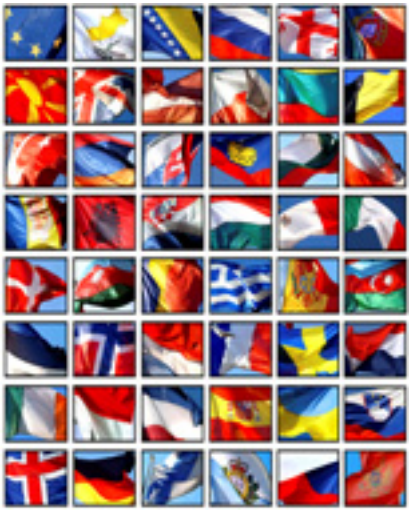
Comparative study on the implementation of the ECHR at the national level



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Foreword

Comparative analysis before you is dedicated to the issue of the application of the European Convention on Human Rights in the national legal framework of several contracting states to the Convention.

This issues is of great importance, as the acceptance of the European Convention on Human Rights represents the first step towards its implementation in the national law, while the Convention leaves to the states the freedom to decide on their own how to respond to their commitment to respect and apply its provision. The way the state will do so, depends primarily on a reply to a question whether the European Convention can be applied directly, and on its status in the hierarchy of the national legal norms. Consequently, two legal systems emerged: monistic and dualistic. However, simple incorporation of the European Convention in domestic legal system is not capable of solving all problems emerging in the application of the European Convention, nor it is a guarantee of its complete and efficient application. Therefore, it is even more important to review the role of courts in this process. It is necessary to analyse up to which level national courts can examine conformity of the authorities' procedures with the provisions of the European Convention, as well as the readiness of judges to apply the principles contained in the European Court of Human Rights jurisprudence, even in the cases when domestic legal framework provides clear basis.

Replies to these important issues are provided in the eight articles dealing with the application of the European Convention in Croatia, France, Greece, Hungary, Italy, Poland, Russia and Serbia. The selection of countries was made following two principles: affiliation to the monistic, or dualistic legal system – in order to demonstrate different

The Implementation of the European Convention on Human Rights and the European Court of Human Rights case law in Italian jurisprudence

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Chapter I
The status of the European Convention on Human Rights in Italy

Italy is a dualistic legal order. In this Chapter, we will analyse the formal position of the ECHR in the Italian hierarchy of legal norms. The Chapter is divided into three parts: the first part is devoted to the status of the ECHR before 2001; the second part deals with the status of the ECHR after 2001 and the two Constitutional Court landmark judgements of 2007; the third part concerns the recent Constitutional Court case law.

I.1. The legal status of the ECHR before 2001

The European Convention of Human Rights (ECHR) was signed by the Republic of Italy on November 4, 1950, while the First Protocol was signed on March 20, 1952. They were both ratified on October 26, 1955. Subsequently, Italian law no. 848 of August 4, 1955 incorporated the ECHR in Italian legal order, providing the authorisation for ratification and the order of execution. Article 2 of that law ordered execution of the Convention into domestic law. In fact, according to the Italian constitutional law, once ratified and executed by the legislature, an international treaty becomes integral part of domestic law. Italy recognised the competence of the Strasbourg organs to receive individual application in 1973.

The Italian Constitution does not mention the ECHR itself, nor it includes special provisions on international human rights treaties[1]. Until 2001, any express provision regulated the problem of the implementation or the hierarchical positioning of international agreements in domestic law. Some general articles take into consideration the relationship between the Italian legal order and the international law. Those articles are intended to express a general principle of openness of Italian Republic

1 See the general overview on the ECHR *status* in Italian legal order in D. Tega, "La Cedu e l'ordinamento italiano", in M. Cartabia (a cura di), "I diritti in azione", Il Mulino, Bologna, 2007, 67–91; A. Caligiuri, N. Napoletano, "The Application of the ECHR in the Domestic Systems", in The Italian Yearbook of International Law, 2010, 125–159. About the protection of fundamental rights in the European dimension, mentioning the Italian perspective, M. Cartabia, "L'ora dei diritti fondamentali nell'Unione Europea", in M. Cartabia (a cura di), "I diritti in azione", Il Mulino, Bologna, 2007, 13–66.

to international legal order. Art. 10, paragraph 1, It. Const. reads: "Italian laws conform to the generally recognised norms of international law", while Article 11 It. Const. reads: "Italy rejects war as an instrument of aggression against the freedoms of others peoples and as a means for settling international disputes; it agrees, on conditions of equality with other states, to the limitations of sovereignty necessary to create an order that ensures peace and justice among Nations; it promotes and encourages international organisations having such ends in view". Article 11 was written to allow Italian participation to United Nations.

On these grounds, legal scholars have tried to find a constitutional "anchor" for the ECHR and several possibilities have been suggested. According to some scholars, a potential basis was found in Article 10, paragraph 1, as the ECHR includes general rules that could be considered part of the "generally recognised norms of international law". For other scholars, the ECHR could enjoy the protection of Article 11. The limitation of sovereignty needed to ensure peace and justice among the Nations, which is mentioned in this Article, could be extended to the Council of Europe system for the protection of human rights. Furthermore, some other authors have invoked Article 2 It. Const., which protects "inviolable rights".

