The Relocation of the Legality Principle by the European Courts' Case Law

An Italian Perspective

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Rule of law and the legality principle – Legality principle in the Italian legal system – 'Prescribed by law' – Legality in supranational dimension – 'Democratic disconnect' – Margin of appreciation – Concepts of 'law' and 'legislation' – Democracy-based legislation – Quality of legislation – 'Political constitutionalism' versus 'legal constitutionalism'

The essay tackles the broader trend in the European legal area of moving from the formalistic concepts of 'law' and 'legislation' to substantive ones, by illustrating its reflection in the Italian legal system, as an example of a country of the civil law tradition in contemporary continental Europe. This trend, fostered by the case law of the European Court of Human Rights and somehow implied in the current status of the legal integration within the European Union, has been taken over by the highest Italian Courts.

The results of this evolution are a progressive decline of the formal categories that dominated the public law literature in the past two centuries but, at the same time, carry the risk of also losing the democratic meaning of the legality principle, represented by the necessary linkage between the system of sources of law and the separation of powers. In other words, relocating the role of parliamentary

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legislation means rethinking the role of parliaments *vis-à-vis* both the government and the courts in the contemporary state. The essay fosters the reflection on this process and on some of its potential disadvantages for the good functioning of European continental democracies.

The emerging trend in Europe to weaken the formal, 'democratic' concept of law

This essay deals with the progressive shift, fostered by the case law of both the European Court of Human Rights and the European Court of Justice, to the identification of a 'lowest common denominator' among the different interpretations of the legality principle.

The main claim is that both Courts are leaning towards a more substantive[1] definition of this principle, narrowing the differences between civil law and common law traditions and, to some extent, pushing the former to be more similar to the latter. Hence, and somehow paradoxically, we claim that, in boosting an idea of 'legality' based on a substantive idea of what 'law' is, this same tendency may weaken its democratic essence: the link to the formal requirement has been traditionally related to the supposedly unique nature of parliamentary legislation, due to its derivation from the elected bodies. Thus, any attempt to a less formal approach in identifying what 'law' is would deprive the 'lawfulness' of its roots in the expression of the popular will.

In order to sustain these hypotheses, the Italian legal system is taken as an example, as it is the epitome of a continental European country with a strong civil law tradition, participating in the European Communities and Union, as well as the Council of Europe from their very beginning. The effects of the abovementioned evolution in the Italian legal system might, at least to some extent, be assumed to be similar to other continental European legal systems.

'Thick' and 'thin' meanings of legality: an overview

Few other principles of law constitute such an important cornerstone of the constitutional and administrative architecture as that of legality. However, one can hardly find a definition of the legality principle that is unanimously accepted in continental Europe or even in a single legal system.[2] Some authors even openly

[1] The meaning of 'substantive' and 'formal' (or 'thick' and 'thin') meaning of legality will be explained below. In order to avoid any confusion, we adopted these adjectives in compliance with the use made of the same words by the ECtHR: *see*, for instance, ECtHR 17 July 2001, Case No. 39288/98, *Ekin Association* v *France*, also reported later in more detail.

[2] On such lack of agreement, it may be appropriate to recall the well-known *paradox of Böckenförde*, according to which the contemporary secular State relies on premises that it is not able

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prefer *not* to define it, claiming that any attempt at a more precise elaboration beyond its mere mention might weaken or reduce its potentialities.[3]

In general, at least two opposite positions deserve to be recalled here: those authors who affirm a 'thick' meaning of the legality principle, and those who prefer a 'thin' (or, at least, a much 'thinner') conception of it.[4]

In brief, the former category comprises those authors who deem the narrower sense of the principle, as conceived in the 19th century, unsatisfactory (thereby restricting it to the mere compliance of the activity of the administration with a legal provision), emphasising its democratic dimension. To do so, they consider the parliamentary representative nature of legislative power as the only possibly acceptable expression of republican liberty. This reading of the legality principle has been criticised by contrasting literature that points out that, in that way, excessive attention would have been paid to the law-maker(s) (i.e. parliaments), while the most active and 'modern' part of public law relies on the courts. According to this second interpretation, only the courts determine what is 'lawful' (to wit, what complies with the *law* in a more general sense), beyond the exclusivity of written norms, and operating upon the basis of higher principles of 'reason' and 'justice'.[5]

In an attempt to make the argument clearer, we have to highlight some important (and somewhat odd) linguistic and conceptual paradoxes. The 'thicker', or substantial, meaning of the legality principle is necessarily connected to a stricter (i.e. formal) concept of parliamentary legislation. *Vice versa*, the formal, or 'thinner', meaning of the same principle accepts a broader class of legal instruments (so, including also legal acts different from formal parliamentary legislation). In other words, passing from the analysis of the *principle* (of legality) to that of the *instrument* (the parliamentary statute), the referral to categories of 'form' and 'substance' are inverted.

to justify: E.W. Böckenförde, 'Die Entstehung des Staates als Vorgang der Säkularisierung' (1964), now in *Kirche und christlicher Glaube in den Herausforderungen der Zeit* (Lit-Verlag 2004) p. 213-230.

[3] L. Carlassare, 'Legalità (principio di)' [*Legality principle*], *Enciclopedia giuridica*, XVIII, (Treccani 1990) p. 4.

[4] A vivid summary of this debate can be found in a famous cross-talk between Andrea Orsi Battaglini and Sabino Cassese originated by the former through the editorial in the opening issue of the journal *Diritto pubblico*, A. Orsi Battaglini, 'In limine', *Diritto pubblico* (1995) p. III, which received a harsh reply by the latter, who contested the idea of granting priority in the new journal to the investigation of the legality principle, considering it to be 'a *passe-partout* notion', still used 'due to tiredness'. And again A. Orsi Battaglini, 'Il puro folle e il perfetto citrullo (Discutendo con Sabino Cassese)' [*The pure mad and the perfect fool (Debating with Sabino Cassese)*], *Diritto pubblico* (1995) p. 639-651.

[5] S. Cassese, 'Alla ricerca del Sacro Graal. A proposito della rivista *Diritto pubblico*' [*Hunt for the Holy Grail. About the Journal* Diritto pubblico], *Rivista trimestrale di diritto pubblico* (1995) p. 789 at p. 794.

These two opposite interpretations of the same principle are not a peculiarity of the Italian debate. A similar divergence can be found through the comparison of different legal systems in the European legal area, and often as well within the individual national legal system, depending on the interpretation given to this principle.

The origins of such divergences are, above all, rooted in the traditional concepts of European legal culture, such as the British idea of the *rule of law*, the German concept of *Rechtsstaat*, and the French elaboration on the *État de droit*. Consequently, the idea of 'legality' might be associated with one or the other, considering that they – even in the different articulations of each individual concept – all share some common basic principles,[6] although diverging significantly at the same time because of the role attributed to parliamentary legislation,[7] and because of the recognition of the existence of the state as the (unique) source of legitimacy of public power.[8]

For instance, the development of the legal systems in continental Europe in the 19th century was mainly based upon assigning to parliamentary legislation the power of protecting some fundamental freedoms, thereby setting limitations to the intervention of sources of law other than parliamentary statutes. These limitations (according to national languages, known as *réserve de loi*, *Gesetzesvorbehalt*, *reserva de ley*, *riserva di legge*) are unfamiliar to the legal systems of common law, so that it is even hard to find a good translation of these terms in English. The very idea of reserving a matter for parliamentary legislation represents the link between the system of the sources of law and the equilibrium in the form of government, in which the higher place is given to the source of law stemming from the constitutional body with the strongest popular legitimacy.[9] The main objection to this approach is based on a general suspicion about the implementation of the rule of law mainly through parliamentary statutes, because of its reliance on political decisions taken by a majority, and on a preference for the protection of rights on the part of the judiciary.[10] On the other hand, a focus based exclusively or mainly upon the courts and the judicial protection of rights might

[6] N. McCormick, 'Der Rechtsstaat und die rule of law', *Juristen-Zeitung* (1984) p. 65-70.

