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**SOME EFFECTS OF EUROPEAN COURTS ON
NATIONAL SOURCES OF LAW: THE EVOLUTION OF
LEGALITY IN THE ITALIAN LEGAL ORDER**

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ABSTRACT

The essay analyses an ongoing tendency that is transforming a traditional cornerstone of constitutional and administrative law in Italy, such as the principle of legality. This progressive makeover is given by the reflections in the internal legal order of the joint effect of the jurisprudence of the European Court of Human Rights, together with the integration in the European Union, that are producing a progressive shift to a more substantial and comprehensive concept of the “rule of law”. The main reason for this seems to derive from the so-called “democratic disconnect” that affects the supranational legal orders and weakens the preference traditionally acknowledged to parliamentary legislation. Due also to the low quality of the internal legislation, the Italian Highest Courts are following the hints coming from the outside and both the Court of Cassation and the Constitutional court are slowly embracing a more comprehensive idea of what “law” is, closer to the idea typical of the “common law” systems.

The results of this evolution are a progressive decline of the formal categories that dominated the literature in the past decades as well as, at the same time, the risk of losing also the democratic meaning of legality, represented by the necessary linkage between the system of sources of law and the form of government. In other words, relocating the role of parliamentary 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 its potential disadvantages for the good functioning of the democracy.

Keywords: Rule of law and the legality – Legality in the Italian legal order – “Prescribed by the law” – Legality in supranational dimension – “Democratic disconnect” – Margin of appreciation – Concepts of “law” and “legislation” – Democratic-based legislation – Nudges from the European Courts – Reflections into the Italian legal order – Legality in criminal matters and the ECHR – Quality of legislation – Frustration of decision-making within parliamentary Assemblies – “Political constitutionalism” v “legal constitutionalism”.

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1. MOVING ON FROM A DISAGREEMENT: THE CONTENT (AND THE ROLE) OF LEGALITY IN THE ITALIAN LEGAL ORDER

A few principles of law embody such cornerstone of the constitutional and administrative architecture as the principle of legality. In general, the idea of correspondence between the legal framework and the state of order of public power entails the idea in itself of a *legal order*. However, paradoxically, one can hardly find a definition of the above-mentioned principle that is unanimously accepted in continental Europe or even in a single legal order,¹ and some authors even openly prefer *not* to define it, claiming that any attempt at a more precise elaboration beyond this simple noun phrase might weaken or reduce its potentialities².

Just to give an idea about how deep (and even harsh) has been the debate among scholars on this topic, it could be interesting to recall a famous cross-talk originated within the Italian Public Law in 1995 between Andrea Orsi Battaglini and Sabino Cassese, which sparked in because of the editorial of the former in the opening issue of the Journal “Diritto pubblico”.³ In particular, Cassese contested the idea of granting priority in the new journal to the investigation of the principle of legality, considering it to be “a *passe-partout* notion” that is still used “due to tiredness”.⁴ Moreover, he pointed out that setting the focus on the principle of legality would have meant paying excessive attention to the law-maker(s), while the most active and “modern” part of administrative law relies on the courts, which were able to enlarge their role and re-define the concept of what “lawful” is (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”.

In his prompt reply, Orsi Battaglini refused to trace legality back to its narrower sense conceived in the XIX century (thereby constraining it to the mere compliance of the activity of the administration to the legislative provision), emphasized its democratic dimension, significantly linking popular

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¹ On such lack of agreement it might 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 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.

² L. CARLASSARE, *Legalità (principio di)*, in *Enciclopedia giuridica*, XVIII, Treccani, 1990, p. 4.

³ A. ORSI BATTAGLINI, *In limine*, in *Diritto pubblico*, 1995, p. I at p. III.

⁴ S. CASSESE, *Alla ricerca del Sacro Graal. A proposito della rivista Diritto pubblico*, in *Rivista trimestrale di diritto pubblico* (1995), p. 789 at p. 794.

sovereignty, democratic representation, parliamentary legislation, highlighting, by means of the latter, the relationship between (public) power and (individual) freedom.⁵

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 system in the European legal space, and often in the individual national legal order, depending on the interpretation given to this principle.

The origins of such divergences are above all rooted in traditional concepts of the European legal culture, such as the Anglo-Saxon 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 declination of each individual concept – all share some common basic principles.⁶ Although, at the same time, they diverge significantly because of the role attributed to parliamentary legislation,⁷ and because of the recognition of the existence of the state as the source of legitimacy of public power.⁸

For instance, the development of the legal systems in continental Europe in the XIX century was mainly based upon the assignment to parliamentary legislation of the discipline of 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 *reserve 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 a reservation to parliamentary legislation represents the link between the system of the sources of law and the inter-institutional balance 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 against this approach relies on a general suspicion about the implementation of the rule of law mainly through parliamentary statutes, because of its foundation on majority decisions, and on a preference for the guaranteeing of rights on the part of the judiciary.¹⁰ On the other hand, a focus based exclusively or mainly upon the courts and upon the judicial protection of

⁵ A. ORSI BATTAGLINI, *Il puro folle e il perfetto citrullo (Discutendo con Sabino Cassese)*, in *Diritto pubblico*, 1995, p. 639-651.

