's independent sources of income, the entity that controls these appropriations can influence the IRA's policy choices.[48] Thus, the guarantee exists and is designed to ensure independence, but it is not completely effective because it is not adjusted to other features of the Brazilian political and legal system.[49]

In the 1980s, the United States faced the same problem that Brazil struggles with today. The U.S. Congress tried to reduce the discretionary interference of the Office of Management and Budget (OMB) by asking commissions to submit their budget proposals simultaneously to the OMB and to Congress.[50]Before, Congress would get only the version of the proposal revised by the OMB. Now, Congress not only receives both versions, but it also has the power to change the proposal sent by OMB.[51]

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[46] Id.

[47] A Gestão nas Agências Reguladora—Fatos e Repercussões [Managing Regulatory Agencies—Facts and Perceptions], at 18 (presentation of José Mário Miranda Abdo, Dir., ANEEL, before the Senate Commision on Infrastructure, June 25, 2003), available at http://www.aneel.gov.br/arquivos/PDF/AudienciaPublicaSenado.pdf.

[48] For literature on the manipulation of agency budgets by elected authorities in order to influence or control the decision-making process, see generally M. H. Bernstein, Regulating Business By Independent Commission 79–84, 128–34, 258 (1955); Anthony Downs, An Economic Theory Of Bureaucracy 52–74 (1957); K Meier, Regulation: Politics, Bureaucracy And Economics 26–27 (1985); and J. Q. Wilson, Bureaucracy: What Government Agencies Do And Why They Do It 214–15 (1989).

[49] For a study that highlights similar concerns in Europe and Africa, see Johannsen, Regulatory Independence in Theory and Practice, cit. at 38. See also A. Eberhard, Regulation of Electricity Services in Africa: An Assessment of Current Challenges and an Exploration of New Regulatory Models (paper prepared for World Bank Conference, June 2005), available at http://www.gsb.uct.ac.za/gsbwebb/mir/documents/InfrastructureRegulationin Africa.pdf. at 27.

[50] T. M. Moe, Regulatory Performance and Presidential Administration 26 Am. J. Pol. Sci. 200, n.3 (1982).

[51] Id.

As an attempt to give agencies more independence, this simultaneous submission could be implemented in the Brazilian system, but its effectiveness would be considerably limited. In contrast to the United States, congressional influence on the appropriations process is strongly limited in Brazil by constitutional and statutory provisions that allow for significant presidential control over the final outcome of the bill approved by Congress.[52]First, the President's proposal will be used as law if the congressional statute is not enacted in timely fashion.[53] Second, the President may veto some of the provisions in the final statute approved by Congress.[54]Therefore, in Brazil, the President has a strong influence over the budgetary appropriations process.

In addition, the President also has control over the amount of funds that the agencies will actually receive, as the President can still modify the congressional appropriations (or the part of it that is available to the agencies) after their enactment, during the budget implementation phase, according to his or her own discretion.[55] These modifications are made through presidential decrees,[56] which are unilateral acts of the President not subject to any congressional control.[57] Thus, in Brazil, there is no guarantee that the resources

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[52] A. C. Figueiredo & F. Limongi, Incentivos Eleitorais, Partidos e Política Orçamentária [Electoral Incentives, Parties, and Budgtary Policy], 45 Dados—Revista Ciências Sociais 303, 313 (2002), available at http://www.scielo.br/pdf/dados/v45n2/10790.pdf.

[53] This has been the practice, given the silence of the constitution on this matter and the fact that no budget is approved on time in Brazil. But it is important to note that the President's proposal is implemented on a monthly basis until the statute is approved. Id. at 314.

[54] Id. at 315.

[55] The LOA defines only the maximum expenditures the President and the Executive branch are authorized to make in a particular fiscal year. Thus, the President cannot surpass the limit approved by Congress, unless Congress authorizes him to do so.

[56] In Portuguese, these decrees are called Decretos de Execução Orçamentária.

[57] The Ministers of each sector also have this power. For instance, the Minister of Telecommunications can reduce the budget of the telecommunications agency. Since the Ministers are appointed and dismissed at the President's will, the Author is assuming here that they would manage the budget of the agency according to

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appropriated by Congress and allocated to the agency will necessarily reach the agency in question. In contrast, in the United States, the presidential power to impose delays or to cancel budget resources (both of which are called impoundments) is subject to congressional control.[58] In sum, the Brazilian President controls, determines, or administers the amount of funds the agencies will in fact receive, and can deeply affect the financial autonomy of those agencies.

The electricity agency (ANEEL) had its appropriations reduced by 22% in 2002 and 50% in 2003.[59] These reductions were determined by presidential decree.[60] The President took similar action with respect to the telecommunications agency ANATEL; he reduced its budget in 2001, 2002, and 2003,[61] with the last reduction being 25%. In fact, in 2005, six infrastructure agencies received only 16% of their appropriations for that year.[62] These reductions show that the President can decrease the amounts allocated to the IRAs by

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Presidential preferences. Thus, the distinction between reductions imposed by the President himself or the Minister of the sector is not relevant.

[58] The Congressional Budget and Impoundment Control Act of 1974 regulates these impoundments and establishes procedures that do not allow the President to abrogate the intention of Congress. 2 U.S.C.A. §§ 601–688 (West 2008).

[59] See Abdo, A Gestão nas Agências Reguladora – – Fatos e Repercussões, cit. at 47 .(This report informs that in 2002, the 174 million reais approved by the LOA was reduced to 145 million reais by a presidential decree and only 137 million was effectively transferred to ANEEL. In 2003, the 162 million reais approved in the LOA was reduced to 70 million by presidential decree. In May 2003, an additional 12 million was added to the 70 million, bringing the sum to 82 million for 2003.).

[60] Decreto No. 4.708, de 28 de maio de 2003, D.O.U. de 29.5.2003. (Brazil); Decreto No. 4.591, de 10 de fevereiro de 2003, D.O.U. de 11.2.2003. (Brazil); Decreto No. 4.120, de 7 de fevereiro de 2002, D.O.U. de 8.2.2002. (Brazil).

[61] Decreto No. 4.591, de 10 de fevereiro de 2003, D.O.U. de 11.2.2003. (Brazil); Decreto No. 4.120, de 7 de fevereiro de 2002, D.O.U. de 8.2.2002. (Brazil); Decreto No. 4.051, de 12 de dezembro de 2001, D.O.U. de 13.12.2001. (Brazil); Decreto No. 4.031, de 23 de novembro de 2001, D.O.U. de 26.11.2001. (Brazil); Decreto No. 3.878, de 25 de julho de 2001, D.O.U. de 27.7.2001. (Brazil); Decreto No. 3.746, de 6 de fevereiro de 2001, D.O.U. de 7.2.2001. (Brazil).

[62] L. Vargas, Agências Fazem ato Contra o Governo [Agencies Protest], Folha De São Paulo, May 6, 2003, at B1; R. Pereira, Governo Lula Corta Verbas e Asfixia Agencias [Lula's Administration Cuts the Budget and Suffocates Agencies], O Estado De São Paulo, July 3, 2006.

Congress to amounts originally proposed by the President or even lower amounts.

In addition to the power to reduce the allocations provided by Congress, the President can also impose limits on specific types of financial expenditures, thereby delineating financial obligations and commitments of a particular administrative office during a specific fiscal year. In 2003, for instance, a presidential decree limited the travel expenses of the employees of all Executive branch bodies (including ministries) to 60% of the total amount spent in 2002.[63] The agencies, as bodies of the Executive branch that belong to the ministries, were also subject to these limits.[64]

In conclusion, alternative sources of funding do not effectively guarantee independence for IRAs in Brazil due to presidential control of the budgetary allocations process. Ultimately, IRAs do not receive the amount assigned to them by the LOA; instead, they receive the allocation approved unilaterally by the President. After the LOA's enactment, there is still much uncertainty as to the amount that will be allocated to IRAs.[65] The President may use his power to unilaterally control the agencies' financial resources as an incentive for agencies to adopt his preferences, under the threat of a budget reduction.