[7] L. Besselink et al., 'Introduction: Legality in Multiple Legal Orders', in L. Besselink et al. (eds.), *The Eclipse of the Legality Principle in the European Union* (Kluwer Law International 2011) p. 3-10.

[8] M. Loughlin, *Foundations of Public Law* (Oxford University Press 2010) p. 312; B. Sordi, '*Révolution*, *Rechtsstaat*, and the Rule of Law: historical reflections on the emergence of administrative law in Europe', in S. Rose-Ackerman and P.L. Lindseth (eds.), *Comparative Administrative Law* (Edward Elgar 2011) p. 23-36.

[9] A. Pizzorusso, 'Sistema delle fonti e forma di Stato e di governo' [*System of the sources of law, form of State and form of government*], *Quaderni costituzionali* (1986) p. 217-235; F. Delpérée, 'Constitutional Systems and Sources of Law', in A. Pizzorusso (ed.), *Law in the making. A comparative survey* (Springer Verlag 1988) p. 88-102.

[10] *See*, critically, the literature quoted by J. Waldron, *The dignity of legislation* (Cambridge University Press 1999) p. 7-35. Besides, among others, S. Cassese, 'Die Zukunft war früher auch

weaken the added value of political participation through parliamentary bodies, potentially affecting the democratic nature of law-making and the transparency of its proceedings.[11] In very broad terms, these two positions might be associated with the dispute between legal and political constitutionalism, recently summarised by Richard Bellamy.[12]

A continuum of interpretations of the legality principle

Among Italian public law scholars, there is no general agreement either on the relevance or on the content of the legality principle.

Just to quote the leading opinions in the literature, some authors proposed it as a criterion for constitutional interpretation, recognising its foundational value for the entire legal system, so much so that it was to be used also in the judicial review of legislation;[13] others have qualified it as a general principle of the legal system, but in the sense that it fully depends on the parliament and its decisions.[14] Furthermore, others have objected that too broad an application of the legality principle would even deprive the *riserva di legge* of its meaning: if every provision of the Constitution had to be completed only by means of a parliamentary statute in compliance with the legality principle, those constitutional provisions that specifically require such a measure in relation to a particular subject would become either meaningless or a source of great confusion.[15]

In short, interpretations of the legality principle vary profoundly, so that they range – at the very least – from minimalist concepts such as (i) the mere imposition upon the public administration of the duty not to infringe the legal framework (independent of the nature and content of the latter, making this approach applicable also to authoritarian regimes, in which the idea of the rule of law is reduced to that of rule *by* law),[16] *via* (ii) the requirement of a previous legal

besser', in C. Franchini and B.G. Mattarella (eds.) *Sabino Cassese e i confini del diritto amministrativo* [*Sabino Cassese and the boundaries of administrative law*] (Editoriale Scientifica 2011) p. 92.

[11] *Ex multis*, J. Waldron, 'Legislation and the Rule of Law', *Legisprudence* (2007) p. 91-123.

[12] R. Bellamy, *Political Constitutionalism. A Republican Defence of the Constitutionality of Democracy* (Cambridge University Press 2007) p. 52.

[13] L. Carlassare, *Regolamenti dell'esecutivo e principio di legalità* [*Government regulations and the legality principle*] (CEDAM 1966). This position, and that of Cheli quoted in the subsequent footnote, will be better clarified in the last part of this essay, when examples of case law of the Italian Constitutional Court are quoted.

[14] E. Cheli, 'Ruolo dell'esecutivo e sviluppi recenti del potere regolamentare' [*Role of the executive and recent developments of regulatory power*], *Quaderni costituzionali* (1990) p. 53 at p. 65.

[15] G. Zagrebelsky, *Manuale di diritto costituzionale. Il sistema delle fonti del diritto* [*Handbook of constitutional law. The system of sources of law*] (UTET 1988) p. 53.

[16] B.Z. Tamahana, *On the Rule of Law: History, Politics, Theory* (Cambridge University Press 2004) p. 91-101; T. Ginsburg and T. Moustafa, 'Introduction: The functions of Courts in

provision to make possible the action of the administration; to 'maximalist' concepts such as (iii) the requirement of a democratic linkage between the concrete activity of the executive power and the legislative choices made by the representative body.[17]

Legality's supranational dimension: the 'democratic disconnect' in Europe

In such a fragmented debate on the legality principle, new and different challenges arise in the supranational context, where the democratic linkage between law-making and the addressees of the same legislative rules proves immediately to be much more problematic.

In order to tackle this issue, it appears to be worth using Peter Lindseth's formula of 'democratic disconnect'[18], according to which the real problem affecting EU legitimacy is neither the *input legitimacy* (as the formal and the substantial tools for the participation of the citizens do exist in the EU legal system), nor the *output legitimacy* (that, at least, there has been for a long time). What is lacking is the general perception of an actual oversight of democratic and constitutional bodies in a historically recognisable sense. In other words, what is missing is neither the power *by* the people, nor the power *for* the people, but the power *of* the people.[19] The consequence, which is salient to our discourse, is the need for a 'rethinking of the linkages between supranational norm-production and democratic legitimation derived from the national level'.

Following this perspective, the supranational dimension of the legality principle might be investigated assuming that the European legal area is characterised by the lack (or, in any event, the insufficiency) of links between the system of sources of law and the channels of democratic legitimacy. In particular, with regard to EU law, we should talk about a substantial 'indifference' towards democracy-based legislation, whereas, in the ECHR system, it seems more appropriate to underline the impossibility – from the point of view of the Court in Strasbourg – of operating any such re-connection between (sources of) law and democracy.

authoritarian regimes', in T. Ginsburg and T. Moustafa (eds.), *Rule by law. The politics of Courts in authoritarian regimes* (Cambridge University Press 2008) p. 1-22.

[17] G.U. Rescigno, 'Sul principio di legalità' [*On the legality principle*], *Diritto pubblico* (1995) p. 247 at p. 262.

[18] P.L. Lindseth, 'Delegation is Dead, Long Live Delegation: Managing the Democratic Disconnect in the European Market-Polity', in C. Joerges and R. Dehousse (eds.), *Good Governance in Europe's Integrated Market* (Oxford University Press 2002) p. 151; P.L. Lindseth, *Power and Legitimacy. Reconciling Europe and Nation-State* (Oxford University Press 2010) p. 234.

[19] Again, P.L. Lindseth, 'Of the people. Democracy, the Eurozone and Lincoln's threshold criterion', 22 *The Berlin Journal* (2012) p. 4-7.

