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Interlegality, the Italian Constitutional Court and supranational fundamental rights: a discussion

Alessia-Ottavia Cozzi*

ABSTRACT: This working paper aims to examine whether the theory of interlegality is compatible with the stance of the Italian Constitutional Court (ItCC) on the European Convention on Human Rights (ECHR) and European Court of Human Rights case law, as well as the Charter of Fundamental Rights of the European Union (CFREU) and the corresponding EU Court of Justice case law. We attempt to ascertain whether the ItCC approach is consistent with the premises underlying interlegality, stating, on the one hand, that not only must a valid norm, but also broader *rationes* and competing principles, be applied in complex cases. On the other hand, interlegality theory suggests that the highest courts should fulfil a dual function, i.e. they must perform their duties of institutional loyalty, but they must also consider the reasons supported by competing legal orders. The paper is in two parts. The first concentrates on the ECHR and the recent ItCC protocols on the incompatibility between national and EU law on fundamental rights, examining them in terms of interlegality. Here, interlegality seems to arise through a number of different elements: language, the idea of concurrent remedies, legal reasoning, and the effects of decisions. We argue that there are two key elements to explore: frequent reliance on the rules of reference of other systems of protection, and routine use of preliminary referrals. We go on to examine how this trend depends on the wording of the written Constitution and/or the margin of interpretation open to the ItCC, discussing the degree of flexibility permitted by constitutional principles. The conclusion is that the ItCC, in reaffirming its role as guarantor of the constitutional system as a whole, is aware of – and responds to – the different legal orders involved. The second part of the paper is devoted to the substantive meaning of interlegality, limiting analysis to the criterion of the maximum level of protection of individual rights. The starting point is ItCC case law, moving on to the formal provisions of Art. 53 ECHR and Art. 53 CFREU. We argue that, despite their formal reference to a "level of protection", these provisions are not intended to reveal the highest degree of substantive protection, which is a controversial criterion in itself, but to reflect the normative theories underlying each system. The conclusion is that interlegality appears to be a helpful way of highlighting and measuring the degree to which the Courts respect the plurality of legal orders and their *rationale*, and that this attitude to compliance and participation lies essentially in the construction of logical methods allowing stable co-operation.

KEYWORDS: Interlegality; Fundamental Rights; Constitutional Court adjudication; ECHR; CFREU.

1. The subject of this paper and some features of interlegality

This paper aims to examine whether the theory of interlegality is compatible with the stance of the Italian Constitutional Court (ItCC) on the European Convention on Human Rights and European Court of Human Rights case law (ECHR and ECtHR or Strasburg Court respectively in the following), the Charter of Fundamental Rights of the European Union, and the corresponding EU Court of Justice case law (CFREU or EU Charter and ECJ respectively in the following).

It may therefore be helpful to summarise some of the features of the theory of interlegality. The current legal spectrum of norms has been described as "a mixed environment that weaves together regulatory regimes and legal orders of different territorial, political and social levels, endowed with distinct organisational and regulatory figures, independently capable of virtually reaching different recipients on a spectrum that varies from sub-national to State, to international, and regional and global levels"[1]. In general terms, the theory of interlegality embraces the plurality of legal orders and the fact that they are reciprocally irreducible. This theory is based on several premises that may be summarised as follows: a. the material interconnection of objects and situations contextually relevant to a plurality of regulatory orders; b. moving beyond state orders; c. more generally, the inadequacy of the concept of a closed and self-sufficient legal order to explain current legal phenomena; d. lastly, the fact that each system is able to identify which rules are valid and applicable according to its own rules, yet these remain silent and are unable to answer the questions that arise between different systems and whose solution lies beyond each of them.

Moreover, the theory of interlegality does not aim to be merely descriptive but also to be normative. From this perspective, the theory concerns the law and production of legal norms, adopting a Kelsenian approach. It argues that monism and dualism are unable to explain the relationship between the domestic, the international, and the supranational legal orders[2]: the former refers to a closed order while the latter assumes that the two orders run parallel, one permeating the other only through transposition and by considering external sources to be

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[1] G. PALOMBELLA, *Interlegalità. L'interconnessione tra ordini giuridici, il diritto, e il ruolo delle corti*, in *Diritto e questioni pubbliche*, n. 2, 2018, 315-342, esp. 318 (our translation). See also J. KLABBERS, G. PALOMBELLA, *Introduction. Situating Inter-Legality*, in J. KLABBERS, G. PALOMBELLA (eds.), *The Challenge of Inter-Legality*, Cambridge University Press, 2019, 1-20.

[2] For an indepth discussion of this inadequacy F. ANGELINI, *Ordine pubblico e integrazione costituzionale europea. I principi fondamentali nelle relazioni interordinamentali*, Padua, 2007, 5-14.

factual. On the other hand, concerning the coexistence of many regulatory frameworks, interlegality argues that the radical form of the theory of constitutional pluralism is questionable since, although it recognises the plurality of competing legal orders, it does not envisage instruments of co-ordination but relies on the voluntary participation of players from different systems[3]. Interlegality therefore, in our understanding, aims to manage mechanisms, safeguards, languages, and structures in the relationships between different legal orders.

It may be appropriate to start by establishing the confines of our analysis. Firstly, the theory of interlegality has been developed as a means of understanding the current plurality of laws and how they interact at different levels: national, supranational, international, global, public and private. Our research is limited to a "regional" dimension, i.e. the European area, encompassing the national legal orders, the Council of Europe, and especially the ECtHR, and the EU legal order. Secondly, it should be borne in mind that these systems are closely linked by institutional forms of co-ordination. Suffice it to recall that national courts are structurally responsible for implementing all three systems of protection. Lastly, the following analysis focuses on the judicial dimension, especially the way the Italian Constitutional Court (ItCC) acts in this context. This perspective is consistent with the premises of the theory of interlegality, affirming that not only must a valid norm, but also broader *rationes* and competing principles, be applied in complex cases, and, on the other hand, that the highest courts should fulfil a dual function, i.e. they must perform their duties of institutional loyalty[4], but they must

[3] Nevertheless, in the opinion of some authors supporting the theory of constitutional pluralism, the co-ordination between legal orders is a commitment. For example, M. POIARES MADURO, *Three Claims of Constitutional Pluralism*, in M. AVBELJ, J. KOMÁREK (eds.), *Constitutional Pluralism in the European Union and Beyond*, Portland, 2012, 67-84, refers to the distinction made by K. TUORI, *The many Constitutions of Europe*, in K. TUORI, S. SANKARI (eds.), *The many Constitutions of Europe*, Farnham, 2010, 3-30, between "legal order" and "legal system", where 'legal order' refers to law as a symbolic-normative phenomenon, while 'legal system' denotes the legal practice where the legal order is produced and reproduced (law-making, adjudication, and legal scholarship). This distinction makes it possible to conceive EU and national legal orders as autonomous, albeit part of the same European legal system and argues that the European legal system implies *commitment* to both legal orders and imposes a *legal obligation* to accommodate and integrate their respective claims (emphasis added). On the other hand, other theories highlight the voluntary nature of Constitutional Courts' behaviour. Reflecting on the reasons why Constitutional Courts long refused to consider themselves as judges on the basis of Art. 267 TFEU, G. MARTINICO, *Multiple loyalties and dual preliminarity: The pains of being a judge in a multilevel legal order*, in *I·CON* (2012), Vol. 10 No. 3, 871-896, esp. 888, in the framework of competitive judicial interaction, argues that the competitive interactions between Constitutional Courts and ECJ, which in any case existed regardless of the preliminary references, were "voluntary in nature, and therefore develop within a framework of spontaneous practise", based on the need for peaceful collaboration rather than formal obligation. For a critical overview of five main features of theories of constitutional pluralism, R. BIFULCO, *L'Europa e il «Constitutional Pluralism»: prospettive e limiti*, in *Dir. pubbl.*, no. 3 of 2018, 805-826, identifying their weakness in the resolution of conflicts not through law, but through politics.

[4] Outside the theory of interlegality, the term "loyalty" has been used in other theories to describe the role that ordinary courts play in the multilevel system, being the guardians of the application of both national law and of EU law. See G. MARTINICO, *Multiple loyalties and dual preliminarity: The pains of being a judge in a multilevel legal order*, quoted above, esp. 873, arguing that, since national and supranational levels share "legal materials",

also consider the reasons supported by competing normative orders. Nevertheless, it should be borne in mind that the intersections between European legal orders consist of tools of institutional and political co-ordination other than judicial intervention. These instruments include structural non-judiciary mechanisms and even purely political debate. In fact, analysis of this debate would perhaps reveal the perception of political actors vis-à-vis the degree of co-ordination between systems of protection and the acceptability, desirability, or advisability of varying levels of integration, providing alternative elements through which to measure "degrees" of interlegality. By way of clarification, as a non-judiciary tool of co-ordination, we might consider the Council of Europe and its mechanism for the execution of judgments under the Committee of Ministers. Regarding political debate, we might recall the lively Italian debate on the ratification of Protocol no. 16 ECHR[5]. Neither of these topics are covered here. At the EU level, Italy fulfils the obligations arising from its membership of the Union, passing the so-called European Law and the European Delegation Law each year in accordance with Law no. 234 of 2012[6]. These instruments too, as well as the corresponding political debates, are beyond the scope of this essay.

The paper is in two parts. The first deals with the direction followed by the ItCC vis-à-vis implementing ECHR and CFREU rights in the Italian domestic legal order. Of particular interest to our study are the recent ItCC protocols on the incompatibility between national and

their judges present multiple loyalties – to the ECJ and to their Constitutional Court – and that, generally speaking, "dual loyalty" refers to a loyalty to two separate interests in potential conflict. The writer clarifies that there is a vast literature on the concept of loyalty in politics and political philosophy, but it has a specific normative meaning in the context of a multilevel system. See note 11 of the mentioned paper for the meaning of loyalty in constitutional studies. Concerning the "institutional loyalty" on the part of Constitutional or Supreme Courts in the theory of interlegality, we assume that it concerns the mission of Constitutional Courts to act as guarantors of the constitutional autonomy of their legal order, in the meaning of M. CARTABIA, *Principi inviolabili e integrazione europea*, Milano, 1995, quoted by G. MARTINICO, op. cit., 887, referring to the so-called "institutional issue" and distinguishing it from the parallel socalled "axiological issue", i.e. the necessity to preserve a certain standard of protection of fundamental rights, understood as a "constitutional good".