All these theories aimed at justifying a higher position of the Convention in the hierarchy of norms. However, the Italian Constitutional Court rejected all of them. On the one side, the Court affirmed that Article 10, paragraph 1, does not apply to international covenants. Article 10, paragraph 1, confines itself to the automatic incorporation of general principles of international law and to customary law. On the other side, under Article 11 no international treaty can entail any limitation of sovereignty. In fact, the Italian Constitutional Court referred to Article 11 to justify Italian membership to EEC and the supremacy of EU Law since its decision no. 183/1973. The meaning of Article 11 was extended to allow limitations of sovereignty related to the European integration process. However, the Court always rejected the application of the same mechanism to the ECHR[2].

2 The different theories aiming at recognising a constitutional *status* to the ECHR despite its incorporation by ordinary law are deeply described in G. Martinico, O. Pollicino, "Report on Italy", in G. Martinico, O. Pollicino (eds.), "The National Judicial Treatment of the ECHR and EU Law. A Comparative Constitutional Perspective", Europa Law Publishing, Groningen, 2010, 271–299, 282–283; D. Tega, "The Constitutional Background of the 2007 Revolution. The Jurisprudence

Therefore, until 2001, from a formal point of view, due to the ratification and the execution order, the ECHR obtained the force of the ordinary law. For this reason, the last-in-time rule, or the *lex posterior* principle, could have emerged. In fact, these international norms, incorporated in Italian law no. 848/1955, could have been rendered invalid by later national norms, i.e. the subsequent provision could have abrogated the anterior rule[3]. Indeed, the last-in-time rule was not applied to the ECHR. For many years, Italian courts did not make frequent reference to the ECHR. The explanation of this behaviour has been found in the fact that the ECHR provisions overlap to a great extent with those of the rights already protected under the Italian Constitution. Moreover, sometimes the application of the ECHR as source of autonomous rights was denied because of the vague and indeterminate nature of its norms. This argument was referred to the so called "non-self-executing" character of conventional norms and concerned their incomplete content[4].

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of the Constitutional Court", in G. Repetto (ed.), "The Constitutional Relevance of the ECHR in Domestic and European Law. An Italian Perspective", Intersentia, Cambridge-Antwerp-Portland, 2013, 25–36, 26–27.

3 For a general analysis of the last-in-time rule application to international norms when the national legal system does not give higher priority to treaty norms, B. Conforti, "National Courts and the International Law of Human Rights", in B. Conforti, F. Francioni (eds.), "Enforcing Human Rights in Domestic Courts", Martinus Nijhoff Publisher, The Hague-Boston-London, 1997, 3–14, 11. When a formal superiority is not sanctioned, the inconsistency between a treaty rule and a subsequent national rule is often solved through interpretation, to increase the cases of prevalence of the international provision even if it is anterior. The Author describes different criteria to ensure prevalence to anterior international norm. The most common criterion is the presumption of conformity of the domestic law to international law. Another criterion considers the convention a special law, thus applying the principle *lex posterior generalis non derogat priori speciali*. This criterion was applied by Italian courts to the relations between conventions of uniform law or of cooperation in judicial matters and Italian domestic provisions in the field of private and procedural law. The same criterion was applied by Italian Constitutional Court to the ECHR only once, in decision no. 10/1993, stating that the law no. 848/1955 of ratification and execution of the Convention had an "atypical competence". The criterion is based on the special character of the subject matter governed by the international treaty. Another criterion – not frequent in Italian experience – considers that the subsequent law prevails only if there is a "clear indication" of the intention of the law-maker to derogate from the treaty.

4 The cases in which courts, in order not to apply conventional norms, focus on their vague and indeterminate nature are critically discussed by B. Conforti, "National Courts and the International Law of Human Rights", quoted above, 8.

Thus, the judiciary tended essentially to use the Convention as a supplementary aid when interpreting domestic law.

Progressively, decisions referring to the provisions of the Convention became more frequent, especially in criminal cases[5]. The Supreme Court (*Corte di Cassazione*) had rejected the view that the ECHR may possess a constitutional rank, because of incorporation as an ordinary law. However, the Supreme Court itself used the ECHR to confirm and reaffirm some constitutional rights. In the same way, the Italian Constitutional Court referred to the Convention to confirm the meaning of those rights directly protected under the Italian Constitution. The ECHR was therefore an interpretative tool to support domestic law interpretation in conformity with constitutional rights. In the end, the Italian Constitutional Court accepted, at least implicitly, the ECHR provisions embodied the same category of fundamental human right that find protection in the Italian Constitution. Thus, the ECHR rights fell essentially within the field of constitutional law[6]. In short, it is possible

5 A. Drzemczewski, "European Human Rights Convention in Domestic Law. A Comparative Study", Clarendon Press, Oxford, 1983, 145–154, quoting V. Grementieri, N. Trocker, "The Protection of Human Rights in Constitutional Law: Italy, in Italian National Reports to the IXth International Congress of Comparative Law", Tehran, 1974, 491–504. At the beginning of the Eighties, the Author considered the number of Italian Supreme Court judgements referring to the ECHR "impressive" and observed academic interest in the Convention was rapidly growing.

