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Giovanni Piccirilli

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WHAT REMAINS OF THE CENTRALITY OF PARLIAMENTARY LEGISLATION IN CONTINENTAL EUROPE? AN ITALIAN PERSPECTIVE

By Giovanni Piccirilli[*]

Abstract

The impact of the European Convention on Human Rights on national legal orders is not limited to the enhancement of the protection of individuals' rights, but implies broader transformations in the constitutional structure of states. This paper investigates the on-going re-shaping of domestic systems of sources of law entailed by the implementation of the concepts of "law" and "legislation" as elaborated by the European Court of Human Rights. With particular reference to the Italian case, the focus is on one of the doctrines that dominated scholarly literature in the last centuries in continental Europe – so-called Gesetzesvorbehalt – which seems to be facing a serious crisis with these latest developments.

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1. Foreword*

In his essay entitled 'A cosmopolitan legal order: Constitutional pluralism and rights adjudication in Europe' published in the opening issue of Global Constitutionalism, Alec Stone Sweet points out that:

> "the incorporation of the European Convention of Human Rights [hereafter ECHR] generated constitutional pluralism and inter-judicial competition within the national order; it destroyed doctrines that underpinned centralized sovereignty (e.g. legislative supremacy, the monopoly of constitutional courts over the domain of rights protection); and it enhanced judicial power with respect to legislative and executive power."[1]

In his view, the ECHR contributed to the creation of a *cosmopolitan legal order*, namely, a transnational legal system characterized by decentralized sovereignty. In doing so, it undermined some of the fundamental pillars of (traditional) national constitutional systems in Europe, including – and this will be the topic of this paper – the role of parliamentary legislation within domestic systems of the sources of law.

According to Stone Sweet, two elements contributed to this achievement: the entitlement of individuals to appeal to the Court of Strasbourg directly (from Protocol no. 11, albeit after exhausting all domestic remedies) and the incorporation of the Convention in domestic legal systems. In most cases it now enjoys a status that, in formal terms, is higher than that of parliamentary legislation.[2] The link between these two elements is the case law of the European Court of Human Rights (ECtHR, or Court

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[1] 2012 (1), p. 53-90, at p. 68 (emphasis added).

[2] The only exceptions, though relevant, are Ireland and the UK. For a detailed overview of the means and the results of the incorporation of the ECHR in domestic legal systems, see A. Stone Sweet, quoted at fn. 1, p. 65. Even in Germany, ECHR law has to be enforced by ordinary courts "even against statutes passed later in time", and this status is monitored through individual constitutional complaints, according to A. Stone Sweet and H. Keller, 'Assessing the Impact of the ECHR on National Legal Systems' in *A Europe of Rights. The impact of the ECHR on national legal systems* (Oxford University Press 2008), p. 685.

of Strasbourg). In short, the interpretation of the Convention stemming from the Strasbourg case law (stemming from applications by individuals after the exhaustion of, and, in a certain way, *against*, domestic remedies) binds national legislatures and courts (by virtue of its *supra*-legislative status).

This process of "domestification" of the ECHR – as Stone Sweet defines it – implies major changes not only in the concrete functioning of national legal orders, but also leads to a necessity of re-thinking the doctrines and concepts that have defined the basics of constitutional law to date.

The aim of this paper is to elaborate more on this claim by focusing on the effects of the incorporation of the ECHR on national (systems of) sources of law as well as on its consequences for the centralized judicial review of legislation undertaken by constitutional courts. More broadly, the paper also aims to take up the invitation made by Louis Favoreu in his last work[3] to update the literature on the impact of the ECHR on domestic constitutional law and on the study of fundamental rights as we used to know them.

In greater detail, this paper aims to investigate the erosion (or, perhaps, following the vocabulary used by Stone Sweet, the "destruction") of one of the doctrines that dominated scholarship in most civil law countries in the last two centuries and underpinned the sovereignty of the state, namely, the "preference" for parliamentary legislation *vis-à-vis* other sources of law in disciplining and limiting fundamental rights.

The most difficult step in the construction of my argument is providing a complete or, at least, satisfying description of this doctrine, which can be synthetized with the German word *Gesetzesvorbehalt*. I have not been able to find a perfect translation into English, since it would imply not only a linguistic correspondence but also a conceptual one.[4] Therefore, I have decided to leave it in the original language. Later in the paper, I will also explain why I prefer to use the German expression instead of the French, Italian or Spanish equivalents (*réserve de loi*, *riserva di legge*, *reserve de*

[3] Cours constitutionnelles nationales et Cour européenne des droits de l'homme, in Liberté, justice, tolérance. Mélanges en hommage au Doyen Cohen-Jonathan, vol. I, Bruylant 2004, p. 789.
[4] Apparently, A. Türk also decided to give up on translating the name of this institution, only "roughly" using the term "legislative reservation" (see his review of the book by H. Rieckhoff, *Der Vorbehalt des Gesetzes im Europarecht*, Mohr Siebeck 2007, in *Common Market Law Review*, 2010 (1), p. 278-280).

ley, respectively). However, the literal translation would be "reservation to legislation" or "legislative reservation". I have deliberately decided not to choose expressions that might (superficially) seem close and widely-used in the English-speaking literature, such as "non-delegation doctrine", as they imply institutions and practices which – precisely because of this – have been developed in different legal cultures[5] and cannot replicate the same cultural tension implied in the (continental) "European" concept.

Thus, taking the *Gesetzesvorbehalt* doctrine as the specific object of this paper, it is necessary at least to mention that it originated in the nineteenth century in continental Europe (with its basic roots already in the previous century) and somehow still deeply characterizes statehood in those countries, although it faced important transformations with the advent of the constitutional state after WWII. However, in the new context of the supranational legal order it seems to be close to "destruction", which would result in an involution of the separation of powers among the branches of government as well as in a significant empowerment of ordinary judges to the detriment of legislatures and Constitutional Courts.