⁶ N. MCCORMICK, *Der Rechtsstaat und die rule of law*, in *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*, in *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 among others S. CASSESE, *Die Zukunft war früher auch besser*, in C. Franchini-B.G. Mattarella (eds.) *Sabino Cassese e i confini del diritto amministrativo*, ES, 2011, p. 92.

rights might weaken the added value of political participation through parliamentary bodies, potentially affecting the democratic nature of law-making and the transparency of its proceedings¹¹. To introduce briefly the debate among Italian public law scholars, it is sufficient to mention that there is any general agreement neither on the relevance nor on the content of legality. Just to quote the leading opinions in the literature, some authors proposed it as a criterion for constitutional interpretation, recognizing its grounding value for the entire legal order, so much so that it was to be used also in the judicial review of legislation¹²; others have deemed it as a general principle of the legal system, but in the sense that it is at the disposal of Parliament.¹³ Furthermore, others have objected that too broad an interpretation of the principle of legality would have even deprived the system of *riserva di legge* of its meaning: if everything in the Constitution required the intervention of a parliamentary statute, those provisions of the Constitution that specifically require it in the substance of the subject matter would become either meaningless or a source of great confusion.¹⁴ In short, the interpretations of legality vary profoundly depending on the doctrines, so that they may differ – at the very least – from some minimalist concepts such as (i) the mere imposition upon the public administration not to infringe the legal framework (independently of how the latter is composed, 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*),¹⁵ or (ii) the requirement of a previous legal command to enable the action of the administration; to a “maximum”, as (iii) a democratic linkage between the concrete activity of the executive power to the legislative choices made by the representative body.¹⁶

2. LEGALITY IN SUPRANATIONAL DIMENSION: THE “DEMOCRATIC DISCONNECT” IN THE EUROPEAN SPACE

Almost 20 years later the picture looks a bit different, and the scenario depicted by Cassese seems closer to reality, in Italy and elsewhere in contemporary Europe. In particular, the supranational Courts operating in Europe (the European Court of Human Rights, hereinafter

¹¹ J. WALDRON, *Legislation and the Rule of Law*, in *Legisprudence*, 2007, p. 91-123; R. BELLAMY, *Political Constitutionalism. A Republican Defence of the Constitutionality of Democracy*, Cambridge University Press, 2007, p. 52.

¹² L. CARLASSARE, *Regolamenti dell'esecutivo e principio di legalità*, CEDAM, 1966.

¹³ E. CHELI, *Ruolo dell'esecutivo e sviluppi recenti del potere regolamentare*, in *Quaderni costituzionali*, 1990, p. 53 at p. 65.

¹⁴ G. ZAGREBELSKY, *Manuale di diritto costituzionale. Il sistema delle fonti del diritto*, UTET, 1988, p. 53.

¹⁵ T. GINSBURG-T. MOUSTAFA, *Introduction: The functions of Courts in authoritarian regimes*, in *Rule by law. The politics of Courts in authoritarian regimes*, edited by the same authors, Cambridge University Press, 2008, p. 1-22.

¹⁶ G.U. RESCIGNO, *Sul principio di legalità*, in *Diritto pubblico*, 1995, p. 247 at p. 262.

ECtHR, and the European Court of Justice, ECJ) have been facing several cases in which they provided hints for the identification of a lowest common denominator in the interpretation of the principle of legality. And both ended up in leaning towards a more substantial definition of it, not so far from that elaborated in the common law systems.

In order to better explain such an evolution, it appears to be worth moving on from an aspect of the problem of democratic legitimacy of supranational legal orders: we will refer to this problem using the formula of “democratic disconnect”, introduced by Peter Lindseth with regard to the European Union and, to some extent, applicable also to the system of rights protection of the ECHR.¹⁷ According to this idea, there is a need for “rethinking of the linkages between supranational norm-production and democratic legitimation derived from the national level”. Thus, one might try to approach the supranational dimension of the principle of legality, assuming that the European legal space experienced the lack (or perhaps, the insufficiency) of links between the system of sources of law and the channels of democratic legitimacy. In particular, with regard to the EU law, one should talk about “indifference” to democratic-based legislation (somehow related to the tension between its *telos* of an ever closer union and the *demos* problem),¹⁸ whereas, in the ECHR system, it seems more appropriate to underline the impossibility – from the point of view of the Court of Strasbourg – to operate any such re-connection.