[5] Protocol no. 16, named the 'Protocol of Dialogue', introduces a formal procedure of interim consultation between the Higher Courts and the ECtHR. For details about the Protocol, see A. GUAZZAROTTI, *La parabola della costituzionalizzazione delle tutele della CEDU: rapida ma anche inarrestabile?*, in C. PADULA (ed.), *La Corte europea dei diritti dell'uomo. Quarto grado di giudizio o seconda Corte costituzionale?*, Naples, 2016, 15-41, esp. 36 ff. For a negative opinion on ratification, see M. LUCIANI, *Note critiche sui disegni di legge per l'autorizzazione alla ratifica dei Protocolli n. 15 e n. 16 della CEDU*, hearing before the Justice Committee of the Chamber of Deputies of 26.11.2019, at www.sistemapenale.it/it/documenti/massimo-luciani-audizione-su-autorizzazione-alla-ratifica-protocollo-15-e-protocollo-16-cedu. Opinions in favour of ratifying Protocol no. 16 have been collected in the *forum* of *Giustiziainsieme.it*, with contributions by scholars of constitutional, international, and EU law, as well as civil procedure (A. RUGGERI, C. PINELLI, E. LAMARQUE, C.V. GIABARDO, E. CANNIZZARO, P. BIAVATI, S. BARTOLE) available at www.giustiziainsieme.it/it/attualita-2/1341-l-estremo-saluto-al-protocollo-n-16-annesso-alla-cedu. See also E. CRIVELLI, *Il contrastato recepimento in Italia del Protocollo n. 16 alla CEDU: cronaca di un rinvio*, in *Osservatorioaic.it*, no. 2 of 2021, 21 March 2021.

[6] Law no. 234 of 24 December 2012, (in G.U. no. 3 of 4 January 2013), *General rules on the participation of Italy in the formation and implementation of European Union legislation and policies*.

EU law on fundamental rights, examining this new orientation from the point of view of interlegality. Here, interlegality seems to arise from a number of different elements: language, the idea of concurrent remedies, legal reasoning, and the effects of ItCC decisions. We go on to examine how far this trend depends on the wording of the written Constitution and/or the margin of interpretation open to the ItCC, discussing the degree of flexibility permitted by constitutional principles. The conclusion is that in reaffirming its role as guarantor of the constitutional system as a whole, the ItCC is aware of – and responds to – the different legal orders involved.

The second part of this working paper is devoted to the substantive meaning of interlegality in terms of the search for the greater protection of individual rights. Our analysis firstly addresses ItCC case law and then the formal provisions of Art. 53 ECHR and Art. 53 CFREU, explicitly devoted to "level of protection". We argue that these provisions are not intended to reveal the highest level of substantive protection, which is a debatable criterion in itself, but principally to highlight the characteristics of each system of protection. The conclusion is that, in our opinion, interlegality may be a helpful means of illustrating and measuring the degree to which Courts express loyalty towards the plurality of legal orders and strive to respect their *rationales*. This attitude to compliance and participation lies essentially in the construction of logical methods leading to stable co-operation.

2. The current orientation of the ItCC regarding the ECHR and the Charter of Fundamental Rights of the European Union

A brief presentation of the development of the roles of the ECHR and CFREU in the Italian domestic legal order may serve as a helpful starting point for a discussion of our topic. In line with the goal of the LUISS Observatory on Interlegality, our purpose is to highlight and measure the "loyalty" of the ItCC to international and supranational fundamental rights and their interpretation by the respective Courts.

a. The ECHR

Before 2001 – from the formal point of view – the ECHR obtained the force of ordinary law upon ratification and through an execution order. Legal scholars tried to find a constitutional "anchor" for the ECHR, and several possibilities were suggested in an attempt to

assign the Convention a higher position in the internal hierarchy of norms[7]. However, the ItCC rejected them all. Nevertheless, especially during the late nineteen-eighties, the ItCC increasingly referred to the ECHR to supplement the provisions of the Constitution. Thus, before 2001, while the ECHR formally enjoyed the force of ordinary law, in practice it was already treated as an interpretative tool to support constitutional rights at constitutional level.

Italian Constitutional Law no. 3 of 2001 added a specific reference to international obligations to Article 117, paragraph 1 of the Italian Constitution[8]. Six years passed – indicative of a general attitude of cautiousness – before the ItCC acknowledged the supra-legislative rank of the ECHR in its changes to Art. 117.1 It. Const. Two landmark judgments: nos. 348 and 349 of 2007 definitively changed the status of the ECHR, affirming its "intermediate" ranking (as a *norma interposta*) between law and the Constitution, making a law in breach of the ECHR indirectly incompatible with Art. 117.1 It. Const., thus requiring it to be quashed[9]. Hence, as of 2007, the ECHR enjoys a hierarchical status superior to that of ordinary law. National courts must interpret domestic legislation following the interpretation given by the Strasbourg Court; any conflict between domestic law and the ECHR has been seen as a constitutional conflict that must be brought before the ItCC.

The ItCC has relied heavily on Strasbourg case law, recognising the ECtHR's prominent role as interpreter of the ECHR and its living interpretation. On the other hand, the principles displayed in the "twin" judgments have been reshaped somewhat. In subsequent decisions, the ItCC started using interpretative tools to justify a margin of discretion when applying the ECHR and Strasbourg interpretation, both in cases directly involving Italy and where conventional principles have been derived from decisions concerning other countries.

[7] The different theories attempting to give the ECHR constitutional status despite its transposition into ordinary law are described in detail in G. MARTINICO, O. POLLICINO, *Report on Italy*, in G. MARTINICO, O. POLLICINO, (eds.), *The National Judicial Treatment of the ECHR and EU Law. A Comparative Constitutional Perspective*, Europa Law Publishing, Groningen, 2010, 271–299, 282–283, and by D. TEGA, *The Constitutional Background of the 2007 Revolution. The Jurisprudence of the Constitutional Court*, in G. REPETTO (ed.), *The Constitutional Relevance of the ECHR in Domestic and European Law. An Italian Perspective*, Intersentia, Cambridge-Antwerp-Portland, 2013, 25–36, 26–27.

[8] "Legislative powers shall be vested in the State and the Regions in compliance with the Constitution and with the constraints deriving from European Union law and international obligations". This introduced a special "anchor" to international treaties into the Italian Constitution for the first time. The provision gave rise to a wide debate, concerning its general relevance or its limited reference to the State and regional powers, but this issue goes beyond the scope of our discussion.

[9] On the decisions no. 348 and 349 see G. REPETTO, *Rethinking a Constitutional Role for the ECHR. The Dilemmas of Incorporation into Italian Domestic Law*, in ID, *The Constitutional Relevance of the ECHR in Domestic and European Law*, quoted above, 39–41; O. POLLICINO, *Constitutional Court at the cross road between parochialism and co-operative constitutionalism*, in *European Constitutional Law Review* (4) (2008), 363 ss.; F. BIONDI DAL MONTE, F. FONTANELLI, *The Decision No. 348 and 349/2007 of the Italian Constitutional Court: The Efficacy of the European Convention on the Italian Legal System*, in *German Law Journal*, vol. 9, no. 7, 2008, 889–932.

The ItCC sometimes refers to the ECtHR's margin of appreciation doctrine whereby national authorities enjoy some discretion in fulfilling their obligations under the ECHR. On other occasions, potential conflicts between constitutional and conventional interpretation are resolved by distinguishing[10].

To describe the current trend in the ItCC's adherence to Strasbourg case law, it may be helpful to refer to the title of a study which fits our purposes very well: "A Falling Tree Makes More Noise Than a Growing Forest"[11]. There have been very few episodes of non-compliance identified by the ItCC itself[12]. These have indicated a conscious distancing from

[10] For example, ItCC no. 236 of 2011, on the principle of the retroactivity of more favourable legislation. The decision was intended to be a response to ECtHR, Grand Chamber, 17 September 2009, *Scoppola v. Italy* (no. 2), application no. 10249/03. The ItCC stated that the Strasbourg precedent, "[a]lthough it is inclined to assert a position of general principle, […] nonetheless remains rooted to the particular circumstances which give rise to it: the fact that proceedings before the European Court relate to a specific case and, above all, the particular facts of each individual case in relation to which it has passed judgment must be assessed and taken into account by this Court when it is called upon to transpose the principle asserted by the Strasbourg Court into national law and to examine the constitutionality of a provision due to the supposed violation of the very same principle". See in this sense A. GUAZZAROTTI, *Strasbourg Jurisprudence as an Input for "Cultural Evolution" in Italian Judicial Practise*, in G. REPETTO (ed.), *The Constitutional Relevance of the ECHR in Domestic and European Law. An Italian Perspective*, quoted above, 55–68, 65.

[11] The title is from D. PARIS, *A Falling Tree Makes More Noise Than a Growing Forest. On the Constitutional Courts' Underestimated Contribution to the Domestic Enforcement of the European Convention on Human Rights*, in *ZaöRV - Heidelberg Journal of International Law*, 2017, 581-584, collecting the contributions from the 2016 Annual Conference of the International Society of Public Law (ICON-S) that took place at Humboldt University in Berlin.

[12] The reference here is to ItCC no. 49 of 2015, where the Court affirmed the axiological priority of the Italian Constitution in respect of the ECHR, but this formula, as far as we know, has never been since. In the same decision, on the other hand, discussing the notion of "consolidated case law" also in the light of future adhesion to Additional Protocol no. 16, the ItCC used a broader wording, referring to "an option that favours an initial engagement based on argumentation within a perspective of co-operation and dialogue between the courts rather than the hierarchical imposition of a particular interpretation concerning questions of principle which have not yet become established within case law and thus have questionable resolutive status for the national courts" in p. 7 *Cons. dir*. Greater weight was given to this decision years later in the 2019 Annual Report of the President of the ItCC (President Lattanzi) concerning the Court's activity in 2018. The occasion was the Strasbourg Court's response to Judgment no. 49 of 2015, concerning urban confiscation in the absence of a criminal sentence. It might be helpful for our purposes to look again at the President's words: "What is at issue in Judgment no. 49 of 2015 (it is important to stress) is not the duty of the Republic to execute the decisions of the Strasbourg Court, which are all, without distinction on this plane, equally binding. Rather, it is a matter of elaborating the prerequisites for inferring, in the context of European case law, the principles of law that penetrate into the national system and pervade the centralized system of constitutional review as interposed rules, or, in exceptional cases, rules that are subject to substantive challenges. This elaboration is a task that transcends Article 46 of the Convention, and is carried out on the basis of criteria proper exclusively to constitutional law, just as it is the Constitution itself, according to the interpretation made by the Court, which defines the position of the ECHR in the system of sources of law. Two important judicial incidents of 2018 served to confirm the correctness of the approach explicitly ushered in with Judgment no. 49 of 2015 (but already contained *in nuce* in earlier constitutional case law and then constantly followed in that which followed). In its judgment in the case of *G.I.E.M. S.R.L. and Others v. Italy*, of 28 June 2018, the Grand Chamber of the European Court of Human Rights definitively ruled out the proposition that confiscation of real property that had been subject to illegal site development is a *per se* violation of Articles 6 and 7 of the European Convention whenever it is not imposed together with a criminal conviction. In so deciding, the Strasbourg Court moved beyond a single precedent (the decision in *Varvara v. Italy* of 29 October 2013), which appeared to hold the opposite, adopting the different interpretation of Articles 6 and 7 of the Convention that the Constitutional Court had offered in Judgment no. 49 of 2015. If the [Italian Constitutional n.d.r.] Court, rather than putting itself in a position of *constructive dialogue* with the European Court, had stopped short at the

the general trend of broad quantitative and qualitative adhesion[13]. A recent example can be found in the field of administrative sanctions of a substantially criminal nature under Art. 7 ECHR and the so-called Engels criteria set out by the ECtHR. The ItCC is gradually but determinedly shifting towards the more protective principles of criminal law from this perspective. Essentially, the ItCC has shown compliance with the ECHR and its interpretation, at the same time seeking ways to reserve a margin of discretion for itself. We will return to this trend in the section on the doctrine of the greatest level of protection.