In fact, the ECtHR cannot decide on the validity of the internal legal acts for two reasons: first, because the validity can be correctly assumed as a category of interpretation only within each individual legal system on the basis of the national constitution and not from the point of view of a supranational court that decides on the basis of an international treaty;[20] secondly, because the ECtHR is not a judge of abstract law, but a judge of concrete individual rights.[21] Consequently, it has to deal directly with the substance of the controversies, thus putting the analysis of the formal legal framework, in which the claimed violation is set, into the background. In so doing, the ECtHR operates in a way that is closer to a common law judge out of necessity, deciding the individual case upon the basis of the (few) provisions of the Convention, but mainly developing its own framework for the development of the subsequent jurisprudence.[22] Finally, one must not forget that the ECtHR has no powers to invalidate acts subject to its scrutiny: since it has to take less fully into account the consequences of its own decisions beyond the individual case at issue and beyond its own jurisprudence, it tends also to pay less attention to the systemic consequences of its decisions in the national legal system,[23] thus remaining, to a certain extent, 'disconnected' from it.[24]

On the other hand, like the EU itself, the ECJ has a limited domain of competences, upon the basis of the principle of conferral (Article 5 TEU). Due to this, from a procedural point of view the ECJ is in charge of verifying only the level of compliance with forms and procedures of the law-making process among the EU institutions and within them, whereas it holds no powers to scrutinise national law from the procedural perspective, regarding its compliance with the provisions of the Constitutions and the parliamentary rules of procedure. EU member states'

[20] A. Stone Sweet and H. Keller, 'Introduction', in A. Stone Sweet and H. Keller (eds.), *A Europe of Rights. The Impact of the ECHR on National Legal Systems* (Oxford University Press 2008) p. 13-15.

[21] Nevertheless, the technique of the pilot judgments introduces relevant elements of abstractness, being based on consideration of the legal framework rather than on the concrete case.

[22] V. Zagrebelsky, 'La Corte europea dei diritti dell'uomo dopo sessant'anni. Pensieri di un giudice a fine mandato' [*The ECtHR after 60 years. Thoughts of a judge at the end of his term*], <www.csfederalismo.it/images/pdf/lecture_spinelli_2011.pdf>, visited 7 July 2014, p. 6.

[23] F. Gallo, 'Rapporti tra Corte costituzionale e Corte EDU' [*Relationships between Constitutional court and ECtHR*], <www.cortecostituzionale.it/documenti/relazioni_internazionali/RI_BRUXELLES_2012_GALLO.pdf>, visited 7 July 2014, p. 4.

[24] This situation might change in the near future, depending on whether and how the members of the Council of Europe implement the contents of the Brighton Declaration, signed on 20 April 2012 and specifically its point 12 d), according to which a system close to the preliminary reference should be established also for the ECtHR. For a (strongly debated) decision of the Italian Constitutional Court underlining the differences between the role and the powers of the ECtHR and the national Constitutional Courts, see Corte Costituzionale 19 November 2012, Sentenza 264/2012, 'Considerato in diritto' para. 5.4, according to which only the latter operate a comprehensive (and not an isolated) assessment of the values involved in each litigation.

law can be scrutinised by the ECJ only in order to check the fulfilment of an EU obligation and, in any case, no attention is paid to the form and rank of the national measure of implementation.[25]

Moreover, other characteristics of the EU legal system seem to be in favour of the 'disconnection' between the rank of legal acts and the level of democratic participation in their approval.

The weakness of the hierarchy of norms among acts of secondary law has been, at least until the Treaty of Lisbon, a consequence of the precise choice of having no clear separation of powers among the EU institutions. Moreover, the absence of a strict *Stufenbau* – namely, that formal hierarchy in which the validity of one act is dependent on that of a superior act – is functional to the intrinsic feature of the EU as an evolutionary concept (the 'ever closer Union').[26]

Apart from the lack of differentiation in the rank of the acts, the *nomen iuris* of the individual act may not help, either. The names of 'regulation', 'directive' or 'decision' depend on the individual prescription of the Treaties and not on the procedure followed for their approval.[27] Thus, according to the Treaties, there is no difference whatsoever between a Regulation approved under the ordinary legislative procedure (in which the participation of the European Parliament is on an equal footing with the Council) and that approved under a special legislative procedure (in which the European Parliament plays a minor role).

Notwithstanding a number of proposals during the Convention for the draft of the Constitutional Treaty set out to delineate more sharply a hierarchy of norms, thus articulating the separation of powers in the EU in a way closer to that of the member states,[28] this framework has not been significantly changed by the Treaty

[25] Although not related to EU law *stricto sensu*, a slight difference could be found with reference to the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (the so called 'Fiscal Compact'), at least concerning the provision of its Art. 3.2, where member states are required to pass 'provisions of binding force and permanent character, *preferably constitutional*' (emphasis added). However, the same provision continues as follows: 'or otherwise guaranteed to be fully respected and adhered to throughout the national budgetary processes', thus confirming what is claimed in the text. In the literature, *see* L. Besselink and J.H. Reestman, 'The Fiscal Compact and the European Constitutions: "Europe Speaking German"', 8 *EuConst* (2012) p.1 at p. 7.

[26] This testifies to the founders not having wanted the functioning of the institutional framework to be bound by strict relationships of consistency among acts deriving from its different institutions; see R. Bieber and I. Salomé, 'Hierarchy of norms in European Law', 33 *Common Market Law Review* (1996) p. 907-930 at. p. 911.

[27] J. Bast, 'New categories of acts after the Lisbon reform: dynamics of parliamentarization in EU law', 49 *Common market law review* (2012) p. 885-227 at p. 887 n. 8, lists the 16 possible matches of categories and types of legal acts.

[28] R. Schütze, 'Sharpening the Separation of Powers through a Hierarchy of Norms? Reflections on the Draft Constitutional Treaty's regime for legislative and executive law-making', EIPA Working Paper 2005/W/01, p. 1-17.

of Lisbon. Even after the overall revision of the categories of legislative, delegated and implementing acts,[29] the Treaties do not embrace a procedural concept of legislation based on parliamentary participation. Thus, in short, a 'legislative act' is no more than a binding legal act based on a Treaty provision that is explicitly providing a legislative competence.[30]

Therefore, the features of the legal systems of the EU and the ECHR did not encourage the two European Courts to adopt a concept of legislation similar to the one prevailing in most of their member states, nor to verify whether the minimum procedural requirements needed in order to have a 'law' were respected. We shall now examine in more detail how these issues have been considered by the ECtHR and the ECJ.

The ECtHR: the progressive application of the 'margin of appreciation' doctrine to what qualifies as 'law'

In the first years of its activity, the Court in Strasbourg seemed to adopt quite a formalistic idea of 'law' whenever the European Convention of Human Rights made references to it, identifying it with the classical concept of parliamentary legislation. In particular, in *Zand*[31], the Commission (*i.e.*, the body which was operative at that time) made it clear that the reference to the 'law' in Article 6 of the Convention was meant to avoid any governmental regulation on the matter of judicial organisation; secondly, in a more specific way, that 'judicial organization in a democratic society […] should be regulated by law emanating from Parliament'. The same decision grants the intervention of delegated legislation in this matter (paragraph 68), although it requires that the fundamental backbone of the organisational framework be directly established by the legislature. In short, this decision shows how the earlier Strasbourg jurisprudence agreed with the democratic essence of the civil law conception of 'law', as the role of the parliament in legislation was considered essential in itself to constrain the discretion of the executive, beyond the substance of the concrete measure and its higher or lower level of inherent quality.