Starting from the latter, the ECtHR fostered a shift to a much more comprehensive concept of “law” in the interpretation of those clauses of the Convention which assign the discipline of the exercise of fundamental rights to national “law”, as a means both to protect *and* to implement them. The concept of “law” has been broadened to include not only parliamentary legislation (as it would have been typical in the tradition of civil law countries), but, progressively, also delegated legislation and subsequent sub-legislative acts approved by the governments, customary law and judicial precedents¹⁹. As mentioned, this process developed essentially upon the basis of necessity: in a context such as the Council of Europe, in which 47 different Member States are called to co-exist whilst maintaining their own legal cultures, it is easily understandable that the ECtHR is simply not able to take into consideration all the possible declinations of 47 national systems of sources of law, all different from one another, in number, nature, and the respective allocation of ranks within the hierarchy of the norms.

¹⁷ P. 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, and *Power and Legitimacy. Reconciling Europe and Nation-State*, Oxford University Press, 2010, p. 234.

¹⁸ J.H.H. WEILER, *Does Europe Need a Constitution? Demos, Telos and the German Maastricht Decision*, in *European Law Journal*, 1995, p. 219-258.

¹⁹ see, in details, *infra*.

To better understand the “necessity” for this first kind of “democratic disconnect”, it has to be underlined that the ECtHR cannot decide upon the basis of the validity of the internal legal acts: firstly, because the validity can be correctly assumed as a category of interpretation only within each individual legal system (to wit, judging upon the basis of the national constitution), and not from the point of view of a supranational court that decides upon 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. 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. Doing so, the ECtHR, *per* necessity, operates in a way closer to a judge of common law, deciding the individual case upon the basis of the (few) provisions of the Convention, but mainly developing its own framework for the solution of the subsequent jurisprudence²¹. Finally, one must not forget that the ECtHR has no powers to invalidate acts subject to its scrutiny: since it has to take less into account the consequences of its own decision 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,²² thus remaining, to a certain extent, “disconnected” from it.²³

On the other hand, the ECJ, like the EU itself, has a limited domain of competences, upon the basis of the principle of conferral (Art. 5 TEU). Due to this, it operates only in a “horizontal” way: in the sense that 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 scrutinize national law from this perspective. National law can be scrutinized only in order to check the fulfillment of a EU obligation and, anyway, no attention is paid at the European level to the form and the rank of the national measure of implementation.²⁴

²⁰ A. STONE SWEET-H. KELLER, *Introduction to A Europe of Rights. The impact of the ECHR on national legal systems*, Oxford University Press 2008, p. 13-15.

²¹ V. ZAGREBELSKY, *La Corte europea dei diritti dell'uomo dopo sessant'anni. Pensieri di un giudice a fine mandato*, www.csfederalismo.it/images/pdf/lecture_spinelli_2011.pdf, p. 6.

²² F. GALLO, *Rapporti tra Corte costituzionale e Corte EDU*, www.cortecostituzionale.it/documenti/relazioni_internazionali/RI_BRUXELLES_2012_GALLO.pdf, p. 4.

²³ This situation might change in the next future, depending on whether and how the Members of the Council of Europe will implement the contents of the Brighton Declaration, signed on the 20th April 2012 and specifically its point 12 d), according to which a system close to the preliminary reference should be established also to the ECtHR (see, again, F. GALLO, *supra* n. 22, p. 9).

²⁴ Although non immediately related to the 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 claimed in the text. In the literature, see L. BESSELINK-J.H. REESTMAN, *The Fiscal Compact and the European Constitutions: “Europe Speaking German”*, in *European Constitutional Law Review*, 2012, p. 7

Moreover, other characteristics of the EU legal systems seem to be in favour of the above-mentioned “disconnect” between the rank of legal acts and the level of democratic participation in their approval: the *nomen* and the legal rank of the acts of secondary legislation (such as “regulation” or “directive”) depend on the prescription of the Treaties upon the basis of their effects and not because of the procedure for their approval. In other words, according to the Treaties, there is no difference whatsoever between a regulation approved under consultation procedure or one approved under ordinary legislative procedure (in which the participation of the European Parliament is full and active).

Both Courts deserve some further elaboration, taking into account – albeit briefly – some trends in their case-law which are essential to the present analysis.

In the first years of activity, the Court of Strasbourg seemed to adopt quite a formalistic idea of “law”, identifying it with the classical concept of parliamentary legislation. In particular, in *Zand*²⁵, the Commission (*i.e.*, the body which was operative at that time) made it clear that the reference to the “law” was meant to avoid any governmental regulation on the matter; secondly, in a more specific way, that “judicial organization in a democratic society [...] should be regulated by law emanating from Parliament”. The same decision admits the intervention of delegated legislation in this matter (§68), although it requires that the fundamental backbone of the organizational framework has to be directly established by the legislature. In short, this decision shows how the earlier case-law of the ECtHR 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 jurisprudence of the ECtHR were suddenly overtaken just a few years later in *The Sunday Times*²⁶. The Court here was quite explicit in broadening the concept of law, stating that “the word ‘law’ in the expression ‘prescribed by law’ covers not only statute but also unwritten law” (§47). Delving into the motivation used by the Court, one discovers that the Court 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

²⁵ ECtHR 16 May 1977, Case No. 7360/76, *Zand v Austria*.