The paper will proceed as follows: I will try first to recap the basics of *Gesetzesvorbehalt* in order to underline its centrality in the tradition of civil law countries, both in its original meaning (§ 2) and in the framework of the post-WWII constitutional state (§ 3). Next, my aim is to show how it clashes with the incorporation of the ECHR because of the concept of what "law" is according to the Court of Strasbourg, and the "destructive" consequences of the latter for this doctrine (§ 4 and 5). Hence, with specific reference to Italy I will describe the reaction of the Italian Constitutional Court to this threat which undermines the very doctrine that underpins its jurisdiction: only centralization (before the Constitutional Court) of the scrutiny of violations of the ECHR can prevent the self-same Court from being deprived of the faculty to concretely protect rights, which is increasingly being undertaken by ordinary courts (§ 6).

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[5] However, for a useful comparison between the German and the US understanding of the concept, see U. Kischel, *Delegation of Legislative Power to Agencies: A Comparative Analysis of United States and German Law*, in *Administrative Law Review*, 1994 (2), p. 238-255. For a comparison with the British system, see G. Jurgens, M. Verhoeven and P. Willemsen, *Administrative Powers in German and English Law*, in L. Besselik, F. Pennings and S. Prechal (eds.), *The Eclipse of the Principle of Legality in the European Union*, Wolters Kluwer 2011, p. 39-53).

2. The Original Demands Answered by the *Gesetzesvorbehalt* Doctrine

Study of the classics of legal theory shows that at a certain point in time in continental Europe the concepts of objective "law" and "parliamentary legislation" were to some extent synonyms. Significantly, Carl Schmitt opened the first chapter of his *Legality and Legitimacy* by stating that:

> "The nineteenth-century constitutional monarchy was a legislative State. It was to a great extent a parliamentary legislative state precisely in the decisive point, specifically, its concept of law. Only a decision receiving the concept of the legislative assembly, or legislature, was a valid law in the formal sense"[6]

The very origin of this correspondence was rooted in trust in parliamentary legislation as a safeguard against interference by public powers in individual liberties and private property, odd as it might sound to an Anglo-Saxon audience, and in particular to a North American one.[7] To understand this standpoint better, one has to see legislatures in the framework of the constitutional monarchies of that time, namely, as the main counter-power limiting the sovereign. From this perspective, legislatures ensured participation of the people's representatives in legislative decisions and, ultimately, constituted the best possible guarantee of self-determination of people (or, at least, of that of the *bourgeoisie*, being the part of the population which fully enjoyed political rights).

In its primary meaning, this idea of a privileged status for parliament-made law – which embodies the foundational conception of the *Gesetzesvorbehalt* doctrine – was first developed in the German literature in the nineteenth century as one of the dogmatic pillars of the Wilhelmine Empire[8] and then circulated in the rest of western

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[6] C. Schmitt, *Legality and legitimacy* (orig. *Legalität und Legitimität*, 1932), English transl. by J. Seitzer, Duke 2004, p. 17 (emphasis added).

[7] ... As it is exactly the opposite of the first amendment to the US Constitution, according to which, as is known, in order to protect individual rights "Congress shall make no law...".

[88][8] See S. Fois, *La "riserva di legge". Lineamenti storici e problem attuali*, Giuffre', 1963, p. 6-7, and more recently (albeit perhaps too enthusiastically) H. Rieckhoff, *Der Vorbehalt des Gesetzes im Europarecht*, p. 40. I therefore find it correct to use the German expression to sum up the concept rather than the French or other ones. Moreover, I prefer the expression *Gesetzesvorbehalt* to that (perhaps more frequently used) of *Vorbehalt des Gesetzes,* following the nominalistic clarification made by J. Pietzcker, *Vorrang und Vorbehalt des Gesetzes*, in *Juristische Schulung*, 1979, p. 710, according to which the latter entails a

continental Europe.[9] The rigid separation of powers which characterized constitutional monarchy required clear boundaries to be defined between the competences of the legislature and what could be left to the autonomous decisions of the emperor (and his government).[10] In order to secure a certain domain of competences for the legislature, particular matters were taken away from the executive power and were "reserved" (*vorbehalten*) to the Parliament and its legal acts (*i.e.* the statute, *das Gesetz*).

The rationale was, therefore, first and foremost negative and limitative. Its aim was both to contain and constrain the (inborn) power of the monarch by imposing a pre-emptive (general and abstract) external (not self-produced by the executive) legal framework in order to restrict his discretion, i.e. to counter-balance the legitimacy of the *Fürerprinzip* politically.[11] Conceived initially as a limitation of executive powers, the role of legislation was essentially that of authorizing the executive to act within prescribed boundaries.[12]

From a practical point of view, parliamentary intervention ended up being a way to publicly disclose a decision, introducing elements of "democracy" into the exercise of power by the public authority. Hence, from a theoretical point of view, the doctrine of *Gesetzesvorbehalt* was ulimately implied by the legal positivism that was predominant in continental Europe in late nineteenth century public law. Rejecting any conception based upon natural law, the only legally valid rights were those conferred on individuals by legislation.[13]

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broader concept of the existence of a normative domain reserved to Parliament, the former being a specification related to individual fundamental rights.

[9] O. Pfersmann, Die normative Demokratie: Der Vorbehalt des Gesetzes und der Rechtsstaat, in C. Grewe and C. Gusy (eds.) Franzosische Staatsdenke, Nomos, 2002, p, 129-145.

[10] D. Jesch, *Gesetz und Verwaltung*, Mohr Siebeck, 1961, p. 124.

[11] E.W. Böckenförde, *Staat, Verfassung, Demokratie. Studien zur Verfassungstheorie und zum Verfassungsrecht*, Suhrkamp 1991, p. 37, suggests the idea of a shared (and even "undecidable") sovereignty between the two branches of government.

[12] Even considering the actual functioning of decision-making at that time, it was no more than participation by parliament in governmental decisions, intervening with a legislative deliberation when the constitution so required. In other words, in the initial phase of its elaboration *Gesetzesvorbehalt* was no more than *Eingriffsvorbehalt*, namely a reservation for a *parliamentary intervention* in order to limit and legitimize the action of the executive power. The vast literature on this topic is systematized in G. Scaccia, *Appunti sulla riserva di legge nell'esperienza costituzionale tedesca*, in *Diritto pubblico*, 2001 (1), p. 219-270.

[13] See M. Loughlin, *Foundations of Public Law*, OUP 2012, p. 320.