6 See for example the so called *San Michele* case, decision no. 98/1965, "Il Foro italiano", 1966, I, 8–14, 13, in which the Court referred to Article 6 the ECHR to confirm that the right to a fair trial was one of the inviolable rights guaranteed in art. 2 It. Const; decision no. 124/1972, "Il Foro Italiano", 1972, I, 1897–1898, affirming that an acquittal for insufficient proof was not contrary to Article 27 It. Const. and to the ECHR; decision no. 178/1973, "Il Foro Italiano", 1973, 15–16, quashing some articles of Italian Criminal Code contrary to Article 3 and Article 24 It. Const., which guarantee equality before the law and the right to defence, as well as to Article 6, paragraph 3, c), the ECHR. For other examples see A. Drzemczewski, "European Human Rights Convention in Domestic Law", quoted above, 149.

The use of the Convention as an interpretative tool has been much stronger since the 1990s. See, for example, decision no. 388/1999, in which the Constitutional Court underlined that human rights enjoy a constitutional guarantee irrespective of the formal position of their respective source in the hierarchy of norms. This is the outcome of the evolution of Italian Constitutional Court jurisprudence until 2007. For a deep analysis of the constitutional case law, D. Tega, "The Constitutional Background of the 2007 Revolution. The Jurisprudence of the Constitutional Court", quoted above, 28–36. The Author distinguishes the constitutional jurisprudence before 2007

to affirm that, before 2001, while the ECHR had formally the force of an ordinary law, materially it had the meaning of a constitutional norm.

In order to understand the evolution of the ECHR in domestic law, it is useful to describe some general features of the Italian legal system. First, the Italian judicial system includes civil, penal and administrative courts. The violation of subjective rights lays under the jurisdiction of civil courts, while the violation of a rule made in the public interest lays under the jurisdiction of administrative courts. Second, Article 107, paragraph 3, It. Const. reads that judges are distinguished only by their different functions, so that there is not a hierarchical relation between higher and lower courts. The Supreme Court (*Corte di Cassazione*) is the highest civil and penal court, while the Council of State (*Consiglio di Stato*) is the highest administrative court. In case of conflict between jurisdictions, the *Corte di Cassazione* has the last word. Third, under Article 134 It. Const., the Constitutional Court adjudicates controversies on the constitutional legitimacy of laws and enactments having force of law issued by the State and the Regions. In relation to civil, penal or administrative matters, the constitutionality of a law may only be questioned during a trial *incidenter tantum*. The judge of the trial has to decide if the constitutional issue is relevant to the decision of the case before him and if it is not manifestly unfounded. Therefore, the jurisdiction of Italian Constitutional Court is limited to cases referred to it by ordinary courts. Thus, the protection of fundamental rights is not secured by means of a direct individual appeal to the Constitutional Court, challenging the law on grounds of constitutionality, but only incidentally[7].

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in three "phases". The first, between 1960 and 1993, is the phase of "traditional dualism". Between the end of the Eighties and the early 2000s, a "more modern dualism" arose. The Constitutional Court referred to the Convention, as well as to other international human rights Treaties, to "discover" new constitutional rights through the "open clause" of Article 2 It. Const. protecting "inviolable rights". The third phase is called "duality in transformation": without giving international treaties a supralegislative *status*, the Court started questioning the legislation compliance with international commitments.

All Italian Constitutional Court judgements are available in www.cortecostituzionale.it; an English summary of more recent decisions is now available at http://www.cortecostituzionale.it/actionJudgment.do.

7 See A. Drzemczewski, "European Human Rights Convention in Domestic Law", quoted above, 148–149 for a short description of the main features of Italian legal system. Alternatively, the constitutionality of a law can be adjudicated by the Italian Constitutional Court by procedure *in via principale*, which regards

I.2. The Constitutional Reform of 2001 and the Italian Constitutional Court "twin" judgements of 2007

The Italian Constitutional Law no. 3 of 2001 introduced a specific reference to international obligations into Article 117, paragraph 1, It. Const.: "Legislative powers shall be vested in the State and the Regions in compliance with the Constitution and with the constraints deriving from European Union law and *international obligations*". A special "anchor" to international treaties was so introduced for the first time into the Constitution.

Under Article 117, paragraph 1, the Italian Constitutional Court recognised a supralegislative rank to the ECHR. The status of the ECHR changed due to two landmark judgments, no. 348 and 349/2007. To understand the *rationale* of the "twin" 2007 leading case, it is necessary to look at the background. Since the 1990s the Supreme Court and ordinary judges had referred more and more to Strasbourg case law[8]. A cultural change arose, as lawyers increased their knowledge of the Strasbourg mechanism. Non-profit associations contributed to spread principles from Strasbourg jurisprudence, asking for their application in domestic trials. Judges started to face directly the Strasbourg decisions to define and interpret the applicable law. In the early 2000s, some courts began to apply the ECHR in the same way they applied EU law. Since the leading case *Granital* no. 170/1984, the Italian Constitutional Court stated that priority must be accorded to EU law in conflict with national law and that the conflict must be solved by ordinary courts.

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the review of a statute or legislation concerning the State and the Regions. For a general overview of the Italian constitutional review of legislation model, see now M. Cartabia, "Of Bridges and Walls: The "Italian Style" of Constitutional Adjudication", in "Constitutional Court of the Republic of Slovenia, 25 Years", International Conference, Bled, Slovenia, June 2016, Conference Proceedings, 69–84, and in Italian Journal of Public Law, Vol. 8, Issue n. 1/2016, 37–55.