²⁶ ECtHR 26 April 1979, Case no. 6538/74, *The Sunday Times v the United Kingdom*.

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”.²⁷

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

After that, the evolution of the case law before the ECtHR went precisely in 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 to its stability and accessibility: that is, providing a clear, precise and foreseeable legal command.

With regard to acts of clear sub-legislative rank, the Court had already admitted a less strictly demanding interpretation of the “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 the easy accessibility for the addressees.²⁸ More explicitly in *Ekin Association*²⁹, the Court stated that “the concept of ‘law’ must be understood in its ‘substantive’ sense, not its ‘formal’ one [, i]t therefore includes everything that goes to make up the written law, including enactments of lower rank than statutes” (§46).

Coming to decisions that had direct concern with regard to Italy, two cases were related to the Italian National Council of the Judiciary (*Consiglio superiore della magistratura*) and its internal guidelines on the limits of the freedom of association for judges, with specific reference to the possibility of their participating in the Freemasonry lodges. Both in *N.F.*³⁰ and later in *Maestri*³¹, the violation of the Convention was not found on the grounds of the nature of the act, nor on its rank, nor with regard to the body that approved it. The only violation was found in the wording of the guidelines, which was quite vague and not sufficiently clear to be perceived as the source of a

²⁷ T.A. O’DONNELL, *Margin of Appreciation Doctrine: Standards in the Jurisprudence of the European Court of Human Rights*, in *Human Rights Quarterly*, 1982, p. 474-507. Specifically on the case (and on the follow-up in the UK legal order): W.M. WONG, *The Sunday Times Case: Freedom of Expression Versus English Contempt-of-Court Law in the European Court of Human Rights*, in *NYU Journal of International Law and Politics*, 1984, p. 35-76.

²⁸ ECtHR 10 March 1972, Cases nos. nos. 2832/66, 2835/66, 2899/66, *De Wilde, Ooms and Versyp v Belgium*.

²⁹ ECtHR 17 July 2001, Case no. 39288/98, *Ekin Association v France*.

³⁰ ECtHR 2 August 2001, Case no. 37119/97, *N.F. v Italy*.

³¹ ECtHR 17 February 2004, Case no. 39748/98, *Maestri v Italy*.

concrete sanction.³² Hence, the Court grounded the lack of foreseeability of the sanction in the light of the preparatory works, underlining how the participation to the Freemasonry had been discussed only with regard to the progression of judges' careers, and not also in the context of their disciplinary supervision.³³

More recently, in the case *Savino and Others*³⁴, the theoretical problem is quite the opposite: the applicants contested the recognition as "law" of an act (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, but (only) by the Presidium (*Ufficio di Presidenza*) of the Chamber of Deputies³⁵. Moreover, the plaintiffs alleged two claims: firstly, 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 to the same institution as that of the rule-maker. The ECtHR agreed only on this last point, rejecting the other pleas, and recognizing the "lawfulness" of the regulation approved by the Presidium, using the – factual, rather than systematic – argument that the regulation was actually accessed by the plaintiffs³⁶ and referred back to the case-law of the Italian Constitutional Court and the Italian Court of Cassation on parliamentary rules of procedure in order to recognize the regulatory independence of the Parliament in its domestic jurisdiction.³⁷

The above-described evolution in the case law may be considered as a development of the broader doctrine of the "margin of appreciation" – a dominant theme of ECtHR jurisprudence – in particular in its "structural" concept, more than in its "substantive" concept.³⁸ The "substantive" concept of the margin of appreciation consists of recognizing 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".³⁹ On the other hand, the "structural" concept of the margin of appreciation, which is relevant to the purpose of this paper, is a feature proper to a supranational judicial system and a subsidiary jurisdiction, thereby implying a certain degree of deference to the

³² The guidelines were in fact limited to the expression "the membership raises delicate problems", without specifying the nature nor the entity of the sanction.

³³ See *Maestri*, supra n. 31, § 40.

³⁴ ECtHR 28 April 2009, Cases nos. 17214/05 42113/04 20329/05, *Savino and Others v Italy*.

³⁵ ... consisting of the President, the vice-presidents and other MPs appointed to specific duties.

³⁶ 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.

³⁷ S.M. CICCONE, *Corte europea dei diritti dell'uomo e autodichia parlamentare*, in *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*, in *Diritto Pubblico Comparato e Europeo*, 2009, p. 1074-1089.

³⁸ G. LETSAS, *A Theory of Interpretation of the European Convention on Human Rights*, Oxford University Press, 2007, p. 80.

³⁹ E. BENVENISTI, *Margin of appreciation, consensus and universal standards*, in *NYU Journal of International Law and Politics*, 1999, p. 843-854.

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 analyzed, underlining a narrower technical dimension of the margin of appreciation: in the sense that the ECtHR looks at the existence of a law, of whatever kind it is, regardless of its position in the internal legal order, but nonetheless requiring, *grosso modo*, the same standards of legal certainty for all types of internal measures.