However, as stated, the idea of an overlap between parliamentary legislation and the idea of objective law in a more general sense is not a particularity of the German constitutional experience. Even though it was created in an extremely different cultural environment and grounded in different principles, the above-mentioned doctrine shared some instrumental implications with those of parliamentary sovereignty in as much as both were an expression of the "general will" developed throughout the French Revolution and systematized during the French Third Republic (1870-1940).[14] Looking at their practical results, they both claim a certain preference for parliamentary legislation, with the effect of creating a hierarchy of norms (at least in those reserved matters) that recognizes a primacy of parliamentary statues and enables other legal acts (mainly governmental regulation) to intervene only as long as and as much as legislation allows them to do so. In other words, they both recognize some kind of uniqueness of acts deriving from parliament and its qualitative difference from other sources of law.[15]

These commonalities are further testified by the emergence in both the German and French legal systems (as well as in those based upon their models) of a jurisdiction for administrative law that is completely separate from civil and criminal law (which constitutes something simply unknown as such in the Anglo Saxon context), with courts specialized in the scrutiny of the compliance of governmental activity with parliamentary legislation. In a certain sense, in the legal state of the nineteenth century administrative judges were deemed the guardians of the domain of parliamentary legislation (or, so to speak, the judges of the *Vorbehalt des Gesetzes*).

[14] Whereas the German *Gesetzesvorbehalt* was intended as a limitation to imperial power, on the contrary the French concept was fully inspired by democratic (or "republican") ideas, on the assumption that "national" sovereignty resides in the representative assembly while the administration and the courts are subject to the expression of the general will "produced" by the Assembly. The roots of this idea are already present in the speech given by Antoine Barnave to the French National Constituent Assembly on 10 August 1791 (now partially published in P. Brunet, *Vouloir pur la Nationе. Le concept de représentation dans la théorie de l'État*, LGDJ 2004, p. 221-227). The classic systematization of the doctrine in legal terms is given by R. Carré de Malberg, *La loi, expression de la volonté générale*, Sirey 1931.

[15] In fact, the French tradition also derives the superiority of parliamentary legislation from the specific procedure for its adoption, legislation being the only source of law emerging from a transparent open participative public debate. See, among others, B. Mathieu, *La loi*, Dalloz 1996, p. 52.

3. The Role Of Parliamentary Legislation in the Time of Constitutional Courts

With the post-WWII advent of the constitutional state, the centrality of parliamentary legislation among sources of law faced a significant evolution in order to adapt to the new legal framework. In the context of rigid constitutions, parliamentary "sovereignty" became far more relative, as statutes became subject to judicial review by constitutional courts. Hence, the concrete functioning of contemporary parliamentary systems showed how governments were able to influence legislation either formally (where enabled to introduce bills) or substantially (by leading discussion in parliament).

Notwithstanding this, *Gesetzesvorbehalt* did not lose its essential meaning (albeit within these new constraints) of presiding over the separation of powers to the advantage of parliamentary legislation *vis-à-vis* executive interventions. On the contrary, it is fully possible to consider this doctrine an integral part of the "postwar constitutional settlement"[16] which emerged, at least in Italy and Germany, in order to define the chain of delegation between the people and their representatives on the one hand and parliament and other branches of government on the other.[17] Legislatures were no longer able to subvert the content of fundamental rights – as their statutes could be struck down by constitutional courts – but, within the room for manoeuvre granted by constitutions, the conditions for the enjoyment of fundamental rights were still to be established primarily by parliamentary statutes.

Entrenchment of bills of rights in rigid constitutions was the way to refer to parliamentary legislation as the means for setting both the discipline and the limits of public interference in the enjoyment of these rights, with the effect of establishing a hierarchy between the constitution, legislation, and other sources of law. More clearly than before, the purpose of *Gesetzesvorbehalt* (and that of the Italian *riserva di legge*)

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[16] P. Lindseth, *Power and Legitimacy. Reconciling Europe and the nation-state*, OUP 2010. See in particular p. 85-88, where there are references to the German and Italian cases (and even to the French Fourth Republic).

[17] Interestingly, A. Stone Sweet, *Governing with Judges*, OUP, 2000, p. 134, connects Kelsenian *Stufenbau* to the principal-agent model of delegation: "the sovereign people (first order principals) decide – albeit through their representatives – to be governed by a constitution. The constitution is the normative instrument through which the people have delegated power to governmental bodies, like legislatures. And the statute is the normative instrument through which governments and legislatures (agents of the electorate, but second order principals *vis-à-vis* ordinary judges and administrations) delegate certain specific responsibilities and powers to the courts and the administration".

in the post-WWII constitutional state became (at least) twofold: not only in a negative sense, to prohibit other sources of law (and in particular governmental regulations) from coming into play; but also in a positive sense, to assign to legal acts produced by the only directly democratic legitimated body the task of regulating the enjoyment of constitutional rights.[18] Thus, *Gesetzesvorbehalt* transfigured its rationale by defining part of the jurisdiction of constitutional courts themselves, these being in charge of enforcing constitutional provisions to reserve specific subject matters to legislation in order to oversee parliaments properly fulfilling the priorities (and, in a certain sense, duties) attributed to them by the constitution.

The existence of a further level of judicial review with the competence to decide on the constitutionality of parliamentary decisions does not only mean that the role played by administrative judges in the nineteenth century was elevated "one level up" in the hierarchy of norms. It is true that constitutional courts have been called upon to solve conflicts at a higher level in the hierarchy of norms (*i.e.* between the constitution and ordinary legislation), but the paradigm of this kind of judicial intervention is completely "new". Imposing (constitutional) legality on legislation means entrenching democracy itself in the requirement of legality: in the nineteenth century legislative state "legality" meant "democracy" (which was represented, by definition, by parliamentary legislation), whereas in the post-WWII constitutional state "democracy" (*i.e.* parliamentary legislation) is subject to conditions and limitations set by constitutions and enforced by constitutional courts. As has recently been pointed out,[19] the latter are called upon to "take rigid constitutions seriously", preserving the constitutional *bloc* from violation by the legislator and at the same time ensuring that parliamentary legislation fulfills what the constitution requires or specifies.