8 Especially the Supreme Court in criminal cases, referring to the procedural guarantees of a fair trial under Article 6 the ECHR; see G. Repetto, "Rethinking a Constitutional Role for the ECHR. The Dilemmas of Incorporation into Italian Domestic Law", in G. Repetto (ed.), "The Constitutional Relevance of the ECHR in Domestic and European Law. An Italian Perspective", Intersentia, Cambridge-Antwerp-Portland, 2013, 37–53, 38, and the Supreme Court leading cases no. 2194/1993; no. 6672/1998 and no. 28507/2005. The Author quotes, for further references to this trend, E. Cannizzaro, "The Effect of the ECHR on the Italian Legal Order: Direct Effect and Supremacy", XIX Italian Yearbook of International Law, 2009, 173, 175–177.

Thus, every judge has to apply EU law, if provided with direct effect, and to decide the non-application of the domestic norm. Some courts considered the same solution viable for the ECHR. They resolved disputes giving direct application to the ECHR norms and deciding the non-application of the relevant internal rules[9]. The Constitutional Court "twin" judgments of 2007 rejected this new judicial approach emerging in ordinary jurisprudence and reaffirmed that judicial review of legislation falls within the exclusive competence of the Constitutional Court. At the same time, the Constitutional Court accepted to give the Convention a higher ranking and to set a mechanism to quash the law incompatible with the Convention itself.

Decisions no. 348 and 349/2007 stated the ECHR has an "intermediate" ranking (*norma interposta*) between law and the Constitution, so that a law violating the Convention is indirectly incompatible with Article 117, paragraph 1, It. Const. and must be quashed[10]. Furthermore, the Constitutional Court stated that every judge, when applying a domestic norm that appears incompatible with the ECHR, shall first try an interpretation of the Italian norm in conformity with the ECHR. If the interpretation "in compliance" is not possible, then the judge must make a referral order to the Constitutional Court, based on Article 117, paragraph 1. In doing so, the judge has to demonstrate the ground on which the domestic law does not comply with the ECHR. Once the referral order is submitted, the Constitutional Court makes a two-step reasoning process. First, the Constitutional Court verifies if the ECHR norm, as interpreted by the Strasbourg Court, is compatible with the Italian Constitution. Second, the Court compares the domestic norm with the Convention, as interpreted by the ECtHR. The first step of this reasoning entails that the incorporation of the ECHR finds its limits in the constitutional norms. Hence, the Italian Constitutional Court can make a barrier to the entry of conventional norms whenever they collide with constitutional norms.

9 This approach was "surprising, if not revolutionary" and "daring" for G. F. Ferrari, "National Judges and Supranational Law. On the Effective Application of EU Law and the ECHR", in G. Martinico, O. Pollicino (eds.), "The National Judicial Treatment of the ECHR and EU Law. A Comparative Constitutional Perspective", Europa Law Publishing, Groningen, 2010, 25.

10 Decisions no. 348 and 349 concerned expropriation and the right of owners to a reasonable compensation in relation to the market value of the expropriated lands. The ECtHR has in several occasions sanctioned Italian regulation on the matter under Article 1 Prot. n. 1 ECHR. See the ECtHR, *Scordino v. Italy*, May 29, 2006.

Two other principles are also relevant and must be taken into consideration. First, the Italian Constitutional Court confirmed the different status of the ECHR and EU law. If the ECHR norms were to share the EU law nature, they would overtake conflicting national law without the balancing intervention of the Constitutional Court. In the Court's opinion, Article 11 It. Const. does not apply to the ECHR, because the Council of Europe system for the protection of human rights did not set up a "supranational legal order" as the EEC first, and EU then, did.

Second, the Italian Constitutional Court made a strong reference to the Strasbourg case law, recognising to the ECtHR a prominent role as interpreter of the Convention. The Court so considered the Convention as a living instrument, that has to be applied in conformity with Strasbourg jurisprudence[11]. The Constitutional Court made no distinction between Strasbourg decisions against Italy on the unconventionality of a specific Italian domestic rule at issue, according to Article 46 ECHR, and Strasbourg jurisprudence in general, including decisions given in different contexts against other States[12].

Looking at the relation between the ECHR and the Italian legal order, the "twin" judgments somehow confirmed the Italian dualistic model, distinguishing between EU law and the ECHR and preventing non-application of domestic law by ordinary courts in case of the ECHR incompatibility. However, the "twin" judgments admitted an implicit integration between the ECHR and domestic law, strongly asking Italian courts to interpret domestic law in conformity with the Strasbourg jurisprudence and considering that the Convention lives through the ECtHR case law.

The outcomes of the "twin" judgments can be summarised as follow: the ECHR possesses a hierarchical status superior to ordinary law and

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11 On the decisions no. 348 and 349 see G. Repetto, "Rethinking a Constitutional Role for the ECHR. The Dilemmas of Incorporation into Italian Domestic Law", quoted above, 39–41; O. Pollicino, "Constitutional Court at the cross road between parochialism and co-operative constitutionalism", in European Constitutional Law Review (4) (2008), 363 ss.; F. Biondi dal Monte, F. Fontanelli, "The Decision No. 348 and 349/2007 of the Italian Constitutional Court: The Efficacy of the European Convention on the Italian Legal System", in German Law Journal, Vol. 09, No. 07, 2008, 889–932.