EU law seems to suffer another kind of “democratic disconnect”, which is equally consistent with the present analysis. Again following the hints provided by Peter Lindseth’s theory, European integration can be interpreted as being in continuity with the “constitutional settlement” of the second half of the XX century, in the sense that it boosted an already existing tendency of delegation of normative powers to the executive.⁴⁰ 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, which are hard to move from the nation states. Such a dissociation ends up being quite paradoxical, as it is increasingly leading to a relocation of the rule of law at European level, in the absence – or, at least, in a situation of clear weakness – of the conditions upon which it typically relies: namely, the cultural and political homogeneity of the social community.⁴¹ Moreover, other authors have underlined how the “construction” of Europe took a pure “judicial” way, emphasizing how it is due to the empowerment of EU and national judges beyond any kind of democratic-based transfer of legitimacy,⁴² with the result of “transforming” the legal orders of the member States, even before the entry into force of the major reforms of the Treaties in the 90s.⁴³

In short, legality within the EU law is a form of legality that has been built without the existence of a political community and with a system of sources of law not founded on an act deriving its legitimacy from its parliamentary deliberation and approval. Consequently, rather than recognizing a higher value to the products of the will of the legislator (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”.⁴⁴

This is not to say that there is no underlying principle of legality in EU law. 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

⁴⁰ P. LINDSETH 2010, *supra* n. 17, p. 75.

⁴¹ 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.

⁴² A. STONE SWEET, *The judicial construction of Europe*, Oxford University Press, 2004.

⁴³ J.H.H. WEILER, *The transformation of Europe*, in *Yale Law Journal*, 1991, p. 2403 at p. 2431.

⁴⁴ M.L FERNANDEZ ESTEBAN, *The Rule of Law in the European Constitution*, Kluwer Law International, 2009, p. 159.

linkage between the form of government and the system of sources of law⁴⁵ do not seem to be confirmed at EU level. Moreover, differently from the system of the ECHR depicted above, this condition of indifference towards the democratic aspects of lawmaking is a stable characteristic of the EU legal order and not something that has been acquired through time.

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

In the famous case *Partie écologiste “Les Verts”*,⁴⁶ it is possible to find the first affirmation of the rule of law in the EU, at least in its “regulatory” dimension.⁴⁷ In this decision, the EEC 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”.⁴⁸ 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 the case *Roquette Frères*),⁴⁹ the Court stated that the participation of the peoples “in the exercise of power through the intermediary of a representative assembly” is deemed as 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 EP) and yet, in the very end, it remained limited to the distribution of competences between the Council and the EP. Furthermore, the identification of the ECC (and then the EU) as a “community of law” has been exactly the way through which the ECJ affirmed its own regulatory role, so that its creative power has no equals in any other legal order (even in those based upon the judge-made law), whereas its decisions are fully taken as “sources of law” in the national legal orders.⁵⁰

In the subsequent case law⁵¹ the review of the legality of the acts seemed to remain to the (quite narrow) control of the legal basis, in terms of ensuring the compliance with the principle of conferral, as well as the division of competences among the institutions and the respect of the prescribed procedure,⁵² without stressing the “democratic added value” of the acts elaborated through an open debate in the EP.

⁴⁵ A. PIZZORUSSO, *supra* n. 9, p. 217.

⁴⁶ ECJ 26 April 1986, Case C-294/83, *Partie écologiste “Les Verts” v The European Parliament*.

⁴⁷ See, again, N. WALKER, *supra* n. 41, p. 126.

⁴⁸ See §23. The French version of the same decision uses the expression “communauté de droit”.

⁴⁹ ECJ 29 October 1980, Case C-138/79, *Roquette Frères v Council*.

⁵⁰ M.P. CHITI, *I Signori del diritto comunitario. La Corte di giustizia e lo sviluppo del diritto amministrativo europeo*, in *Rivista trimestrale di diritto pubblico*, 1991, p. 796 at p. 798.

⁵¹ ECJ 26 March 1986 Case C-45/86, *Commission v Council*; ECJ 4 October 1991, Case C-70/88 *Parliament v Council*.

⁵² G. TESAURO, *Diritto dell’Unione europea*, CEDAM, 2012, p. 116.

It still remains to be seen whether the raised number of the acts 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 9-12 TEU) will have any impact in the case law of the Court. The stress added 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 acts approved with the involvement of the EP as the representative body of European citizens and with the contribution of the National Parliaments through the mechanisms of protocols nos. 1 and 2. Although some scholars do not share this point of view, opting for a more formal perspective in continuity with the past,⁵³ what could constitute the real counterbalance of the mentioned “democratic disconnect” is the increasing involvement of National Parliaments in the democratic life of the EU. Rather than expecting a sudden discovery of the democratic dimension of legality on the part of the ECJ, the emerging action of National Parliaments as active players in the EU decision-making 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 the respect of the division of competences between the EU and the member States, but has to be opened to a more comprehensive participation in the elaboration of the policies (as the example of the first “yellow card”, with the Commission retiring its proposal, although arguing that the subsidiarity principle had not been breached, showed).⁵⁴