In this new context, the doctrine of *Gesetzesvorbehalt* ended up embodying some basic answers to the fundamental exigencies of the constitutional state in order to: (1) strengthen the hierarchical structure of the system of sources of law; (2) ground the

[18] This evolving meaning of the doctrine is underlined by L. Carlassare, *Legge (riserva di)*, in *Enciclopedia giuridica italiana*, vol. XVIII, Treccani 1990.
[19] P. Pasquino, Classifying constitutions: preliminary conceptual analysis, in Cardozo Law Review, 2013 (3), p. 999-1019.

latter in the democratic principle; and (3) define the most active part of constitutional courts' jurisdiction.

Consequently, a major role in re-defining the scope and the latitude of *Gesetzesvorbehalt* was played by constitutional courts themselves. Some examples will help us to better understand the evolution of the institution and its role in defining the boundaries between the areas of interest of the different courts operating at the different levels of the European legal space.

The German Federal Constitutional Court, for instance, through progressive steps developed the so-called theory of essentiality (*Wesentlichkeitstheorie*), according to which the essential core of fundamental rights within the nation state (only) needs to be defined and regulated by parliamentary legislation.[20] The main difference with respect to the past is the recognition of a positive duty for the *Bundestag*, based upon the democratic principle, not only to intervene on behalf of fundamental rights when the constitution so requires, but also to cover all issues that essentially (*wesentlich*) affect the fundamental right at stake. The aim is to reduce the room for manoeuvre of administrative discretion and judicial interpretation by recognizing the necessary pivotal role of parliamentary statutes which are expected to regulate the basic principles of the matter at issue that are essential for the realization of fundamental rights.[21] Once they fulfill this requirement, parliamentary statutes are recognized as holding not only a formal supremacy over competing sources of law in terms of the rank of the act, but also a kind of content-based primacy, substantially (and not only formally) outweighing the other law-makers, such as first and foremost the executive branch.[22]

The same court re-stated the existence of fields reserved for national parliaments in matters concerning expansion of the competences of the European Union.[23] Even

[20] The leading case in this field is BVerfGE 40, 237 (248) in 1976. The classification of this judicial doctrine as *Wesentlichkeitstheorie* (theory of essentiality) can be attributed to T. Oppermann, *Nach welchen rechtlichen Grundsätzen sind das öffentliche Schulwesen und die Stellung der an ihm Beteiligten zu ordnen?*, in *51. Deutschen Juristentag*, C, 1976, p. 48.
[21] F. Ossenbühl, Vorrang und Vorbehalt des Gesetzes, in J. Isensee and P.Kirchhof (eds.), Handbuch Des Staatsrechts der Bundesrepublik Deutschlands, 3rd edition, 198.
[22] E.W. Böckenförde, Gesetz und gesetzgebende Gewalt. Von den Anfängen der deutschen Staatsrechtslehre bis zur Höhe des staatsrechtlichen Positivismus, new edition Duncker & Humblot 1981, 394.
[23] Section 4 deals with the *Lissabon Urteil* in a little more depth.

though this is not directly related to the role of statutory law, such jurisprudence is nevertheless important to the present analysis because it shows how the valorization of the role of national parliaments (whether or not as legislator in a more traditional sense) might be done by constitutional courts in an instrumental way: by empowering the parliament, the constitutional court aims to empower itself, and the way to do this recalls the traditional doctrines of national sovereignty, such as, in this case, the *Parliamentsvorbehalt*.

A further example of contemporary versions of the *Gesetzesvorbehalt* doctrine can be found in decisions by the Italian *Corte Costitutionale* and the Spanish *Tribunal Constitucional*. Here, the role played by the Court *vis-à-vis* the legislature is perhaps even more evident in overseeing the latter's implementation of the constitution. For instance, just to look at the most recent developments, the Italian Court struck down part of the Code on Local Authorities (as amended in 2008), which enabled city mayors to issue urgent decrees (*ordinanze sindacali*) on matters of local interest.[24] Due to the lack of clear boundaries of this power conferred by a statute on local authorities, the use of these decrees became more and more pervasive over time. In most cases, these local decrees even introduced sanctions on individuals, thereby encroaching on a field that Article 23 of the Constitution attributes to the domain of parliamentary legislation. Thus, the Constitutional Court recognized the inadequacy of the statutory provision enabling local authorities to issue such decrees and struck it down on the ground of infringement of the legality principle in its substantial meaning.[25] In other words, the Court held that the Parliament had failed to fulfill its task prescribed by the Constitution of being the only law-maker with the right to impose sanctions, and consequently annulled the provision that caused the infringement. Further recent decisions confirm this jurisprudence: when legislative provisions prove vague or inadequate, or are unable to direct administrative activity, the Court intervenes.[26]

Similarly, already in its first years of operation the Spanish *Tribunal Constitucional* admitted the possibility of delegation to regulations by the executive in

[24] See decision no. 115/2011.
[25] U. De Siervo, *Conclusioni*, in M. Cartabia et al. (eds.), *Gli atti normativi del Governo tra Corte costituzionale e giudici*, Giappichelli 2011, p. 553-559.
[26] See, at least, decisions nos. 232/2010, 248/2011 and 200/2012.

fields reserved by the constitution for parliamentary legislation, but it required parliamentary legislation to maintain a pivotal role in the system of the sources of law, avoiding independent regulatory activity by the government in such matters.[27]

In conclusion, in a time of rigid and "strong" constitutions,[28] constitutional courts are empowered to enforce the constitution and to declare pieces of legislation void whenever they transgress. Thus, the role of parliamentary legislation in continental Europe has certainly changed, becoming far more relative. From the legislative state of the nineteenth century to the constitutional state of the subsequent one, statutes have lost the centrality that they once held, and constraints upon the autonomy of the legislative powers have significantly increased. In particular, within the framework of national legal orders, parliamentary legislation continues to hold a supremacy in matters concerning fundamental rights, but within the limitations of rigid constitutions and according to interpretation of the latter by constitutional courts. However, constitutional courts themselves are strategically interested in maintaining the pivotal role of parliaments and parliamentary legislation in order to secure their position against "pressures" coming from the outside, and especially from supranational courts.[29] The following part of this paper is devoted to an analysis of the influence of supranational courts on domestic legal orders and to the effects that specifically derive from national constitutional courts.