This example illustrates how in Brazil the creation of IRAs with alternative sources of funds that are not connected to the Executive branch fiscal accounts ignored important institutional interdependencies. The appropriations process in Congress, and the role the Executive plays in this process – i.e. the broader institutional framework in which these IRAs would operate – was not contemplated at the time of the reforms, rendering the guarantee of financial autonomy for IRAs rather ineffective. This type of institutional interdependencies is an important – but often ignored --

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[63] Decreto No. 4.691, art. 2, de 8 de maio de 2003, D.O.U. de 9.5.2003. (Brazil).

[64] Id.

[65] This is a problem for all executive offices in Brazil – not only IRAs. World Bank, Relatório Sobre A Avaliação Do Sistema De Administração E Controle Financeiros Do Brasil [Report On The System Of Financial Administration And Management Of Brazil] (2002), available at http://www.planejamento.gov.br/arquivos_down/sof/Texto_CFAA.pdf.

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aspect of any legal and institutional reform.[66] Transplanted institutions will operate in a legal and political environment that differs from the environment in their country of origin, and they need to be adapted to the particular conditions of other countries.

This raises a series of questions to comparativists who are studying administrative law reforms in European countries. If we are to contrast the case of Brazil with reforms in the context of the European Union, one could ask whether the fact that the reforms in the European context are broader, and more integrated with other reforms than the ones implemented in Brazil, results in a smaller risk of lack of convergence due to institutional interconnections. Moreover, it would be interesting to investigate to what extent the existence of a regional or transnational institution allows for better coordination between different set of reforms. In other words, to what extent is the European Union able and willing to account for institutional interconnections? In sum, whereas institutional interconnections may operate as an obstacle to convergence in other countries, it seems interesting to ask to what extent the European Union offers mechanisms to deal with such interconnections, thereby increasing the probably of convergence in the European context.

b) Setting up Policy Priorities and Dealing with Tradeoffs

As I mentioned earlier, privatization of state-owned companies was often justified in terms of efficiency, i.e. privatized companies were regarded to be more efficient than state-owned companies (which is a belief that was strongly qualified after numerous failures in privatization experiences).[67] Another oft-cited rationale for privatization is to raise revenues. Some countries may face two major tradeoffs involving these rationales. Although not intrinsically incompatible, there are circumstances in which governments might

[66] M. M. Prado & M. Trebilcock, Path Dependence, Development and the Dynamics of Institutional Reforms, 59:3 University of Toronto Law Journal 341-380 (2009).

[67] There is little evidence that ownership has any impact on levels of efficiency. J. Vickers & G. Yarrow, Economic Perspectives on Privatization, cit. at 12. See also Y. Zhang, D. Parker & C. Kirkpatrick, Electricity sector reform in developing countries: an econometric assessment of the effects of privatization, competition and regulation, 33:2 Journal of Regulatory Economics, Springer 159-178 (2008).

need to choose between raising revenues and promoting efficiency, as the Brazilian case illustrates.

Privatization might increase efficiency in the delivery of infrastructure services. Two basic factors are thought to contribute to this. One is ownership, i.e. the assumption that the principal-agent relationship is more effective in pressing managers for results when there are shareholders, instead of a diffuse body of taxpayers who do not necessarily press the government for results. The other factor is competition. The assumption is that under a competitive market structure, companies have to show results in order to survive and this would create incentives for them to be more efficient.[68] In sectors where there is no free market, like infrastructure sectors, the sale of state-owned companies will be more effective in promoting efficiency if there is a regulatory framework that replicates competitive outcomes or imposes restraints on companies in non-competitive sectors.

In addition to increasing efficiency, one incentive that countries have to implement regulatory frameworks is the belief that investors are more likely to invest if the regulatory framework is well defined ex ante, reducing uncertainties. As mentioned earlier, this depends not only on the actual rules applicable to the sector, but also on whether the broader institutional framework provides an environment that secures a credible commitment to reforms.

Despite these incentives, there are circumstances in which countries are forced to make difficult tradeoffs. Implementing regulatory frameworks before privatization takes time, and some countries have other pressing needs. For instance, in cases of major macroeconomic crisis and rampant fiscal deficits, governments may be in such desperate need to resources that they will not have time to wait until the regulatory framework is defined and implemented. If a government cannot take the time to design and implement reforms as it needs the cash immediately, governments may choose to move forward with privatization without a proper regulatory framework to avoid a greater loss.

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[68] A. Smith & M. Trebilcock, State-Owned Enterprises in Less Developed Countries: Privatization and Alternative Reform Measures, Eur. J. L. & Econ. 12 (2001).

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This is exactly what happened in Brazil.[69] The government used privatization to support a macroeconomic plan.[70] Indeed, privatization was mainly conceived as a mechanism to deal with the urgent need for immediate cash, which was intrinsically linked to a macroeconomic stabilization plan. This might explain why the government went ahead with privatization, despite knowing of its limited positive impact (if any) on the infrastructure sectors. An urgent need for resources also made the country adopt costly strategies to protect investors, so as to increase the price paid for the companies. Brazil has done so by providing public financing to private investors, shifting the risk of default to the government.[71] The macroeconomic concern may also help explain why Brazil offered public financing for privatization.

In 1993, Brazil implemented a macroeconomic stabilization plan (Plano Real)[72] that relied on an exchange rate anchor to stabilize inflation.[73] An overvalued currency put pressure on domestic

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[69] M. M. Prado, Policy and Politics: Privatization of the Electricity Sector in Brazil. J.S.D thesis, Yale Law School (2008, unpublished).

[70] Id.

[71] This is as illustrated by the cases involving AES in Brazil. For a detailed discussion, see Id.

[72] The plan contained: US$ 6 billion cut to government spending (9% of federal government spending), a tightening of tax collection, and a recasting of financial relationships with state governments, which owed US$ 36 billion to the federal government in 1993, and were approximately US$ 2 billion in arrears. E. Amann & W. Baer, The Illusion of Stability: The Brazilian Economy Under Cardoso, 28:10 World Development 1806 (2000). V. Ramalho, 'Plano Real:' The End of Hyperinflation in Brazil, in Harry Costin & Hector Vanolli, (eds.), Economic Reform in Latin America, 175 (1998). (indicating that unlike either the Collor or Cruzado Plans, the changes would be gradual, and the Plan would not involve prize freezes, seizures of assets, or government-imposed breaches of private contracts). F. Ferrari-Filho & L. F. de Paula, The Legacy of the Real Plan and an Alternative Agenda for the Brazilian Economy, LXII: 244 Investigación Económica 61 (2003). (In the original version of the plan, these two elements (fiscal adjustment and indexing system) were implemented in three phases. First, the government adjusted the short-term fiscal deficit. Second, the central bank introduced a price index, the URV, to stabilize inflation. Third, monetary reform was implemented, introducing the real as legal tender, and disindexing the currency).

[73] The system operated as follows. The value of the real was kept artificially high, and trade restrictions were lessened. This increased the ability of the country to

producers not to increase the prices, but it also generated a current account deficit, which led to borrowing.[74] Borrowing at high interest rates in turn generated a rising public debt, rising debt interest payment, and an increasing current account deficit.[75] Although the anchored exchange rate mechanism proved effective at halting inflation in the short-run, in the longer-run a more fundamental fiscal adjustment was required.[76] Nevertheless, fiscal adjustment did not come until 1998.[77]

Between 1995 and 1998, over 80 state-owned companies were sold, providing revenues of US$60.1 billion, and a transfer of debt to

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import, and by doing so put pressure on domestic producers to limit price increases. A subsequent result of an overvalued exchange rate is a current account deficit: the country imports more than it exports. To cover up the current account deficits that resulted from an overvalued exchange rate, Brazil needed capital inflows (i.e. money to pay for the increased imports). This capital came from two primary means: borrowing and foreign investment. Borrowing was done by keeping domestic interest rates higher than their foreign counterparts throughout 1994-1998. Investment came due to the end of inflation, ongoing economic liberalizations (including privatizations), and a president who encouraged markets and private investment.

[74] Amann & Baer, The Illusion of Stability, cit. at 72 , 1811.

[75] F. Anuatti-Neto, , M. Barossi-Filho, A. G. de Carvalho & R. Macedo, Costs and Benefits of Privatization: Evidence from Brazil, in A. Chong & F. López-de-Silanes (eds.), Privatization in Latin America: Myths and Reality, 169 (2005).