b. The EU Charter of Fundamental Rights

It is well known that, with Judgment no. 269 of 2017, the ItCC moved in a new direction, addressing questions of the non-compliance of domestic legislation with the fundamental rights guaranteed under the Italian Constitution and, at the same time, the EU Charter of Fundamental Rights in areas of EU intervention[14]. Over the previous 30 years, taking the leading *Granital* no. 170 of 1984 case as its basis, the ItCC had always affirmed that priority must be accorded to EU law with direct effects in conflicts with national law, and that the conflict must be solved by ordinary courts by not applying the domestic norm. Today, following this new approach, when a domestic norm conflicts with constitutional and similar norms of the EU Charter (possibly linked to EU secondary law), ordinary courts may raise a question of constitutionality before the ItCC under Arts. 11 and 117.1 It. Const. and – before or after the incident of constitutionality – make a preliminary reference to the ECJ on similar or different

narrower interpretation of the *Varvara case*, and had struck down the national law as unconstitutional on that basis, this would have caused serious harm to the protection of the territory, without any corresponding benefit for the personal protections required under the Convention. […] The effects of Judgment no. 49 of 2015, moreover, *do not weaken the Convention, but rather reinvigorate it, because they call on all legal practitioners to cooperate with the Strasbourg Court, including in light of the principles of their own legal systems, in order to build a shared home of the rights of the person, the bricks of which are formed in the furnace of the fruitful and diverse experiences of the constitutional states that are party to the Convention. In light of this, the rulings of the European court, even when they are isolated, never amount to scrap material, which national practitioners may circumvent. Rather, they form the starting point for shared dialogue, by means of which, without making hegemonic claims, we contribute to defining a minimum shared content for individual freedoms, which is better able to prevail since it is the fruit of sincere debate*" (our stress in the text). See the paragraph devoted to the Italian Constitutional Court and the European Court of Human Rights in https://www.cortecostituzionale.it/documenti/download/pdf/Report_by_President_Giorgio_Lattanzi_on_the_Constitutional_Court_s_activity_in_the_year_2018.pdf . So even the heaviest downsizing of the ECHR and ECtHR, Judgment no. 49 of 2015, has been re-read as a symptom of constructive dialogue and cooperative approach.

[13] The same impression is shared by D. Tega, for whom despite few cases of open conflict between the two courts, most judgments of the ItCC express a genuine quest for convergence and a sincere will to enforce the ECtHR's judgments, as recalled by D. PARIS, *A Falling Tree Makes More Noise Than a Growing Forest*, quoted above.

[14] On this decision, G. MARTINICO, G. REPETTO, *Fundamental Rights and Constitutional Duels in Europe: An Italian Perspective on Case 269/2017 of the Italian Constitutional Court and Its Aftermath*, in *Eur. Const. Law Rev.*, no. 4 of 2019 (15), 731-751.

grounds. Moreover, even after the question as to constitutionality has been settled, ordinary courts may not apply a domestic rule contrary to EU law even though it has not been declared unconstitutional. This new orientation, which will be examined in greater depth from the perspective of interlegality in the following paragraphs, has led to a lively debate between scholars on the protocols for approaching the ItCC and the grounds for the partial re-centralisation of EU non-conformity[15]. Some scholars have perceived this new path as a reduction of the well-established and fruitful relationship between the ordinary courts and the ECJ, explaining it as a re-appropriation of adjudication which serves to prioritise the Italian Constitution, indicating closedness. Others have described it in terms of openness, as a better form of co-ordination with the ECJ. We share the second position. In our opinion, the partial re-centralisation of questions of non-compliance between domestic legislation and constitutional and EU rights follows a trend begun several years ago, when the ItCC overruled its previous voluntary exclusion of the notion that it should be seen as a court issuing preliminary rulings and thus part of the mechanism of institutional relations with the ECJ, initially referring a preliminary question in a proceeding on State and regional legislative competences (2008) and then in an incidental proceeding (2013). Clearly, these dates – 2008, 2013, and 2017 – demonstrate that such development has been slow, subtle, and certainly not automatic. Instead, it is the result of choices that have been refined over time.

3. Assessing interlegality

Having summarised the ItCC's attitude to the ECHR and the EU Charter, we can now pose the question around which this paper revolves: Does this trend comply with an interlegalitarian approach, meaning that the Court plays "[…] on the borders between several normative orders and their different basic objectives" and may "not be accountable solely to the order to which it belongs, since performing the tasks of justice imposes a new responsibility to uphold the full range of normative complexities involved, to avoid injustice and partiality in decisions, and to put first the effects on those subject to their authority"[16]? We divide this query into two parts. The first refers to the "responsibility to uphold the full range of normative

[15] Space does not allow us to summarise here all the positions emerging from the debate. They are fully analysed by A. CARDONE, *Dalla doppia pregiudizialità al parametro di costituzionalità: il nuovo ruolo della giustizia costituzionale accentrata nel contesto dell'integrazione europea*, in *Consultaonline.it*, *Liber Amicorum per Pasquale Costanzo*, 13 March 2020, 1 ff.

[16] G. PALOMBELLA, *Interlegalità. L'interconnessione tra ordini giuridici, il diritto, e il ruolo delle corti*, quoted above, 338.

complexities at stake", and the second concerns avoiding "injustice and partiality". Regarding the first part, relating to responsibility through different normative standards, the preliminary conclusion is positive: over the last decade, the ItCC has not ignored, indeed it continues to develop, instruments able to clarify the force and meaning of supranational norms and to increase channels for dialogue with the supranational Courts[17].

More specifically, this trend takes place by means of two different tools: a general re-setting and a case-by-case adjudication. Firstly, the ItCC envisages a general reset of the system-coordination mechanisms, which will be viable in the future and is addressed internally to national courts, lawyers, and applicants – and externally to the supranational Courts. This reset involves the source of law and the judicial forum for conflicts. Regarding the ECHR, it came about once and for all with the twin judgments of 2007, re-defining both the formal position of the sources and the protocols of adjudication on grounds of conventionality. As for the EU Charter of Fundamental Rights, it was a gradual process, with a series of decisions being adopted between 2018 and 2020 and probably still ongoing, reformulating the conditions for making constitutional referrals[18]. This recent evolution represents a further step in the definition of the relationship between domestic and EU law, which has been marked in constitutional jurisprudence by a series of several stages[19]. Following the general reset, the second tool is an instrument for daily implementation: The work of the ItCC involves a process of fine tuning, which depends on the individual case in question.

[17] Well before 2017 M. CARTABIA, *La tutela multilivello dei diritti fondamentali – il cammino della giurisprudenza costituzionale italiana dopo l'entrata in vigore del Trattato di Lisbona*, Report to the Trilateral Meeting of the Italian, Portuguese and Spanish Constitutional Courts and Tribunals, Santiago de Compostela, 16-18 October 2014, in *www.cortecostituzionale.it*, mapped the relationship between national constitutional Courts and the European Courts as consisting in five attitudes: the promotion of supranational law and the case law of the respective Courts; resistance, by not taking into account the provisions of external judgments; defence, by placing conditions on the effectiveness of supranational law; challenge, (rarely), by openly questioning a decision taken at European level; participation, through preliminary reference to, or use of, the margin of appreciation as tools to "express one's own voice", concluding that all these attitudes were in some way present in ItCC case law, with clear exception of the attitude of indifference (our translation).

[18] We have used a musical metaphor (fine tuning) to describe how the conventional route begun with the twin judgments of 2007 in a decisive way, relating to the force of the ECHR and judiciary protocols on unconventionality as the first, crisp, and peremptory notes of Beethoven's *Fifth Symphony*, while the new EU law route begun in 2017 on tiptoe and is comparable to the sound of bells in Mozart's *Magic Flute*, in A.O. COZZI, *Nuovo cammino europeo e cammino convenzionale della Corte costituzionale a confronto*, in C. CARUSO, F. MEDICO, A. MORRONE (eds.), *Granital Revisited? L'integrazione europea attraverso il diritto giurisprudenziale*, in Annali di Diritto Costituzionale, Anno VI, n. 8, Università degli studi di Bologna, Bonomia University Press, 2020, 47-65, openaccess in buponline.com/prodotto/granital-revisited/.

[19] See note 43.

Referring specifically to the recent direction taken by the ItCC, starting from Judgment no. 269 of 2017, we can identify four signs of interlegality: language, procedures, legal reasoning, and the effects of judgments.

a. *language*: an analysis of language may not be sufficient in itself to assess a new judicial approach, because the concrete effects might run counter to those that the language may have been expected to produce. Nevertheless, the choice of words may be a good indicator of the context in which the ItCC seeks to work and the way it wishes to be understood. After Judgment no. 269 of 2017, and even more so in subsequent decisions, the ItCC introduced a centralised review of legislation within the framework of co-operation with the ECJ. Reference has been made to the fact that the "Charter of Rights is a part of Union law endowed with particular characteristics due to the typically constitutional stamp of its contents. The principles and rights laid out in the Charter largely intersect with the principles and rights guaranteed by the Italian Constitution (and by other Member States' constitutions)"[20]; "there is an inseparable link between the constitutional principles and rights invoked … and those recognised by the Charter, as enriched by secondary law, which bodies of law complement each other and operate in harmony"[21], and that "[…] all of this plays out within a framework of *constructive and loyal cooperation between the various systems of safeguards*, in which the constitutional courts are called to enhance dialogue with the ECJ (see, more recently, Order no. 24 of 2017), in order that the maximum protection of rights is assured at the system-wide level (Article 53 of the CFREU)"[22].

b. *procedure*: since Judgment no. 269 of 2017, and more clearly from Judgment no. 20 of 2019, the question of constitutionality has been presented as a concurrent remedy in the light of the criteria and requirements of the ECJ for preliminary rulings: "On the other hand, the emergence of the guarantees found in the EUCFR and those provided by the Italian

[20] ItCC no. 269 of 2017, p. 5.2. *Cons. dir.*; the same in ItCC no. 20 of 2019, p. 2.1. and p. 2.2.; on the similarity between the Italian Constitutional rights, EU Charter Rights, and ECHR rights in question in the case, see ItCC no. 63 of 2019, p. 4.3. *Cons. dir*; ord. no. 119 of 2019, p. 2. *Cons. dir*.; ord. no. 182 of 2020, p. 3.2. *Cons. dir*. All references are taken from the English translations of Judgments in the website of ItCC, www.cortecostituzionale.it.
[21] ItCC ord. no. 182 of 2020, p. 3.2. *Cons. dir*.
[22] ItCC no. 269 of 2017, p. 5.2. *Cons. dir.*; on the concurrence of remedies and the loyal and constructive co-operation between Courts, also ord. no 119 of 2019, p. 2 *Cons. dir.*, ord. no. 182 of 2020, p. 3.1. *Cons. dir*.: "Where a referring court raises a question of constitutionality that also touches upon the provisions of the Charter, this Court cannot avoid assessing whether the contested provision at the same time violates both the principles of Italian constitutional law and the guarantees enshrined in the Charter (Judgment No. 63 of 2019, point 4.3 of the Conclusions on points of law). In fact, as the guarantees laid down in the Constitution are supplemented by those enshrined in the Charter, this "generates more legal remedies, enriches the tools for protecting fundamental rights, and, by definition, denies any restriction" (Judgment No. 20 of 2019, point 2.3 of the Conclusions on points of law)".

