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The Progress of Integration between the European Convention on Human Rights and the Italian Constitutional Order in the Protection of Fundamental Rights in the EU

di
Franco Rossi*

'Nihil enim prodest iura condere,
nisi sit qui iura tueatur'
(There is no sense in the proclamation of rights if
there is no power to protect them)
Henry Bracton
(De Legibus, 55b, lI, 166, c. 1235)

Introduction – The development of fundamental rights in the EU and the European Convention on Human Rights (ECHR) – The integration between the ECHR and the Italian constitutional system: what the ECHR is not… - A new paradigm: sentt. C. Cost. n. 348/2007 and n. 349/2007 – Conclusion: multilevel protection and the effectiveness of fundamental rights.

INTRODUCTION

Although the Lisbon Treaty has removed any reference to European symbols, the E.U.'s motto, 'United in diversity', still represents a basic concept.[1] The history of European integration, from its origin to the present, has been characterized by several periods of advancement as well as by unexpected setbacks. However, it has always shown a tendency towards progress, both in terms of organization and civilization.[2]

Rights are the most important expression of civilization, culture and common values. As has been noted, they are, through a circular process[3], an instrument of integration and a factor of cultural and political identity[4]. In *Verfassungslehre als Kulturwissenschaft*[5], the German author Peter Häberle considers Europe as a 'rights-based community', noting that this idea is reflected in

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[1] *See* Art. IV(1) 'The symbols of the Union', *Constitution for Europe – European Convention*, 10 June-15 July 2003 and Art. I(8) of the *European Constitutional Treaty*. See also M. Cartabia, '*Unità nella diversità': il rapporto tra la costituzione europea e le costituzioni nazionali*, ['United in diversity': the relationship between the European constitution and the constitutions of Member States'], Florence (18 February 2005), from: <www.giustamm.it/index0/newsletter/2005/2005_2_28.htm> visited 9 September 2009.

[2] L. Febvre, *L'Europa, storia di una civiltà*, [Europe, history of a civilization] (Roma, Donzelli 1999) p. 67. According to the A., Europe is two things: an organization and a civilization.

[3] S. Mangiameli, 'Il contributo dell'esperienza italiana alla dommatica europea della tutela dei diritti fondamentali' [The contribution of the Italian experience to the European dogmatism of the protection of basic rights'] (2005), <www.giurcost.it> visited 20 July 2009.

[4] S.P. Panunzio, *I diritti fondamentali e le corti in Europa* [Fundamental/ Basic rights and the Courts in Europe], (Naples, Jovene 2005) p. 6.

[5] P. Häberle, *Verfassungslehre als Kulturwissenschaft*, (Berlin, Duncker & Humblot 1982) *passim*.

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Article 49(1) of the Treaty of the European Union[6], which states that every European State can become a member of the Union if it respects the principles decreed in Article 2[7] of the TEU.

Today the legal system around basic human rights in Europe is quite particular: it is characterized by a number of different sources, each of which recognizes and protects those rights in different ways with varying levels of efficiency. This 'multilevel system'[8] reflects the peculiar situati of European citizens, who have not just one but several identities that correspond to the different social aggregates to which they belong.[9]

In the Italian context, there are three main levels of guardianship related to the protection of fundamental rights: i) the E.U. and its treaties; ii) the Council of Europe and the 'European convention for the protection of human rights and fundamental freedoms'; and iii) the Italian Republic and its Constitution. These interconnections can generate problems between the different judicial systems (the European Court of Justice at the EU level; the European Court of Human Rights (ECtHR) at the Convention level; and the Italian Constitutional Court at the national level).[10]

[6] Art. 49(1) TEU: 'Any European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union. The European Parliament and national Parliaments shall be notified of the application. The applicant State shall address its application to the Council, which shall act unanimously after consulting the Commission and after receiving the consent of the European Parliament, which shall act by a majority of its component members. The conditions of eligibility agreed upon by the European Council shall be taken into account'.

[7] Art. 2 TEU: 'The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of those belonging to minority groups. These values are common to Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail'.

[8] On the concept of multilevel constitutionalism, *see* I. Pernice, 'The Treaty of Lisbon: Multilevel Constitutionalism in Action', 3 *Columbia Journal of European Law*. (2009) p. 349, *passim.* According to the A., multilevel constitutionalism is a theoretical approach to conceptualize the constitution of the European system as an interactive process of establishing, dividing, organizing, and limiting powers, involving national constitutions and the supranational constitutional framework as two interdependent components of a legal system governed by constitutional pluralism instead of hierarchies; F. Sorrentino, 'La tutela multilivello dei diritti' [The multilevel protection of rights], (report at the AIC annual Congress, 2004), <www.associazionedeicostituzionalisti.it/materiali/convegni/aic200410/> visited 20 July 2009; M. Morlok, *Il diritto costituzionale nel sistema europeo a più livelli* [Constitutional law in the European multilevel system], in S.P. Panunzio (ed.), *I costituzionalisti e l'Europa. Riflessioni sui mutamenti costituzionali nel processo d'integrazione europea* [Constitutional lawyers and Europe. Reflections on constitutional changes in the process of European integration], (Milan, Giuffrè 2002) p. 507 et seq.; Cf. I. Pernice, 'Multilevel Constitutionalism in the European Union', 27 *European Law Review*. (2002) p. 511 et seq.