[76] Amann & Baer, The Illusion of Stability, cit. at 72 , 1811. A. de Souza, Cardoso and the Struggle for Reform in Brazil 10:3 Journal of Democracy 54 (1999). (…keeping interest rates attractively high for foreign investors required balanced public accounts lest the internal debt explode. Thus the core strategy was to reform public finance through reforming social security, the civil service, and the tax system, through privatizing state owned companies and eliminating deficit spending at all levels of government. Over the long haul, the stability of the real hinged on the credibility of fiscal policy.)

[77] Amann & Baer, The Illusion of Stability, cit. at 72 , 1811. . (The failure of the government to secure rapidly badly needed fiscal reforms…resulted from deep divisions within Congress. Discipline among pro-government parties was weak while the exercise of local as opposed to national interests over members of Congress remained strong….Congress in general proved very reluctant to accede to thoroughgoing fiscal reform, especially that which would have restricted the fiscal autonomy of the states and municipalities or would have adversely affected…employment in the public sector.)

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the private sector of US$ 13.3 billion.[78] These revenues from privatization played a role in temporarily tackling the current account and the fiscal deficits in two ways. First, they helped fund the deepening current account deficit by attracting private investment.[79] Second, they helped reduce fiscal deficit and thus public debt (which increased but would have been much higher by 1999 in the absence privatization).[80] In sum, by increasing investment flows, privatization served as a short-term adjustment mechanism for the economy.[81]

The main conclusion is that the primary reason for the strong privatization efforts from 1995-1998 was the need to sustain the Plano Real.[82] The pace of privatization is evidence that privatization was

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[78] A. C. Pinheiro, R. Bonelli & B. R. Schneider, Pragmatic Policy in Brazil: the political economy of incomplete market reform, Texto para discussão 1035, at 21 (2004). Online: <http://www.ipea.gov.br/pub/td/2004/td_1035.pdf>.

[79] R. Macedo, Privatization and the Distribution of Assets and Income in Brazil, Carnegie Endowment Working Papers: Global Policy Program, No. 14, at 20 (2000) Available at http://www.carnegieendowment.org/publications/index.cfm?fa=view&id=368 . ("Although not an official objective, the privatization program [of the mid 1990s] was…assigned the role of financing a major part of the external disequilibrium, by means of the foreign direct investment it was to attract.") From 1997-2000, the ratio between FDI inflows associated with privatization and the current account deficit averaged approximately 25 per cent. Pinheiro, Bonelli & Schneider, Pragmatic Policy in Brazil, cit at 78. In fact, net portfolio investment rose from US$ 0.62 billion/year from 1990-1992 to US$ 4.5 billion/year from 1995-1997. Also, net direct investment rose from US$0.3 billion/year from 1990-1992 to US$ 16.3 billion/year from 1996-1998. Amann & Baer, The Illusion of Stability, cit. at 72 , 1806-1812.

[80] A. C. Pinheiro, F. Giambiagi & M. M. Moreira, Brazil in the 1990s: A Successful Transition?, BNDES Discussion paper number 91, at 11 (2001).

[81] A. Averbug & F. Giambiagi, The Brazilian Crisis of 1998-1999: Origins and Consequences, BNDES Discussion Paper, at 10. Online: <http://www.bndes.gov.br/english/studies/td77i.pdf> ("[I]t seemed reasonable, therefore, to imagine that the sum of 'pure' direct investment plus privatization would suffice to finance a substantial part of the current account deficit in the following years, while the country 'saved time' to promote a graduate real devaluation of its currency and stimulate exports through non-exchange rate mechanisms…").

[82] A. C. Pinheiro, The Brazilian Privatization Experience: What's Next? University of Oxford Centre for Brazilian Studies Working Paper Series, CBS-30-02, at 22, 26 (2002). Online:

intrinsically connected with the plan. To be sure, Brazil privatized some state-owned companies from 1991 to 1994, but the bulk of privatization was from 1995 to 1998 (a period in which privatization was broadened and expedited). Specifically, in 1997, after the Asian financial crisis, privatization assumed a vital role in the survival of the plan. It was between 1997 and 1998 that a significant number of companies, particularly in the electricity and telecommunications sectors, were sold. Similarly, after the exchange rate was allowed to float freely in 1999 the priority ascribed to privatization declined,[83] and the revenues from privatization decreased significantly, until the privatization program was officially abandoned by the Lula government in 2002.

The Brazilian case illustrates that when pressing need for resources (such as a macroeconomic problem) are added to the picture, the exercise of setting up policy priorities changes radically and tradeoffs become even more complex. The concern with macroeconomic instability also had an impact on the regulatory framework, i.e. on the goal of improving efficiency and quality in the delivery of infrastructure services. This impact was relevant, but it was rather different in distinct moments of the privatization process. In some moments, macroeconomic concerns were aligned with efficiency concerns and in other moments they were not.[84] This partially explains why in some cases privatization was preceded by regulation (such as the telecommunications sector), but in others it was not (the electricity sector).

This analysis raises a series of important questions for those analyzing reforms in the context of the European Union. The first question is to what extent countries are likely to rush through

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<http://www.brazil.ox.ac.uk/workingpapers/CastelarPinheiro30.pdf>. See also Pinheiro, Bonelli & Schneider, Pragmatic Policy in Brazil, cit at 78.

[83] When the exchange rate was allowed to float freely in 1999, the result was to reduce the twin deficits: the primary fiscal balance went from a deficit to a surplus and the current account deficit fell, while at the same time flows of non-privatization FDI went up. This "[reduced] the importance of privatization finance of the external deficit." Pinheiro, Bonelli & Schneider, Pragmatic Policy in Brazil, cit at 78., 26.

[84] Prado, Policy and Politics, cit. at 69.

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reforms due to the need for cash. Does the existence of a supranational entity that is both able to provide financial resources and interested in the quality of the reforms being implemented put aside this potential dilemma? Does the existence of this same entity provides some assurance and guarantees to investors that reduce the burden on reforming countries to offer guarantees against expropriations and other unforeseen events (such as political and economic crises)? Finally, one may be tempted to say that international financial institutions, such as the IMF, perform exactly the same role as the European Union, and therefore the differences between the context of reforms in Brazil and in European countries would not be so stark. However, one may need to ask if both institutions face the same incentives, or whether the fact that the European Union depends on the success of its members countries to thrive may change the set of incentives it faces both to offer financial support and/or to press for certain reforms.

c) Overcoming Political Resistance to Reforms

In the Brazilian electricity sector, there was a delay in setting up regulation and sectoral institutions. While the specialized literature recommends regulating before privatizing, in the Brazilian electricity sector privatization preceded regulation and regulatory institutions. A considerable number of the companies were in private hands before there was a regulatory agency and a stable regulatory framework settled.[85] Selling companies without a regulatory framework has had negative effects on the functioning of the market, slowing the process to establish the new regulatory framework, compromising the credibility of the regulatory agency (ANEEL), and

[85] A. Oliveira, Political Economy of the Brazilian Power Industry Reform. In D. Victor & T. Heller (eds.) The Political Economy of Power Sector Reform: The Experiences of Five Major Developing Countries 31-75 (2007). In fact, the privatization process started only one week after a first and rough statute regulating the sector (Statute 9.074/95) was enacted. The first company to be privatized, Escelsa, was in the hands of investors two years before the creation of the regulatory agency Agência Nacional de Energia Elétrica (ANEEL). After the creation of ANEEL, a total of 18 companies were sold before the system operator and the electricity exchange for the wholesale energy market (MAE) were legally established.

helping to make regulation more ad hoc.[86] There was no clear separation of competencies between ANEEL, the Ministry of Mining and Energy, the system operator and the state-owned electricity holding company (Eletrobrás), which led to much confusion in the regulation of the sector.[87]

The main reason for the delay was political economy problems. In the electricity sector, there were many conflicting interests involved: the holding company Eletrobrás has been a consistent opponent of privatization and of increased competition in the sector and technocrats from the Ministry of Mines and Energy and the National Department of Water and Energy (DNAEE) have remained committed to a strong state role in the sector.[88]On the other hand, the Brazilian Development Bank (BNDES) has been a proponent of privatization on pragmatic, fiscal grounds. As a result of these conflicts of interest, and outright resistance to the reforms, the government decided not to privatize all companies in a coordinated fashion, as it did in the telecommunications sector. Instead, it started with the subsector that faced less resistance: electricity distribution.[89] The response of the Brazilian government to these pressing but conflicting concerns was to do what was feasible to minimize costs while addressing the most pressing need at the time, preserving macroeconomic stability.[90]

Political economy problems also determined different institutional designs of Brazilian independent regulatory agencies,

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[86] Id..

