

THE FORK IN THE ROAD AFTER STRASBOURG:  
EFFECTIVE REMEDY OR MORAL VICTORY?  
A PROVOCATIVE INTERPRETATION OF THE  
DUTY TO ‘ABIDE BY THE FINAL JUDGMENT’ OF  
THE EUROPEAN COURT OF HUMAN RIGHTS,  
FROM THE ITALIAN PERSPECTIVE

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*The article deals with the enforcement of judgments of the European Court of Human Rights in domestic systems, and particularly with the advisability of a provision that allows the review of a final judgment at domestic level when the Court found that judgment in violation of the Convention. The most relevant provision is Article 46 of the Convention.*

*After showing how the way Article 46 is construed influences the protection of fundamental freedoms (I), the article focuses specifically on Italy, that – unlike other countries – has never provided for any form of review of its final judgments in order to comply with Article 46. Though recently the courts have started filling this gap in the law (II).*

*The thesis is that the only way to comply with Article 46 is to allow a review and an immediate suspension of the enforcement of a judgment, with no conditions and for any kind of proceeding, whenever the Court found it was in violation of the Convention (III). Then, the article contrasts the proposed approach to the bills on the matter pending before the Italian Parliament (IV), and concludes by arguing that the proposed legislative reform is advisable both for European federalists and for ‘Eurosceptics’ (V).*

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I. THE POSSIBLE INTERPRETATIONS OF THE DUTY TO ‘ABIDE BY THE FINAL JUDGMENT’ OF THE EUROPEAN COURT OF HUMAN RIGHTS AND HOW THEY REFLECT ON THE PROTECTION OF FUNDAMENTAL FREEDOMS IN MEMBER STATES’ DOMESTIC SYSTEMS

If one takes the long view, the process of political integration in Europe has achieved very far-reaching results,<sup>1</sup> that largely overcome the recent standstill.<sup>2</sup> Some argue that it has gone way too far, some others that it should go much further. It is worth considering, though, that there is at least one aspect of the many-sided phenomenon of European integration, that seems to meet with the favor also of the former: the role played by the European Court of Human Rights (ECtHR) in protecting fundamental freedoms.

As is well known, the ECtHR was created by the European Convention on Human Rights and Fundamental Freedoms (ECHR), which was the first international legal document to make the protection of fundamental rights

<sup>1</sup> D. Dinan, *Fifty years of European integration: a remarkable achievement*, 31 *Fordham Int'l L.J.* 1118, 1118 (2008).

<sup>2</sup> Due to the failure to ratify the Treaty establishing a Constitution for Europe of 2004 and to the delay in ratifying the Treaty of Lisbon of 2007, finally entered into force on December 1, 2009. Among many comments to the Treaty of Lisbon, see I. Pernice, *The Treaty of Lisbon: Multilevel Constitutionalism in Action*, 15 *Colum. J. Eur. L.* 349 (2009).

enforceable; in order to enforce the rights and freedoms it proclaimed, the ECHR established its own set of organs and institutions, including indeed a Court judging on the violation of fundamental rights committed by the Member States of the Convention.

With the purpose of making the Court's role truly effective, the ECHR also imposed on Member States the duty to 'abide by the final judgment of the' European Court of Human Rights. In this article, we will focus on this duty, provided for by Article 46(1) of the ECHR.<sup>3</sup> This provision does not specify the content of such obligation, leaving to Member States the decision about how to comply with it,<sup>4</sup> thus leaving the door open to interpretations even very different from one another.

Therefore, the way this provision is interpreted seriously affects the level of protection of individual liberties within the ECHR system: evidently, if this duty is understood as requiring Member States to amend their law when a violation found by the ECtHR is systematic (as it depends on a legislative provision), and especially to allow the review of a judgment whenever the ECtHR finds it in violation of the ECHR, then ECtHR standards will invariably have to be applied by Member States, without a possible way of escape. Instead, if one holds that the duty to 'abide by the final judgment of the Court' only requires the States to pay the petitioners the *just satisfaction* provided for by Article 41, ECHR, when the ECtHR condemns them to pay this form of compensation, then the consequences on the domestic systems will be far smaller.

In this work, we will focus on the impact of European judgments on the domestic judgments they refer to, leaving out their impact on other judgments and on domestic legislation<sup>5</sup>. The subject has been studied by many scholars,

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<sup>3</sup> For a general comment to this Article, see A. Drzemczewski, 'Art. 46', in S. Bartole and B. Conforti and G. Raimondi (eds.), *Commentario alla Convenzione per la Tutela dei Diritti dell'Uomo e delle Libertà Fondamentali* (2001) 685. See also a work specifically dealing with Art. 46, P. Pirrone, *L'obbligo di Conformarsi Alle Sentenze della Corte Europea dei Diritti dell'Uomo* (2004).