Constitution can generate *competing legal remedies*. In light of this, for cases of "double prejudice" [doppia pregiudizialità] – i.e. disputes that may give rise to questions of constitutionality and, simultaneously, questions of compliance with Union law – the ECJ has, in turn, affirmed that Union law "does not preclude" the overriding character of the constitutional determination that falls under the competence of the national constitutional courts, *provided that the ordinary judges are free to submit to the ECJ "any question that it considers necessary, at whatever stage of the proceedings it considers appropriate, even at the end of an interlocutory procedure for the review of constitutionality*". "In general, the supervening value of the guarantees set down by the EU Charter with respect to those of the Italian Constitution generates *more legal remedies*, enriches the tools for protecting fundamental rights, and, by definition, denies any restriction"[23]. Among these tools there is *also* the declaration of unconstitutionality of domestic legislation[24]. On the other hand, "Within an area that is marked by the growing influence of EU law, it is inconceivable not to promote a dialogue with the Court of Justice, which is charged with ensuring 'that in the interpretation and application of the Treaties the law is observed' (Article 19(1) TEU)" [25]. Verification of constitutionality has thus been extended while seeking to strike a balance with the requirements to apply EU law in a uniform manner, considering the needs of both orders[26]. This is why the ItCC has left the ordinary courts free to adopt any measure necessary to ensure provisional judicial protection of the rights conferred by the EU legal order and to disapply, at the conclusion of the interim constitutionality proceedings, the domestic provision at issue even if it is deemed not unconstitutional but in conflict with EU law[27]. Moreover, the position of the ItCC regarding the ECJ is that the ItCC itself has the "first word", so framing a question, rather than the power of the "last word", in a hierarchical approach[28].

[23] ItCC no. 20 of 2019, p. 2.3. *Cons. dir*.
[24] ItCC no. 63 of 2019, p. 4.3. *Cons. dir*.
[25] ItCC ord. no. 182 of 2020, p. 3.2. *Cons. dir*., that continues: "The prohibition on arbitrary discrimination and the guarantee of protection for maternity and young children, as enshrined in the Italian Constitution (Articles 3(1) and 31 of the Constitution) must in fact be interpreted also in the light of the binding requirements resulting from EU law (pursuant to Articles 11 and 117(1) of the Constitution). The questions referred for a preliminary ruling that it is considered appropriate to submit to the Court of Justice in these proceedings are focused on the scope and depth of those guarantees, which have implications for the constant evolution of constitutional principles, as part of a dynamic of mutual implication and fruitful supplementation".
[26] In fact, the requirement most frequently challenged by the new orientation of the ItCC is that of immediacy: the immediate, simultaneous, and automatic application of Regulations in all EU Member States. For a discussion of this aspect, we may refer to A.O. COZZI, *Sindacato accentrato di costituzionalità e contributo alla normatività della Carta europea dei diritti fondamentali a vent'anni dalla sua proclamazione*, in *Dir. pubbl.*, no. 3 of 2020, 659-715, esp. 694.
[27] ItCC no. 269 of 2017, p. 5.2. *Cons. dir.*, expressly mentioning ECJ, Fifth Chamber, 11 September 2014, C-112/13 *A v. B and others*, and ECJ, Grand Chamber, 22 June 2010, C-188/10, *Melki* and C-189/10, *Abdeli*.
[28] ItCC no. 20 of 2019, p. 2.3. *Cons. dir*.

c. *legal reasoning*: in the case law following Judgment no. 269 of 2017, the ItCC carries out a parallel examination of domestic, international, and EU norms in the light of their respective case law. This analysis highlights the principles developed by the supranational courts, which the ItCC then compares with the domestic constitutional provisions. It is frequently stated that the plurality of sources of law examined (the Constitution, the ECHR, and the EU Charter) converge towards a single principle or that the principles set out in the case law of the Strasbourg Court and the ECJ have a common *rationale* or highlight common limits. As in the case of conventional norms, also in judgments on EU law it becomes customary to examine ECJ case law and to compare its scope with what may be found in domestic norms.

In our opinion, this kind of reasoning has the merit of clarifying what Strasbourg and the ECJ say and from which cases their orientations have been formed, albeit keeping the respective sources distinct[29]. It is, therefore, a comparison between principles and their respective interpretations, which does not proceed in an all-consuming flow, according to passages and fractions whose origin has become unrecognisable; rather it is one that has the merit of keeping the respective sources and their interpretation distinct in order to "make them speak". This allows for greater scrutiny of the argumentative process by other jurisdictional referents, scholars and, more broadly, public opinion.

d. *effects*: the judgments quoted above quashed the domestic legislation in conflict with EU law. Thus, as things stand, recentralising the review of constitutionality seems to bring advantages in terms of the coexistence between constitutional and EU principles, shaping the conformity of domestic law in relation to EU law without undermining its application, and thus increasing legal certainty[30]. These outcomes show that centralised review can indeed serve to expunge domestic rules that are also in conflict with EU rules, ensuring their uniform

[29] In Judgment no. 63 of 2019, for example, on the retroactivity of the *lex mitior* in matters of administrative penalties, there clearly emerges an attempt to frame and discuss supranational case law even when there are no precedents in Strasbourg case law and there is no consolidated orientation. Similarly, in Ordinance no. 117 of 2019, the ItCC began its legal reasoning by affirming that: "All the provisions of the Constitution, the ECHR, the International Covenant on Civil and Political Rights and the CFREU cited by the Supreme Court of Cassation recognise – expressly, in the case of Article 14 of the International Covenant and implicitly, in all other cases – the right of the person not to be compelled to testify against themselves or to confess guilt (*nemo tenetur se ipsum accusare*)" (p. 3 *Cons. dir.*); so the ItCC analyses the case law of the ECJ on hearing the interested party in proceedings relating to anti-trust offences, but defines it as outdated and questions its continuing relevance.

[30] ItCC Judgments no. 20, no. 63 and no. 112 of 2019 declared the challenged domestic rules unconstitutional; ordinances no. 117 of 2019 and no. 182 of 2020 suspended the proceedings to raise a preliminary question. The ECJ answered ord. no 117 of 2019 in ECJ, GS, 2 February 2021, *D.B.*, C-481/19, following the approach of the ItCC and interpreting the secondary legislation in the light of Articles 47 and 48 of the EU Charter.

application. We will discuss later on the effects the outcomes show in terms of degree of protection.

Thus, the wording, the idea of concurrent remedies provided in constitutional law (but coherent with – and not destructive of – EU principles), and legal reasoning that takes into account all the provisions and their interpretation by each Court are, in our opinion, signs of loyal co-operation with, and responsibility towards, the other legal orders to which those in the EU area belong – and to their Courts. As motioned above, the EU supranational legal order and the internal orders are so strictly connected that ordinary courts are *per se* courts of both EU and domestic law. And the ItCC takes up the game once again and more vigorously.

4. More key elements

Of course, some elements may be read in terms of closedness, reappropriation, or exclusion. For example, in both the ItCC case law on the ECHR, and now in its new orientation on EU fundamental rights, the ItCC seems to prioritise domestic constitutional provisions. Is this a sign of hierarchical priority? The answer would appear to be in the negative since, as mentioned, its reasoning sets out and discusses all the relevant supranational principles and their respective jurisprudence, acknowledging that each court has the privileged task of interpreting its own rules of reference. And the need to make the Constitution speak, as it were, is justified by the aim of building constitutional traditions: "The Court will make a judgment in light of internal parameters and, potentially, European ones as well (per Articles 11 and 117 of the Constitution), in the order that is appropriate to the specific case, including for the purpose of ensuring that the rights guaranteed by the aforementioned Charter of fundamental rights are interpreted in a way consistent with constitutional traditions, which are mentioned in Article 6 of the Treaty on European Union and by Article 52(4) of the EUCFR as relevant sources in this area"[31].

Certainly, the recognition of a constitutional tradition lies on the borderline between the Court's affirmation of its distinctiveness and the construction of a common heritage, but all things considered, the ItCC's loyal co-operation towards the various systems seems solid. The ItCC's reference to Art. 6 TEU and Art. 52.4 of the EU Charter underlines one of the key elements in discerning the attitude of the Court. In its reasoning, there is continuous and

[31] ItCC no. 269 of 2017, p. 5.2. *Cons. dir*.

voluntary oscillation between the norms of reference for the different systems of protection in both substantive and procedural terms: Art. 11 and Art. 117.1, as the norms that open up the domestic system to international and supranational law; Art. 101.2 It. Const., stating that judges are subject only to the law, where the notion of law is also extended to conventional and EU law[32]; Art. 134 It. Const., as the source of the centrality of the judicial review of legislation with effects *erga omnes*. But at the same time, reference is made also to Art. 19 TEU and Art. 267 TFEU on the role of the ECJ and preliminary references, as well as to Art. 6 TEU and to Art. 52.4 of the EU Charter on common constitutional traditions, together with the individual substantive norms of the ECHR and of the EU Charter in question[33]. Thus, the judicial basis for adjudication not only takes domestic provisions into account but also the requirements of the

[32] Regarding Art. 101.2 It. Const., see ItCC no. 49 of 2015, p. 7 *Cons. dir*. on the obligation of ordinary courts to implement ECHR principles: "However, it would be mistaken and even at odds with these premises to conclude that the ECHR has turned national legal operators, including first and foremost the ordinary courts, into passive recipients of an interpretative command issued elsewhere in the form of a court ruling, irrespective of the conditions that gave rise to it. The national court cannot deprive itself of the function assigned to it under Article 101(2) of the Constitution which "expresses the requirement that the courts infer exclusively from the law indications concerning the rules to be applied in proceedings and that no other authority is thus able to issue instructions or provide suggestions to the courts regarding the manner in which they are to rule in specific cases" (see Judgment no. 40 of 1964; followed by Judgment no. 234 of 1976), *which also applies to the provisions of the ECHR, incorporated into internal law by an ordinary implementing law*. There is no doubt that the ordinary courts cannot refuse to act on a decision by the Strasbourg Court concerning proceedings of which that court is subsequently apprised, where necessary, provided that they put an end, as is their duty, to the harmful effects of the violation found to have occurred (see Judgment no. 210 of 2013). In such an eventuality "the court ruling will remain subject to the law, even if the latter provides that the court must reach its decision having regard to a decision taken in another judgment issued in relation to the same case" (see Judgment no. 50 of 1970). "[…] However, this does not mean that the courts can disregard the interpretation of the Strasbourg Court, once it has become consolidated with a certain effect. In fact, it is a primary requirement of constitutional law that a stable interpretative equilibrium be reached in relation to fundamental rights which is facilitated, as far as the ECHR is concerned, by the role of ultimate arbiter vested in the Strasbourg Court. *This interpretative equilibrium, which is based on Article 117(1) of the Constitution* and in any case the interest of constitutional dignity referred to above, *must be coordinated with Article 101(2) of the Constitution within the synthesis between the interpretative autonomy of the ordinary courts and their duty to cooperate in ensuring that the meaning of the fundamental rights ceases to be a matter of dispute*. It is within this perspective that the role of the Strasbourg Court may be explained in enabling the objective of legal certainty and stability to be satisfied" (our emphasis).
In ItCC no. 269 of 2017, Art. 101(2) is referred to EU law: "Therefore, where an internal law clashes with a European Union rule, the judge – after having failed in every attempt to bridge the gap on an interpretative basis or, when applicable, through reference for a preliminary ruling – directly applies the European Union provision endowed with direct effects. *This satisfies, at one and the same time, the primacy of European Union law and the principle that judges are subject only to the law (Article 101 of the Constitution), which must be understood to mean the kinds of laws that the constitutional system itself obliges them to observe and apply*" (our emphasis). About the sense and function of «law» in Italian Constitution in a European perspective, now G. PICCIRILLI, *La "riserva di legge". Evoluzioni costituzionali, influenze sovrastatuali*, Torino, 2019.