[87] J. C. Pires, Os desafios da reestruturação do setor elétrico brasileiro, BNDES, Discussion Paper, 76 (2000).

[88] P. Kingstone, The Long (and Uncertain) March to Energy Privatization in Brazil, Baker Institute Energy Forum: Critical Issues in Brazil's Energy Sector, at 38 (2004). Online: <http://www.rice.edu/energy/publications/brazilenergysector.html>.

[89] Pinheiro, Bonelli & Schneider, Pragmatic Policy in Brazil, cit at 78. (mentioning that this resistance also absent in the telecommunications sector, where regulatory reform preceded privatization).

[90] P. Kingstone, The Long (and Uncertain) March to Energy Privatization in Brazil, cit at 88, 39. (In addition to opposing interests "[i]f we add to the mix the government's exceptionally complex reform agenda,…a series of macro-economic shocks, and an energy crisis, it is not hard to understand that the government has largely reacted to circumstances.")

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especially in the telecommunications and electricity sectors. Earlier in this paper, I indicated that at the time of the privatizations there was a common belief that independent agencies could create a secure environment for private investment in infrastructure sectors. This belief seems to be the predominant reason why Brazil implemented IRAs in both sectors, but circumstantial factors caused the design of these two agencies to be quite different.[91] And among all the factors playing a role, political economy problems were especially relevant.

President Cardoso (1995-2002) assigned to the ministry of each sector the task of formulating the new regulatory agency's structure for that particular sector.[92] In each of the sectoral ministries, the specialized bureaucrats managed the process of creating IRAs differently, leading to different outcomes in the telecommunications and electricity sectors. In the electricity sector, where there was strong resistance to privatization and regulatory reforms, bureaucrats in charge of designing the agency rejected any external advice,[93] and the bill prepared by them did not include measures to secure the new regulatory agency's independence.[94] Instead, the bill would replace

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[91] Prado, The Challenges and Risks of Creating Independent Regulatory Agencies, cit. at 21.

[92] Id.

[93] Despite the fact that external consultants were involved, they were not able to influence the proposed design, and the bureaucracy retained the final word in the process. For instance, the consulting firm Coopers and Lybrand was formally involved in the process and it highlighted its disagreement with the institutional design proposed by the Ministry but was not able to implement changes. E-mail interview with Edvaldo Alves de Santana, Director of ANEEL (Feb. 3 & July 20, 2006) (on file with author). Also, some independent consultants were invited to discuss the proposal informally, but again, their suggestions were not taken into consideration. The most influential players in this process were the bureaucrats of the previous regulatory body, DNAEE. Three of them (José Mario Miranda Abdo, Luciano Pacheco, and Eduardo Henrique Ellery Filho) became the first directors of ANEEL. Other people who were very influential in the process were José Said Brito (former director of DNAEE, before Abdo), Peter Greiner (National Secretary of Energy), and Reginaldo Medeiros (Chief of Staff of Greiner).

[94] Representative Aleluia declared that the original bill proposed by the Executive branch was "timid" in guaranteeing independence. R. C. Nunes & S. P. Nunes, Privatização e Ajuste Fiscal: A Exeriência Brasileira, 17 Planejamento e Políticas Públicas 192 (1998).

the existing regulatory body (Departamento Nacional de Águas e Energia Elétrica or DNAEE) with another non-independent entity.[95]

The President did not want to implement a non-independent body, and to avoid confronting the specialized bureaucracy he decided to transfer the debate to Congress,[96] sending them a bill that included no guarantees of independence.[97] Before that, however, the President negotiated the bill's revision with party leaders and assembled a coalition in Congress to implement the changes that would make the regulatory agency independent.[98] Thus, the Congressional changes in the bill were actually a Presidential initiative.[99] The bill was enacted as Statute 9,427/96, creating ANEEL, which regulated the electricity sector.

In contrast with electricity, the telecommunications bill submitted to Congress already guaranteed a very high level of independence for the regulatory agency.[100] Two circumstantial conditions largely contributed to this. First, the telecommunications Minister took a strong leadership position in promoting the

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[95] It would be an autarquia. Different from DNAEE, this new body would be located outside of the Minister, but would not necessarily have institutional guarantees of independence to avoid political influence.

[96] Interview with Sergio Abranches (Nov. 2005).

[97] Projeto de Lei No. 1.669/96 (Mensagem n. 234/96).

[98] See Interview with Sergio Abranches (Nov. 2005) (reporting a private conversation with Fernando Henrique Cardoso in 1996).

[99] Representative José Carlos Aleluia, from one of the parties of the governing coalition, drafted the new version that would guarantee the agency's independence. The reports of the discussions in the House of Representatives show that the author of the reforms, Representative Aleluia, was in close consultation with the Cardoso Administration. Diário da Câmara dos Deputados, July 25, 1996, at 21155–61 available at http://www2.camara.gov.br/publicacoes. ; see also José Carlos Aleluia, Speeches at the House of Representatives, July 9 & 24, 1996, in Diário da Câmara dos Deputados, July 10, 1996, at 19647; July 25, 1996, at 21177, 21185, available at http://www2.camara.gov.br/publicacoes.

[100] The bill proposed by the Executive branch was PL 2,648/96, which was incorporated into an existing legislative proposal (PL 821/96) and later became Statute 9,472/97. Interview with Carlos Ari Sundfeld, Former Legal Advisor for the Cardoso Administration on the Privatization of Telecommunication Companies, and Member of the Commission that Designed the Regulatory Agency (Jan. 2006).

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reforms.[101] Second, the telecommunications bureaucracy was not only more open to international trends and to external advice,[102] but the bureaucracy's leadership was actually supportive of the privatization reforms and advocated for an IRA in the sector.[103]

The differences in the bill sent to Congress, which later translated into actual differences in the institutional design of agencies, can be largely ascribed to political economy problems. More specifically, the bureaucratic resistance to reforms in the electricity sector radically changed the way in which institutional reforms were conducted. The outcome is two regulatory agencies, whose creation can be ascribed to the same governmental concern with attracting private investment, that have fundamentally different institutional designs.

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[101] R. Marinzoli et al., Lessons of Telebrás: The Leadership of Sergio Motta. Latin America III Article no.:12. Global Privatisation and Telecommunications Group - Lehman Brothers, USA (1998). Available at http://www.connect-world.com/index.php/white-papers/item/2155-lessons-of-telebras-the-leadership-of-sergio-motta.

[102]Interview with Renato Guerreiro, Former Secretary of the Ministry of Telecommunications, Former President of ANATEL, and Mentor of the Privatization Reforms in the Telecommunications Sector (Feb. 2006).

[103] Interview with Carlos Ari Sundfeld, Former Legal Advisor for the Cardoso Administration on the Privatization of Telecommunication Companies and Member of the Commission that Designed the Regulatory Agency (Jan. 2006); Interview with Renato Guerreiro, Former Secretary of the Ministry of Telecommunications, Former President of ANATEL, and Mentor of the Privatization Reforms in the Telecommunications Sector (Feb. 2006). Guerreiro himself is the clearest example of that because he was supportive of privatization reforms. In the telecommunications sector, the bureaucrats not only had a lot of contact with international institutions and were aware of international trends in the sector, but they also knew that a process of privatization would not threaten their jobs. This was not necessarily the same in the electricity sector. Privatization brought the threat of a potential shift from hydro generation to thermo generation, a technology that was not the expertise of the specialized bureaucracy. Also, in the pre-privatization period, these bureaucrats, who alternated between periods in government offices and periods in state-owned companies, dominated the regulatory bodies. Many resisted privatization and independent agencies because both would cause them to lose power in the sector. The Author is grateful to Sergio H. Abranches for calling her attention to this point.