3. THE REFLECTIONS OF THESE NUDGES INTO THE ITALIAN LEGAL ORDER (AND IN PARTICULAR, IN RECENT DECISIONS OF ITALIAN HIGHEST COURTS)

The above-mentioned trends in the supranational legal orders have led, in an explicit or implicit form, to significant novelties in the decisions issued by the highest Italian Courts. As usual, it is not easy to summarize the results of an evolution that is currently ongoing and that stems from Court decisions: what it is possible to underline are some results that are obviously provisional (as

⁵³ For example, in the Italian literature, M. STARITA, *I principi democratici nel diritto dell'Unione europea*, Giappichelli, 2011, foresees an increasing division of legislative work between the European Parliament and the Council.

⁵⁴ See, but arguing in favour of a scrutiny strictly related to the respect of the subsidiarity principle, F. FABBRINI-K. GRANAT, “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*, in *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-N. Lupo-A. Simoncini (eds.), *Democracy and subsidiarity in the EU. National parliaments, regions and civil society in the decision-making process*, Il Mulino, 2013, p. 107-132.

such, subject to further developments) and even fragmented in time and related to several subject matters.

However, once the idea of legality based upon substantial elements rather than upon the formal rank of parliamentary statutes had been affirmed at supranational level, both the Court of Cassation (the “Supreme” Court) and the Constitutional Court are slowly moving along the same direction. On the one hand, they embraced the trend opened by the ECtHR, broadening the concept of “legislation” far beyond the sole parliamentary statute (or other acts with the same legal force); on the other hand, an increasing relevance has been attributed to a thick meaning of legality, setting aside more formalist interpretations based solely upon the democratic derivation of parliamentary statutes.

Before analyzing the reception in the Italian legal order of these hints coming from the ECJ and the ECtHR, 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, that went clearly in the sense of an opening of the Italian legal order to the supranational jurisdictions.⁵⁵ Firstly, with the Decisions no. 348 and 349 in 2007, the Court declared the ECHR (and the case law of the ECtHR) as suitable to integrate the Constitutional parameter in the judicial review of legislation.⁵⁶ Secondly, with the 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” (art. 267 TFEU, at that time art 234 TEC).⁵⁷

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, at certain conditions, as a part of the legal framework for the solution of subsequent controversies, exactly as it happens for a new act passed by the legislator. This statement is all the more important since it is referred to one of the hardest “cores” of the legislative domain, such as the conditions for the revision of criminal trials. In greater detail, with the Decision no. 18288/10⁵⁸, taken by its Criminal Joint Sections (*Sezioni Unite*), the Court of Cassation affirmed that an evolution of the “*diritto vivente*” (i.e. the law in action, beyond the mere wording of the

⁵⁵ On the dialogue between the national courts of the Italian legal order (and the Constitutional Court, in particular) and the European courts, see G. MARTINICO-O. POLLICINO (eds.), *The Interaction between Europe’s Legal Systems Judicial Dialogue and the Creation of Supranational Laws*, Edward Elgar, 2012, p. 87-96.

⁵⁶ Specifically on these two decisions, see F. BIONDI DAL MONTE-F. FONTANELLI, *The Decisions No. 348 and 349/2007 of the Italian Constitutional Court: The Efficacy of the European Convention in the Italian Legal System*, in *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*, in *European Constitutional Law Review*, 2008, p. 363-382.

⁵⁷ On the first preliminary reference to the ECJ by the Italian Constitutional Court see F. FONTANELLI-G. MARTINICO, *Between Procedural Impermeability and Constitutional Openness: The Italian Constitutional Court and Preliminary References to the European Court of Justice*, in *European Law Journal*, 2010, p. 345-364; G. MARTINICO, *The tangled Complexity of the EU Constitutional Process*, Routledge, 2012, p. 142.

⁵⁸ Italian Court of Cassation, Criminal Joint Sections 21st January 2010, no. 18288.

legislation in force), in particular when the case law is underpinned by a decision of the Joint Sections themselves – namely, the highest body within the Court –, can now be considered as having the same legal force of a new statute approved by the Parliament.⁵⁹ In other words, the (highest) judge-made law, considering its substantive qualities, has not only 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 precisely the trend set by the Court in Strasbourg.

To some extent, a similar position has been reached by the Constitutional Court in the case concluded with 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 Cassation⁶⁰, 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 general observations about the impossibility to equalize written law and case law, in a system in which the “riserva di legge” in penal matters implies a specific attribution for the Parliament⁶¹ – dismissed the case only because it could not find any decision of the ECtHR affirming the principle of the retrospectivity of the *lex mitior* on the basis of a novelty in the national case law, but such a conclusion cannot exclude that a future evolution in the case law of the Court of Strasbourg would lead to a parallel *revirement* of the Italian Constitutional Court.