[9] G. Cordini, *Le linee evolutive della cittadinanza europea. Profili costituzionali* [The European citizenship's evolutionary lines. Constitutional profiles], Various Authors, *Studi in onore di Fausto Cuocolo* [Studies in memory of Fausto Cuocolo], (Milan, Giuffrè 2005) p. 245-248; Cf. P. Ridola, *La carta dei diritti fondamentali dell'Unione europea e le "tradizioni costituzionali comuni" degli stati membri* [The European Union's charter of fundamental rights and the Member States constitutional common traditions], in S.P. Panunzio and E. Sciso (eds.), *Le riforme costituzionali e la partecipazione dell'Italia all'Unione Europea* [The constitutional reforms and Italy's partecipation to the European Union], (Milan, Giuffrè 2002); *See also* F. Cerrone, 'La cittadinanza europea fra costituzione ed immaginario sociale' [The European citzenship between the Constitution and the social imaginary], *Rivista Critica di diritto Privato*. (2002) p. 476 at p. 500.

[10] F. Salmoni, *La Corte costituzionale, la Corte di giustizia delle Comunità europee e la tutela dei diritti fondamentali* [The Constitutional Court, the European Court of Justice and the protection of fundamental rights], in P. Falzea et al. (eds.), *La Corte costituzionale e le Corti in Europa* [The Constitutional Court and the Courts in Europe], (Turin, Giappichelli 2003) p. 145 et seq.

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The combination of the various levels (that represent different legal systems) creates a lack of consistency, including in the regulation of the same right at different levels. Moreover, judicial interpretation may vary according to the different levels of protection.[11]

The problems arising from these divergences could be solved through a process of integration of the different legal systems, or, as suggested by some authors, through creating a hierarchy between the different systems. Another solution could involve establishing some form of institutional hierarchy between the various judges; or, at least, introducing a set of proper rules.[12]

As suggested by many authors, the relationship between the different levels of protection for fundamental rights and the respective judicial authorities is unclear and not fully effective[13]. The purpose of this essay is to highlight some improvements that have emerged in the relationship between the Italian constitutional system and the European Convention on Human Rights.

THE DEVELOPMENT OF FUNDAMENTAL RIGHTS IN THE EU AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS (ECHR)

As mentioned, the protection of fundamental rights involves different legal orders - the national, the E.U. and the international - forming a common pattern used as a *palladium* in defending the common values of western society.[14]

In international order, the 20th century represented an historical period in terms of progress for the protection of human rights. The aim was to set a minimum standard to be respected by all States. For this reason, international law has obliged national systems to develop within the context of a shared ethic and heritage of common values, in which fundamental and human rights are the essential core.[15]

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[11] M. Cartabia, *The multilevel Protection of Fundamental Rights in Europe: The European Pluralism and the Need for a Judicial Dialogue*, in C. Casonato (ed.), *The protection of Fundamental Rights in Europe: Lessons from Canada*, (Trento, DSG 2004) p. 81 et seq.

[12] For a different approach, related to the relations between judges in general, *see* A. Sandulli, 'La Corte di Giustizia europea ed il dialogo fra le corti' [The European Court of Justice and the dialogue between the Courts], <www.irpa.eu/file/ArticoliNovit2009/Sandulli-Cortedigiustiziaeuropea.pdf.> visited 18 September 2009.

[13] A. Barbera, *Le tre corti e la tutela multilivello dei diritti* [The three Courts and the multilevel protection of rights], in *Idem* (ed.), *La tutela multilivello dei diritti* [The multilevel protection of rights], (Milan, Giuffrè 2004) p. 89-98; *See also* G. Zagrebelsky, *Corti europee e corti nazionali* [European Courts and National Courts], in S.P. Panunzio (ed.), *supra* n. 8, p. 529-553; Cf. G. Repetto, *I rapporti fra le Corti europee e le prospettive dell'adesione dell'Unione europea alla CEDU* [The relationship between the European Courts and the prospect of European Union agreement to the ECHR], in S.P. Panunzio, *supra* n. 4, p. 287-332; *See also* A. Arnull, *The European Court of Justice*, (Oxford University Press 2006); *See* R.A. Cichowsky, *The European court and civil society*, (Cambridge University Press 2007) and G. De Burca, 'The EU, the European Court of Justice and the International Legal Order after Kadi', 1 *Harvard International Law Journal*, Vol. 51, (2009) p. 1 et seq.

[14] A. Ruggeri, 'Sovranità dello Stato e sovranità sovranazionale, attraverso i diritti umani, e le prospettive di un diritto europeo intercostituzionale' [The sovereignity of the State and supranational sovereignity, through human rights, and the perspectives of an interconstitutional European law], 2 *Diritto pubblico comparato ed europeo* (2001) p. 544 et seq. For an in-depth examination of the affirmation process of fundamental rights, *see* S. Mangiameli, *La tutela dei diritti fondamentali nell'ordinamento europeo* [The protection of fundamental rights in the European legal order], in Various Authors, *Per il quarantennale della Facoltà di Giurisprudenza dell'Abruzzo* [For the 40th Anniversary of Abruzzo's Law Faculty], (Milan, Giuffrè 2007) p. 555-574.