[33] Reference is also made to supranational doctrines: see, for example, ItCC no. 269 of 2017, p. 7. *Cons. dir.*, which begins with the following words: "Granted the principles of the primacy and direct effect of European Union law as consolidated in both European and constitutional case law […]". Moreover, interestingly the ItCC also refers to Art. 53 of the EU Charter, the controversial interpretation of which will be discussed below: "[…] all of this plays out within a framework of constructive and loyal co-operation between the various systems of safeguards, in which the constitutional courts are called to enhance dialogue with the ECJ (see, most recently, Order no. 24 of 2017), in order that the maximum protection of rights is assured at the system-wide level (Article 53 of the EUCFR)", in ItCC no. 269 of 2017, p. 5.2. *Cons. dir.* So Art. 53 seems to be understood as one of the reasons permitting a centralised review of constitutionality in the new terms provided for by the ItCC.

supranational sources. In the same line of argument, which emphasises the plurality of sources belonging to different legal systems, are those authors who consider the new orientation of the ItCC as an expression of the meta-principle of loyal co-operation between the States and the Union deriving from art. 4.3. TEU and embedded in the national system in art. 11 Const. it.[34].

Secondly, for our purposes, it is important to note that the preliminary reference by the ItCC to the ECJ has become ordinary, habitual, and not reserved to extraordinary cases of alleged violation of the supreme principles of our legal order. In sum, these elements show responsibility across the different legal orders and adhere to the vision of interlegality as courts playing "on the borders between several normative orders and their different basic principles" and "not only accountable to the order to which they belong, because performing the tasks of justice imposes a new responsibility to uphold the full range of normative complexities at stake"[35].

The next section examines to what extent this approach depends on the formal sources and how much on the interpretation of the ItCC itself.

5. Interlegality as a feature of written norms

Having observed that the ItCC takes into account supranational norms concerning fundamental rights, some considerations should now be offered as to whether the interlegalitarian approach depends directly on the characteristics of the Italian Constitution's norms on international and EU law or whether this approach mainly depends on their interpretation by the ItCC. We should begin by clarifying whether the item in question falls within the meaning of interlegality. Clearly, interlegality highlights the fact that the internal norms of a legal order are not enough to emphasise the current close interrelation between systems: "Each system is able to identify which rules are valid and applicable according to its own 'recognition rules', but these remain silent and inadequate to answer questions that arise between several systems and whose solution goes beyond each of them"[36]. But this consideration (the structural inadequacy of the norms of reference in an individual system) does not give rise to a different solution: there is (still) no general international set of norms able to

[34] N. LUPO, *Con quattro pronunce dei primi mesi del 2019 la Corte costituzionale completa il suo rientro nel sistema "a rete" di tutela dei diritti in Europa*, in *Federalismi.it*, 10 July 2019, 21.
[35] See note 16.
[36] G. PALOMBELLA, *Interlegalità. L'interconnessione tra ordini giuridici, il diritto, e il ruolo delle corti*, in *Diritto e questioni pubbliche*, quoted above, 331.

serve as a reference for all national systems. It has even been claimed that a general constitutional supranational order does not exist[37]. So, from a normative perspective, it would not seem completely mistaken to start from a reflection on the constitutional norms of each system.

In this sense, Arts. 10 and 11 It. Const. have been interpreted by scholars as the source and expression of a principle of "openness" of the Italian Constitution across international and supranational legal orders[38]. This openness is not empty and neutral but is substantively addressed to the protection of individual human rights, as emphasised by reading Arts. 10 and 11 in the light of Arts. 2 and 3 It. Const. on inviolable rights and imperative duties, as well as the principle of equality in formal and substantial terms. A clear index of this substantive focus can be found in Art. 11 itself, where limitations of sovereignty are conditioned by the purpose of ensuring peace and justice among nations. So, the first point is that *the written Constitution* contains the seeds for the due consideration of international and supranational norms. Thus, "openness" does not depend exclusively on judicial interpretation; rather, it is rooted in the wording of the Constitution.

This is the result of the historical premises of the Italian Constitution – the personal circumstances of many of those involved in framing the new document, exiled under Fascism; the concomitant negotiations of the Paris Treaty during the discussion phase[39] – and subsequent implementation by parliament itself. It has been argued that the Constituent Assembly's openness to the international order was geared to Italy's active diplomatic participation in international relations as part of a new order of relations between States, much less conditioned by the awareness of orienting the Republic towards international instruments to protect human rights, which were only in the early stages at the time. But Italy's adhesion to the European Convention in 1955 represented recognition and acceptance of a common heritage of traditions and political ideals, respect for freedoms, and the pre-eminence of law, thus giving meaning and direction to a constitutional opening on the international level and with regard to some of

[37] J. KLABBERS, G. PALOMBELLA, *Introduction. Situating Inter-Legality*, quoted above, 4-5, on the reasons why the idea of a constitutionalisation of the international order, which was very inspiring a decade ago, has somewhat lost ground.

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

[39] A. CASSESE, *Lo Stato e la Comunità internazionale (Gli ideali internazionalistici del costituente)*, in *Commentario alla Costituzione, Art.1-12, Principi fondamentali*, Bologna-Roma, 1975, 461 ff.

its basic choices. The fact that the Preamble to the ECHR referred to the Universal Declaration of Human Rights proclaimed by the General Assembly of the United Nations on 10th December 1948 led to the assertion that Italy accepted the supranational dimension of human rights, which had not been emphasised in constitutional debate. This implied voluntary acceptance of, rather than submission to, the constraints of the political clauses of the Peace Treaty[40].

Conversely, other Constitutions undoubtedly have a more detailed and specific range of norms devoted to international human rights (for example the Spanish Constitution of 1978, Art. 10.2, or Art. 16.2 of the 1976 Portuguese Constitution)[41] and/or the EU integration process. These and other Constitutions have been amended following the evolution of EU Treaties (the German and French Constitutions of 1949 and 1958 respectively). In Italy, however, the evolution of EU integration did not go hand in hand with constitutional revisions; indeed Art. 11 remains unchanged since 1948[42]. Consequently, compared with the more detailed provisions of other Constitutions, Arts. 10 and 11, and the more recent Art. 117.1 It. Const., allow a wider margin of interpretation. This margin will be discussed in the section to follow.

6. Interlegality arising from interpretation

We may now turn to the ItCC's contribution to the interlegalitarian approach. As we mentioned before, the Italian Constitutional provisions left ample leeway to the interpreter. The principle of separation between the supranational and national legal orders has always been confirmed (and this is one of the reasons for the theory of interlegality, disputing that a similar doctrine is still tenable, as well as the qualification of EU law as a factual source), while the behaviour of the ItCC in many ways tends towards integration. Each of these options, i.e.,

[40] S. BARTOLE, *La nazione italiana e il patrimonio costituzionale europeo. Appunti per una prima riflessione*, in *Diritto pubblico*, 1997, 1-26, now in S. BARTOLE, *Scritti scelti*, introduced by R. BIN, A.O. COZZI, F. DIMORA, G.P. DOLSO, P. FARAGUNA, F. GAMBINI, P. GIANGASPERO, D. GIROTTO, L.A. MAZZAROLLI, Naple, 2013, 759-777, esp. 760, as would be demonstrated by the Constituents' failure focus on the political clauses of the Peace Treaty and their effects on the domestic order, and esp. 770 on adhesion to the ECHR, quoting F. COCOZZA, *Diritto commune delle libertà in Europa, Profili costituzionali della convenzione europea dei diritti dell'uomo*, Turin, 1994, 51ff.

[41] For example, L.F.M. BESSELINK, *The Protection of Fundamental Rights post-Lisbon. The interaction between the EU Charter of Fundamental Rights, the European Convention on Human Rights (ECHR) and National Constitutions, Questionnaire and General Report*, in Reports of the XXV FIDE Congress, Tallinn, 2012, Vol. 1, Tartu University Press, 1-1398, paper version in pure.uva.nl/ws/files/1863964/122194_The_Protection_of_Fundamental_Rights_post_Lisbon_FINAL_corrected.doc, referred to the technique of national rights interpretation consistent with international human rights standard as *implied* in the Italian Constitution, quoting ItCC judgments no. 348 and 349 of 2007 in note 23, while it is *mandated explicitly* in other Constitutions (our emphasis).

[42] On the inadequacy of Art. 11 to handle the current degree of development of the European order, which no longer involves only limitations, but real transfers of sovereignty, among many others S. BARTOLE, *La nazione italiana e il patrimonio costituzionale europeo*, quoted above, 775.

separation v. integration, have been thoroughly analysed and discussed by scholars, but here, the point is that the contribution of the ItCC to defining the set of relations between domestic, international, and supranational norms has been extremely significant, as issues concerning the ECHR and EU law clearly indicate. The ItCC has shaped the status and legal force of the ECHR within the domestic legal order. Even more impressively, under the unchanged Art. 11 It. Const., the ItCC set out four methods to resolve the antinomies between domestic and EU law, so it may be argued that Art. 11 is not specifically linked to either of them[43].

Elsewhere, we have reflected on why the parameter for bringing the ECHR into the domestic legal order is Art. 117.1 (and sometimes general international law under Art. 10.1 It. Const.), while Art. 11 Const. is reserved for EU law. We have considered that these provisions may be understood as having three distinct meanings: The techniques and procedural fora for resolving conflicts between internal and supranational norms; the different legal consistency of protection systems; or the limits of the resistance of constitutional norms to external norms[44]. Very briefly, we have demonstrated that the choice of technique for resolving the antinomies (non-application *inter partes* or unconstitutionality *erga omnes*) and the relative forum (the ordinary courts or the Constitutional Court) does not represent an intrinsic feature of the constitutional provision, as non-applicability is not imposed by Art. 11 but depends on the features of the system whose rules are being sought. Regarding the legal consistency of protection systems, the ItCC considers the EU to have the characteristics of a political system, which the conventional system lacks. Its political nature is acknowledged in the essentially Kelsenian sense of the ability to make law, so transfer of sovereignty corresponds to a transfer of legislative powers, which is not the case in the conventional system. The existence of legislative powers justifies some typical features of EU norms, such as direct effect, but it does not help define the nature of conventional norms, nor the judgments of the Strasbourg Court. Thirdly, considering these norms as rules defining limitations to integration, as things stand at present, the conventional norms, as "interposed provisions" under Art. 117.1 alone, formally encounter the limits of all constitutional provisions, while EU provisions, with Art. 11 and 117.1

[43] Initially, a chronological criterion was adopted (Judgment no. 4 of 1964); later, the hierarchical criterion was introduced (Judgments no. 232 of 1975, 163 of 1977); in the third phase, with *Granital*, the criterion of competence in the form of non-application resulting from the retreat of domestic law to the spaces defined by the EU Treaties on the basis of the principle of attribution was applied. It should not be forgotten that, even before Judgment no. 269 of 2017, Art. 11 It. Const. allowed for a centralised review in proceedings on constitutionality *in via principale* and in the incidental proceedings concerning EU rules without direct effect. In essence, Art. 11 It. Const., provides for all variations regarding the techniques and fora for resolving the antinomies between domestic and EU norms.
[44] A.O. COZZI, *Nuovo cammino europeo e cammino convenzionale della Corte costituzionale a confronto*, quoted above, 47-65.