This analysis raises a series of interesting questions for comparative law scholars who are analyzing reforms in the context of the European Union. The central question is whether there are mechanisms employed by the Union that can reduce political resistance to reforms and easily overcome the obstacles that other countries may otherwise face. For instance, are some of the European Courts, such as the European Court of Justice, able to overcome such resistance by imposing obligations to certain principles, as it did when it established that national procedural autonomy may not encroach on general principles such as the duty to give reasons and the right to seek judicial protection?[104]

Moreover, it would be interesting to explore to what extent the European Union fosters or facilitates the creation of transnational regulatory networks that may become interesting -- albeit complex -- vehicles for regulatory reforms.[105]The question is whether the European Union is creating conditions for collaboration between national actors and the formation of networks, which may in turn facilitate reforms by reducing resistance ex-ante. Indeed, there is a complex set of interactions between domestic and foreign actors in transnational regulatory networks,[106]which are "networks of national government officials exchanging information, coordinating national

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[104] The example comes from G. della Cananea, Administrative Law In Europe, cit. at 5, note 41 and accompanying text.

[105] See, for instance, C. F. Sabel, J. Zeitlin Learning From Difference: The New Architecture of Experimentalist Governance in the EU, in C.F. Sabel & J. Zeitlin (eds.), Experimentalist Governance in the European Union, 1-28(2010).

[106] A more precise term is transgovernmental regulatory networks. R. O. Keohane & J.S. Nye Transgovernmental Relations and International Organizations, 27:1 World Politics 41 (1974) distinguish between two types of networks. "Transnational" refers to non-governmental actors, while "transgovernmental" to refer to sub-units of government that act relatively autonomously from a higher authority. As Slaugther explains, the terminology has not been very precise, as these transgovernmental networks have been described as policy networks, regulatory networks or government networks interchangeably. A. M. Slaughter Global Government Networks, Global Information Agencies, and Disaggregated Democracy, 24 Mich. J. Int'l L., 1041-1075 (2002).

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policies, and working together to address common problems."[107] These networks may exist outside of any formal framework, but they may also exist within an established international organization. Indeed, international organizations may create the conditions for collaboration among national regulators, by providing arenas for interaction and opportunities for contact that turn tacit or potential transnational coalitions into explicit coalitions.[108]The question is whether the European Union is doing that.

III. Conclusion: The Promises and Perils of Legal and Academic Transplants

The previous section has indicated that Brazil has faced numerous constraints to implementing privatization and regulatory reforms. These illustrate the obstacles to convergence identified in the first part of this paper. The section also provided a series of questions to comparative law scholars as to the role that the European Union could play in pushing for similar reforms in European countries. The contrast with the Brazilian case suggests that there may be reasons to suspect that the European Union may be a powerful agent in increasing convergence, influencing and determining the outcomes of reforms in a way that does not happen in countries outside the Union.

Even if comparative administrative law scholars reach this conclusion – that the European Union is a powerful agent increasing convergence – they need to be aware of the conceptual and theoretical framework that they are using to formulate this distinction. The dynamics of reforms are often classified as either top-down (outsiders pressing insiders to adopt reforms) or bottom-up (insiders taking the lead regardless of outsiders' manifested preferences).[109] However, some authors have questioned this

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[107] A. M. Slaughter, Global Government Networks, Global Information Agencies, and Disaggregated Democracy, cit. at 106, 1042-1043.

[108] R. O. Keohane & J.S. Nye Transgovernmental Relations and International Organizations, cit. at 106, 50-51.

[109] G. della Cananea, Administrative Law In Europe: A Historical And Comparative Perspective, cit at 5.

distinction, claiming that in most of the cases reforms fall somewhere in the middle. Peerenboom, for instance, argues,

In some cases it is possible to describe a particular institution, rule, or practice as a foreign transplant or the result of a top-down/deductive or bottom-up/inductive process. In most cases, however, these metaphors fail to capture the complexity of the situation. Indeed, most reforms will involve a mixture of foreign and domestic inputs that interact in complicated ways, as well as attempts to deduce successful approaches from both general principles and local circumstances and induce possible solutions from experiments.[110]

This is especially true if we account for the existence of regulatory networks. Indeed, with these networks scholars may not be able to classify reforms as either top down or bottom up. One may say that it remains top down to the extent that networks are influencing reforms at the national level. However, what are the mechanisms through which these networks are influencing reforms? Taking into account the reasons for resistance mentioned earlier, there are at least three hypotheses as to how these networks could influence domestic actors. First, they may be modifying interests, by showing to groups that could potentially resist reforms how they can attain significant benefits, as reforms may open up the opportunity for them to significantly increase their salaries and benefits. They can also make these groups more aware of new technologies, preparing them to adapt for changes, and offering support for professional training that will allow them to effectively adapt to the reforms. Second, they may change ideological resistance by changing ideas and mindsets. If they operate as epistemic communities,[111] they may

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[110] R. Peeremboom, What Have We Learned About Law and Development? Describing, Predicting, and Assessing Legal Reforms in China, 27:3 Mich. J. Int'l L. 823-871 (2005-2006).

[111] Hass has defined these communities as "networks of professionals with recognized expertise and competence in a particular domain and an authoritative claim to policy-relevant knowledge within that domain or issue-area" P. M. Haas, Introduction. Epistemic communities and international policy coordination. 46:1 International Organization 3 (1992). While not all transgovernmental networks are epistemic communities, they can potentially become epistemic. Keohane and Nye

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redefine how relevant actors think about their roles, their interests, and the rules according to which their interactions with other actors should be governed.[112]Third, these networks can operate by modifying both ideas and interests simultaneously, which may help reduce technical resistance. Transnational networks offer a forum for professionals to exchange ideas. This forum can be useful to "test" the idea. In other words, with an open dialogue, it is more likely that both parties will be able to find a common ground where the technical concerns are properly addressed without dismissing entirely the agenda for liberalization.[113]These hypotheses suggest that until we unpack the mechanisms through which these networks influence reforms at the national level, it is not possible to determine which level (national or international) is influencing the other.

Thus, comparative administrative law scholars should not rush to classify reforms as top down or bottom up. These scholars should be concerned in determining the complex dynamics of political resistance to reforms in the European Union, without trying to place them in a particular moment in time. This resistance may be happening at the time of the formation of the policy consensus, or afterwards. It may also be happening at both moments. In any event, the concept of top down or bottom up reform seems to be too

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suggest that coordination among sub-units of national governments can change their behaviour over time. Moreover, collegiality creates flexible bargaining behaviour, facilitating agreements over goals and policies. The conditions for this to happen, however, are very strict. The members of such networks need to have broad and intense contact, and they need to share a great common interest. R. O. Keohane & J.S. Nye Transgovernmental Relations and International Organizations cit. at 106, 45-46.

[112] However, not all transnational governmental networks can be characterized as epistemic communities, as these require more than just regular contact between its members. Indeed, epistemic communities have four defining characteristics: (1) a shared set of normative and principled beliefs (rationale for action); (2) shared causal beliefs (which determine policies to achieve desirable outcomes); (3) shared notions of validity (criteria to validate the knowledge that serves as basis for action); and (4) a common policy enterprise (shared set of problems to which their professional competence is directed) P. M. Haas, Introduction. Epistemic communities and international policy coordination, cit. at 111.

[113] R. O. Keohane & J.S. Nye Transgovernmental Relations and International Organizations, cit. at 106, 44.

simplistic to capture the rich and complex dynamics guiding these actors.

Another important question that scholars may need to ask – if they reach the conclusion the European Union a powerful force for convergence -- is to what extent the analysis above assumes too much of a theoretical framework that is not applicable to the European context. The concern here would be not only that countries are transplanting legal institutions, but also legal scholars would be transplanting theories from foreign jurisdictions to explain the realities in their own countries. And the question is whether these theories are adequate to explain such realities. Indeed, comparativists need to be careful with what we are implicitly assuming, because we can be inadvertently importing theories that do not apply to the reality they are analyzing.