[15] S. Greer, *The European Convention on Human Rights*, (Cambridge University Press 2006) p. 1-8; *See* J.R. Milton and P.P. Milton (eds.), *John Locke: An Essay Concerning Toleration and other Writings on Law and Politics*,

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The development of fundamental rights often leads to a significant expansion of jurisdiction that becomes uncontrolled where there is a lack of authoritative political decision-making authority. In the modern age, fundamental rights tend to swing between the two poles of political decision-making and judicial guarantee. This swing has historically been translated into the alternation between different models of the realization of rights, typical of the dichotomy of common law-civil law systems – in other words, implementation through jurisdiction and implementation through legislation.[16] The European Union experience, so far, has been an interesting experiment in integration between the two legal families. The EU legal order was established as an order based on written law (i.e. the Treaties), that was consolidated over time to "judge made law" (i.e. bringing together the Court of Justice's case law and the decisions of the General Court).[17]

As is generally agreed, the original version of the European Communities' Treaties did not contain adequate provision for the protection of fundamental rights. The only human rights provided for were those that helped to achieve the economic integration purposes of the Treaties. Examples include freedom of movement for work and the prohibition of sexual discrimination in remuneration.

Initially, the European Court of Justice denied the possibility of subjecting EU acts on fundamental rights to controls over their enforcement (i.e. *Stork* v. *High Authority of the European Coal and Steel Community*[18] and *"Geitling"* v. *High Authority of the European Coal and Steel Community*[19]). Due to this stance, the risk that EU law could prejudice the fundamental rights protected by Member States' Constitutions emerged. This risk was strengthened by the recognition of the Court of Justice's case law on the direct-effect principle and the EU law supremacy principle (*Van Gend & Loos* v. *Netherlands Inland Revenue Administration*[20] and *Costa* v. *E.N.E.L.*[21]).

In such a situation, the Constitutional Courts of Germany[22] and Italy[23] elaborated the counter-limits theory, affirming their competence in violations to fundamental rights over EU acts[24].

(Oxford/New York: Clarendon Press, 1993) p. 1667-1683. *See also* C. Pinelli, 'I diritti fondamentali in Europa fra politica e giurisprudenza', 1 *Politica del diritto.* (2008) p. 45 et seq.

[16] R. Bin, *Diritti e argomenti. Il bilanciamento degli interessi nella giustizia costituzionale* [Rights and reasons. The trade-off of interests in Constitutional justice], (Milan, Giuffrè 1992) p. 88 et 120 et seq.

[17] C. Panzera, 'Il bello dell'essere diversi. Corte costituzionale e Corti europee ad una svolta' [The beauty of being different. The Italian Constitutional Court and European Courts at a turning point], <www.forumcostituzionale.it> visited 13 July 2009.

[18] ECJ, 4 February 1959. C-1/58, *Friedrich Stork & Cie* v. *High Authority of the European Coal and Steel Community.*

[19] ECJ, 18 May 1962, C-13/60, *"Geitling", Ruhrkohlen-Verkaufsgesellschaft mbH and others* v. *High Authority of the European Coal and Steel Community*

[20] ECJ, 5 February 1963, C-26/62, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos* v. *Netherlands Inland Revenue Administration*

[21] ECJ, 15 July 1964, C-6/64, *Flaminio Costa* v. *E.N.E.L.*

[22] BVerfGE, 29 May 1974, 37, 271 2 BvL 52/71, *Solange I-Beschluß.*

[23] Sent. C. Cost., 16 December 1965, n. 98.

[24] *See* M. Cartabia, *Principi inviolabili e integrazione europea* [Inviolable principles and European integration] (Milan, Giuffrè 1995); R. Calvano, 'Il ruolo dei principi fondamentali della Costituzione nella giurisprudenza costituzionale' [The role of Constitution's fundamental principles in constitutional case-law], <www.news.unina.it/tmpPDF/Calvano.pdf> visited 14 July 2009; M. Claes, *The National Courts' Mandate in the European Constitution*, (Oxford, Hart 2006) p. 450. Cf G. Martinico, *L'integrazione silente. La funzione interpretativa della Corte di Giustizia e il diritto costituzionale europeo* [Silent Integration. The Interpretative Function of the ECJ and the European Constitutional Law], *(*Naples, Jovene 2009).

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Because of these decisions, the European Court of Justice, through some important judgments (*Erich Stauder* v. *City of Ulm - Sozialamt*[25]; *Internationale Handelsgesellschaft mbH* v. *Eirfurt*[26]; *Nold* v. *Commission of the European Communities*[27]), progressively recognized certain fundamental rights, referring to Member States' common constitutional traditions and the Treaties to which they have agreed, in particular, the European convention for the protection of human rights and fundamental freedoms (ECHR).

The ECHR was adopted under the auspices of the Council of Europe in 1950 to protect human rights and fundamental rights in Europe (all Council of Europe Member States are parties to the Convention and new Members are expected to ratify the convention at the earliest opportunity).[28]

The Convention established the European Court of Human Rights (ECtHR), which can be resorted to by any person who feels that their rights have been violated by a State party, but only after the exhaustion of domestic judicial processes. The Court's decisions are not *de plano* legally binding, but the Court does have the power to award damages. However, States must guarantee the level of protection determined by the Convention, in line with the subsidiarity principle. The establishment of a Court to protect individuals from human rights violations was an innovative feature for an international convention on human rights, as it provided the individual with a completely new and proactive role on the international stage when, traditionally, only states were considered actors in international law.[29]

The crucial relevance of fundamental rights has found express recognition in the EU Treaties. The Treaty of Maastricht (1992), in Article 6, provides that 'The Union must respect fundamental rights as guaranteed by the European Convention on Human Rights (ECHR) and as they result from constitutional traditions common to Member States, as general principles of Community law'.[30] It was subsequently amended by the Amsterdam Treaty in 1997.[31] Now it states that the Union is founded on the principles of 'liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to Member States. It has also provided