It. Const., encounter the sole limit of the supreme principles of the legal system. But current constitutional case law challenges this sharp division, which is flawed on the one hand by excess, and on the other by defect. It is flawed by excess with respect to conventional provisions, since the trends in ItCC case law show that, in reality, the constitutional norms "breathe" in the light of conventional provisions; they are understood to be porous and open to them, so the constitutional norms may be supplemented.

As for EU law, with the new trend introduced by Judgment no. 269 of 2017, EU norms as "interposed provisions" are coming into more frequent contact with constitutional provisions. This "talking to each other" does not only call into question the supreme principles, as in the previous *Granital* framework, but, indeed, all the constitutional norms. In this renewed context, therefore, counter-limits do not appear to represent the only case in which the ItCC is required to make a preliminary reference to the ECJ, as in the *Taricco* case. But the reference may be useful in terms of the interpretation or validity of EU law in cases relating to *any* constitutional principle. Even in cases where the hard core of the Constitution is not in question, EU norms are called upon to interact with constitutional norms, as the recent ItCC ord. no. 282 of 2020 on social policies demonstrates. Thus, looking at ItCC practice, a less defined and softer boundary is probably affirmed, in which the substance of constitutional rules is addressed one by one, together with both conventional and EU provisions.

These considerations are useful here to demonstrate the breadth of the flexibility the Constitution leaves to the ItCC. There is certainly a link expressed in Art. 11 It. Const., namely peace and justice among Nations. And indeed, the direction undertaken by the ItCC has meant that the normative fulness of other formal expressions of Art.11, such as the reciprocity clause, have been devalued[45]. Ultimately, ItCC has taken upon itself the task of shaping the relationship between legal orders and has done so in terms that attest to a concurrent responsibility towards different systems of protection. We may, therefore, speak of interlegality in the sense outlined above. The second element claimed by the theory of interlegality, i.e. its functionality to avoid injustice and impartiality, should now be addressed.

[45] Even if it is assumed that Art. 11 does not apply to the ECHR, it should be noted that the reciprocity principle does not comply with the universal protection of human rights stated in Art. 1 ECHR. The aims of peace and justice were considered enough for the application of Art. 11 It. Const. to the UN Charter (ItCC Judgment no. 238 of 2014).

7. Interlegality and higher protection

On the subject of interlegality, we read that: "What seems crucial is to abandon the point of view of the interests of the rulers, whether the monarch, the optimates, or the many, and to always embrace the common good, which becomes the ultimate parameter of value, a parameter whose respect is not automatically guaranteed, or intrinsic, in the constitutional formulas, given that they can lead to forms deviating from that parameter. And it is precisely onto this parameter that the epistemic perspective essential for the validation of constitutions shifts"[46]. In this way, the theory of interlegality seems to oscillate between a formal criterion relating to positive norms and a substantive criterion concerning the justice of the case. We will concentrate on this meaning here, confining our analysis to the extent to which interlegality may relate to the maximisation of individual protection.

The criterion of maximum expansion of constitutional freedoms was developed in Italian constitutional scholarship and refers to the need for an extensive interpretation of the relevant constitutional norms. The argument was part of a specific debate on explicit and implicit limits to constitutional rights[47]. Years later, but well before the EU Charter came into force, the issue of the level of protection emerged in a different sphere – that of the relationship between domestic and European protection systems. The point is that there is no clear dividing line between the different systems for the protection of rights, be they constitutional, conventional, or EU. Discussion regarding the level of protection provides one of the possible answers to the question of which law should apply to a case that is relevant to each of the systems. The terms "higher level of protection" or "more extensive level of protection" were understood to mean the most favourable protection offered to a subjective situation, as concretely claimed by the person concerned[48]. Without going into detail, this kind of substantive criterion has long been questioned, observing that quantitative criteria, which focus

[46] G. PALOMBELLA, *Interlegalità. L'interconnessione tra ordini giuridici, il diritto, e il ruolo delle corti*, quoted above, 325. See also 331: "it is, however, a matter of considering (rather than ignoring) the overlapping of different normative rationalities as something that needs *its own measure of justice*" (our emphasis and our translation).
[47] P. BARILE, *Diritti dell'uomo e libertà fondamentali*, Bologna, 1984, 41, as mentioned by R. BIN, *Critica della teoria dei diritti*, Milan, 2018, 63.
[48] Scholars have proposed a number of solutions to harmonize national and supranational standards; these include a universalised maximum standard, a common minimal standard, or a local national maximum standard approach. For general references, see L.F.M. BESSELINK, *Entrapped by the Maximum Standard: On Fundamental Rights, Pluralism and Subsidiarity in the European Union*, in *Common Market Law Review*, no. 3 of 1998 (35), 629-680, and ID, *The Protection of Fundamental Rights post-Lisbon*, op. cit., 45 of the paper.

on measuring the minimum and maximum standards of protection, are structurally unsuited to resolving conflicts between rights, given their relational nature[49].

For the purposes of this paper, we will analyse the level of protection from two perspectives: as a technique of argumentation developed by the ItCC in its reasoning; as a criterion formally expressed by written norms, in particular Art. 53 ECHR and Art. 53 of the EU Charter, concerning co-ordination between protection systems. Art. 53 of the EU Charter, in fact, is called precisely a "Level of protection". The purpose of the analysis is to ascertain whether both the argumentative doctrine developed by the ItCC and the interpretation of the written clauses of the Convention and the EU Charter refer to the most extensive individual protection.

Regarding the final provisions (Art. 53 ECHR and Art. 53 CFREU), it may be helpful to remark that the criterion of the level of protection may steer co-ordination between bills of rights, in terms of theory of sources or theory of interpretation. In the relationship between sources, the criterion becomes the selection of the applicable source, thus leading to the downgrading and non-application of the potentially competing source containing less favourable rules. In the context of the theory of interpretation, on the other hand, the criterion

[49] Also because the consistency of each legal order lies not so much in the rights as their very *limits*, which are a consequence of the founding values adopted by each order, in J.H.H. WEILER, *Fundamental Rights and Fundamental Boundaries: On Standards and Values in the Protection of Human Rights*, in N. NEUWAHL, A. ROSAS (eds.), *The European Union and Human Rights*, Boston-London, 1995, now in *The Constitution of Europe*, 1999. Many scholars share this assumption. Among the authors already mentioned, see L.F. M. BESSELINK, *The Protection of Fundamental Rights post-Lisbon*, op. cit., 46 of the paper, concerning the *Von Hannover* case, where the ECtHR and the BVerfG disagreed: one gave greater protection to privacy, whereas the other laid greater emphasis on safeguarding freedom of expression, so the criterion of the greater level of protection is structurally unsuited to resolving this kind of conflict. In the same vein, M. CARTABIA, *Convergenze e divergenze nell'interpretazione delle clausole finali della Carta dei diritti fondamentali dell'Unione europea*, a contribution during the seminar *60 anni dopo i Trattati di Roma. I diritti ed i valori fondamentali nel dialogo tra la Corte di giustizia e le Corti supreme italiane*, 25 May 2017, Rome, in *rivistaaic.it*, no. 3 of 2017, 16.7.2017. A partially dissenting voice is R. ALONSO GARCÍA, *Le clausole orizzontali della Carta dei diritti fondamentali dell'Unione Europea*, in *Rivista italiana diritto pubblico comunitario*, 2002, 1 ff., esp. 21-23. Here, the discourse on fundamental rights is still essentially centred on the individual in relation to public power, both in its classic version regarding obligations to abstain and the modern version concerning positive obligations. It follows that, while the criterion of the greater level of protection is not applicable when comparing two rights, it becomes valid when a right is opposed to a general interest. In such cases, the system providing greater protection must prevail, namely the one that meets the needs of the individual more than public intervention, however important the general interest behind it may be. In the wake of J.H.H. Weiler's comparison between European and American protection, the writer refers to the right to life, arguing that the European system, which prohibits the death penalty, offers greater protection – which is technically observable – than the US system. It may be helpful to recall that in Alonso Garcia's arguments there is no room for automatism, the reconstruction of the relations between systems of protection being based on ample margins of interpretation and the presumption of equivalent protection and dialogue fuelled by a "shared modesty" among courts. In Italian scholarship, see also the numerous works by A. RUGGERI on the theory of interconnection between Charters through interpretation: among others, A. RUGGERI, *Primato del diritto dell'Unione europea in fatto di tutela dei diritti fondamentali?*, in *Quad. cost*., no. 4 of 2015, 931-949.

does not act as a canon for selecting the source but indicates a harmonious interpretation of the various principles, so the rule drawn from the applicable source becomes clearer and assumes a meaning more favourable to the applicant thanks to interference from the rules provided by the other provisions. In practice, the distinction between a rule for applying sources and a rule for interpretation is often blurred, so it may appear theoretically correct but somewhat artificial. Nevertheless, the selection of sources and their interpretation remain logically distinct. Indeed, in our opinion, the identification and selection of sources, even at this time, is the ultimate guarantee of individual rights also within a framework where different legal orders coexist[50].

Let us start from ItCC case law and then return to the analysis of the final provisions of both ECHR and the EU Charter.

a. The ItCC criterion of the greatest expansion of guarantees

In one of the twin Judgements, no. 348 of 2007, despite explicitly referring to ECtHR interpretation, the ItCC had already affirmed that the ECtHR's precedents were not strictly binding on constitutional adjudication, given the need for a 'fair balance' between respect for international obligations and the protection of constitutional rights and interests[51]. In decision no. 317 of 2009, again referring to the ECHR, the ItCC clarified the criterion of "the greatest expansion of fundamental rights"[52]. The Court stated that "It is evident that this Court not only cannot permit Article 117.1 of the Constitution to determine a lower level of protection compared to that already existing under internal law, but *neither can it be accepted that a higher level of protection which it is possible to introduce through the same mechanism should be*

[50] Regarding the current trend of losing information about the *status* of acts and their respective places in each legal order, see R. BIN, *Gli effetti del diritto dell'Unione nell'ordinamento italiano e il principio di entropia*, in *Scritti in onore di Franco Modugno*, Vol. I, Naples, 2011, 363-383; on the need for legal 'forms', which is not formalism but a theoretical scheme within which to order relations between sources and between systems, ID, *Perché Granital serve ancora*, in C. CARUSO, F. MEDICO, A. MORRONE (eds), *Granital Revisited?*, quoted above, 15-20. It seems to us that the theory of interlegality cannot easily be combined with this assumption.