12 The point is underlined by A. Guazzarotti, "Strasbourg Jurisprudence as an Input for "Cultural Evolution" in Italian Judicial Practise", in G. Repetto (ed.), "The Constitutional Relevance of the ECHR in Domestic and European Law. An Italian Perspective", Intersentia, Cambridge-Antwerp-Portland, 2013, 55–68, 63.

it has acquired a predominant position into domestic legal order; the conflict between domestic law and the Convention has been shaped as a constitutional conflict carried out before the Constitutional Court; national judges are obliged to interpret domestic law in conformity with the interpretation given by the Strasbourg Court.

I.3. The recent constitutional case law: the criterion of "the greatest expansion of fundamental rights"

The principles displayed in the "twin" judgements were confirmed by following constitutional jurisprudence. However, they were in some way reshaped. In decision no. 311/2009, the Constitutional Court admitted that several rights guaranteed under the Convention, i.e. the right to life under Article 2 ECHR and the prohibition of torture under Article 3 ECHR, embody international customary law, so that they can be directly applied by judges on the basis of Article 10, paragraph 1, It. Const.

In decision no. 317/2009, the Constitutional Court clarified the criterion of "the greatest expansion of fundamental rights". The Court stated that "It is evident that this Court not only cannot permit Article 117 (1) of the Constitution to determine a lower level of protection compared to that already existing under internal law, but neither can it be accepted that a higher level of protection which it is possible to introduce through the same mechanism should be denied to the holders of a fundamental right. The consequence of this reasoning is that the comparison between the Convention protection and constitutional protection of fundamental rights must be carried out seeking to obtain the greatest expansion of guarantees, including through the development of the potential inherent in the constitutional norms which concern the same rights". The Constitution and the ECHR are so joined to pursue the greatest expansion of fundamental rights common to both catalogues. If a different level of protection exists between constitutional norms and conventional norms, prevalence will be given to the rule that more extensively protects the individual right at stake[13]. Thus, the final criterion does not call upon the formal rank of norms (constitutional norms and supralegislative norms as the ECHR), but the substantial degree of protection.

13 G. Repetto, "Rethinking a Constitutional Role for the ECHR. The Dilemmas of Incorporation into Italian Domestic Law", quoted above, 47.

In the same decision no. 317 of 2009, the Italian Constitutional Court also affirmed: "The concept of the greatest expansion of protection must include, as already clarified in judgements no. 348 and 349 of 2007, a requirement to weight up the right against other constitutionally protected interest that is with other constitutional rules which in turn guarantee the fundamental rights which may be affected by the expansion of one individual protection. This balancing is to be carried out primarily by the legislature, but it is also a matter for this Court when interpreting constitutional law [....]. The overall result of the supplementation of the guarantees under national law must be positive, in the sense that the impact of individual the ECHR rules on Italian law must result in an increase in protection for the entire system of fundamental rights"[14]. Finally, it is the Constitutional Court itself that is requested to strike a fair balance between rights and general interests at stake.

The following decision no. 80/2011 confirmed that the review of legislation on the ground of conventionality belongs to the exclusive competence of the Constitutional Court. The Court clearly reaffirmed that the mechanism set up by the "twin" judgements does not change as a result of the entry into force of the Treaty of Lisbon. Again, doubts have arisen as to whether the ECHR could have the same position and force of EU law due to Article 6 of the Treaty of Lisbon[15]. The Constitutional Court reiterated that Article 11 It. Const. is confined to EU law and does not apply to the ECHR.

Up to the present time, the Italian Constitutional Court has never declared the incompatibility of a conventional norm with constitutional norms. In the "twin" judgments the Court has emphasised obedience to the Strasbourg case law, affirming that the exact meaning of the ECHR can be ascertained only as it is interpreted by the ECtHR. Instead,

14 Decision no. 317/2009, para. 7, quoted by G. Repetto, "Rethinking a Constitutional Role for the ECHR. The Dilemmas of Incorporation into Italian Domestic Law", 47.

15 Article 6, paragraphs 2 and 3, Treaty on the European Union reads: "2. 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. 3. 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".

in following judgments the Court starts using interpretative tools to justify a margin of discretion while applying the ECHR[16].

On the one hand, the Court makes reference to general interests protected by the Italian legal system. In this way, it is for the Court to declare where the fair balance lies between the rights and the legitimate interests at issue. The Court sometimes refers to the ECtHR margin of appreciation doctrine, according to which national authorities enjoy some discretion in fulfilling their obligations under the ECHR[17]. In fact, the ECtHR stated since its early decisions that the Convention leaves to each Contracting State, in the first place, the task of securing the rights and liberties it enshrines. The machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights. Thus, the Constitutional Court shapes the fair balance between rights and general interest using the margin of discretion that the ECHR system in principle allows.