These first statements in the Strasbourg jurisprudence were suddenly revised just a few years later in *The Sunday Times.*[32] The Court here was quite explicit in broadening the concept of law, stating that 'the word "law" in the expression

[29] P. Craig, 'Delegated Acts, Implementing Acts and the New Comitology Regulation', 5 *European Law Review* (2011) p. 671-687.

[30] J. Bast 2012, *supra* n. 27, at p. 890. Later on, at p. 894, the same author defines the legislation in the Treaty of Lisbon as a 'voluntaristic concept', in the sense that it reflects 'the will of the Treaty drafters'.

[31] EComHR 16 May 1977, Case No. 7360/76, *Zand* v *Austria.*

[32] ECtHR, 26 April 1979, Case No. 6538/74, *The Sunday Times* v *the United Kingdom.*

"prescribed by law" [in Article 10] covers not only statutes but also unwritten law' (paragraph 47). Delving into the motivation used by the Court, one discovers that it resorted to an argument close to originalism in order to defend the legal tradition of the country in which the case was set, recalling that 'it would [have been] clearly contrary to the intention of the drafters of the Convention to hold that a restriction imposed by virtue of the common law is not "prescribed by law" on the sole ground that it is not enunciated in legislation', since this would have deprived 'a common-law State which is Party to the Convention of the protection of Article 10 (2) and struck at the very roots of that State's legal system' (paragraph 47).[33]

The step taken by the Court in *The Sunday Times*, in order to recognise the specificity of the common law legal systems, is important both in the individual case and in a more general perspective. In the individual case, it was a way of opening the reasoning of the Court to one of the major legal cultures, especially on a crucial topic such as that of freedom of expression. Hence, from a more general point of view, the necessary uniformity in the protection of rights among the member states would, sooner or later, have led to an application of the same principle also to civil law countries.

After that, the evolution of the case law of the ECtHR went in precisely this direction. It is easy to find a clear evolution in the sense of broadening the concept of 'law', which now includes not only written acts of lower rank than parliamentary statutes and customary law, but also (and significantly) the case law of member states, conditional on its stability and accessibility: that is, providing a clear, precise and foreseeable legal norm.

With regard to acts of clearly sub-legislative rank, the Court had already put forward a less demanding interpretation of 'lawfulness', in the sense that it had not to be taken as the legislative nature of the national measure, but as a sufficient level of the precision and clarity of its content as well as its ease of accessibility for the addressees.[34] More explicitly, in *Ekin Association*,[35] the Court stated that 'the concept of "law" must be understood in its "substantive" sense, not its "formal" one, so including everything that goes to make up the written law, including enactments of a lower rank than statutes' (paragraph 46).

Coming to decisions that directly concerned Italy, two cases were related to the Italian National Council of the Judiciary (*Consiglio superiore della magistratura*)

[33] T.A. O'Donnel, 'Margin of Appreciation Doctrine: Standards in the Jurisprudence of the European Court of Human Rights', 4 *Human Rights Quarterly* (1982) p. 474-507. Specifically on the case (and on the follow-up in the UK legal system): W.M. Wong, '*The Sunday Times* Case: Freedom of Expression Versus English Contempt-of-Court Law in the European Court of Human Rights', 17 *NYU Journal of International Law and Politics* (1984) p. 35-76.

[34] ECtHR 10 March 1972, Case Nos. 2832/66, 2835/66, 2899/66, *De Wilde, Ooms and Versyp* v *Belgium.*

[35] ECtHR 17 July 2001, Case No. 39288/98, *Ekin Association* v *France.*

and its internal guidelines on the limits of freedom of association for judges, with specific reference to the possibility of their participating in Freemasonry Lodges. Both in *N.F.*[36] and later in *Maestri*[37], the violation of the Convention was not found on the grounds of the nature of the act, either as to its rank, or with regard to the body that approved it. The only bias was found in the wording of the guidelines, which was quite vague and not sufficiently clear as to be perceived as the source of a concrete sanction.[38] Hence, the Court grounded the lack of foreseeability of the sanction on the guideline's origins, underlining how participation in Freemasonry had been discussed only with regard to the advancement of judges' careers, and not also in the context of their disciplinary supervision.[39]

More recently, in the case of *Savino and Others*[40], the theoretical problem is quite the opposite: the applicants contested the recognition as 'law' of a measure (a minor parliamentary regulation concerning the judicial protection of officials of the Chamber of Deputies) which, albeit approved by a parliamentary body, had not been passed by the plenary body but (only) by the Presidium (*Ufficio di Presidenza*) of the Chamber of Deputies (consisting of the President, the vice-presidents and other MPs appointed to specific duties). Moreover, the plaintiffs alleged two claims: first, that the regulation was hardly accessible (as it was not published in the Official Journal); secondly, that the impartiality of the judgment was not guaranteed, since the final body of appeal was the same institution as that of the rule-maker. The ECtHR agreed only on this last point, rejecting the other pleas, and recognising the 'lawfulness' of the regulation approved by the Presidium, using the – factual, rather than systematic – argument that the regulation was actually accessed by the plaintiffs[41] and referred back to the jurisprudence of the Italian Constitutional Court and the Italian Court of Cassation on parliamentary rules of procedure, in order to recognise the regulatory independence of Parliament in its internal affairs.[42]

The evolution in the case law described above may be considered as a development of the broader doctrine of the 'margin of appreciation' – a dominant

[36] ECtHR 2 August 2001, Case No. 37119/97, *N.F.* v *Italy.*

[37] ECtHR 17 February 2004, Case No. 39748/98, *Maestri* v *Italy.*

[38] The guidelines were in fact limited to the expression 'the membership raises delicate problems', without specifying either the nature or the entity of the sanction.

[39] See *Maestri*, *supra* n. 37, para. 40.

[40] ECtHR 28 April 2009, Case Nos. 17214/05 42113/04 20329/05, *Savino and Others* v *Italy.*

[41] Almost immediately after the decision, the regulation, as modified in order to comply with it, was integrally published (for the first time) in the Official Journal.

[42] S.M. Cicconetti, 'Corte europea dei diritti dell'uomo e autodichia parlamentare' [*ECtHR and parliamentary autonomy*], *Giurisprudenza Italiana* (2010) p. 1271-1279; C. Fasone, 'L'autodichia delle Camere dopo il caso Savino. Una condanna (lieve) da parte della Corte di Strasburgo' [*Parliamentary autonomy after the Savino case. A (light) sentence from the ECHR*], *Diritto Pubblico Comparato e Europeo* (2009) p. 1074-1089.

theme of ECtHR jurisprudence – in particular in its 'structural' meaning.[43] It is not so much that each society has to be entitled to some discretion in 'resolving the inherent conflicts between individual rights and national interests or among different moral convictions'[44]: what is relevant here is the margin of appreciation as a feature proper to a supranational judicial system and a subsidiary jurisdiction, thereby implying a certain degree of deference to the national legal system, at least for the institutional architecture of each individual member state.

We could further refine these definitions with regard to the cases analysed, underlining a narrower technical dimension of the margin of appreciation in the sense that the ECtHR looks at the existence of a legal norm, of whatever kind it may be, regardless of its position in the internal legal system, but nonetheless requiring roughly the same standards of legal certainty for all types of normative measures.

EU law and its 'indifference' towards democracy-based legislation

With regard to EU law, the concept of legislation deals with a very different framework in principles, but it ends up being not so dissimilar in practical conclusions.