[51] See in Judgment no 236 of 2011, p. 9 *Cons. dir.*, quoting no. 317 of 2009: "However, whilst this Court can certainly not replace its own interpretation of the ECHR for that of the Strasbourg Court, it may however "assess how and to what extent the results of the interpretation of the European Court interact with the Italian constitutional order. Since an ECHR provision effectively supplements Article 117(1) of the Constitution, it receives from the latter its status within the system of sources, with all implications in terms of interpretation and balancing, which are the ordinary operations that this Court is required to carry out in proceedings falling within its jurisdiction" (judgment no. 317 of 2009)".

[52] Scholars sometimes use the concept of the "maximum expansion of guarantees" for all the ItCC case law, Art. 53 ECHR, and Art. 53 of the EU Charter. For example, L. CAPPUCCIO, *La massima espansione delle garanzie tra Costituzione nazionale e Carte dei diritti*, in *Studi in onore di Gaetano Silvestri*, Vol. I, Turin, 2016, 412-431. In this text, however, we reserve the expression to ItCC case law. We qualify Art. 53 ECHR as a non-regression clause and analyse Art. 53 EU Charter in the light of the principles of subsidiarity and primacy, thus highlighting that each legal context, although clearly interconnected and facing the same issues, uses a partly different language, indicating the existence of different doctrines and legal premises.

denied to the holders of a fundamental right. The consequence of this reasoning is that *the comparison between the Convention* (sic) *protection and constitutional protection of fundamental rights must be carried out seeking to obtain the greatest expansion of guarantees*, including through the development of the potential inherent in the constitutional norms which concern the same rights"[53]. The Constitution and the ECHR are therefore brought together to pursue the greatest expansion of fundamental rights common to both documents.

This criterion may imply that if a different level of protection exists between constitutional and conventional norms, prevalence will be given to the rule that protects the individual right at stake more extensively. But in the same decision (no. 317 of 2009), the ItCC continued: "The concept of the greatest expansion of protection must include, as already clarified in judgment nos. 348 and 349 of 2007, a requirement to weigh up the right *against other constitutionally protected interest, that is with other constitutional rules, which in turn guarantee the fundamental rights which may be affected by the expansion of one individual protection*. This balancing is to be carried out primarily by the legislature, but it is also a matter for this Court when interpreting constitutional law [....]. The overall result of the supplementation of the guarantees under national law must be positive, in the sense that the impact of individual ECHR rules on Italian law must result in an increase *in protection for the entire system of fundamental rights*".

So, in this formula, the maximum expansion of guarantees does not relate to an individual right alone but measures protection in relation to other constitutional interests. Firstly, it is a substantial criterion which looks at the sphere of interests involved and implies the constitutional substance of the conventional rules, superseding their formal qualification as sub-constitutional rules, as we mentioned earlier. Secondly – and this is the point here – the criterion concerns the relationship between entire systems of rights and duties, the ECHR, and the Italian Constitution as a whole, rather than the relationship between individual rights. It is based precisely on an overall assessment of the system, namely the constitutional and conventional systems. Without doubt, the affirmation of this criterion was instrumental in defining a different role for the ItCC with respect to the Strasbourg Court and in reserving the task of interpreting the constitutional system, seen as an overarching whole, to the Constitutional Court. Thus, the very formula 'maximisation of protection' offered by the ItCC serves to guarantee the unity of the constitutional system of rights in the face of the

[53] Our emphasis. On this decision, see G. REPETTO, *Rethinking a Constitutional Role for the ECHR. The Dilemmas of Incorporation into Italian Domestic Law*, quoted above, 47.

particularised vision offered by Strasbourg, the judge of the case. But it also corresponds to a theory of the Constitution in itself, as a composite and systemic ensemble which precludes fragmented interpretations of individual provisions disconnected from their contextual relationship with other constitutional principles[54]. This reading avoids an individualistic and monistic view of individual rights in order to grasp their respective correlations, expanding a constitutional fabric that is based – alongside rights – on duties of political, economic, and social solidarity, which translate into constitutional interests pertaining to a collective dimension.

In conclusion, this criterion does not lead to an *a priori* maximisation of the individual position at stake and does not, in our view, therefore correspond to our initial definition of the "maximum level of protection". It is rooted in interpretation rather than in a strict order of sources. It does not preclude the assimilation of conventional interpretations, where these offer greater protection, such as in cases of criminal administrative penalties. Rather, it preserves the ability of the Constitution to contextualise individual cases within legal institutes and instruments expressing general constitutional interests.

b. Levels of protection under Art. 53 ECHR and Art. 53 CFREU

Leaving aside ItCC case law, the level of protection is also mentioned in formal sources. Both the ECHR and the EU Charter include final provisions on this issue, adopting the level of protection as a way of co-ordinating between charters of rights. As mentioned, these provisions may refer to a selection of sources or a method of interpretation.

As for other international human rights agreements, Art. 53 ECHR is a so-called "non-regression" or "safeguard" clause and is intended to prevent the international source being used to lower the level of protection already achieved under domestic law or other international treaties[55]. In the ECHR, in particular, the provision expresses the treaty's "complementary

[54] M. CARTABIA, *Of Bridges and Walls: The "Italian Style" of Constitutional Adjudication*, in *Constitutional Court of the Republic of Slovenia, 25 Years*, Bled, Slovenia, June 2016, Conference Proceedings, 69-84, esp. 81-82, in http://www.us-rs.si/media/zbornik.25.let.pdf, and in *Italian Journal of Public Law*, n. 1 of 2016 (8), 37-55.

[55] See Art. 53 ECHR, *Safeguard for existing human rights*: "Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a party". On classification as a non-regression clause, ST. J. MACDONALD, F. MATSCHER, H. PETZOLD (eds.), *The European System of Protection of Human Rights*, Boston, London, 1993, 43; F. CAPOTORTI, *Interferenza tra la Convenzione europea dei diritti dell'uomo ed altri accordi, e loro riflessi negli ordinamenti interni*, in *Comunicazioni e studi*, vol. XII, 1966, 131 ff.; P. PUSTORINO, *Art. 53*, in S. BARTOLE, B. CONFORTI, G. RAIMONDI (eds.), *Commentario alla Convenzione europea per la tutela dei diritti dell'uomo e delle libertà fondamentali*, Padua, 2001, 741 ff., esp. 743; E. CRIVELLI,

vocation" with respect to national systems and acts as a unifying factor around a minimum mandatory core of rights addressed to all States parties. Moreover, the provision is an expression of the principle of subsidiarity at the basis of the entire conventional system, and it is reflected both in the procedural features and in the substantive contents, like the condition of prior exhaustion of domestic remedies, as well as the doctrine of the margin of appreciation, which is one of the key argumentative doctrines of the Strasbourg Court. The ECHR is therefore an unavailable minimum guarantee, freely derogable upwards by the Member States but not downwards.

Art. 53 of the EU Charter, on the other hand, does refer to the level of protection[56], but unlike Art. 53 ECHR, is part of a system that has developed, and is based on, the principle of the primacy of Union law over national sources. In fact, the interpretation of Art. 53 of the EU Charter has been much more controversial, shifting between subsidiarity and primacy[57]. As mentioned earlier, Art. 53 has been one of the subjects of long and complex debate on the existence of constitutional limits to the primacy of EU law when this leads to less protection[58]. The legal literature on the issue is abundant, but we may summarise some main opinions. For some authors, also Art. 53 of the EU Charter is an expression of the principle of subsidiarity, assuming, like Art. 53 ECHR, either the traditional non-regression function assigned to similar clauses in international law[59] or more strenuously arguing that the Charter should not apply

Art. 53, in S. BARTOLE, P. DE SENA, V. ZAGREBELSKY (eds.), *Commentario breve alla Convenzione Europea*, Padua, 2012, 775-777.

[56] Art. 53 EU Charter, *Level of protection*: "Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union, the Community or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions".

[57] Specific reference to subsidiarity is made in the Preamble of the Charter and Art. 51.1, stating that "The provisions of this Charter are addressed to the institutions and bodies of the Union *with due regard for the principle of subsidiarity* and to the Member States only when they are implementing Union law. […]".

[58] B. DE WITTE, *Art. 53*, in S. PEERS, T. HERVEY. J. KENNER, A. WARD (eds.), *The EU Charter of Fundamental Rights. A Commentary*, Oxford, Portland, 2014, 1525, 1527, 1529.

[59] O. DE SCHUTTER, *Art. 53*, in *EU Network of Independent Experts on Fundamental Ri*ghts (eds.), *Commentary of the Charter of Fundamental Rights of the European Union*, 2006, *http://ec.europa.eu/justice/fundamental-rights/files/networkcommentaryfinal_en.pdf*, 411, specifying, however, that regression is possible "within the limits authorised by Union law", so that whenever a constitutional provision does not comply with EU law, there will be no choice but to amend the Constitution, or, if adhesion to an international clause entails infringement of Union obligations, the only solution is to denounce the specific clause in order to preserve compliance with Union constraints. The principle of primacy thus also appears in this interpretation. Opposed to interpreting Art. 53 EU Charter according to the canons of international law, G. GAJA, *L'incorporazione della Carta dei diritti fondamentali nella Costituzione per l'Europa*, in *I diritti dell'Uomo. Cronache e battaglie*, no. 3 of 2003, 5-10, esp., 9, because, if this may have been the original meaning intended by the drafters of the Charter, the function of the provision must be interpreted in the light of the traits of the Union order. For a correlation between Art. 53 EU Charter and EU competences, see J. P. JACQUE, *La Charte des droits fondamentaux de l'Union européenne: présentation générale*, in L. S. ROSSI (ed.), *Carta dei diritti fondamentali e Costituzione dell'Unione europea*, Milan, 2002, 55 ff., esp. 66.

when offering a lower level of protection than that offered by the ECHR and the national Constitutions, demonstrating the limitation of the powers conferred. Here the reasoning is in terms of sources[60]. For many authors, on the other hand, Art. 53 guarantees the coexistence of different bill of rights called upon to coexist. From this point of view, the EU Charter does not appear to be a factor in the homogenisation of rights either downwards – in terms of a minimum common denominator – or upwards, as a greater standard of protection. Rather, it seems to imply a pluralistic vision of the desired coexistence of different systems set up to safeguard rights. Thus, Art. 53 of the EU Charter is understood as a means of co-ordination in terms of interpretation: The Charter remains applicable to the case relevant to EU law, but its content may be modulated in the light of the other catalogues of rights offering greater protection. From this perspective, Art. 53 of the EU Charter has indeed been interpreted as a condition for EU membership imposed by national Constitutions that require the Union to ensure a level of protection of rights equivalent, or at any rate not lower, than that offered by the domestic constitutional system[61]. Ultimately, in these interpretations of Art. 53 EU Charter, the principle of subsidiarity determines which source applies or implies that the interpretation of one source is open and inclusive of the meanings provided by the others.