In this regard, I have shown how the application of the principal-agent theory in the Brazilian context does not allow us to conclude that the theory of congressional dominance (Congress is the principal and IRAs are the agent) applies to Brazil. The Brazilian Presidential system has unique characteristics. Indeed, Brazil has one of the strongest presidencies in the world and a President with stronger legislative powers than the American President. Due to the peculiarities of Presidential systems in Latin America in general and Brazil in particular, the theory of congressional dominance that is largely used in the US fails to capture the reality of Brazilian IRAs, where the President – not Congress – is the principal. Thus, I propose a theory of presidential dominance to describe that Brazilian reality.[114]Comparativists concerned with European countries need to ask the same question. Does the principal-agent theory describe the European reality accurately? Who is the principal in a parliamentary system of government? Are agencies indeed agents?

Most importantly, if comparativists are to include the transnational dimension in their analyses, they need to ask whether a principal-agent framework is appropriate to describe the dynamic of

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[114] M. M. Prado, Presidential Dominance from a Comparative Perspective: The Relationship between the Executive Branch and Regulatory Agencies in Brazil in S. Rose-Ackerman & P. Lindseth, Comparative Administrative Law (2010).

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reforms in Europe. The argument that the European Union is a driver of convergence raises the question of whether this idea that there is one driver (the Union or the nation states) is accurate. Indeed, a recent book by Peter Lindseth suggests that the nature and legitimacy of European governance comes from administrative governance. Indeed, he suggests that supranational regulatory authority should properly be seen as 'delegated' from national constitutional bodies.[115]This suggests that the principal-agent theory is applicable to the European context, but the agents are the transnational bodies, not the other way around. The idea that administrative forms of governance may prevail at the transnational level calls for a reformulation of the principal-agent theory as it is often applied in the American regulatory context. But it also questions that idea that comparativists should be focusing only on explaining where national reforms are coming from. As Lindseth argues it may as well be the case that transnational reforms originate in domestic arrangements, and vice-versa. Again, this questions the idea that we could accurately describe the reforms in the European context as top-down or bottom-up, which only makes the intellectual challenge even more interesting for comparativists.

[115] P. L. Lindseth, Power and Legitimacy: Reconciling Europe and the Nation-State (2010).

DEBATES

THE APOLOGUE OF MARCO AND LEONARDO. A RESPONSE TO JOSEPH WEILER

Simone Pajno

1. – After the recent, well-known, and widely discussed verdict of the European Court of Human Rights (section II, November 3, 2009, Appl. No 30814/06, Lautsi v. Italy), Joseph Weiler discusses, very acutely as usual, the essence of the issue of the crucifix in schools (EJIL (2010), Vol. 21 No. 1, 1-6).

The Author uses an instrument that is quite unusual in scientific debate: the apologue.

Weiler imagines two classmates, Marco and Leonardo, who respectively belong to a religious family and to a not religious family. When the latter pays a visit to the former, he is very surprised: there is an object on the wall that he does not know at all. «It's a crucifix – he is told – every house should have one».

Leonardo goes back home quite impressed, and asks his mother about this strange object. The mother, patiently, replies: «They are Catholics. We respect them and their beliefs». To the her son's request of if they could also hang the crucifix on the wall of their house, the mother answers politely but firmly in the negative. And rightly so, in Weiler's opinion: «It is a secular world view that she wants to impart to her children».

A while later, Marco pays a visit to his friend. Again the visitor is struck by the wall of the house of his host. It is "strangely" bare. There is no crucifix hanging. Marco asks his mother for an explanation. The answer is similar to that of Leonardo's mother: «They are a wonderful family, good and kind and charitable. But they do not share our belief in the Saviour. We respect them». Finally, also in this case, the mother answers negatively to her child's request to adapt their own wall: «We respect them, but for us it is unthinkable to have a house without a crucifix».

So far, so good. The problems begin the first day of school.

Let's imagine first a school with a crucifix. In the classroom

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Leonardo is shaken: the school is like Marco's home! He comes back home tormented and full of doubts.

Weiler invites us to imagine, then, what would happen in the school assuming the opposite. Now Marco is the upset one. The school is like Leonardo's home: there is no crucifix on the wall! He comes back home in tears, distraught, and convinced that something is wrong with the position of his family. Moreover – Weiler adds – the situation would be even more alarming if the crucifix, that was initially in the classroom, had been removed.

From this short apologue, the author draws the following conclusions.

In contemporary society, in which «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». Marco's dismay clearly demonstrates this point. Weiler goes on: «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 [Strasbourg]. It is no more neutral than having a crucifix on the wall». This is the main point of the argument proposed by Weiler: one can perfectly match up the positions of Marco and Leonardo. Their situations are perfectly symmetrical. In Weiler's opinion, the denial of this symmetry is, on the whole, «a disingenuous secular canard, the opposite of pluralism», and we have to unmask it once and for all if we really want our children, believers or not, Christians, Muslims or Jews, to live in a harmonious society with mutual respect for each other.

2. – The apologue has the unquestionable merits of clarity and simplicity. It points out the essence of the subtle problem that we face today: is the "bare wall" really more respectful of pluralism? Or is Weiler right to say that this is nothing but a «disingenuous secular canard »? The main question is the one that Weiler highlights: are Marco and Leonardo indeed in equal positions, overlapping in a perfectly symmetrical way? If the answer is positive, Weiler is surely right. I believe it is better to consider this question in a different way. Making use of apologues in order to expose a theory can be very useful, and in this situation it certainly was. However, this technique has its limits. The conclusions depend on how the apologue is constructed. These considerations underline the need for caution. Indeed, in my

opinion Weiler did not build the apologue correctly. It would have been better, in fact, to reconstruct the points of views of the two families in a different way, in order to give a more adequate account of the complex worldviews that they underlie.

In my own version of the apologue, in fact, Leonardo's mother, when asked by her son about the religious symbol, replies: «We respect the family of Marco and their beliefs. But they are very different from us. We believe that happiness in this house depends only on our goodwill, on our ability to take each other into consideration and on our willingness, and on the ability that each of us has, to deal with the other members of the family in a rational, reasonable and sympathetic way. Conversely, Marco's family believe that their happiness depends not only on what I just told you, but also on God's protection».

Similarly, Marco's mother replies to her child who asks her to remove the crucifix from their wall: «We respect Leonardo's family's beliefs . However, our point of view is quite different. We believe that the happiness of our family depends not only on our willingness, and on the ability that each of us has, to deal with others peacefully and rationally, but also on the help that the Lord in the heavens, in his unfathomable goodness, will decide to give us. For this we pray».

In my view, this small correction of the apologue is very important. First of all, it makes the apologue of Marco and Leonardo more precise; secondly, it leads us to a very different conclusion from that of Weiler. Let's see why.

3. – Firstly, the apologue is more accurate. Through it one can realize that the things the two families believe in are not entirely opposite to each other. Indeed, the beliefs of the two families partially overlap each other. Both families believe in some important "human" virtues: rationality, reasonableness and mutual understanding. The two families are therefore likely to find a shared ground. Indeed, they appreciate each other.

The difference between the worldviews of the two families is the following. In the Marco's family's view their future not only depends on the resources of rationality, reasonableness and mutual understanding. Their fortunes also depend on religious faith.

As one can see, the symmetrical image suggested by Weiler

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is misleading. Conversely, a scalar image would be more appropriate. The first step is common to both families, whereas only Marco's family is able to add a second step to the first, namely the belief in an afterlife entity.

The worldview of Marco's family , then, is not "opposite" to that of Leonardo's. Rather, the former encompasses and surpasses the latter. We can say, briefly: the first family has more resources, more arrows to its bow than the second one.

We can now return to our question. Are the positions of Marco and Leonardo really symmetrical, as Weiler argues? What I have just highlighted clearly leads to a negative answer. Marco's relatives trust in resources that are denied by Leonardo's relatives. Conversely, all of the resources trusted by the latter family are shared by the former.