Once again following the hints provided by Peter Lindseth's theory, European integration can be interpreted as a 'constitutional settlement' that boosted an already existing tendency to delegate normative powers to the executive.[45] As a result, we have been experiencing the dissociation between the delegation of normative powers to the supranational level *via* national governments and the sources of democratic legitimacy, as it is difficult to move the latter away from the nation states. Such a dissociation turns out to be quite paradoxical, as it is increasingly leading to a relocation of the rule of law at European level, although in the absence – or, at least, in a situation of clear weakness – of the conditions on which it typically relies: namely, the cultural and political homogeneity of the social community.[46] Moreover, other authors have underlined how the 'construction' of Europe took a purely 'judicial' way, emphasising how it is due to the empowerment of EU and national judges beyond any kind of democracy-based transfer of legitimacy.[47] The result of this was the 'transforming' of the legal

[43] G. Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford University Press 2007), p. 80.

[44] E. Benvenisti, 'Margin of appreciation, consensus and universal standards', 31 *NYU Journal of International Law and Politics* (1999) p. 843-854.

[45] P.L. Lindseth 2010, *supra* n. 18, p. 75.

[46] N. Walker, 'The rule of law and the EU: necessity's mixed virtue', in G. Palombella and N. Walker (eds.), *Relocating the rule of law* (Hart 2009) p. 119-130.

[47] A. Stone Sweet, *The judicial construction of Europe* (Oxford University Press 2004).

systems of the member states, even before the entry into force of the major reforms of the Treaties in the 1990s.[48]

In short, legality within EU law has been built without (or, maybe before) the existence of a political community, and with a system of sources of law that received democratic legitimacy from parliaments only passively and subsequently, with the process of ratification. Therefore, rather than recognising a higher value to the products of the will of the legislature (in hypothesis, a European *loi* as expression of a European *volonté générale*), it implies the 'lack of the traditional distinction between statute and administrative act in Community law'.[49]

This is not to say that there is no underlying legality principle in EU law. On the contrary, if the substantial protection granted by the same principle is quite robust, its 'democratic' dimension appears really thin. In other words, those assumptions of the literature according to which there is a necessary match between the form of government and the system of sources of law[50] do not seem to be confirmed at EU level. Moreover, differently from the system of the ECHR outlined above, this condition of indifference towards the democratic aspects of law-making is a stable characteristic of the EU legal system and not something that has been acquired over time.

Some references to the case law of the ECJ help to present this idea more clearly.

In the famous case *Partie ecologiste 'Les Verts'*,[51] it is possible to find the first affirmation of the rule of law in the European Communities, at least in its 'regulatory' dimension.[52] In this decision, the European Economic Community is defined as a 'Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty'.[53] Thus, although the ECJ affirmed the subjection of both the member states and the European institutions to the rule of law, it occurs without any further specification on the 'specialty' of that law stemming from the representative body. It is true that, in some prior decisions (and, notably, in *Roquette Frères*),[54] the Court stated that the participation of the peoples 'in the

[48] J.H.H. Weiler, 'The transformation of Europe', 100 *Yale Law Journal* (1991) p. 2403 at p. 2431.

[49] M.L Fernandez Esteban, *The Rule of Law in the European Constitution* (Kluwer Law International 2009) p. 159.

[50] A. Pizzorusso 1986, *supra* n. 9, p. 217.

[51] ECJ 26 April 1986, Case C-294/83, *Partie ecologiste 'Les Verts'* v *European Parliament*.

[52] *See*, again, N. Walker, *supra* n. 46, p. 126.

[53] *Les Verts*, *supra* n. 51, para. 23. The French version of the same decision uses the expression 'communauté de droit'.

[54] ECJ 29 October 1980, Case C-138/79, *Roquette Frères* v *Council*.

exercise of power through the intermediary of a representative assembly' is deemed to be a 'fundamental democratic principle'. However, this orientation has to be interpreted in the light of the time in which the decision was adopted (namely, just after the first direct election of the European Parliament) and yet, in the very end, it remained limited to the distribution of competences between the Council and the European Parliament. Furthermore, the identification of the EEC (later the EU) as a 'community of law' was exactly the way whereby the ECJ affirmed its own regulatory role, so that its creative power has no equals in any other legal system (even in those based upon judge-made law), and its decisions are fully taken as 'sources of law' in the national legal systems (at least, in the EU member states of continental Europe).[55]

In the subsequent jurisprudence,[56] the review of the legality of measures seemed to lie with the (quite narrow) control of the legal basis, in terms of ensuring compliance with the principle of conferral, as well as the division of competences among the institutions and respect for the prescribed procedure,[57] without stressing the 'democratic added value' of measures refined through an open debate in the European Parliament.

It still remains to be seen whether the increased number of measures to be approved under the ordinary legislative procedure as well as the new provisions on the democratic principles in the EU introduced by the Treaty of Lisbon (Articles 9 to 12 TEU) will have any impact in the case law of the Court. The stress placed on representative democracy as a foundation of the functioning of the EU might be further interpreted as a recognition of an 'added value' for those measures approved with the decisive involvement of the European Parliament, as the representative body of European citizens, and with the contribution of the national parliaments, through the mechanisms of Protocols Nos. 1 and 2 annexed to the Treaty of Lisbon.

Although some scholars do not share this point of view, opting for a more formal perspective in continuity with the past,[58] what could constitute the real counterbalance to the above mentioned 'democratic disconnect' is the increasing

[55] M.P. Chiti, 'I Signori del diritto comunitario. La Corte di giustizia e lo sviluppo del diritto amministrativo europeo' [*The Masters of Community Law. The ECJ and the development of European administrative law*], *Rivista trimestrale di diritto pubblico* (1991) p. 796 at p. 798.

[56] ECJ 26 March 1986, Case C-45/86, *Commission* v *Council*; ECJ 4 October 1991, Case C-70/88 *Parliament* v *Council*.

[57] A. Weber, 'Art. 5. Principles on the Distribution and Limits of Competences', in H.-J. Blanke, S. Mangiameli (eds.) *The Treaty on European Union (TEU). A Commentary* (Springer 2013), p. 255-286. G. Tesauro, *Diritto dell'Unione europea* [*EU Law*] (CEDAM 2012), p. 116.

[58] For example, in the Italian literature, M. Starita, *I principi democratici nel diritto dell'Unione europea* [*Democratic principles in the EU law*] (Giappichelli 2011) foresees an increasing division of legislative work between the European Parliament and the Council.

involvement of national parliaments in the democratic life of the EU. Rather than expecting a sudden discovery of the democratic dimension of the legality principle on the part of the ECJ, the emerging action of national parliaments as active players in the EU decision-making – especially in the ordinary legislative procedure, the only one in which the 'orange card' procedure can be used[59] – could lead to a radical change of scenery. In particular, their involvement in the subsidiarity check cannot be limited only to a legal contribution in evaluating respect for the division of competences between the EU and the member states, but has to be considered as opening up to a more comprehensive participation in the refinement of policies. The first 'yellow card' showed the potentialities of this mechanism, with the Commission withdrawing its proposal on the right to strike, although arguing that the subsidiarity principle had not been breached.[60] And even the experience of the second 'yellow card', raised on the proposal for the European Public Prosecutor, albeit different in its results, confirmed the positive influence that the participation of the national parliaments can have on the law-making process in the EU.[61]

Nudged by Europe: The reflections in the Italian legal system and case law

The above-mentioned trends in the supranational legal systems have led, either explicitly or implicitly, to significant novelties in the decisions issued by the highest Italian courts. As usual, it is not easy to summarise the results of an evolution that is currently on-going and stems from court decisions: what is possible is to underline some results that are obviously provisional, subject to further developments, fragmented in time, and also concern specific subject matters.