<sup>4</sup> See for example the following ECtHR judgments: *Kolkaku v. Italy* (No. 25701/03, judgment of 8 February 2007, para. 82); *Zunic v. Italy* (No. 14405/05, judgment of 21 December 2006, para. 75); *Sammio v. Italy* (No. 30961/03, judgment of 27 April 2006, para. 71); *Piersack v. Belgium* (No. 8692/79, judgment of 26 October 1984, para. 12, on the former Art. 50); *Lyons and Others v. the UK* (No. 15227/03, decision of 8 July 2003).

<sup>5</sup> On the first issue, see for example G. Ress, *The Effect of Decisions and Judgments of the European Court of Human Rights in the Domestic Legal Order*, 40 *Tex. Int'l L.J.* 359, 374 (2005); on the second one, A. Drzemczewski, *supra* note 3, at 690.

especially from the criminal procedure perspective,<sup>6</sup> where there seems to be a greater need to *take the rights* to a fair trial (Article 6(3) ECHR) *seriously*.<sup>7</sup> Keeping these studies in mind, this article will look at the same subject from the point of view of constitutional law (with some comparison between the Italian and the French approach). We will keep the Italian legal system as a primary object of observation (especially in sections 2 and 4), but we believe that the conclusion we draw, when we discuss the choice between the two possible interpretations mentioned above (sections 3 and 5), can be valid, *mutatis mutandis*, for any other Member State, since it is based on general arguments, not specific to the Italian law.

## II. THE ITALIAN CONSTITUTIONAL FRAMEWORK: THE NEW WORDING OF ARTICLE 117(1) OF THE ITALIAN CONSTITUTION AND THE CASE-LAW OF THE CORTE DI CASSAZIONE AND THE CORTE COSTITUZIONALE

Until recently, Italy has always chosen the latter interpretation between the two mentioned in the previous section, i.e. the narrower one. Indeed, unlike other countries,<sup>8</sup> Italy has never provided for a general mechanism to

<sup>6</sup> Recently, see for example A. Balsamo and R. E. Kostoris (eds.), *Giurisprudenza Europea e Processo Penale Italiano: Nuovi Scenari Dopo il "Caso Dorigo" e gli Interventi della Corte Costituzionale* (2008).

<sup>7</sup> We are clearly quoting the title of a very famous book: R. Dworkin, *Taking Rights Seriously* (1977). We will paraphrase again this fortunate expression, recently used also in an article on the dialogue between the different European Courts by M. Cartabia, *Europe and Rights: Taking Dialogue Seriously*, 5 *European Constitutional Review* 5 (2009).

<sup>8</sup> From T. Barkhuysen-M.L. van Emmerik, *A Comparative View on the Execution of Judgments of the European Court of Human Rights*, in T.A. Christou and J. P. Raymond (eds.), *European Court of Human Rights. Remedies and Execution of Judgments* 1, 9 (2005), we draw the following list of countries that passed a special law to allow some form of reopening of domestic proceedings: Austria, Belgium, Bulgaria, Croatia, France, Germany, Greece, Lithuania, Luxembourg, Malta, Norway, Poland, Slovenia, Switzerland, The Netherlands, while a general provision allowing the reopening can be certainly used to reopen proceedings after a judgments of the ECtHR in Finland and Sweden. D. Tega, *Il seguito delle sentenze di condanna della Corte dei diritti di Strasburgo: è nato un quarto grado di giudizio?*, available at [http://www.forumcostituzionale.it/site/images/stories/pdf/nuovi%20pdf/Giurisprudenza/Giurisdizioni\\_Ordinarie/0002\\_caso\\_dorigo\\_tega.pdf](http://www.forumcostituzionale.it/site/images/stories/pdf/nuovi%20pdf/Giurisprudenza/Giurisdizioni_Ordinarie/0002_caso_dorigo_tega.pdf), also mentions the Republic of San Marino and the United Kingdom in the first group, and, listing the countries that got to allow a reopening through their case-law, adds Denmark, Russian Federation, Slovak Republic, and Spain. Since 2007, the first group shall also include Portugal. See also V. Sciarabba, *La "riapertura" del giudicato in seguito a sentenze della Corte di Strasburgo: profili di comparazione*, 11 *Diritto Pubblico Comparato ed Europeo* 917 (2009).