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[27] See decision no. 83/1984: "el principio de reserva de ley entraña una garantía esencial de nuestro Estado de Derecho, cuyo significado último es el de asegurar que la regulación de los ámbitos de libertad que corresponden a los ciudadanos dependa exclusivamente de la voluntad de los representantes, por lo que tales ámbitos han de quedar exentos de la acción del ejecutivo y, en consecuencia, de sus productos normativos propios, que son los reglamentos. El principio no excluye la posibilidad de que las leyes contengan remisiones a normas reglamentarias, pero sí que tales remisiones hagan posible una regulación independiente y no claramente subordinada a la Ley, lo que supondría una degradación de la reserva formulada por la Constitución a favor del legislador."

[28] The idea of "strength" of the Constitution is proposed by L. Paladin, *Le fonti del diritto italiano*, Il Mulino 1996. According to this idea, constitutions can be considered "rigid" when the procedures for their amendment are more complex than those for ordinary legislation, requiring at least a larger majority; and constitutions can be considered "strong" when there is a body (*i.e.* a constitutional court) or a power held by judges to enforce their clauses and to concretely ensure that the constitution actually prevails over ordinary legislation.

[29] Specifically on the pressures on constitutional courts, see V. Ferreres Comella, *Constitutional Courts and Democratic Values: A European Perspective*, YUP 2009, in particular pp. 139-154.

4. Gesetzesvorbehalt-like Clauses in the ECHR and the Position of the Court of Strasbourg in Interpreting References to the "Law" Therein

The aim of this section is to show how the ECtHR approach to sources of law diverges from that affirmed through time in western continental Europe and why its interpretation of the concept of "law" ultimately clashes with the tradition of nation-states of recognizing a preference to parliamentary legislation.

The existence of normative domains reserved to parliamentary legislation – *Gesetzesvorbehalte* – is typically identifiable by clauses of constitutional text assigning the discipline of a given matter to (parliamentary) legislation.[30] Not dissimilarly, many clauses of the ECHR state that limitations to the individual fundamental right at issue must be "prescribed by law" or respect "conditions provided for by law".[31] I will deal with the interpretation of these clauses given by the ECtHR later. For the moment, it is worth underlining that the English version of the text is alone in providing a very broad definition of the means through which limitations to the enjoyment of rights might be imposed (the "law", in an abstract and general sense).[32] In contrast, in several different linguistic versions of the same text, reference is made to a precise class of legal acts, namely to parliamentary *statutes* – rather than the abstract concept of "law".[33] Thus, when comparing the wording of the ECHR to that of national constitutions, very little difference can be found with respect to the usual formulation of clauses setting *Gesetzesvorbehalte*. It is generally difficult to find any salient distinction either in textual terms, the context (the constitutive document of the legal order), the specific

[30] Just to take a few examples, art. 19.1: "Soweit nach diesem Grundgesetz ein Grundrecht durch Gesetz oder auf Grund eines Gesetzes eingeschränkt werden kann, muß das Gesetz allgemein und nicht nur für den Einzelfall gelten. Außerdem muß das Gesetz das Grundrecht unter Angabe des Artikels nennen" [*Insofar as, under this Basic Law, a basic right may be restricted by or pursuant to a statute, this statute must apply generally and not merely to a single case. In addition, the statute must specify the basic right affected and the article in which it appears*]; art. 23 Italian Constitution: "Nessuna prestazione personale o patrimoniale può essere imposta se non in base alla legge" [*No obligations of a personal or a financial nature may be imposed on any person except by statute*].

[31] See, at least, art. 5, 9, 10 and 11 ECHR.; Art, 1, prot. no. 1; moreover, see all the times in which the adjective "lawful" comes into play.

[32] The ECHR was drafted in two official languages (English and French) and translated into 34 more: most of the official languages of the member states of the Council of Europe, but surprisingly not all of them: for example, there are no official translations into Greek or Gaelic (this being one of the official languages of Ireland, and both are official languages of the European Union), whereas there is one in Catalan – and geographically more distant languages such as Arabic and Chinese.

[33] Significantly, it is possible to find similar references in the French ("*loi*"), German ("*Gesetz*"), Italian ("*legge*") and Spanish ("*ley*") versions, and in many others too.

subject (fundamental rights), the aim of the clause (to provide for the way in which the former can be limited), or the logical connection between the last two elements.

Far from representing mere linguistic alternatives, these different references to concepts of "law", on the one hand, and to that of the "(parliamentary) legislative act", on the other, reflect conceptual distinctions, each of which is descended from the tradition of each individual legal culture. This topic has been occasionally investigated by German scholars[34] or otherwise discussed in specific fields such as criminal law,[35] but to date it does not seem to have received extensive study in the English-speaking literature, probably because it has been considered to be too much a "national" interest (since the problem only arises with regard to national practice and always in non-English speaking countries). However, it would seem to deserve general consideration as it may help us to attain a more comprehensive awareness of the actual impact of the ECHR on national systems of rights protections.

It is true that the perspective of the Court of Strasbourg on such dynamics inherent in domestic systems of sources of law is extremely different from that of national courts (constitutional or otherwise). As a supranational body, the ECtHR does not take into account mechanisms such as *Gesetzesvorbehalt*, which simply fall out of its jurisdiction. It would be inconceivable for the Court to enter into the formalities of each of the 47 different legal systems composing the Council of Europe, not only because practically it would be almost impossible, but more so because it would make legal *nonsense* in the light of the institutional mission of the ECtHR itself. The formal interrelation between the sources of law in a given legal system (their *validity,* so to speak) can be correctly evaluated only on the basis of national constitutions and domestic interpretative practices. Thus, in any case, it would exceed the institutional mission of the ECtHR.[36] Being a (supranational) judge of concrete individual rights,

[34] R. Weiβ, Das Gesetz im Sinne der Europäischen Menschenrechtskonvention, Duncker & Humboldt, 1996.

[35] For example, most commentaries on the ECHR delve into this topic when analyzing art. 7 and its basic principle *nulla poena sine lege*. See P. Rolland, *Article 7*, in L.E. Pettiti, E. Decaux and P.H. Imbert (eds.), *La Convention européenne des droits de l'homme. Commentaire article par article*, Economica 1995, 293-303.