However, since the idea of legality based upon qualitative criteria, rather than upon the formal rank of parliamentary statutes, was been affirmed at supranational level, both the Supreme Court of Cassation (*Corte Suprema di Cassazione*) and the Constitutional Court (*Corte costituzionale*) have been coherently, albeit slowly, moving in the same direction.

[59] So, again, J. Bast 2012, *supra*. n. 27, p. 893-894.

[60] See, F. Fabbrini and K. Granat, arguing in favour of a scrutiny strictly related to respect for the subsidiarity principle, '"Yellow Card, but No Foul": The Commission Proposal for an EU Regulation on the Right to Strike and the Reaction of the National Parliaments Under the Subsidiarity Protocol', 50 *Common Market Law Review* (2013) p. 115-143. For the opposite solution, see N. Lupo, 'National parliaments in the European integration process: re-aligning politics and policies', in M. Cartabia et al. (eds.), *Democracy and Subsidiarity in the EU* (Il mulino 2013) p. 107-132.

[61] In this second case, the Commission did not proceed to withdraw the proposal, submitting a detailed impact analysis in order to justify its maintenance.

Firstly, both the Court of Cassation and the Constitutional Court recognised the impossibility of adopting the same criteria in judging domestic and European legislation.[62] Secondly, they embraced the trend started by the ECtHR, broadening the concept of 'legislation' far beyond parliamentary statutes (or other measures with the same legal force). Thirdly and finally, an increasing relevance has been attributed to the legality principle in its more substantive meaning, setting aside more formal interpretations based solely upon the democratic derivation of parliamentary statutes.

Borrowing some concepts from the most recent studies in political science, in this field domestic courts seemed to follow a path somewhere in between 'obedience' to and 'contained compliance' with supranational jurisprudence.[63] The core principles of the ECtHR and the ECJ have been fully accepted, but their implementation has been (and still is) coming about progressively and gradually.

Before analysing the reception of these hints from the ECJ and the ECtHR in the Italian legal system, it might be helpful to recall some fundamental steps taken in the last few years by the Italian Constitutional Court on a more general scale. These went clearly in the direction of an opening up of the Italian legal system to the two supranational jurisdictions.[64] First, with Decisions Nos. 348 and 349 in 2007, the Constitutional Court declared the ECHR (and the case law of the ECtHR) suitable to function as a constitutional parameter in the judicial review of legislation.[65] Secondly, with subsequent decision No. 103/2008, the Constitutional Court proceeded to submit the first preliminary reference to the ECJ, finally coming to the acknowledgment of its belonging to the category of 'courts or tribunals of a Member State' (Article 267 TFEU, at that time

[62] Just to quote the leading case on the matter, Corte Costituzionale 18 December 1973, No. 183/1973, 'Considerato in diritto' para. 8, where Community Regulations were recognised as not incompatible with the mechanisms of the *riserva di legge* just because the latter cannot be applied to norms stemming from another legal system.

[63] On this distinction see M. Blauberger, 'National Responses to European Court Jurisprudence', *West European politics* (2013) p. 1-18, according to whom the anticipatory obedience usually occurs 'if legal uncertainty is particularly costly for the supporters of the regulatory *status quo*', whereas the 'contained compliance' is pursued 'if the challengers of the regulatory *status quo* have to carry the main burden of legal uncertainty'.

[64] On the dialogue between the national courts of the Italian legal system (and the Constitutional Court, in particular) and the European courts, see G. Martinico and O. Pollicino, *The Interaction between Europe's Legal Systems: Judicial Dialogue and the Creation of Supranational Laws* (Edward Elgar 2012), p. 87-96.

[65] Specifically on these two decisions, *see* F. Biondi Dal Monte and F. Fontanelli, 'Decision Nos. 348 and 349/2007 of the Italian Constitutional Court: the Efficacy of the European Convention in the Italian Legal System', 9 *German Law Journal* (2008) p. 889-931; O. Pollicino, 'The Italian Constitutional Court at the Crossroads between Constitutional Parochialism and Co-operative Constitutionalism. Judgments No. 348 and 349 of 22 and 24 October 2007', 4 *EuConst* (2008) p. 363-382.

Article 234 TEC).[66] This last step has more recently been confirmed by decision No. 207/2013, by means of which the Constitutional Court issued a second preliminary reference. This second case is extremely important, because for the first time a preliminary reference was issued during a case examined *incidentaliter*, namely upon a reference by a domestic court involving a 'dual preliminarity'. The Constitutional Court had the possibility to refer the case back to the *a quo* judge, asking that the preliminary question be answered first (by means of a preliminary reference to the ECJ), but it decided to formulate on the question itself, with the aim of playing a pivotal role in the judicial dialogue within the multilevel system.[67]

Case law (of the Court of Cassation) equals legislation

With regard to the broadening of the concept of 'law', in 2010 the Court of Cassation adopted a decision that should be considered of historical value, since it formally recognized that its own case law can be deemed, on certain conditions, to be a part of the legal framework for the resolution of subsequent controversies, just as is the case for a new law passed by the legislature. This statement is all the more important as it concerned one of the hardest 'cores' of the legislative domain, to wit the conditions for the review of criminal trials. In Decision No. 18288/10[68], taken by its Joint Criminal Sections (*Sezioni Unite Penali*), the Court of Cassation affirmed that an evolution of the '*diritto vivente*' (i.e. the law in action, beyond the mere wording of the legislation in force[69]), in particular when the case law is underpinned by a decision of the Joint Sections themselves – which constitute the highest body within the Court – can be considered as having the same legal force as a new statute approved by Parliament.[70] In other words, the (highest) judge-made law, considering its substantive quality of ensuring certainty, has not only

[66] On the first preliminary reference to the ECJ by the Italian Constitutional Court, *see* F. Fontanelli and G. Martinico, 'Between Procedural Impermeability and Constitutional Openness: The Italian Constitutional Court and Preliminary References to the European Court of Justice', 16 *European Law Journal* (2010) p. 345-364; G. Martinico, *The tangled Complexity of the EU Constitutional Process* (Routledge 2012), p. 142.

[67] On the dual preliminarity *see* G. Martinico, 'Multiple loyalties and dual preliminarity: the pains of being a judge in a multilevel legal order', 10 *International Journal of Constitutional Law* (2012) p. 871-896. *See also* O. Pollicino, 'From Partial to Full Dialogue with Luxembourg: The Last Cooperative Step of the Italian Constitutional Court', 10 *EuConst* (2014) p. 143-153.

[68] Italian Court of Cassation (Joint Criminal Sections) 21 January 2010, No. 18288.

[69] G. Zagrebelsky, 'La dottrina del diritto vivente' [*The doctrine of the* diritto vivente], 6 *Giurisprudenza costituzionale* (1986) p. 1148-1166.

[70] The content of the decision is deeply analysed by 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' [*Do decisions of the Joint Sections of the Court of Cassation have the same value as written law? When conforming with the interpretation of the ECHR raises issues of constitutional compliance*], *Osservatorio sulle fonti* (2010) p. 1-7.