[25] ECJ, 12 November 1969, C-29/69, *Erich Stauder* v. *City of Ulm – Sozialamt.*

[26] ECJ, 17 December 1970, C-11/70, *Internationale Handelsgesellschaft mbH* v. *Einfuhr und Vorratsstelle für Getreide und Futtermittel***.**

[27] ECJ, 14 May 1974, C-4/73, J. *Nold, Kohlen- und Baustoffgroßhandlung* v. *Commission of the European Communities.*

[28] S. Greer, *supra* n. 15, p. 2, 'the modern western human rights ideal can be summed up as follows: *prima facie* everyone has an equal legitimate claim to those tangible and intangible goods and benefits most essential for human well-being. Self-evident though this notion might seem in contemporary Europe, it did not gain serious political and social momentum until the collapse of feudalism in the early modern era accompanied by the rise of natural rights theory, liberalism, constitutionalism and internationalism. The European Convention of Human Rights is one of the many products of this process'; *see also* E. Kamenka, *The Anatomy of an Idea*, in E. Kamenka and A. Soon Tay, (eds.), *Human Rights*, (London, Edward Arnold 1978).

[29]L. Wildhaber, 'Role of the ECtHR and A Constitutional future for the European Court of Human Rights?', 23 *Human Rights Law Journal*, (2002) p. 161-165; *See also* E.A. Alkema, *The European Convention as a Constitution and its Court as a constitutional court*, in P. Mahoney et al. (eds.), *Protecting Human Rights: The European perspective – Studies in memory of Rolv Ryssdall*, (Cologne, Carl Heymans 2000) p. 41-63.

[30]M. Michetti, *La tutela dei diritti fondamentali nell'ordinamento europeo* [The protection of fundamental rights in the European legal order], in S. Mangiameli (ed.), *supra* n. 30, in particular, p. 147-153.

[31] On the judicial development of fundamental rights in the EU legal order, *see* T. Lobello, *Diritti dell'Uomo e libertà fondamentali nell'UE: evoluzione storico-giuridica* [Human Rights and fundamental freedoms in the EU: the historical and judicial evolution], in S. Mangiameli (ed.), *supra* n. 30, p. 111-143.

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a procedure to check serious breaches of human and fundamental rights committed by a Member State, which could lead to the right to vote for suspension of the representative of the government of that Member State in the Council. (Article 7 TEU, now modified by the Lisbon Treaty).

Furthermore, the Charter of fundamental rights of the European Union proclaimed in Nice in December 2000 by the European Parliament, the Council and the Commission, represents another step towards the protection of human rights.[32] The codification of a catalogue of written rights itself symbolizes a remarkable innovation that offers guarantees with regard to the existence of these rights, reinforces them and provides an important aid to interpretation by the European Court of Justice. The inclusion of a new rights catalogue opens the door to their recognition as general principles of EU law.

Finally, it is important to underline that the Charter provides that in the presence of rights that correspond to rights guaranteed by the Convention, 'the meaning and scope of those rights shall be the same as those laid down by the said Convention'.[33]

On this basis, we may conclude that, although the path to the attainment of a common standard on fundamental and human rights in the EU has not yet been reached, it has certainly been clearly identified.

THE INTEGRATION BETWEEN THE ECHR AND THE ITALIAN CONSTITUTIONAL SYSTEM: WHAT THE ECHR IS NOT…

The integration between the Italian constitutional system and the ECHR has been appreciably lower than the relations with the EU legal order.[34] The Convention has always been presented in negative terms as what *it is not*. According to the Italian Constitutional Court's historical stand, the Convention could not be considered for the stated purposes of the legal order along the same lines as EU law or international customs. This occurred as a result of several juridical reasons.[35]

[32] *See* the Italian Constitutional Court's judgment n. 135/2002, in which it is said that, although the Charter does not have judicial binding force, it has 'the character expressive of European orders' common principles'.

[33] Art. 52(3) of the Charter of Fundamental Rights of the European Union; paragraph 1 indicates the range of rights and freedoms: 'Any limitation on the exercise of the rights and freedoms recognized by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others'. For an in-depth examination on the relations between the Charter of Fundamental Rights and the ECHR, *see* M. De Salvia, *La Carta di Nizza e la Convenzione europea dei diritti dell'uomo – Concorrenza o complementarietà?* [The Charter of Nice and the European Convention on Human Rights – Competition or Complementarity?], in M. Napoli (ed.), *La Carta di Nizza – I diritti fondamentali dell'Europa* [The Charter of Nice – Europe's fundamental rights], (Milan, Vita&Pensiero 2004) p. 29-33, and F.S. Marini, *I diritti fondamentali della CEDU e della Carta dell'Unione Europea come diritti pubblici soggettivi* [The fundamental rights of the ECHR and the EU Treaty as public subjective rights], in A. D'Atena and P. Grossi (eds.), *Tutela dei diritti fondamentali e costituzionalismo multilivello – Tra Europa e Stati nazionali* [The protection of fundamental rights' and multilevel constitutionalism], (Milan, Giuffrè 2004) p. 62-63.

[34] *See* C. Panzera, *supra* n. 17 , p. 3. The A. defines the framework of the relationship between the Italian Constitutional Court and the European Courts in the recent past as a 'calm chaos': a condition in which, despite an apparent peaceful indifference in the relationship between jurisdictions, there was a situation of real agitation and disagreement due to the fact that every Court avoided, using all its powers, the possibility of subordination in relation to all the others. In this light, it is possible to understand the Italian Constitutional Court's 'monolithic case-law' headed towards recognizing ordinary-law effectiveness of the ECHR, but not its constitutional nature.