[36] A. Stone Sweet and H. Keller, quoted at fn. 2, p. 14: "the ECHR is an autonomous legal regime. The Court does not preside over a hierarchically constituted judicial system in which it exercises appellate review, or cassation powers, when it comes to decisions of national courts. Put differently, the Court's

rather than of abstract (domestic) law, it therefore holds no powers to invalidate acts subject to its scrutiny.[37] Finally, not having to take account of the consequences of its own decisions beyond the individual case at issue (apart from the effects on its own subsequent case law), the ECtHR has another reason to pay less attention to the systemic consequences of its decisions in national legal systems.[38]

Consequently, apart from some early decisions in which a more rigid view of the separation of powers seemed to be adopted,[39] the Court of Strasbourg has employed a fully substantial (instrumental) approach to the concept of law, recognizing a wide margin of appreciation to national legal orders, including with regard to the nature and the rank of legal measures, disregarding any formality whatsoever.[40] In its massive case law, it states that "the concept of 'law' must be understood in its 'substantive' sense, not its 'formal' one", therefore including everything that goes to make up the written law, including enactments of lower rank than statutes,[41] as well as *unwritten* law.[42] By focusing on the instrumental features of the "law", the ECtHR has drawn up a set of qualitative requirements to be met in order to identify what "law" is,[43] such as precision, clarity, accessibility and foreseeability.[44] On this basis, the ECtHR does not exclude

command and control capacities are weak, at best. They are primarily reduced to the ordering of compensatory damages to be paid in just satisfaction to successful applicants."

[37] L. Favoreu, Les cours de Luxembourg et de Strasbourg ne sont pas de cours constitutionnelles, in Au carrefour des droits: Mélanges en l'honneur de Louis Dubouis, Dalloz 2002, p. 35.

[38] See the opinion of the former President of the Italian *Corte Costituzionale*, F. Gallo, *Rapporti tra Corte costituzionale e Corte EDU*, at www.cortecostituzionale.it, p. 4. This situation might change in the near future in the case of ratification and entry into force of Protocol no. 16, signed in October 2013, which would allow the highest courts of a state party to request the Court to give advisory opinions on questions of principle relating to interpretation of the ECHR. For a (strongly debated) decision by the Italian Constitutional Court underlining the differences between the role and the powers of the ECtHR and the national Constitutional Courts see no. 264/2012, according to which (§5.4 in "Considerato in diritto") only the latter operate a comprehensive (and not an isolated) balancing of the values involved in each litigation.

[39] *Zand* v *Austria*, 16 May 1977.

[40] I have contributed to a summary of the evolution of the case law in this field in N. Lupo and G. Piccirilli, *European Court of Human Rights and the quality of legislation: shifting to a substantial concept of 'law'?*, in *Legisprudence*, 2012 (2), p. 229-242.

[41] *Ekin Association* v *France*, 17 July 2001. Similar cases are: *De Wilde, Ooms and Versyp* v *Belgium*, 18 June 1971; *N.F.* v *Italy*, 2 August 2001; *Maestri* v *Italy*, 20 February 2004; *Savino and Others* v *Italy,* 28 April 2009.

[42] The Sunday Times v the United Kingdom case, 26 April 1979.

[43] *Kruslin* v *France*, 24 April 1990: (then restated in the concurring opinion of Judge Morenilla in the case *Open Door and Dublin Well Woman* v *Ireland* case, 19 October 1992).

[44] Among others, specifically on the precision of the law, in: *Kokkinakis* v *Greece*, 25 May 1993; *Vogt* v *Germany*, 26 September 1995; *Rekvényi* v *Hungary*, 20 May 1999; *Hashman and Harrup* v *the United*

judge-made law either, recognizing its suitability to be considered "law" on equal footing with legislation for the purpose of the Convention, on the condition that it meets the same qualitative requirements.[45]

5. The Implementation of the ECtHR Idea of "Law" at National Level via Judicial Dialogue (and the consequent marginalization of legislatures)

Once the indifference toward the particularities of domestic sources of law has been proven within the case law of the ECtHR, what deserves further evaluation are the effects of the latter at national level. Recalling Stone Sweet's idea of the ECHR "destroying" the doctrines that underpinned centralized sovereignty in nation states for centuries, this seems to be precisely the case of *Gesetzesvorbehalt*. Even the more "modern" and relative version of it which emerged under the contemporary constitutional state is completely overturned within the framework of the ECHR.

As stated, this instrumental idea of "law" embraced by the Strasbourg Court disregards any consideration of the formal rank of what has to be considered as "law". If this is not only perfectly understandable but also even legally necessary at supranational level, the subsequent effect of this jurisprudence in national legal systems is precisely that of depriving parliamentary legislation of its distinctive role, traditionally fostered and protected by domestic courts.

To understand how this may have occurred, it is necessary to look at the effects of such judgments at national level. The case law of the Court of Strasbourg constitutes the *law in action* of fundamental rights enshrined in the ECHR and so, in the light of the way in which the latter has been incorporated in domestic legal systems, it also enjoys a *supra*-legislative rank. In countries with a centralized system of constitutional justice, only constitutional courts may question the standards set in Strasbourg by imposing a higher level of right protection at the internal level.[46]

In contrast, ordinary courts are in a very different position. From a certain point of view, they cannot directly challenge the ECtHR case law; they are simply required to

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Kingdom, 25 November 1999; and on clarity and foreseeability: *Tolstoy Miloslavsky* v *the United Kingdom*.

[45] *Cantoni* v *France*, 15 November 1996, and then: *Coëme and Others* v *Belgium*, 22 June 2000; *Achour* v *France*, 29 March 2006.

[46] On this topic, but without a definitive answer, see E. Bjorge, *National supreme courts and* the *development of ECHR rights*, in *International Journal of Constitutional Law*, 2011 (1), p. 5-31.

apply it. Otherwise, by definition, they would commit a further violation of the Convention by not implementing it in the terms indicated by the ECtHR. Moreover, ordinary domestic judges share no power to further interpret or adapt ECtHR case law in the light of national practice. They have to consider ECtHR case law as an "external fact" and take it as such.[47] This happens not only because of its *supra*-legislative status, but also because the substance of Strasbourg judgments enjoys a sort of "authority of final interpretation"[48] that binds national judges: once the Convention right at issue – which enjoys a status that is able to bind national judges – has been conclusively interpreted by the body institutionally devoted to that – *i.e.* the ECtHR – domestic judges cannot do anything but follow that interpretation.