On the other hand, the Italian Constitutional Court resolves potential conflicts between constitutional norms and conventional norms through the technique of distinguishing[18]. The same strategy is

16 For a case of non-obedience to a Strasbourg precedent, see the so-called *Maggio case*, decision no. 264/2012, following ECtHR, *Maggio and others v. Italy*, May 31, 2011. The Constitutional Court considered a challenge to legislation modifying the system to calculate pensions of Italian workers employed in Switzerland. Due to a law of "authentic interpretation", these Italian pensions were to be calculated in a different way than before, thus resulting lower. The Court ruled that the applicants had no legitimate expectations to a pension in line with the previous system of calculation, since the contested legislation expressed the principles of equality and solidarity, prevailing within the balancing text of rights and interests at stake. For a general overview of Italian Constitutional recent case law in English, see now P. Faraguna, M. Massa, D. Tega, M. Cartabia, "Developments in Italian Constitutional Law: The Year 2015 in Review", Int'l J. Const. L. Blog, Mar. 4, 2016, at: http://www.iconnectblog.com/2016/02/developments-in-italian-constitutional-law-the-year-2015-in-review

17 S. Greer, "The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights", Council of Europe, Strasbourg, 2000, 5.

18 For example, Constitutional Court decision no. 236/2011, concerning the principle of *nulla poena sine lege*. The decision has been intended as a reply to ECtHR, Grand Chamber, 17 September 2009, *Scoppola v. Italy* (no. 2), application no. 10249/03. The Italian Constitutional Court stated the Strasbourg precedent "although aimed at establishing a general principle [...], remains nonetheless linked to the concreteness of the case in which it was ruled: the fact that the European Court is called to assess upon a material case and, most of all, the specificity of the single case issued, are factors to be carefully weighed and

applied by the Supreme Court. The Constitutional Court itself often asks ordinary courts to distinguish their cases from the relevant precedents of Strasbourg. Legal scholars recognise that the technique of distinguishing is admissible, as the ECtHR has jurisdiction on the facts of the case. This technique also increases the dialogue between the ECtHR and Italian courts, questioning if and in which circumstances a situation could entail a violation of the Convention[19]. Nevertheless, a superficial application of the technique could jeopardise the respect for Strasbourg precedents and it could threaten the principle of legal certainty, the principle of equal treatment and the respect for legitimate expectations.

Chapter II
National Courts referral to the European Court of Human Rights case law in Italian judgements

In the previous Chapter, we provided some information on the behaviour of the judiciary before the Italian Constitutional Court landmark decisions no. 348 and 349/2007. We explained how the referral to the ECtHR case law is more and more frequent in recent years and how the Strasbourg jurisprudence has become pervasive in legal reasoning concerning human rights. As a whole, the ECHR has a prominent role in driving interpretation of national law. In the previous Chapter, we illustrated also that the "twin" judgments aimed at preventing ordinary judges from not applying national law incompatible with the ECHR.

In this Chapter, we will evaluate if the Italian highest courts and ordinary courts comply with the "twin" judgments' directives. This issue was addressed by a comprehensive study recently conducted by an Italian legal scholar. We will refer to this study, quoting the main outcomes[20].

taken into account by the Constitutional Court, when applying the principles ascertained by the Strasbourg Court at the domestic level, in order to review the constitutionality of one norm allegedly at odds with that principles". The decision is quoted by A. Guazzarotti, "Strasbourg Jurisprudence as an Input for "Cultural Evolution" in Italian Judicial Practise", quoted above, 65.

19 A. Guazzarotti, "Strasbourg Jurisprudence as an Input for "Cultural Evolution" in Italian Judicial Practise", quoted above, 63.

20 I. Carlotto, "I giudici italiani e il divieto di applicazione diretta della Convenzione europea dei diritti dell'uomo dopo il Trattato di Lisbona", in L. Cappuccio, E.

Regarding the highest courts behaviour, both the Supreme Court and the Council of State fully respect the "twin" judgments model[21]. This means that they do not state the direct non-application of national law incompatible with the ECHR. In fact, when a problem of compatibility arises, the highest courts firstly attempt to give the domestic law an interpretation "in conformity with" the Strasbourg case law. This attempt sometimes leads to a strong modulation of the meaning of the written legal text. Only when the interpretation "in conformity with" is not possible, as a second step the highest courts make a referral order to the Constitutional Court, asking for the invalidation of the national law. Furthermore, as illustrated in the previous Chapter, the highest courts "shape" the precedents of the ECtHR through the technique of distinguishing. In these cases, it is the Court of Strasbourg that, when an application is submitted, verify if the facts of the cases were different – so that the condition for distinguishing did exist – and if the implementation of the ECHR in the Italian legal order was correct.

The overview of ordinary courts' behaviour is more complicated. Most of the judges – civil, penal, as well as administrative judges – follow the Constitutional Court's directives[22]. However, a minority of them

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Lamarque, "Dove va il sistema italiano accentrato di controllo di costituzionalità. Ragionando intorno al libro di Víctor Ferreres Comella *Constitutional Courts and Democratic Value*", Editoriale Scientifica, Napoli, 2013, 177–240. See also the previous research of the same Author, I. Carlotto, "I giudici comuni e gli obblighi internazionali dopo le sentenze n. 348 e n. 349 del 2007 della Corte costituzionale: un'analisi sul seguito giurisprudenziale (Parte I)", in Politica del diritto, 2010, 76 ss.

21 See, among others, Supreme Criminal Court (Corte di Cassazione penale), VI Section, 8 June 2012, no. 22301; Supreme Criminal Court, VI Section, 15 June 2011, no. 24039; Supreme Criminal Court, II Section, 15 January 2013, no. 3809; Supreme Criminal Court, V Section, 23 October 2012, no. 41249; Supreme Court, United Sections, 25 October 2012, no. 41694, on unlawful detention; Supreme Court, United Sections, 10 September 2012, no. 34472, on the ECtHR *Scoppola case*, concerning the principle of *nulla poena sine lege* under Article 7 ECHR; Supreme Court, United Sections, 13 June 2012, no. 9595 and 20 June 2012, no. 10130; Supreme Civil Court, VI Section, 27 November 2012, no. 21053 to no. 21060 and 14 December 2012, no. 23154. Concerning administrative issues, Council of State, VI Section, 9 August 2011, no. 4723 and 2 April 2012, no. 1957, all quoted by I. Carlotto, "I giudici italiani e il divieto di applicazione diretta della Convenzione europea dei diritti dell'uomo dopo il Trattato di Lisbona", cited above, 204, 222, 225.