[35] S.P. Panunzio, *supra* n. 4, p. 30-31.

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Firstly, the integration involves a relationship based on a model of international law. This is different to a relationship ruled by E.U. law because it favours States' autonomous role rather than the international organization that they form, depending upon the total autonomy of those States rather than the ECHR order.[36]

Secondly, the legislative integration between the ECHR and the Italian legal order does not occur at the constitutional level as happens, in, for example, the Netherlands or France, but at the ordinary level of legislation. In fact, in Italy, the Convention and the ECHR Protocols were authorized and executed by ordinary legislative acts[37]. Consequently, ECHR rules could not prevail over those of the national constitution.

In addition, there is neither an institutional nor a preeminence relationship between the ECtHR and national judges. This is why the Convention does not provide for an instrument to request the European Court of Human Rights to give a preliminary ruling on domestic cases pending (as Article 19(3) TEU, and Article 267 TFEU provide for the Court of Justice).[38]

Ultimately, from a practical point of view, even if the ECHR's rules were formally acknowledged, they have been rarely enforced by judges.[39]

Whilst the ECtHR maintains the main features of an international court and, after the adoption of *Protocol 11* (allowing for individual appeal), the Strasbourg Court can also receive individual appeals, it is still the judgment of individual States that prevails in deciding which cases should be considered as subject to international law.[40] For this reason, ECtHR decisions cannot have any impact on legal relationships that have implications at the lower level of national systems. These limitations imply that the ECtHR cannot nullify States' actions through sentences, decisions or other measures, but can only ascertain and declare the ECHR's violation by a Member State and, ultimately, request the offender to pay a 'satisfactory reparation'. [41]

In line with this, the Strasbourg Court affirmed, through the *"Loizidou"*[42] decision, that it cannot directly guarantee fundamental rights to Member States' citizens because it is just the 'constitutional guarantor of an objective European public order'.

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[36]On the dichotomy of monism vs. dualism in the relations between different legal orders, *see* R. Guastini, *Diritto internazionale, diritto comunitario, diritto interno: monismo o dualismo?* [International law, EU law, National law: monism or dualism?], in Various Authors, *Scritti in memoria di L. Paladin* [Studies in memory of L. Paladin], Vol. 3, (Naples, Jovene 2004) p. 1192 et seq.

[37] The Convention and Protocol n. 1 were ratified and made executive with the law 4 August 1955, n. 848. Protocol n. 11 was ratified and made executive with the law 28 August 1997, n. 296. Protocol n. 13, was ratified and made executive with the law 15 October 2008, n. 179. Protocol n. 14 was ratified and made executive with the law 15 December 2005, n. 280.

[38] On the possibility to provide for an ECtHR preliminary ruling instrument, *see* T. Giovannetti, *La protezione dei diritti dell'uomo in ambito CEDU: le recenti ipotesi di riforma* [The protection of Human Rights in the ECHR system: recent reform hypothesis], <www.forumcostituzionale.it> visited 12 November 2009.

[39] For an overview of the situation, *see* B. Randazzo, *Giudici comuni e Corte europea dei diritti* [Common judges and the European Court of Justice], <www.associazionedeicostituzionalisti.it> visited 13 January 2010.

[40] Art. 34 ('Individual applications') of the ECHR states that: 'The Court may receive applications from any person, non-governmental organization or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right'.

[41] S. Greer, *supra* n. 15, in particular chapter 3, 'The Applications and the Enforcement of Judgment Process', p. 136 et seq.

[42] ECHR, 23 March 1995, Series A n. 310, *Loizidou* v. *Turkey*.

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A NEW PARADIGM: SENTT. C. COST. N. 348/2007 AND N. 349/2007

As underlined, the extent of integration between the ECHR and the Italian legal system has been lacking for years. This is because it was maintained that the ECHR's integration was based exclusively on Italian execution of ordinary legislation. In some authors' opinion, this is the origin of the different levels of ECHR integration in comparison with the EU. Indeed, the integration of the EU's legal system is not only based on the execution of the ordinary legislation of its Treaties but, above all, on Article 11 of the Italian Constitution[43]. Nevertheless, in recent years some elements have evolved that could promote and reinforce integration between the two systems.

The first element originates from the synergy of both the ECHR and E.U. systems. According to Article 6(3) of the TEU, as modified by the Lisbon Treaty, the European Court of Justice guarantees compliance with ECHR rules since they are general principles of EU law. This implies that the implemented rights of the ECHR, similarly to EU law principles, become binding under the Italian legal system *ex* Article 11 Cost.[44]

The second element regards the legal basis of ECHR integration. In the Italian system, there is no rule similar to Article 55 of the French Constitution[45] - which affirms preeminent effectiveness of any ratified treaty relative to domestic laws – that allows French judges not to apply the rules in contradiction to the Treaties and in particular to the ECHR. This is the reason why in Italy the thesis of ECHR's integration at an ordinary legislative level has prevailed.[46]

[43] Art. 11 of the Italian Constitution: 'L'Italia ripudia la guerra come strumento di offesa alla libertà degli altri popoli e come mezzo di risoluzione delle controversie internazionali; consente, in condizioni di parità con gli altri Stati, alle limitazioni di sovranità necessarie ad un ordinamento che assicuri la pace e la giustizia fra le Nazioni; promuove e favorisce le organizzazioni internazionali rivolte a tale scopo.' [Italy rejects war as an instrument of aggression against the freedom of other peoples and as a means for the settlement of international disputes. Italy agrees, on conditions of equality with other States, to the limitations of sovereignty that may be necessary to a world order ensuring peace and justice among the Nations. Italy promotes and favors the international organizations addressed to such purpose.] For the official English translation of the Italian Constitution, *see* www.quirinale.it/qrnw/statico/costituzione/costituzione.htm