From a different point of view, even though ordinary domestic courts may not interpret their role as bound by supranational jurisdictions, they may equally foster the enforcement of their judgments in a sort of inter-institutional competition with constitutional courts. In both cases, such processes lead to a completely unexpected (be it intentional or otherwise) effect: the empowerment of ordinary judges *vis-à-vis* constitutional courts, because, in the application of the ECtHR case law (albeit with a marginal degree of autonomy), the former are entitled to deal directly with fundamental rights, which are usually reserved to the latter.[49]

Coming to the focus of this analysis, what we are witnessing is a sort of short-circuit in judicial dialogue: (1) individuals appeal directly to the ECtHR, completely bypassing national institutions (and even with the intention of going against their determinations); (2) upon these individuals' applications, the ECtHR defines – for its

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[47] G. Repetto, Rethinking a Constitutional Role for the ECHR, in G. Repetto (ed.), *The Constitutional Relevance of the ECHR in domestic and European Law. An Italian perspective*, Intersentia, 2013, p. 37-53.

[48] In this sense, see J. Andriantsimbazovina, L'autorité des décisions de justice constitutionnelles et européennes sur le juge administratif français. Conseil constitutionnel, Cour de justice des Communautés européennes et Cour européenne des droits de l'homme, LGDJ 1998, p. 369, who in the context of the ECHR develops the idea of "autorité de chose interprétée" first elaborated with regard to the preliminary rulings of the European Court of Justice by J. Boulouis, À propos de la fonction normative de la jurisprudence. Remarques sur l'œuvre jurisprudentielle de la Cour de justice des Communautés européennes, in Mélanges offerts à Marcel Waline. Le juge et le droit public, LGDJ 1974, p. 155.

[49] See L. Garlicki, *Constitutional Courts versus Supreme Courts*, in *International Journal of Constitutional Law*, 2007 (1), p. 47-68, at p. 49: "The judicial process no longer is limited to the two-dimensional application of statutory norms to the facts of the case. In the modern constitutional state, each and every judge must first establish the content of the relevant norm, and this requires the simultaneous application of statutory, constitutional, and supranational provisions."

purposes – what has to be considered "law" (namely, what kind of source might limit or discipline a fundamental right) with the aim of interpreting the individual fundamental rights enshrined in the ECHR; (3) the individual state is obliged to implement the decisions of the ECtHR; (4) and, in so doing, domestic judges are called upon to implement the ECtHR decisions, including the concept of "law" as defined therein, irrespective of whether it would be considered as such according to domestic interpretative practice or not.

An example will make things clearer. As stated, the ECtHR makes no distinction between parliamentary legislation and judge-made law, "lawfulness" being reached by substantive conditions such as the precision, clarity, accessibility and foreseeability of the legal command, regardless of how it is framed or enacted. With its decision no. 18288/2010, the Italian Court of Cassation (the "supreme Court" for civil and criminal matters) implemented this jurisprudence in domestic law – as an obligation under Article 7 ECHR – recognizing its own decisions as having the same legal value as a new statute approved by the Parliament. In doing so, it declared its own case law[50] to be a new "element of law" under Article 666 of the Code of Criminal Procedure (whereas up to that time it was something reserved exclusively to parliamentary statutes) in order to agree on a more favorable regime for the execution of penalties in matters concerning one of the "most fundamental" rights, such as *habeas corpus*.[51]

The example shows how the Italian Court of Cassation made use of the concept of law elaborated in Strasbourg, thereby overcoming previous national interpretative practices. It was necessary to broaden the concept of law by also including judge-made law in order not to impose internal constraints on the protection of the Convention right to legality of punishment as interpreted by the ECtHR.

However, in doing so the Court of Cassation exploited the jurisprudence of the ECtHR to its own advantage in order to gain power *vis-à-vis* both the Parliament and

[50] At least, decisions taken by its Joint Sections ("Sezioni Unite"), this being the highest body within the Court of Cassation, similar to a Grand Chamber.

[51] The case is far more complicated than how it has been summarized here, involving a pardon law approved by the Parliament and a person convicted in a third country and then transferred to Italy for detention. For details, see F. Biondi, *La decisione delle Sezioni Unite della Cassazione ha lo stesso "valore" della fonte del diritto scritto? Quando l'interpretazione conforme alla CEDU pone dubbi di costituzionalità*, in *Osservatorio sulle fonti*, 2010 (3), p. 1-7.

the Constitutional Court. Ultimately, it recognized itself as a positive law-maker, able to tackle fundamental rights without any concern for the doctrine of *Gesetzesvorbehalt,* which would have imposed either the supremacy of parliamentary legislation in that field or, at the very least, the question of constitutionality on the Constitutional Court in order to refer the *rapprochement* between internal and external safeguards to that body.

Finally, it is worth underlining the complete absence of any role for legislatures in this entire discourse. The idea of "law" has been shifting from correspondence with that of "parliamentary statute" to a much more comprehensive one, without any minimal contribution of the former protagonists of law-making. The combination of: (1) applications by individuals; (2) the *supra*-legislative status of the ECHR in the domestic legal order; and (3) interaction among domestic courts and the supranational one all rule parliaments out of the game.

The ECtHR pursues its institutional mission without concerning itself with national specificities. Its jurisprudence is implemented at national level through judicial dialogue with domestic courts, undermining the very idea of a parliamentary (*i.e.* democratic) origin of the law. In sum, even though the doctrine of *Gesetzesvorbehalt* had already been relativized by the advent of the constitutional state and constitutional courts, it is evident that any minimal concept of this doctrine is about to vanish.

6. The case of Italy: Jurisdictional claims by the Constitutional Court as a strategy to "survive" in the rights protection network

Not only has the role of national legislatures been reduced by the loss of privileged status of parliamentary legislation, but further consequences also involve national constitutional courts, at least those whose jurisdiction is limited to specific classes of acts, such as legislative ones.