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been recognized as a proper source of law, but it has also been deemed to share the same value as decisions taken by the representative assemblies, following the very trend established by the Court in Strasbourg.

To some extent, also, the Constitutional Court fits in with the same trend with its Decision No. 230/2012. In this case, the Constitutional Court dealt with the issue of the applicability of an *abolitio criminis* recognized by a Decision of the Joint Sections of the Court of Cassation[71], investigating whether it might be applied also to closed cases, as a retrospective effect of a *lex mitior*. In the end, the Constitutional Court – after some premises reconstructing the traditional position about the impossibility of considering written law and case law equal in a system in which the *riserva di legge* in criminal matters implies a specific role for the parliament[72] – dismissed the case with a formalistic (and, apparently, quite cautious) reasoning: it could not find any decision of the ECtHR affirming expressly the principle of the retrospectivity of the *lex mitior* on the basis of a novelty in the national case law. Such a conclusion cannot, however, exclude the possibility that a future development in the case law of the Court in Strasbourg might lead to a parallel *revirement* (change in the opinion) of the Italian Constitutional Court.[73]

Parliamentary statutes' failure to meet the 'foreseeability' standard of lawfulness

Along the same path as discovering a substantive idea of 'law', another important step has been taken by the Constitutional Court with Decision No. 293/2010. In this decision, the idea that parliamentary statutes can satisfy the legality principle upon the sole basis of their democratic derivation is denied, the Court identifying certain substantive features that are required for a legal act in order for it to be considered as 'law'. In disciplining the so-called 'indirect expropriations' (which, by the way, generated a large number of cases before national courts and the ECtHR),[74] the Court annulled Article 43 of the Code on Expropriation (adopted as delegated legislation[75]), because it exceeded the delegation clause of the parliamentary law on which it was supposed to be based. However, in a salient

[71] *See* Court of Cassation (Joint Criminal Sections) 27 April 2011, No. 16543.

[72] *See* Italian Constitutional Court 8 October 2012, Decision No. 230, 'Considerato in diritto' para. 7.

[73] An evolution in this direction might be found in the decision, subsequent to that released by the Italian Constitutional Court quoted in the text, of ECtHR 21 October 2013, Case no. 42750/09 *Del Rio Prada* v *Spain*.

[74] *See*, at least, ECtHR 30 May 2000, Case No. 31524/96, *Belvedere Alberghiera s.r.l.* v *Italy*; ECtHR 30 May 2000, Case No. 24638/94, *Carbonara and Ventura* v *Italy*; later *see* ECtHR 29 March 2006, Case No. 36813/97 *Scordino* v *Italy*.

[75] The provision was incorporated in the decree of the President of the Republic adopted on 8 June 2001, no. 327.

obiter dictum,[76] the Court anticipated some further substantial reasons that cast strong doubts on its compliance with the qualitative requirements stemming from the case law in Strasbourg. Independently of its formal rank as primary legislation – and so, even if ever transposed into a parliamentary statute – the wording of the provision would have in any case lacked the substantive characteristics of 'lawfulness', according to the quoted jurisprudence of the ECtHR. In particular, the resolution by the Italian Court of Cassation and the Italian Council of State of the controversies originating from this provision diverged in such a way that it was impossible for individuals to regulate their conduct in order to comply with such an uncertain, imprecise and unforeseeable law. Consequently, the Constitutional Court stated that the mere repetition of the same wording in a future parliamentary statute (thus, avoiding any problem with the constraints imposed on the delegated legislation made by the executive) would not be able *per se* to ensure its validity.

In short, the combination of Decisions No. 18288/10 of the Court of Cassation and No. 293/2010 of the Constitutional Court reveals that parliamentary statutes are neither necessary, nor sufficient in themselves, to ensure full compliance with the legality principle.[77] If this were to be confirmed by future case law, in line with Decision No. 230/2012 of the Constitutional Court, we would witness quite a dramatic innovation in the Italian legal system. Although the connection between the effectiveness of the legality principle and the quality of (parliamentary) legislation (in particular, the degree of generality and abstraction of the latter) had already been highlighted in the literature,[78] the possibility of the complete inadequacy of parliamentary statutes to satisfy the principle, because of the lack of some substantial features, has not been explored yet.

Like the evolution of EU law, it seems that also in the Italian legal system an indifference to the democracy-based sources of law is emerging, whereas what really matters is the content of the legal provision, in terms of its clarity, foreseeability and accessibility. Similar conditions can be reached by a parliamentary statute as well as by *any* other source of law; *vice versa*, both legislation and other legal acts can fail in the same attempt, thus up to a certain extent replicating, even in the Italian legal system, the 'indifference' towards the supposed added value of the democratic derivation held by parliamentary

[76] *See* Italian Constitutional Court 4 October 2010, Decision No. 293, 'Considerato in diritto' para 8.4.

[77] G. Piccirilli, 'Una sentenza non conclusiva sul rapporto tra Costituzione e CEDU in tema di espropriazioni indirette. Spunti per uno studio sul concetto di 'legge' nella Convenzione europea dei diritti dell'uomo' [*A non definitive decision on the relationship between ECHR and the Constitution about indirect expropriations. Hints for a study of the concept of 'law' in the European Convention of Human Rights*], *Giurisprudenza italiana* (2010) p. 2003 at 2006.

[78] G.U. Rescigno, *supra* n. 17, p. 262.

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legislation, that has been a pillar of the entire legal order (and of the case law of the Constitutional Court) so far.

The substantive legality principle according to the Constitutional Court

A different thread of case law before the Constitutional Court shows a significant number of decisions in which explicit references were made to the legality principle in its 'substantive' sense, that is to say, going beyond the formal rank of the legal acts involved in the controversy, in order to look for a more comprehensive basis able to ensure that the law can effectively rule.

Decision No. 115/2011 is particularly significant here. By this decision, the legislative provision of Article 54.4 of the Code on local authorities (as amended in 2008), which made a pervasive use of emergency decrees by the city mayors possible (*ordinanze sindacali*), has been declared unconstitutional, because these *ordinanze* began to assume regulative content derogating from statute law and even to prescribe sanctions which – due to the reservation of Article 23 of the Constitution – should remain in the domain of the national legislature. In the end, however, the rationale of the censure was not to ban all regulatory power at local level. On the contrary, the infringement of the legality principle in its substantial meaning was found in what the legislative provision did not provide for: namely, clear boundaries to the powers of the local authorities.[79] Once again, the qualitative deficiencies in the legislative provision were at the centre of the Court's censure. Similarly, although on different topics, the Court decided on the basis of the legality principle in its substantive meaning in a significant number of further cases,[80] affirming the insufficiency of legislative provisions due to their vagueness or their inadequacy in directing the administrative activity. However, this increased attention paid to the topic shows that it is a current trend, the results of which are still far from being completely settled.

The enduring frustration of democratic decision-making within parliamentary assemblies

It is interesting to note how the trend in the Italian legal system seems to follow, mostly in an implicit way, the 'nudges' coming from the European Courts. In particular, some concepts developed by the ECtHR are now making themselves felt even in the reasoning of the Italian Courts. Progressive integration with the two European legal systems is thus pushing the Italian judges further to abandon

[79] U. De Siervo, 'Conclusioni', in M. Cartabia et al. (eds.), *Gli atti normativi del Governo tra Corte costituzionale e giudici* [*Government normative powers between the Constitutional court and judges*] (Giappichelli 2011), p. 553-559.