This different version of the story greatly changes the way of interpreting what happens on the first day of school. The crucifix on the wall would forced Leonardo to accept a religious symbol as a part of the beliefs trusted by the community, even if he does not share this belief. On the contrary, when Marco is faced with the "bare wall", he is not forced to trust in something that does not correspond with his beliefs. The scholastic community believes in only a part of the resources that Marco believes to have. He is not forced into anything. He is only asked not to impose on others what they do not believe in. Unlike the former, this is a "nonviolent" way of living together.

As one can see, the situation is very different from Weiler's description. Therefore, the conclusion he reaches cannot be shared. It is worth noting, inter alia, that if the positions of Marco and Leonardo had indeed been truly symmetrical, the problem would not have allowed a satisfactory solution. Any solution, in fact, would contain elements of violence against one party. Fortunately this is not the case. It is obvious that the choice of the "white wall" calls for a sacrifice from Marco, and not from Leonardo. It is not, however, a sacrifice comparable to the one forced on Leonardo , if we assume the opposite. If we do hang the crucifix in the classroom, we will ask the latter to endure something far from his beliefs. Conversely, if we do not hang the crucifix, we ask the former only to accept, in the public sphere, a language shared by everyone, even if he has to give up part of his own language.

4. – The following example, in my view very fitting, could be added to the tale of Marco and Leonardo.

Let's imagine a group of friends gathered to chat in the evening. There are people who come from different countries. There are guys from Germany, France, England, Spain and Italy. Of course, all of them can speak their own language. Each of them also speaks English, but nobody is able to converse in a language different from the latter and from his own language. In such a situation it would be extremely rude to insist on speaking a language other than English, even with a fellow countryman. Moreover, it would be absurd if a non-English guy asked the others to converse in their own language.

Why do we consider a conversation in English in the situation above described a better solution than the other possibilities? Obviously it is the most inclusive option. It does not leave anyone out. It looks after the interests of every one. One can certainly say that this option is the more pluralistic one. None of us would consider this solution to be an imposition of the Englishman on his friends, though undoubtedly he is the one that benefits from the situation more than the others.

On the other hand, why do we not hold as a good choice to speak in the language of the majority in the group? Because in this way, although it is based on the majority principle, it would be heavily penalizing to the minority, as it would prevent those who belong to the minority from being full members of the group. Things should go in the same way in everything that affects the public sphere of a genuinely pluralistic constitutional State. What is the only language that all of us are able to speak? The language of rationality, reasonableness and mutual understanding. Not those of religious faiths, as widespread, historically rooted, or tolerant and enlightened as they are. The public sphere, therefore, can be guided only by what can be attributed to that language. And the walls of a public school, one of the most important institutions devoted to educate us and our children to the common language, are undoubtedly attributable to it.

The example of languages, moreover, may be particularly relevant for Christians. Consider the passage from the Acts of the Apostles in which the Holy Spirit gives some disciples the power to speak all languages (Acts 2,1). It is a gift to those who have faith. How would they behave in the situation suggested above?

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Of course – driven by charity, the most important virtue, according to the famous passage by the apostle Paul (1 Cor 13) – they would make a great effort to speak English, although this would have been a sacrifice for them.

Christians should behave similarly nowadays, in pluralistic societies. In the public sphere they should look at the others in a charitable way, and speak a language that those who do not participate in the gift of faith can understand. This obviously does not prevent Christians from trying to communicate their good news to others, trying to allow them to share in this gift. But charity should encourage them to strictly separate this activity from those that take place in the public sphere.

A Reply To Simone Pajno

Joseph H.H. Weiler

I thank Simone Pajno his thoughtful reactions to my piece. I do not want to respond directly but to offer one lexical clarification. I think I made a mistake using the metaphor of the "naked wall" or the "empty wall" -- which has a very clear meaning in American culture, but creates confusion in Europe. In the laique conception of neutrality the "Wall" is not naked at all. What is displayed on the "Wall" is determined by the democratic politics of the polity.

In France you will greeted, as you enter any primary school, with Liberté, égalité, fraternité -- I like that, because I am a child of the French Revolution, but if I were a Royalist, I could take offense. Nothing to do -- it is the choice of French democracy to have that icon on every school. It could, in a different constellation be Workers of the World Unite, or Save The Earth or for that matter the Icon or symbol of any social or political movement following the discipline of democracy. The only thing that may not be placed on the Wall, is a Cross.

In the laique polity the public wall is not naked or empty at all. It is Religiously Cleansed. In the Laique polity the lesson, the world view, that both Marco and Giovanni grow up with is that the "public wall," irrespective of voter preference, national self understanding, history, is a religiously cleansed zone.

Voltaire, yes, St Francis No. Good? Bad? Justified? Not Justified? Who know. But hardly "neutral."

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THE RULE OF LAW: A FUNDAMENTAL SAFEGUARD OR AN INSTRUMENT OF PLUNDER?

A discussion of Ugo Mattei & Laura Nader, Plunder - When the Rule of Law Is Illegal (2009) organized by the Law School, University of Naples Suor Orsola Benincasa – Convenors: Giacinto della Cananea & Tommaso Edoardo Frosini.

1. Tommaso Edoardo Frosini, University Suor Orsola Benincasa – Naples, Introduction. A Defence of the Rule of Law

In this short introduction, I will argue that Mattei and Nader's critique of the Rule of Law deserves full attention by public lawyers, although, on the merits, it is fundamentally flawed.

Mattei and Nader's critique ought not to be neglected for two reasons. First of all, they focus on the Rule of Law, which is not simply a general principle of public law. Rather, it lies at the very heart of constitutionalism as we know it. The has been a limit to the exercise of sovereignty, well before becoming a limit to the will of the majority, in institutional frameworks based on democracy. From this point of view, the Rule of Law is not an exclusive prerogative of a limited club of Western democracies. Indeed, it is frequently invoked in many others, in order to limit and structure the exercise of discretionary powers by those who govern. Second, and by no means less important, unlike other kinds of limits of the exercise of powers by the sovereign, the Rule of Law favours the supremacy of law. It limits the powers of the executive branch, which must respect the rules laid down the legislative and is constantly placed under the supervision of the courts. At the same time, it limits the powers of legislators, because of the rigidity of the law.

That said, Mattei and Nader's book has three main weaknesses. First, even a quick glance to the literature concerning the Rule of Law shows that it has a variety of meaning. Such meanings include, in particular, both a conception of law founded on general rules, which is particularly relevant for imposing constraints on government, and the fundamental idea of equality before the law, regardless of personal aspects, which leads to a

sort of universality. The connection with common law expresses still another meaning of the rule of law. If we bear these meanings in mind when considering Mattei and Nader's analysis, the first two meanings look more relevant than the third and possibly others, but there is not even a brief explanation.

Second, whatever our ideas about the meaning of the Rule of Law, historically it has provided a set of principles, designed to keep government within its legal bounds. Only if the Rule of Law is recognized as a central tenet of the legal order, is it possible to affirm that there is no fundamental difference between rulers and ruled and, as consequence, that the former and the latter are equally bound by it. The fact that Mattei and Nader bring some evidence of the insufficiencies and weaknesses of the rule of law in some institutional and cultural environments may not, and does not, cancel neither those merits nor the potentialities of the rule of law in other environments. In other words, the problem is not the rule of law, but, rather, how it is enforced.

Last, but by no means least of all, although adopting an explicitly critical approach, Mattei and Nader do not provide us with any ideas regarding the solutions that may be adopted in order to cope with the insufficiencies and weaknesses that they point out. In other, and clearer, words, the book has a pars destruens, but lacks a pars construens.

2. Gianni Ferrara, University of Rome "La Sapienza", The Virtues of Critical Constitutionalism

In every decade, in my experience, there are only few legal books that are not simply helpful, but necessary, and Mattei and Nader's Plunder is one of such books, for three fundamental reasons. Firstly, from an empirical point of view, they deal with what is probably the main problem of our epoch for constitutional law,

that is to say the fact that the rule of law lacks legitimacy. Secondly, although much of this book contains an empirical analysis of the inadequacies of the rule of law in modern systems of government, at the same time, it is also an important contribution from a jurisprudential point of view. Thirdly, it puts into question the constitutionalism of our time.