This, for example, is the case of Italy, where access to judicial review is based on formal requirements relating to the rank of the individual legal act at issue. Article 134 of the 1948 Constitution states that only statutes (*leggi*) and a further closed number of other acts at legislative level (such as so-called *decreti-legge* and *decreti legislativi*, both defined by the Constitution as *atti con forza di legge*[52]) are justiciable before the *Corte*

[52] Both the above-mentioned categories of acts either follow an act of delegation entailed in a parliamentary statute (*decreti legislativi*) or receive confirmation ("*conversione*") by a parliamentary

Costituzionale. Therefore, any alleged violation of constitutional rights can be scrutinized by the Constitutional Court as long as it is somehow rooted in one of the above-mentioned categories of acts. In contrast, no access to judicial review is admitted when it is grounded on a different (other than statutory) legal basis. However, if the violation comes from a non-legislative act depending on a legislative provision that is unable to guide and constrain the law-making power of the executive, the *Corte Costituzionale* – as in the example mentioned above[53] – can intervene indirectly by annulling the latter because of its failure to fulfill the task imposed on parliament by the *riserva di legge*.

This limitation to the jurisdiction of constitutional justice is also relevant to defining, *vice versa*, the domain of the competences of ordinary courts. Individuals have no direct access to constitutional justice. There is no way of making constitutional complaints similar to the German *Verfassungsbeschwerde* or the Spanish *amparo*. Thus, the only way in which individuals may bring cases before the judge of laws is through ordinary judges: if the alleged violation stems from one of the above-mentioned categories of acts, the judge can issue a question of constitutionality to the Constitutional Court. If not, it will fall to the ordinary judge to deal with the case directly and give a final answer to it.

Nevertheless, problems (from the point of view of the *Corte Costituzionale*) arise when the violation of a fundamental right cannot be connected to an infringement of the Constitution carried out by a legislative act, simply because there is no legal basis of statutory rank to constitute the object of the constitutional litigation. In this hypothesis, as stated, the power to solve the case relies directly on ordinary judges, since appeal to the Constitutional Court would be either impossible or unfruitful (because it would not fall within its jurisdiction).

Thus, by being restricted to legislative acts in a formal sense, the jurisdiction of the *Corte Costituzionale* is very sensitive to an extensive implementation in Italy of the

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statute within 60 days ("*decreti legge*"). The idea of "*forza di legge*" (roughly, legislative rank) is more or less the same as the German concept of *Gesetzeskraft*, in the sense that it works both passively (as an ability to resist modification attempted by lower acts) and actively (an ability to modify acts having the same formal legislative rank). See V. Onida (ed.), *Constitutional Law in Italy*, Wolters Kluwer 2013, at p. 56-59.

[53] The reference is to decision no. 115/2011, quoted at fn. 24.

broader concept of "law" fostered by the ECtHR. If enhanced to its maximum, this would simply nullify the role of the Court in judicial review, because more and more cases concerning fundamental rights would rely upon legal bases devoid of formal legislative rank.

In more general terms, the fully substantial approach of the ECtHR in interpreting reference to the "law" might marginalize legislatures (depriving them of the role traditionally held as the privileged center of law-making), and, in the Italian context, might result in empowering ordinary judges to the detriment of the *Corte costituzionale*. In a certain sense, albeit paradoxically, the jurisprudence of the ECtHR might be seen as even jeopardizing the level of rights protection at national level, at least in the sense of reducing the role of constitutional courts in this field.

This perspective may offer a further way of reading the approach to the ECHR that the *Corte Costituzionale* had already embraced in 2007 with its Decisions nos. 348 and 349. These two decisions have cardinal importance regarding the incorporation of the ECHR because they were the way in which the Convention was recognized as having a *supra*-legislative status within the domestic legal order.[54] However, by means of these two decisions, the *Corte Costituzionale* recognized any violation of the Convention as an indirect violation of the national Constitution, thereby centralizing scrutiny of violations of the ECHR with the effect of taking it away from ordinary courts. The Court made it clear that in every case of an alleged violation of the ECHR the individual judge has no power to apply it directly and has to refer the case to itself.

It seems possible to interpret such a strategy as an attempt by the *Corte Costituzionale* to re-think its own role and, as it were, to "survive" in the network of rights protection that is increasingly occupied by ordinary and supranational judges.

[54] The literature on this point is becoming massive. See, at least, G. Martinico and O. Pollicino, The National Judicial Treatment of the ECHR and EU Laws. The National Judicial Treatment of the ECHR and EU Laws. A Comparative Constitutional Perspective, Europa Law Publishing 2010, and G. Repetto (ed.), The Constitutional Relevance of the ECHR in domestic and European Law. An Italian perspective, quoted at fn. 47.

7. Conclusions

The evolution depicted in this paper shows that, according to the concepts of "law" and "legislation" elaborated by the ECtHR (and in the light of its implementation by ordinary judges), any source of law might be admitted to the discipline of fundamental rights on the condition that it meets some "substantial" requirements, such as clarity, accessibility, foreseeability etc. Consequently, any supposed "uniqueness" (or "specialty") of Parliaments as lawmakers is simply denied, as no "added value" is recognized to democratic-based norms *per se*. Furthermore, even constitutional courts are "threatened" by this evolution since they risk already being deprived of their monopoly over guaranteeing fundamental rights in domestic judicial competition (not to mention their "competition" with supranational courts).

In the light of these results, all the claims made by Stone Sweet quoted at the beginning of the paper[55] seem to be confirmed by the facts, particularly considering their reflections in domestic systems of sources of law. The specific ways in which each national legal order will move in this direction might be different one from the other, but the general impression is that they will all converge in a common framework, opening up a completely new season for scholarly research into constitutional law.

The same evolution even seems capable of influencing European Union Law, the latest developments in which seem to introduce elements of hierarchization and "parliamentarization" among EU legal acts.[56] However, this is certainly too vast a topic to be undertaken here, and it will deserve a separate paper for its analysis.

[55] As quoted at the beginning of the Foreword, "the incorporation of the ECHR generated constitutional pluralism and inter-judicial competition within the national order; it destroyed doctrines that underpinned centralized sovereignty (e.g. legislative supremacy, the monopoly of constitutional courts over the domain of rights protection); and it enhanced judicial power with respect to legislative and executive power."

[56] See J. Bast, New categories of acts after the Lisbon reform: dynamics of parliamentarization in EU law, Common market law review, 2012, p. 885-227.

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