[80] *See*, at least, Italian Constitutional Court, Decisions Nos. 232/2010, 248/2011, and 200/2012.

old categories of the more traditional schemes of the civil law tradition, in favour of a more comprehensive and substantive approach.

Beyond these external influences, some internal dynamics of the Italian legal system, regarding the features of legislative procedure, also seem to have contributed to this progressive shift. It is the loss of the supposed higher level of transparency and participation in the parliamentary law-making process, and the 'progressive decadence' of the quality of the legislative output of the Parliament, that may have played a significant role in this evolution.

It is probably not the case, for instance, that *all* the above-mentioned decisions of the Constitutional Court, in which the legality principle has been interpreted in its substantive sense, were related to legislative provisions approved through confidence votes and the so-called 'maxi-amendments'. This procedure developed over the years with progressive adjustments, exploiting flaws in the enforcement of parliamentary rules of procedure (which cannot be scrutinised by the Constitutional Court) and the difficulty inherent in politics of imposing self-limitation on the legislative process. In the end, the procedure with the so-called 'maxi-amendments' allows the Government to attach a vote of confidence to a single amendment that practically replaces the entire bill. Doing so, the Government is empowered to force the Parliament to approve massive texts (even of thousands of paragraphs) in a single vote. In the absence of an explicit ban on this procedure, either in the Constitution or in the parliamentary rules of procedure, the Constitutional Court has so far not deemed it unconstitutional.[81] This notwithstanding, the violation of the principles stated in Articles 70 and 72 of the Constitution (concerning the entitlement of the Chambers to legislate, and the requirement of different votes on each single article of a bill) would seem to be all too self-evident.[82]

However this may be, it is clear that statutes approved through this procedure completely lack a sincere and full parliamentary debate which justifies the precedence traditionally accorded to the expressions of popular will. Consequently, the Constitutional Court has been forced to re-think the legality

[81] *See*, for instance, Decisions Nos. 391/1995 and 148/1999; and, more recently, 237/2013.

[82] N. Lupo, 'Emendamenti, maxi-emendamenti e questione di fiducia nelle legislature del maggioritario' [*Amendments, maxi-amendments and the question of confidence in majority legislatures*], in E. Gianfrancesco and N. Lupo (eds.), *Le regole del diritto parlamentare nella dialettica tra maggioranza e opposizione* [*Parliamentary rules in the dialectic between majority and opposition*] (LUISS University Press 2007), p. 41-112; G. Piccirilli, *L'emendamento nel processo di decisione parlamentare* [*Amendments in the parliamentary decision-making process*] (CEDAM 2008), p. 291; M. Manetti, 'Procedimenti, controlli costituzionali e conflitti nella formazione degli atti legislativi' [*Procedures, constitutional oversight and conflicts in parliamentary law-making*], in *Decisione conflitti controlli. Procedure costituzionali e sistema politico* [*Decision, conflicts, oversight. Constitutional procedures and the political system*] (Jovene 2012), p. 3-45.

principle, 're-locating' it according to more substantive criteria, in line with those adopted by the European Courts.

Conclusions. The need for a reconciliation between legal and political constitutionalism, in order to restore the legality principle to its proper place

The evolution described in the Italian legal system shows how the on-going reassessment of the role to be attributed to the legality principle has been driven by the hints given by the supranational jurisdictions. The general (and, to some extent, passive) compliance with the jurisprudence of the ECtHR may have been a safe solution (or a sort of 'soft option') for the Court of Cassation. They were thus able to support such a doctrine without explicit adhesion through the need for a general reconsideration of the fundamental principles in the new context of the broader European legal area. Nevertheless, it seems possible to underline a series of disadvantages or, at least, unintentional consequences, deriving in the long run from pursuing this (mostly implicit, but anyway clear) judicial strategy.

Such a development of the interpretation of the legality principle, one that is triggered and sustained only by courts, risks importing not only the 'solution' from the supranational level, but also its inherent problems. In other words, by following the approach of a more substantive concept of 'law' and setting aside every consideration of the role of democracy-based law, one risks reproducing in the internal arena, also, the 'democratic disconnect' experienced at supranational level. Thus, something (the 'disconnect') produced as a result of necessity (in the area of the Council of Europe) or as a direct consequence of the principle of conferral (in the EU context) would then have been imported to the national level, potentially affecting its basis of democratic legitimacy. Paradoxically, the final result would be further to weaken the role of the national parliaments, which are the very institutions that are typically and naturally invoked as the main source of democratic legitimacy.[83]

The risk consists in an increasing dissociation between the fundamental aims pursued by the courts, on the one hand, and by the parliaments, on the other. In the end, this would result in the illusion that the protection of individual rights by the courts can still work on its own, whilst remaining perfectly separated from the

[83] Echoes of this problem can be found in the above-quoted Decisions No. 230/12 of the Italian Constitutional Court (see *supra* n. 72), where it is affirmed that the legality principle in criminal matters assumed by the ECtHR is narrower than that incorporated in the Italian Constitution, since the former does not take into account principles affirmed by the Constitutional Court's case law (see Decision Nos. 487/89 and 394/06), according to which the law-making in such a field has to be the prerogative of Parliament, as that is the body elected through general suffrage and which decides after an open deliberation process that includes the opposition and, albeit indirectly, the public opinion.

implementation of public policies that are up to the legislature. Although carrying out different duties, both judges and legislators need to be (and feel) responsible for the good functioning of democracy and for the protection of fundamental rights, which can hardly be truly effective with the action of only one out of the two.

In conclusion, between the two opposite (but not necessarily contradictory) positions of the so-called 'legal' and 'political' constitutionalism[84], the result of the evolution outlined in this essay seems to be much closer to 'legal' constitutionalism, relying increasingly on the courts to pursue the formal coherence of the legal system and to protect individual rights through case law. Consequently, parliaments would end up being sidelined from the action of securing the legality principle. In the name of a more comprehensive and enduring protection of the rights of individuals they need, on the contrary, to be included in this aim, starting to promote and protect fundamental rights first in the parliamentary process and then in the enactment of public policies. In this latter scenario, ordinary and constitutional courts would, anyway, be entitled to act in defence of individual rights, but they would operate as a second step in the process, undoubtedly having the 'final word'[85] on legality in the sense of *jurisdictio*, but without claiming to have also the 'first say' in the sense of *gubernaculum*.

[84] For this distinction, see again R. Bellamy, *supra* n. 11, p. 1-12, whose analysis – probably because of the need clearly to state the differences between the two approaches – risks emphasising the elements of divergence even too much, perhaps underestimating the chances of a possible combination.

[85] See. M. Dogliani, 'Il principio di legalità. Dalla conquista del diritto all'ultima parola alla perdita del diritto alla prima' [*The legality principle, from the conquest of the right to the last word to the loss of the right to the first*], *Diritto pubblico* (2008) p. 1-28; and G. Zagrebelsky and V. Marcenò, *Giustizia costituzionale* [*Constitutional Justice*] (Il mulino 2012), p. 102-108, according to whom the balancing among constitutional principles is a task to be exercised first of all by the political process, although with the limit of reasonableness, the protection of which is the responsibility of Constitutional justice, but only *ex post factum* (not *ex ante*).