22 For example, in the administrative jurisprudence, Regional Administrative Tribunal (Tribunale Amministrativo Regionale), Lombardia, Milan, II Section, 7 Augut 2012, no. 2178; Regional Administrative Tribunal Trentino Alto Adige,

resists the logic of the "twin" judgements, giving a direct application of the ECHR instead of making a referral order to the Constitutional Court[23]. This behaviour is not necessarily a form of "rebellion". Most of the time, this results from a misunderstanding and misapplication of different charters of rights. Sometimes ordinary judges give direct application to the ECHR because they unintentionally overlap the ECHR with the Charter of Fundamental Right of the European Union. It is well known that the Charter of Fundamental Right of the European Union confines itself into the scope of EU Law. Yet in practice it is not clearly distinguishable what is inside and what is outside the scope of

4 April 2012, no. 101; Regional Administrative Tribunal Calabria, ordinance 13 October 2011, no. 732; Regional Administrative Tribunal Lazio, Rome, I Section, 25 June 2012, no. 5769 and 16 May 2012, no. 4455, 4456, 4457; Regional Admnistrative Tribunal Sicilia, Palermo, ordinance 10 January 2012; Regional Administrative Tribunal Toscana, 15 March 2012, no. 544; Regional Administrative Tribunal Umbria, 21 January 2013, no. 29, all quoted by I. Carlotto, "I giudici italiani e il divieto di applicazione diretta della Convenzione europea dei diritti dell'uomo dopo il Trattato di Lisbona", cited above, 205. Civil and penal ordinary courts' judgements quoted by I. Carlotto are dozens, regarding the Court of Appeal of L'Aquila, Venezia and the Tribunals of Nardò, Pozzuoli, Lecce, Nocera Inferiore, Cagliari. See "I giudici italiani e il divieto di applicazione diretta della Convenzione europea dei diritti dell'uomo dopo il Trattato di Lisbona", 210.

23 Regional Administrative Tribunal Campania, V Section, 13 December 2011, no. 5764; Regional Administrative Tribunal Lazio, Rome, III Section, 5 January 2011, no. 40; Regional Administrative Tribunal Puglia, I Section, 7 June 2012, no. 289 and III Section, 10 January 2013, no. 20, all confusing the ECHR and the EU Charter of Fundamental Rights. Regional Administrative Tribunal Lombardia, Brescia, II Section, 9 February 2012, no. 213 and 214; 6 September 2012, no. 1521 and 22 November 2012, no. 1836; Regional Administrative Tribunal Lombardia, Milan, III Section, 1 February 2013, no. 313; Regional Administrative Tribunal Veneto, III Section, 21 November 2012, no. 1430; Regional Administrative Tribunal Lazio, Rome, I Section, 28 January 2013, no. 966 and 973; 4 February 2013, no. 1180, concerning compensation for the length of proceedings, provided non-application of Italian law on the matter (*Legge Pinto*) and condemned the Public Administration to make financial resources available in order to pay compensation. See also Regional Administrative Tribunal Sicilia, Palermo, II Section, 9 March 2011, no. 418 and 14 October 2011, no. 1864 evaluating family ties of aliens under Article 8 ECHR, even if the relevant domestic law does not oblige the public administration to take them into consideration. Among civil and penal courts, Tribunal of Milan, Labour Section, 17 May 2011, no. 2474; Tribunal of Cassino, 27 September 2011; Corte di Assise, Terni, 6 July 2011; Court of Appeal, Firenze, Labour Section, 26 April 2011, no. 534; Tribunal of Milan, 8 July 2011, no. 3558. Cfr. I. Carlotto, "I giudici italiani e il divieto di applicazione diretta della Convenzione europea dei diritti dell'uomo dopo il Trattato di Lisbona", 206–210, 213–214.

EU Law. Furthermore, the constitutional substance of all human rights encourages their direct application irrespectively of their formal source. Indeed, the supremacy of human rights is not in question. However, the attitude of a minority of judges to self-determine the non-application of domestic law challenges the competence of the Constitutional Court. In conclusion, the main problem is who decides not to apply the domestic law incompatible with the ECHR and to what extent. In fact, only the Constitutional Court decisions are compulsory *erga omnes*. Most of the ordinary courts refer to the Constitutional Court. Only a minority of them acts autonomously. All in all, the consistency of the Constitutional Court, the Supreme Court and the Council of State jurisprudence ensures legal certainty and stability. As recognised by legal writers, the highest courts can regularly quash the decisions of lower courts that deviate from existing precedents[24].