[44] On the relevance, in the Italian Constitutional court case-law, of art. 11 Cost. as a constitutional handhold for the ECHR's dispositions, *see* B. Randazzo, *La Convenzione europea dei diritti dell'uomo nella giurisprudenza costituzionale* [The European Convention on Human Rights in Constitutional case-law] in particular, paragraph 2.4, *L'esclusione di uno scrutinio ex art. 11 Cost.* [The exclusion of scrutiny *ex* art. 11 Cost.], <www.cortecostituzionale.net>; considering that the TEU, amended by the Lisbon Treaty, states in art. 6(2) that 'The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties'. Considering that the TEU, amended by the Lisbon Treaty, at art. 6(2) has stated that 'The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties', on the issue of the EU's adhesion to the ECHR, *see, ex multis*, V. Zagrebelsky, *La prevista adesione dell'Unione Europea alla Convenzione europea dei diritti dell'uomo* [The foreseen adhesion of the EU to the European Convention on Human Rights], <www.europeanrights.eu> visited 10 January 2010. Cf. the Italian Government Dossier referring to the Treaty of Lisbon, especially chapter 2, *Il rapporto fra la Convenzione Europea per la salvaguardia dei diritti dell'uomo e delle libertà fondamentali e il diritto dell'Unione_Europea*, <www.governo.it/GovernoInforma/Dossier/pronunce_corte_europea/sommario/II_capitolo.pdf> visited 8 January 2010.

[45] Art. 55 of the French Constitution (1958): 'Treaties or agreements duly ratified or approved shall, upon publication, prevail over Acts of Parliament, subject, with respect to each agreement or treaty, to its application by the other party'. For the official English translation of the French Constitution, *see* <www.assemblee-nationale.fr/english/8ab.asp>

[46] On the legislative development and the constitutional case-law related to the rights' subject, *see* P. Caretti, *I diritti fondamentali- Libertà e diritti sociali* [Fundamental rights – Freedom and social rights], (Turin, Giappichelli 2005) *passim.*

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From the outset, however, this thesis has not been the only one. Sometimes jurisprudence has recognized the ECHR as an atypical legal source and therefore a source that cannot be annulled by an ordinary level's law. However, this is not at the level of constitutional law.[47]

The traditional thesis of integration at the level of ordinary legislation has even been brought into question by the Italian Supreme Court in a number of decisions[48].

In fact, the clearest dividing line is represented by the 2001 constitutional reform that amended Article 117 Cost[49]. In light of this new text, it would be very difficult to question a judge's responsibility to determine, where possible, the scope of domestic rules to align with the ECHR to make them consistent. The main demand is to avoid the ECtHR's criticism of Italy, and so to conform to its decisions.

The Italian Constitution has a distinctive international aspect that characterizes the form of the State, beyond the single dispositions regarding recognition of foreign sources. From this perspective, an interpretation that is consistent with the Constitution seems also to imply an attempt to recreate the legal order with suggestions from foreign rules (particularly from Treaties). In line with this thesis, jurisdiction authorities would fail in their interpretative task if they did not guarantee the effectiveness of constitutional rules, integrated with foreign rules.[50]

In short, leaving aside the grade of laws according to which the treaties' rules enter into the domestic order[51], the highly principled value of these dispositions makes them privileged instruments for the interpretation of domestic law.

All of this represents the *humus* of a new approach to the problem of ECHR integration in the Italian system. Indeed the Italian Constitutional Court's judgments n. 348/2007 and 349/2007 constitute a new paradigm.

Both sentences revolve around the norm set out by Article 117(2), Cost., according to which the State and the Regions should exert their legislative power in compliance with the constraints deriving from EU legislation and international obligations. The international obligations bind the State not only in its external profile, as a subject of international law, but also in its constitutional profile, since their respect is a requirement for the valid exertion of legislation's power[52].

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[47] *See* sent. C. Cost., n. 10/1993, in which the Court affirms that the international dispositions contained in the ECHR were introduced into the Italian legal order with the legal effectiveness typical of the act contained in their execution orders, and that they are still in force because they could not be annulled by subsequent laws, since they derive from a legal source with an atypical competence, thus it is impossible for an ordinary legislative act to annul or modify them; and the Supreme Court's judgement: Cass. Civ., sez I, 8 July 1998, n. 6672.

[48] Cass. civ. ss.uu., 26 January 2004, n. 1339. It is possible to consult the text of the decision at <www.associazionedeicostituzionalisti.it/cronache/archivio/durata_processi/ssuucassciv_20041339.pdf> visited 4 February 2010.

[49] Art. 117(1) of the Italian Constitution: 'La potestà legislativa è esercitata dallo Stato e dalle Regioni nel rispetto della Costituzione, nonché dei vincoli derivanti dall'ordinamento comunitario e dagli obblighi internazionali.' [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].

[50] F. Sorrentino, 'Apologia delle "sentenze gemelle"' (Brevi note a margine delle sentenze nn. 348 e 349/2007 della Corte costituzionale' [Eulogy of the twin decisions (Brief comment on the Constitutional Court's decisions nn. 348 and 349/2007)], 2 *Diritto e Società*, (2009) p. 213-224.