Along the same path of discovering a substantial idea of “law”, another important step has been taken by the Constitutional Court with the Decision no. 293/2010, in which the idea that parliamentary statutes can satisfy the principle of legality upon the sole basis of their democratic derivation is simply denied by the identification of those substantial features that are required for a legal act in order for it to be considered as “law”. Dealing with the discipline of the so-called “indirect expropriations” (which, by the way, generated an extremely high number of litigations before national courts and the ECtHR),⁶² the Court annulled Article 43 of the Code on Expropriation (adopted as delegated legislation), because of its redundancy from the parliamentary act of delegation. However, in a salient *obiter dictum*,⁶³ the Court anticipated some further substantial reasons that cast robust doubts on its compliance with the qualitative requirement stemming from the case law in Strasbourg. Notwithstanding its formal rank as primary legislation –

⁵⁹ 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*, in *Osservatorio sulle fonti*, 2010, p. 1-7.

⁶⁰ See Court of cassation-Criminal Joint Sections, 27 April 2011, no. 16543.

⁶¹ See Italian Constitutional Court 8 October 2012, Decision no. 230, §7 in “Considerato in diritto”.

⁶² 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 marzo 2006, Case no. 36813/97 *Scordino v Italy*.

⁶³ See Italian Constitutional Court 4 October 2010, Decision no. 293, §8.5 in “Considerato in diritto”.

and so, even if ever transposed into a parliamentary statute – the wording of the provision would have lacked in any case of the substantial characteristics of “lawfulness”, according to the quoted jurisprudence of the ECtHR. In particular, the resolution of the controversies originating from this provision before the Italian Court of Cassation and the Council of State diverged in such a way that it was impossible for the 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 given to the delegated legislation coming from the Executive) would not be able to ensure its validity *per se*.

In short, the combination of these two judgments reveals that parliamentary statutes are neither necessary, nor sufficient in themselves to ensure full compliance with the principle of legality.⁶⁴ If this will be confirmed by the future case-law, we would have witnessed quite a dramatic innovation in the Italian legal order. Although the connection between the effectiveness of legality and the quality of (parliamentary) legislation – and, in particular, the degree of generality and abstractness of the latter – had already been highlighted in the literature,⁶⁵ 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. To return to the results of the evolution of EU law: it seems that in the Italian legal order, too, an indifference to the democratic-based sources of law is emerging, whereas what really matters is the content of the legal command, 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 order, the above-mentioned “indifference” towards the supposed added value of the democratic derivation held by parliamentary legislation.

A different thread of case-law before the Constitutional Court shows a significant number of decisions: in which explicit references were made to the principle of legality in its “substantial” 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 rule effectively.

Decision no. 115/2011 is particularly meaningful in this discourse. By this decision, the legislative provision of Article 54.4 of the Code on local authorities (as amended in 2008), which enabled a pervasive use of urgency decrees by the city mayors (*ordinanze sindacali*), has been declared

⁶⁴ 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*, in *Giurisprudenza italiana*, 2010, p. 2003 at 2006.

⁶⁵ G.U. RESCIGNO, *supra* n. 16, p. 262.

unconstitutional, because these *ordinanze* began to assume regulative content derogating the statutes and even to prescribe sanctions which – due to the reserve of Article 23 of the Constitution – should remain in the domain of the national legislator. However, in the end, the rationale of the censure was not to ban all regulatory power at local level. On the contrary, the infringement of the principle of legality in its substantial meaning was found in what the legislative provision did not foresee: namely, clear boundaries to the powers of the local authorities.⁶⁶ Once again, the lack of quality in the legislative provision was at the basis of the censure of the Court. Similarly, although on different topics, the Court decided on the basis of legality in its substantial meaning in a significant number of further cases,⁶⁷ affirming the insufficiency of legislative provisions due to their vagueness or their inadequacy in directing the administrative activity. However, this increased attention on the topic shows that it is a trend currently on going, whose results are still far from being completely perceived.

It is interesting to register how the trend in the Italian legal order seems to follow, mostly in an implicit way, the nudges coming from the European Courts. In particular, some concepts elaborated by the ECtHR are now making themselves felt even in the reasoning of Italian Courts. Hence, the progressive integration with the EU legal orders is pushing the Italian judges further to abandon old categories of the more traditional schemes of the civil law tradition, in favor of a more comprehensive and substantial approach.

Beyond these external influences, some inner dynamics of the Italian legal order, 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 principle of legality has been interpreted in its substantial sense, were related to legislative provisions approved through confidence votes and the so-called “maxi-amendments”. This procedure leads to the approval of an entire bill going through on just a single vote, following the request of the government to assimilate its result in a vote of confidence in order to ensure its own survival. In the absence of an explicit ban of this procedure, either in the Constitution or in the parliamentary rules of procedure, the Constitutional Court has, so far, not deemed it as unconstitutional (see, for instance, Decisions nos. 391/1995 and 148/1999). On the contrary, the

⁶⁶ 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.