Chapter III
Conclusions and Recommendations

As we illustrated in the previous Chapters, the ECHR status in Italian legal order can be summarised as follows:

a. the ECHR has a supralegislative rank;

b. all the courts are obliged to implement conventional rights following the ECtHR case law; all the judges must interpret domestic law as far as possible in conformity with the ECtHR living interpretation;

c. the judicial review of legislation on the ground on conventionality is an exclusive competence of the Constitutional Court. When the interpretation in conformity with the Convention is not possible, ordinary courts must make a referral to the Constitutional Court, in order to evaluate the consistency of the internal norm with the ECHR;

d. the Italian Constitutional Court recognises a prominent role to the ECtHR interpretation, but eventually it is for the

24 V. Ferreres Comella, Constitutional Courts and Democratic Values, 22, quoted by I. Carlotto, "I giudici italiani e il divieto di applicazione diretta della Convenzione europea dei diritti dell'uomo dopo il Trattato di Lisbona", cited above, 225.

Constitutional Court to strike the fair balance between all the rights and the general interests at stake.

As Keller and Stone had demonstrated, there was not a causal linkage between *ex ante* monism and dualism and the reception of the ECHR. The way the ECHR is incorporated is an outcome of the reception process which, in turn, will impinge on reception *ex post*. The Italian experience confirms that the assumption that dualistic States have, *a priori*, an unfriendly attitude towards international law, and will, therefore, generate a relatively poorer rights record, is untenable[25]. The spread of the Strasbourg Court principles has grown impressively in recent years. The attitude of courts of every level to quote the Strasbourg jurisprudence is wide.

As legal scholars affirmed years ago, international protection of human rights has reached an impressive scope regarding both the rights covered and the number of countries bound. However, this protection remains unsatisfactory if the related obligations are not implemented in the real life. The responsibility of an effective implementation of human rights to a great extent is assigned to the judiciary. Courts participate in the "interpretative enterprise" of internationally shared values and act independently from the governments in power. Surely, interpretation and application of human rights cannot be a substitute for democratic elections and political decision. Nonetheless, human right adjudication provided by independent judges is an indispensable instrument for a democratic and liberal society. Developing a jurisdictional model that is responsive to the universal recognition of a minimum human rights core is part of the aims of a democratic legal order[26]. This is

25 H. Keller, A. Stone Sweet (eds.), "A Europe of Rights: The Impact of the ECHR on National Legal Systems", Oxford University Press, Oxford, 2009, 685–686. That point accepted, some States, including Italy, have found it difficult to confer supralegislative rank on the Convention precisely because of their dualistic natures, though there is a great deal of variation even among this small group. Dualistic countries tend to incorporate through statute, whereas monist States tend to do so through judicial decision. Clearly, a monistic constitutional structure can provide the judiciary with more leeway in the reception process. In dualistic countries where a powerful Constitutional or Supreme Court defends national human rights, the Authors observed reticence among judges to base their rulings on the Convention as an independent source of rights.

26 F. Francioni, "The Jurisprudence of International Human Rights Enforcement: Reflections on the Italian Experience", in B. Conforti, F. Francioni (eds,), "Enforcing Human Rights in Domestic Courts", Martinus Nijhoff Publisher, The Hague-Boston-London, 1997, 15–34, 15, concluding that the hiatus between

much more true if we considered that international remedies, as the ECtHR mechanism, depend on the exhaustion of domestic remedies[27]. This requirement is based on the assumption that the domestic legal order will provide an effective remedy for the violation of conventional rights. The requirement finally expresses the subsidiary nature of the ECHR system. National authorities, and especially national courts, are in a "better position" to assure the effective implementation of human rights, because they are in direct contact with vital forces, national traditions and cultural backgrounds of their countries.

If this is true, in our opinion the main point is that the interpretation and application of the ECtHR case law into the domestic legal order must follow a clear and well established mechanism. In the previous Chapters, we illustrated the evolution of the Constitutional Court's jurisprudence and the consistency of the judicial behaviour with the Constitutional Court's directive. The stability of this mechanism and the coherence between judgments are meaningful to fulfil a responsive jurisdictional model. In fact, stability and coherence guarantee values that are fundamental to the effectiveness of human rights, like legal certainty and equal treatment. Surely, modern legal systems are complex. The overlapping of charters of rights can jeopardise the protection of human rights instead of increasing their effectiveness. Thus, assuring full knowledge and awareness of the different sets of human right legal sources currently existing, and their respective mechanism should be an aim of primary importance, in order to avoid risk of diverging jurisprudence and unequal treatment. In our opinion, this objective could be better achieved through the continuing training of judges and prosecutors about the different system of protection of human rights and their co-ordination.

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the international recognition of rights and their actual implementation by domestic court, and by public organs in general, was at that time one of the most disturbing aspects of the international effort to ensure respect for human dignity.

27 See Article 35, §1, ECHR, on admissibility criteria, reading that: "1. The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law...".

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This comparative analysis deals with the issues of application of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) in national legal systems of several States Parties to the Convention.

These important issues are dealt with in eight articles elaborating the application of the ECHR in Croatia, France, Greece, Hungary, Italy, Poland, Russia and Serbia. Countries were selected following two criteria: monistic or dualistic systems – in order to demonstrate different legal consequences in both systems due to the application of the European Convention, and the commencement of the application of the Convention – presenting the states that have been parties to the Convention since its adoption, as well as those that have become so in the past two decades, which affects different level of activity of their courts regarding the implementation of the Convention.

The experience from one country, as shown here, can serve as the inspiration for improving the implementation in another, as well as for overcoming certain obstacles and problems identified in the articles.

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