[51] For a clear exposition of the different instruments involved, *see* S.M. Cicconetti, 'Creazione indiretta del diritto e norme interposte' [The indirect creation of laws and interposed norms], <www.associazionedeicostituzionalisti.it>, paragraph 2.

[52] See F. Sorrentino, *supra* n. 48, p. 214-215.

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In underlining the ECHR's peculiarity compared to other sources of international law, the two aforementioned decisions declare that even if both the ECHR and the Italian Constitutional Court pursue the protection of fundamental rights, the latter has to ensure that ECHR rules guarantee fundamental rights to at least at the same level the as the Italian Constitution.

Secondly, they affirm that the ECHR should hold a sub-constitutional level in the hierarchy of Italian legal sources, thereby being subordinate to the Constitution but superordinate to law. The ECHR is therefore intended to be a source that is the concrete expression of Article 117 Cost.[53]

Finally, the Constitutional Court acknowledges a constitutional handhold in the ECHR, having denied a link both with Article 10(1) Cost[54] and Article 11 Cost.[55] It is Article 117 Cost. that secures the ECHR in relation with ordinary legislation and, at the same time, allows for ECHR rules in the competence area of the Constitutional Court. In this way, any incompatibility between domestic laws and those of the ECHR would be considered as a contravention of the constitutional legitimacy of law and a breach of Article 117(1) Cost.

Moreover, the Constitutional Court restates that the ECHR's rules and their interpretation are under the jurisprudence of the Court of Strasburg. Therefore, it is the sub-constitutional disposition that enters the Italian order and becomes the norm, as the product of interpretation, and not the ECHR's disposition. Whilst this assertion emphasizes the role of the ECHR, it also affirms, in relation to control over the constitutional legitimacy of domestic legislation, that the ECHR's decisions are not unconditionally binding.[56]

In addition, it is true that Italian domestic legislation has to conform to the ECHR's rules along with the interpretation of the Court of Strasbourg. Yet, at the same time, the Court only has an interpretative function and not a jurisdiction competence that overlaps with the Italian jurisdiction authorities.

In line with this thesis, the ECHR is now considered by the Italian constitutional jurisprudence as a "sub-constitutional" source superordinate to domestic law and an important criterion for its

[53] D. Tega, 'Le sentenze della Corte costituzionale nn. 348 e 349 del 2007: la Cedu da fonte ordinaria a fonte "sub-costituzionale" del diritto' [Constitutional Court Decisions no. 348 and 349 of 2007: from ordinary to "sub-consitutional" sources of law], 1 *Quaderni costituzionali*, (Bologna, Il Mulino 2008) p. 133-136.

[54] Art. 10(1) of the Italian Constitution: 'L'ordinamento giuridico italiano si conforma alle norme del diritto internazionale generalmente riconosciute.' [The Italian legal system conforms to the generally recognized principles of international law.]

[55] In the past, the famous scholar R. Quadri, in *Diritto internazionale pubblico* [Public International Law], (Naples, Jovene 1968) p. 68, affirmed that art. 10(1) Cost. introduces, in the Italian order, an adaptation disposition to the principle *pacta sunt servanda*. Instead, according to P. Barile, *Rapporti tra norme primarie comunitarie e norme costituzionali e primarie italiane* [Relations between primary communitarian norms and constitutional and primary Italian norms], in *Idem*, *La comunità internazionale* [The international community], the cited article introduces the principle *pacta recepta sunt servanda.* On this subject, *see* E. Selvaggi, 'Le linee di evoluzione dell'ordinamento integrato. I limiti della protezione dei diritti da parte della CEDU' [The evolution of integrated order], <http://appinter.csm.it/incontri/relaz/15260.pdf, 13-14> visited 14 February 2010.

[56] C. Pinelli, 'Sul trattamento giurisdizionale della CEDU e delle leggi con essa confliggenti' [The judicial treatment of the ECHR and the laws in conflict with it], <www.associazionedeicostituzionalisti.it> visited 3 March 2010. In the author's opinion, the assertion made by the Italian Constitutional court in judgment n. 348/2007 - according to which, the Strasbourg Court does not dispose of a jurisdictional competence that lies above those of the Italian State's judicial organs, but exercises an eminent interpretation function, able to specify the States party's international obligations – aims to exclude the ECHR hierarchical position over national judges. This means that the national legislator is the recipient of international obligations, which derive from the ECHR and can be called on after the declaration of incompatibility of a domestic law.

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constitutional legitimacy. Therefore, if there is an ECHR rule involved in a dispute over constitutional legitimacy, the Court should conduct its examination through three different stages. Firstly, the ECHR's rules, as interpreted by the Court of Strasburg, must always be checked for compatibility with the entire text of the Italian Constitution. Secondly, this control must be based on the trade-off principle between the linkages that derive from the jurisprudence of the ECHR and the guardianship of the constitutionally relevant interests contained in other articles of the Constitution. Finally, the legitimacy of the censored disposition should be checked in comparison with the interposed one.[57]

CONCLUSION: MULTILEVEL PROTECTION AND THE EFFECTIVENESS OF FUNDAMENTAL RIGHTS

From what has been said, it is clear that the Italian Constitutional Court has recognized the multilevel protection model for fundamental rights[58] and wishes to participate actively.