⁶⁷ See, at least, Italian Constitutional Court, Decisions nos. 232/2010, 248/2011, and 200/2012.

violation of the principles stated in Articles 70 and 72 of the Constitutions (concerning the entitlement of the Chambers to legislation, and the requirement of different votes on each single article of the bill) seems to be all too self-evident.⁶⁸

However, it is patent how statutes approved through this procedure completely lack a sincere and full parliamentary debate which justify the precedence traditionally acknowledged to the expressions of the popular will. Consequently, the Constitutional Court has had, to some extent, necessarily to re-think the principle of legality, re-locating it according to more substantial criteria.

4. CONCLUSIONS. THE NEED FOR A RECONCILIATION BETWEEN LEGAL AND POLITICAL CONSTITUTIONALISM, IN ORDER TO BETTER RELOCATE THE PRINCIPLE OF LEGALITY

The evolution described in the Italian legal order showed how the ongoing reassessment of the role to be attributed to the principle of legality in the Italian legal order has been driven by the hints given by the supranational jurisdictions. The general (and, to some extent, passive) compliance with the jurisprudence of the European Courts may have been a safe solution (or a sort of “soft option”) for the Italian Constitutional Court, as it was able to justify such a doctrine by the need for a general reconsideration of the fundamental principles in the new context of the broader European legal space. 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) judicial strategy.

Such an evolution of the interpretation of legality, that is triggered and sustained only by Courts, risks to import not only the “solution” from the supranational level, but also its inherent problems together with it. In other words, following the approach of a more substantial concept of “law” and setting aside every consideration for the role of democratic-based law, one risks to reproduce in the internal arena also the “democratic disconnect” experienced at supranational level. Thus, something (the “disconnect”) produced as a result of a necessity (in the area of the Council of Europe) or as a direct consequence of the principle of conferral (in the EU context) would have been imported to the national level, potentially affecting its basis of democratic legitimacy. Paradoxically, the final

⁶⁸ N. LUPO, *Emendamenti, maxi-emendamenti e questione di fiducia nelle legislature del maggioritario*, in E. Gianfrancesco-N. Lupo (eds.), *Le regole del diritto parlamentare nella dialettica tra maggioranza e opposizione*, LUISS University Press, 2007, p. 41-112; G. PICCIRILLI, *L'emendamento nel processo di decisione parlamentare*, CEDAM, 2008, p. 291; M. MANETTI, *Procedimenti, controlli costituzionali e conflitti nella formazione degli atti legislativi*, in *Decisione conflitti controlli. Procedure costituzionali e sistema politico*, Jovene, 2012, p. 3-45.

result of this evolution would weaken the role of the National Parliament, which are exactly the institutions who are typically and naturally invoked as *the* source of democratic legitimacy⁶⁹.

The risk consists namely in leading towards 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, the overall evolution will result in the illusion that the protection of individual rights carried out by the Courts can still work alone, albeit remaining perfectly separated from the implementation of public policies that are up to the legislator. Diversely, although carrying out different duties, both judges and legislators need to be (and feel) responsible for the good functioning of democracy and for the guarantee of fundamental rights: rights that can hardly be properly effective with the action of only one out of the two. Without going too far in time and space, the current Hungarian example may help in clarifying the possible consequences of a similar, enduring, “disconnect” between politics and the action of the Courts.

In conclusion, between the two opposite (but not necessarily contradictory) positions of the so called “legal” and “political” constitutionalism⁷⁰, the result of the evolution depicted in this essay seems to be much closer to the former, relying increasingly on the Courts in pursuing the formal coherence of the legal order and securing individual rights through the case law. Consequently, Parliaments would end up to be set aside from the action of securing legality, while – in the name of a more comprehensive and enduring guarantee of the rights of the individuals – they need to be included in this aim, starting to promote and protect the fundamental rights already in the parliamentary process and the in the enactment of the public policies. In a similar scenery, judges and Constitutional Courts would be anyway entitled to act in defense of individual rights, but they would operate as a second step of the process, surely maintaining the “final word”⁷¹ on the legality in the sense of *jurisdictio*, but without claiming to have the “first say” in the sense of *gubernaculum*.

⁶⁹ Echoes of this problem can be found in the abovequoted Decision no. 230/12 of the Italian Constitutional Court (see *supra* n. 61), where it is affirmed that the principle of legality 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 case law (see. Decisions nos. 487/89 and 394/06), according to which the lawmaking in such field has to be attributed to the the Parliament, as the body elected through general suffrage and which decides after an open process of deliberation, that includes the opposition and, albeit indirectly, the public opinion.

⁷⁰ For this distinction, see again R. BELLAMY, *supra* n. 11, p. 1-12, whose analysis – probably because of the need of stating clearly the differences between the two approaches – risks to emphasise even too much the elements of divergence, maybe underestimating the chances for a possible combination.

⁷¹ See. M. DOGLIANI, *Il principio di legalità. Dalla conquista del diritto all’ultima parola alla perdita del diritto alla prima*, in *Diritto pubblico*, 2008, p. 1-28.

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