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Plunder is, first of all, a book that describes, with an impressive set of data, how the rule of law has not only lost its function of imposing constraints on the most powerful and wealthy, because it has been transformed into something else. More precisely, it has become an instrument of oppression in the context of global capitalism. In this respect, perhaps the most important message of Plunder is that there is an intrinsic connection between the rule of law, as a conceptual structure, and the hegemony of Western countries, in particular the US.

An important implication of this is that the radical separation of the study of law from the study of politics, a late nineteenth-century construct, obscures the real functions performed by the legal institutions. In this sense, the time is ripe for a rethink of the way we conceive the law, the isolation of legal science from other social sciences. The cooperation between Ugo Mattei, a private lawyer and an expert of comparative law, and Laura Nader, an anthropologist, opens a new perspective. A critical legal approach does not only demonstrate that the positivist construct fails to respond to the felt necessities of our epoch. In this moment of crisis, it also serves to achieve another goal, that is to say to discuss the persistent influence of Kelsenian theory of law. Put it briefly, such theory conceive the law as system of norms. In this context, what matters more, socially and legally, is that people must obey the law. As a result, the fundamental questions posed by legal science are those concerning the validity of legal norms and their enforcement. Other questions are neglected, including the most fundamental one, that is to say why do people obey the law. They do so, arguably, because the law has a democratic legitimacy and serves to the preservation and promotion of social interests.

Once it becomes empirically evident that the edifice of public law that we have built is based on hegemony, and the individualistic assumptions of both legal institutions and the underlying doctrines are openly criticized, not only the rule of law, but modern constitutionalism, seen as a whole, must be discussed. If we consider the two revolutionary periods of modern constitutionalism, the American and the French, a strong contradiction soon emerges between the universality of personal rights and the right of property. This contradiction was attenuated by the efforts made to build welfare states during the twentieth

century. Such efforts ultimately seemed to fail, due to the action of vested interests, but fortunately some public institutions oppose to them. Their role is important not only in order to shape the edifice of public law, but also from the point of view of constitutional doctrines, to the extent to that it demonstrates the persistent necessity of militant constitutionalism. Mattei and Nader's book is a very important effort in this sense.

3. Giacinto della Cananea, University of Rome "Tor Vergata", The Rule of Law As An Instrument of Plunder? An Epistemological Perspective

The are two reasons why Mattei and Nader's Plunder is important for public law and deserves, therefore, being discussed. First, Plunder sheds light on the role of law in current processes of globalization. Mattei and Nader seem right when they do not simply assume ex hypothesi, but demonstrate empirically that the increasing mobility of capitals and the greater economic wealth that this can generate may favour some human enterprises, but can, and do often, produce exploitation of natural resources and oppress the poor and the weak. No unbiased observer can fail to recognize this. Second, from a continental, and particularly from an Italian, point of view, the questions they raise with regard to public law thoughts are, in my view, methodologically correct, although the answers they give are not necessarily the only possible ones. I agree with them that we need to go beyond self-assuring ideas about the Rule of Law. For too long a time, in this country, public lawyers have, more or less consciously, accepted the opinion expressed by Vittorio Emanuele Orlando at the end of the Nineteenth century, that is, that after re-unification of the country was achieved, the task of legal culture is to consolidate its institutions. The underlying conception of legal analysis as an objective and neutral task, which occasionally gives rise only to disputes about the correct use of the same method, does not correspond to today's reality. My analysis of Plunder thus begins with the recognition that constitutional law is not only about processes, but calls into question substantive principles and values. As a consequence, we need some methodological placeholder around with which or within which to structure

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conversations about the evolution of traditional guarantees, such as the Rule of Law.

That said, it is precisely on methodological grounds that Mattei and Nader's analysis is not entirely convincing. First of all, their analysis faces a problem which is typical of the functionally oriented empirical literature that seeks to evaluate the functioning of constitutional safeguards. This problem is not simply the usual difficulty with constructing good empirical studies of the impact of legal rules. Such efforts are undermined at the outset by the their failure to specify and defend previously a set of criteria by which to evaluate the points of strength, if any, and the weaknesses that they find empirically. To discover that, in our case, the Rule of Law raises high expectation but disappoints them, or that it protects effectively some interests as opposed to other (which deserve equally or even more legal protection), provides only a minor premise for some ultimate conclusion about the goodness or badness of the Rule of Law. The question thus arises of what is the major premise that would permit convincing evaluative conclusions to be deduced, which requires a clarification on epistemological grounds. A basic distinction must be drawn between partial judgments and more general or overall judgments. While the former are based on analyses concerning one or some specific aspects of either a set of rules or a general principle of law, the latter are the result of all the analyses concerning the relevant aspects of the phenomenon taken into account. This explains why partial judgments may and do differ - the choice of a specific issue often obscures or distorts other issues. There is nothing wrong, of course, in choosing a set of issues which shed light on the weaknesses of the Rule of Law. However, if we want to build more general conclusions, we should also wonder whether there are counter-examples and, if so, consider their implications.

The epistemological argument brings in the normative argument. As I said earlier, I agree with the authors, as well with Ferrara, that we need to develop a style of public law thought which is able to reflect more adequately the relationship between law and society. However, this style must also recognize the normativity of law, that is, its deontological dimension (the ought). There is little hope of understanding law, not only public law, if we leave aside this normative or deontological dimension. Of

course, the nature of this normative elements is itself problematic, but it cannot be neglected. If, for example, we consider freedom of the press under the first Italian Constitution, the Statuto Albertino, it is easy to observe that it was respected by liberal governments, while it was eroded and eventually cancelled by Fascism. The constitutional provision according to which the law represses the abuses of the press was even considered as the foundation of political censure. But it would be incorrect to consider this as a weakness of such guarantee, while it depended on political forces and ideologies. It is not a minor merit of Mattei and Nader's book to remind us of the need to be aware of such political forces and ideologies in the field of public law.

4. Ugo Mattei, University of Turin, A Reply

Although the co-author of Plunder (Laura Nader could not be here today, but her contribution to the project of this book and to its achievement has been of fundamental importance) could be satisfied of the debate provoked by the book, I believe that at least some points ought to be clarified.

First of all, I'm aware that while the choice of focusing on the Rule of Law, both as a concept and as a constitutional principle, does not require particular explanations to an American audience, other countries, also within the Western world, use more or less different concepts and principles. However, since this is a book about law and globalization in our epoch, which is characterized by the hegemony of American legal institutions and ideologies, the choice to focus on the Rule of Law was inevitable, for Nader and myself.

Second, and partly as consequence of this, I'm afraid that I have to say that I find quite odd what Frosini said earlier, that is, that he was shocked by our critique of the Rule of Law. What is shocking is not the fact of criticising such a venerated legal principle but, rather, the unquestioning acceptance of received and formalistic views about it. One thing is to say that our empirical analysis is wrong (but neither Frosini nor anybody else said this), or partial as della Cananea argued, another is to refuse even the idea of a critical analysis. Such a conclusion is unacceptable, for a twofold reason. On the one hand, if only part of our empirical analysis is correct, our attempt to demonstrate

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that too often current views about the Rule of Law are simply complacent and distorted by the formalism which still dominates many public law thoughts. On the other hand, even if our analysis had not provided empirical evidence of the distorted use of the Rule of Law, to accept such unquestioning enthusiasm about it would mean to deny the value of critical thought, which is the cornerstone of social sciences, and of science as such.

Last but not least, those who accept, against any evidence, the received and complacent conception of the Rule of Law which we criticize in our book, should at least be aware of the distorted effects that derive from it. The effect of formalism is to neglect issues of distributive justice. This effect is magnified by the growing diffusion of law and economics doctrines. In particular, the Chicago school economic analysis of law, although enriched by the analytical apparatus of modern economy, rests on the assumption of the "rational economic man", and on liberal views about justice, which is considered almost exclusively as commutative justice. My argument is, instead, that the only kind of State which can be morally justified is a positive State, which does not seek justice only though the courts or alternative dispute resolution tools, but also through redistributive justice. Our task, as critical observers, is therefore to dismantle the ideology of the Rule of Law, which is used by those who benefit from current processes of globalization, in order to bring back in constitutional discourses the interests and the views of the losers, and if possible to seek to improve their condition.