The perspective of a transnational judicial community is an interesting one which could help to bring fundamental rights towards a globalized world. This horizontal system of reciprocal checks and balances between the Courts could create a sort of *subsidiary protection* for fundamental rights: for example, the breach of a right provided by EU law could cause a breach of the ECHR, involving the Strasburg Court's competence. Another case is represented by the acknowledgment made by some Constitutional Courts (Germany in 1987 and Spain in 2004) of the possibility of having direct recourse (with the instruments, respectively, of the *Verfassungsbeschwerde* and the *recurso de amparo*) against the rejection of a national judicial authority to ask for an ECJ preliminary ruling, which is considered a breach of the right to have effective judicial guardianship protected by respective Constitutions.[59]

Moreover, to the *subsidiary protection* has to be added the *progressive protection* of rights device, which is based on the "minimum thresholds" typical of each order, according to which the specific competence of each Court emerges only if the other level or levels fall under that minimum threshold. What is really important for each guarantor is that every order assures at least the *equivalent protection* of that specific right. It is upon these two principles - the "subsidiary protection" and the "equivalent protection" - that the complex *multilevel protection* system of rights in Europe depends.

All of these occurrences are confirmed by the reference made by the Charter of Nice to the normative 'minimum threshold-more extended protection', and by the existing relations between the European Courts and the national Courts.[60]

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[57] C. Pinelli, *ibidem*, The Constitutional Court does not ignore the fact that the Strasbourg Court has put itself forward for some time as a candidate to assume a constitutional jurisdiction function, with the power to inspect the compatibility of Member States' constitutions with the ECHR's catalogue. The A. underlines the possibility of conflicts, since creating an interposed source is equivalent to reasserting the ECHR's subservience to the Constitution, only tempered, but not logically excluded by the promise of a 'reasonable trade-off' between the bond of international obligations (art. 117(1) Cost.) and the guardianship of interests protected by other articles of the Constitution.

[58] A. D'Atena, *Costituzionalismo moderno e tutela dei diritti fondamentali* [Modern Constitutionalism and the protection of fundamental rights], in A. D'Atena and P. Grossi (eds.), *supra* n. 33, p. 19-36.

[59] It is important to underline that the ECHR and its Court, the ECtHR, have both contributed to the effective configuration of this right.

[60] For an example of the first case, see the decision *Bosphorus* no. 45036/98 *(*2005) of the ECtHR and K. Kuhnert, 'Bosphorus - Double standards in European human rights protection?', <www.utrechtlawreview.org/publish/articles/000032/article.pdf>; for an example of the second case, the recall is to the

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Since multilevel systems are inevitably changeable, due to the fact that they are open and dynamic by nature, a unification pole should not be sought, but rather a series of flexible hooks and junctures that can bring into technical contact the different levels.[61] So, like a revolving door system, the concepts of "equivalent protection" and "more extended protection" provide, for different settings (the national, communitarian or conventional orders), access to the next stage.[62] It follows that such interaction between the national and European Courts could be more productive today than could have been imagined only a few years ago.

The absence of an apex and reciprocal control between the different subjects represents the effective conditions for the development of a system of European constitutional justice: not only a multilevel system, but a wider net, since it would be characterized by operative communication channels.

According to J.H.H. Weiler, the borderlines of competences should be the subject of a constitutional dialogue and should not be established by a *diktat*. All of this is possible only if the constitutional discussion is intended as a dialogue between several subjects within an interpreting constitutional community, rather than within a hierarchical framework with the European Court of Justice on top.[63]

Considering what has been said, contrasting the recent reciprocal opening between the Courts across the EU and between the respective different orders, would be a pointless endeavour. Yet, to make fundamental rights really effective, it is time for European politics to play a role. As is written in the Italian Constitutional Court ruling n. 348/2007, fundamental rights do not appear instantly, as if a Creator has commanded a *"fiant iura"*, but they develop over time in people's consciousness.[64] This consciousness is expressed through both the voices of the democratic legislator and those of the Constitutional judges.

This is the reason why the integration between the Italian constitutional order and the ECHR system has been reinforced by decisions 348/2007 and 349/2007. The Court has moved in the right direction as it recognizes, in ruling n. 348, the Italian legislator's right to complete the normative reconstruction that the Court can only begin with the annulment of a censored law. The reconstruction must be carried out fully respecting the ECHR's rules, now considered as "sub-constitutional" sources.

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decisions *Solange I* and *II* from the German Constitutional Court (1974 and 1986); similarly, the famous judgment *Frontini*, from the Italian Constitutional Court (sent. C. Cost., 18 December 1973, n. 183), of which the decisions 348 and 349 represent a logical continuation.

[61] F. Pizzetti, *La tutela dei diritti nei livelli substatuali* [The protection of rights at the sub-national levels], in P. Bilancia and E. De Marco (eds.), *La tutela multilivello dei diritti* [The multilevel protection of rights] (Milan, Giuffrè 2004) p. 200 et seq., considering that the collapse of the three great pillars of the past is the ontological condition of multilevel systems: a *unitary* system of sources, a *unitary* and hierarchical executive apparatus, a *unitary* judicial order.

[62] These effective expressions are present in C. Panzera, *supra* n. 17, p. 5.

[63] J.H.H. Weiler, *The Transformation of Europe* (1991), trad. it. in ID., *La Costituzione dell'Europa*, (Bologna, 2003) p. 45 et seq.

[64] G. Silvestri, *Verso uno "ius commune" europeo dei diritti fondamentali* [Towards a European "ius commune" of fundamental rights], in V. Scalisi (ed.), *Il ruolo della civilistica italiana nel processo di costruzione della nuova Europa* [The role of Italian civil law doctrine in the process of the new Europe's construction], (Milan, Giuffrè 2007) p. 12.