Conversely, other scholars have insisted on the principle of primacy. For them, Art. 53 offers no legal basis for derogating from primacy and allowing rules outside EU law, such as the ECHR and national constitutions, to take precedence over the provisions of the Charter. According to these opinions, Art. 53 seeks to co-ordinate the coexistence of different systems *inside* EU law: it would allow the rights of the Charter to be set aside when greater protection is offered by the ECHR and the national Constitutions, not as sources outside the Union but *insofar as they have given rise, in the medium term, to norms relevant to Union law, i.e. general principles of law*[62]. In essence, the provision would prevent the Charter from lowering the level

[60] L.F.M. BESSELINK, *The Protection of Fundamental Rights post-Lisbon*, quoted above, 44 of this paper, note 178, interestingly states that after the Charter came into force, many national Reports still assumed that the national standard prevailed when it provided greater protection (namely Austria, Hungary, Italy, Portugal, Spain, Bulgaria, Germany, although not all of these specify whether this applies unconditionally and in all cases, particularly in conflicts with directly effective EU law).

[61] M. CARTABIA, *Art. 53*, in R. BIFULCO, M. CARTABIA, A. CELOTTO (eds.), *L'Europa dei diritti. Commento alla Carta dei diritti fondamentali dell'Unione Europea*, Bologna, 2001 361, 364-366.

[62] G. GAJA, *L'incorporazione della Carta dei diritti fondamentali nella Costituzione per l'Europa*, op. cit., 9. L.F.M. BESSELINK, *The Protection of Fundamental Rights post-Lisbon*, quoted above, argues that Art. 53 of the EU Charter, understood as the substantive highest level of protection, is unable to avoid conflicting jurisdictional decisions concerning a balancing of rights. Frequently, courts avoid conflicts by *transforming rule-based rights into principles*. In this sense, Art. 6.3 TEU still refers to the general principles of EU law, whose role is to give coherence to the composite constitutional order of EU and Member States. Therefore, Art. 52.3, referring the meaning of the Charter's provisions to the corresponding meaning of the ECHR, and thus to its living interpretation, and Art. 52.4, concerning common constitutional traditions, are tools to make the interpretation of

of protection of rights already guaranteed in EU law. In a different version, the main meaning of Art. 53 is that the constitutional protection of rights can coexist with the Charter and operate *when Union law, especially secondary law, leaves a margin of discretion to the States in its implementation*. In the context of this discretion, which Union law itself authorises, there is room to allow for greater protection of rights provided by national constitutions[63].

In terms of case law, in some well-known decisions, such as *Melloni* in 2013[64] and the opinion on the accession of the Union to the ECHR of 2014[65], the ECJ gave an interpretation of Art. 53 of the Charter that was much closer to the principle of primacy than to the principle of subsidiarity, granting no room for the application of constitutional standards. However, after a more thorough analysis, the picture is not so clear. Firstly, it has been noted that those decisions date to a time when the courts tended to reassert their decision-making autonomy, drawing the boundaries of their own norms of reference[66]. Years later, cases of explicit interpretation of Art. 53 of the EU Charter were still rare. On closer inspection, an overall assessment of the scope of application of EU law in the light of the provisions of the Charter does not depend on Art. 53 of the EU Charter. Rather, fluctuations in the relationship between EU and national law and standards are measured by the ECJ on a case-by-case basis, sector by sector, rule by rule, analysing the requirements of EU and national law as and when necessary[67]. And these fluctuations are triggered by national influences, including the Constitutional Courts' actions to enter into direct dialogue with the ECJ.

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the Charter more open and flexible. If composition by interpretation is not possible, the proposal is to adopt the ECJ *Omega* scheme, whereby – within the scope of application of EU law – pursuant to Art. 4.2 TEU, room should be left for national constitutional authorities when the constitutional identity of a Member State is at stake, without prejudice to the review of legitimate aims and proportionality by the ECJ.

[63] B. DE WITTE, *Art. 53*,op. cit., 1533-1536, citing as examples the application of the *ne bis in idem* rule to administrative sanctions and VAT offences in the Swedish Constitution, where the relevant EU directive left a margin to State authorities, affirmed by the ECJ in *Åkerberg Fransson*, §§29, 36.

[64] ECJ, GS, 26 February 2013, *Melloni*, C-399/11, §§ 53-64. The principle of primacy is defined, recalling well-established case law, as an essential feature of the Union's legal order, preventing a State from invoking provisions of national law, even of constitutional rank, to diminish the effectiveness of Union law on its territory.

[65] ECJ, Opinion no. 2/13 delivered in plenary session, 18 December 2014, on the lack of co-ordination between Art. 53 ECHR and Art. 53 of the EU Charter in the draft agreement: "Now, the Court has interpreted that provision as meaning that the application of national standards of protection of fundamental rights must not undermine the level of protection provided by the Charter or the primacy, unity and effectiveness of Union law (*Melloni* judgment, EU:C:2013:107, paragraph 60)".

[66] L. MONTANARI, *Le Carte europee dei diritti: i rapporti tra sistemi di garanzia*, Collana Europeiunite, working paper no. 1 of 2015, University of Teramo, 21, 34, referring to the ECJ *Åkerberg Fransson* and *Melloni* cases, and Opinion no. 2/2013 but also to ItCC *Maggio* of 2012 and ItCC no. 49 of 2015 quoted above; reference is also made to UK High Court case law and the proposals for revision of the Human Rights Act, and lastly the Conseil Constitutionnel preliminary referral on the priority of the issue of constitutionality.

[67] Very revealing in this respect is the essay by M.E. BARTOLONI, *L'apporto delle tecniche di armonizzazione nella definizione dei rapporti tra sistemi concorrenti di tutela dei diritti fondamentali*, in *Il Diritto dell'Unione europea*, no. 1 of 2019, 55-85.

In conclusion, despite the heading "level of protection", the written co-ordination clause of Art. 53 of the EU Charter has not been interpreted either by a fair number of scholars or by the current case law as mainly referring to the degree of individual protection provided. In general, Art. 53 of the ECHR and 53 of the EU Charter have little impact on case law, and the fact that they are rarely mentioned makes them not wholly meaningful for describing the degree of co-ordination carried out by the Courts. In our opinion, this is precisely because these provisions call into question the normative theories underlying the respective systems, and not only the level of protection of the individual right at stake, while courts prefer to co-ordinate through daily case law.

8. Tentative conclusions: interlegality as a search for stable logical methods

The preceding considerations provide an answer to the initial question: whether the concept of interlegality fits the ItCC's approach to the ECHR and CFREU systems of protection. As mentioned earlier, we understand this concept as a managing of mechanisms, guarantees, languages, and structures to drive relations between these different legalities.

We have demonstrated that, in our opinion, the recent orientation of the ItCC on questions concerning the simultaneous breach of constitutional and EU Charter rights fits in well with this concept. Four indicators have been identified: language; the idea of concurrent remedies provided in constitutional law, but coherent with, and not destructive of, EU principles; legal reasoning discussing all the provisions and each court's interpretation; the effects of judgments assuring coherence among the systems. In our opinion, all these elements point to "loyalty" and responsibility towards the other legal orders to which we concurrently belong. Although the opinions of scholars differ, in our analysis, two fundamental elements stand out. Firstly, the *ratio* of judgments frequently includes reference to the substantive and procedural norms found in the different protection systems. Arts. 11 and 117.1 It. Const. embody the principle of "openness" of the domestic system; Art. 101.2 includes the ECHR and the EU law in the notion of law, insofar as the constitutional system itself obliges their observation and application; Art. 134 It. Const. refers to the centrality of the judicial review of legislation with effects *erga omnes*. But the ItCC refers simultaneously to Art. 19 TEU and Art. 267 TFEU on the role of the ECJ and preliminary references, to Art. 6 TEU and to Art. 52.4 of the EU Charter on common constitutional traditions, together with the single substantive norms of the ECHR and the EU Charter coming into play. Thus, the reasoning follows a line of plural

justification, inclusive of the norms of reference found in different protection systems. Secondly, a new feature is that the ItCC's preliminary references to the ECJ have become ordinary and habitual, no longer reserved for extraordinary cases of alleged violation of the supreme principles of the domestic legal order, so the interface between the different orders is made explicit and operational. Ultimately, the ItCC remains the arbiter of constitutional adjudication but at the same time seems to have assumed concurrent responsibility towards different systems of protection.

We then discussed to what extent this result depends on the constitutional principle itself and how much on judicial interpretation. We have argued that, in the Italian case, "openness" through supranational norms does not depend exclusively on judicial interpretation but is rooted in the wording of the written Constitution. Nevertheless, the extent to which the Court has enlarged upon it has been substantial. We have seen that, while Art. 11 It. Const. has remained unchanged, the ItCC has taken steps to bring about a general reset of the mechanism of co-ordination across the systems. What is truly striking about the Italian constitutional experience is that judicial decisions have touched upon the very structure of the assessment of incompatibility among rules, determining both the positioning of the source and the forum of conflict. Clearly the ItCC, which remains the arbiter of constitutional adjudication, responds to developments throughout the entire institutional and political system as one of the many institutional actors involved, but the topic is too broad for this study.

In the last part of this paper, an attempt has been made to consider interlegality in its substantive terms, as a search for the greater level of protection of the position of individuals. In fact, this criterion seems to exist in ItCC case law, as the standard of the "maximum expansion of guarantees", and in written norms, such as Art. 53 ECHR and Art. 53 CFREU. However, the criterion developed by ItCC case law does not refer to individual rights but to the resilience of the constitutional system as a whole. Neither do the final provisions of the other documents – especially Art. 53 CFREU, whose interpretation is controversial – consider the protection-level of the position of the individual, but mirror the features of each system of protection understood within the normative theory adopted for their configuration. Thus, their meaning refers to an objective dimension, relating to the relationship between whole systems and their goals, rather than a subjective dimension linked to the individual position of the applicant.

In conclusion, we considered interlegality to be a concept related more to the sources and their interpretation than to the degree of protection of a single position. In our opinion, interlegality works well as a relational concept insofar as it favours a dual relationship between two or more institutional actors from different systems of protection – in our case the constitutional and supranational courts. Thus, the concept of interlegality seems to consist, ultimately, in the flourishing of the provisions that allow interrelation between the systems. The effectiveness of these norms, seen through the lens of interlegality, depends on how the openness of the clauses found in each system is valued and on how frequent, open, transparent, and motivated the dialogue between the courts is, even when the solutions differ. In sum, it is not so much a question of substantial justice seeking the greater protection of the position of the individual, a concept that is debatable in itself, as one of keeping alive formal, institutional mechanisms of co-operation. In the words of a past President of the Italian Constitutional Court, the aim is more to construct and implement stable logical methods[68] than to search for a maximisation of protections which, in our opinion, is changeable by definition.

[68] These are the concluding words of the relation of President Paolo Grossi for the year 2016: "In the constitutional experience we are living through, the Court therefore seems to be increasingly taking on the role not so much of a guardian, almost like a museum, of values that are embalmed or immobilised in solemn formulas, but rather of a guarantor of logical methods, intrinsically characterised also on the ethical level, which allow those values, from time to time, between stability and change, to be recognised in their current and concrete consistency", https://www.cortecostituzionale.it/documenti/interventi_presidente/Relazione_Grossi.pdf, 2016, on the activity of 2015 (our translation in English, any mistakes are only our responsibility).