abide by the European Court's decisions. In the last decade, both the courts and the literature have repeatedly considered this gap in the law, that many authorities deem it necessary to fill as soon as possible.<sup>9</sup>

In fact, both the *Corte di Cassazione* (Italy's Supreme Court) and the *Corte Costituzionale* (Italy's Constitutional Court) have taken very important steps towards the full effectiveness of European judgments, but so far these measures have been only partial and incomplete. In two famous cases where ECtHR had found two different violations of Article 6 ECHR, the First Section of the *Corte di Cassazione* got to grant respectively a leave to appeal out of time to a default defendant to whom the court of appeal had denied this request,<sup>10</sup> and even a stay against the enforcement of a final judgment.<sup>11</sup>

However, this trend is not well-established. In another case, where the ECtHR had found a conviction in violation of the Convention, the Court of Appeal of Milan<sup>12</sup> denied a stay and the reopening of a trial where that conviction had been delivered, observing that no rule of Italian law allows the enforcing court to interfere with the enforcement of a judgment or the imprisonment of a convict, nor to order the reopening of the trial and its

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<sup>9</sup> Within the scholarship, see for example G. Campanelli, 'La sentenza 129/2008 della Corte Costituzionale e il valore delle decisioni della Corte EDU: dalla ragionevole durata alla ragionevole revisione del processo', available at <http://www.giurcost.org/studi/campanelli.htm>.

See also the Interim Resolutions of the Committee of Ministers on the case *Dorigo v. Italy* (on this case, see *infra*): ResDH (99) 258 of 15 April 1999, ResDH (2002) 30 of 19 February 2002, ResDH (2004) 13 of 10 February 2004, and ResDH (2005) 85 of 12 October 2005 (and also the Final Resolution ResDH (2007) 83). The Committee of Ministers also issued two Recommendations addressed to all Member States: Nos. R (2000) 2 of 19 January 2000 and CM/Rec (2008) 2 'on efficient domestic capacity for rapid execution of judgments of the European Court of Human Rights.' For a list of all the reports and resolutions on the subject adopted by the Parliamentary Assembly of the Council of Europe, see the latest *Progress Report on the Implementation of judgments of the European Court of Human Rights* (AS/Jur (2009) 36), issued on 31 August 2009 by the Committee on Legal Affairs and Human Rights, 2, note 2, available at [http://assembly.coe.int/CommitteeDocs/2009/ejdoc36\\_2009.pdf](http://assembly.coe.int/CommitteeDocs/2009/ejdoc36_2009.pdf).

<sup>10</sup> *Corte di Cassazione*, Criminal Section I, judgment of 3 October 2006, No. 32678 (case *Somogyi*). The judgment by the ECtHR in the case *Somogyi v. Italy* (No. 67972/01) was issued by the Second Section, and dates back to 18 May 2004.

<sup>11</sup> *Corte di Cassazione*, Criminal Section I, judgment of 1 December 2006 – 25 January 2007, No. 2800 (case *Dorigo*). The European ruling is *Dorigo v. Italy* (No. 46520/99, Fourth Section, judgment of 13 November 2000).

<sup>12</sup> *Corte d'Assise d'Appello di Milano*, judgment of 30 January 2006.

repetition according to the fair trial rules.<sup>13</sup> The Fifth Section of the *Cassazione*<sup>14</sup> rejected the appeal against this judgment, even though on formal grounds.

Then, more recently, still another Section of the Court, the Sixth,<sup>15</sup> allowed a ‘partial “exception” to the principle of *res judicata*’ and a reconsideration of the claim, insofar as the Strasbourg ruling was concerned, applying by analogy to the case under consideration the remedy provided for in Article 625-*bis*, Code of Criminal Procedure (*ricorso straordinario per errore materiale o di fatto*, extraordinary petition for factual error).

Furthermore, some decisions stipulated that Italian judges shall not refuse to apply internal rules that conflict with the ECHR,<sup>16</sup> arguing that ‘the idea that the ECHR has become part of the European Union law through Article 6(2) of the Maastricht Treaty cannot be accepted.’<sup>17</sup>

Finally, a very recent judgment by the Fifth Section<sup>18</sup> replaced the applicant’s sentence of life imprisonment with a penalty of thirty years’ imprisonment, with the explicit purpose of complying with a previous important judgment by the Grand Chamber of the ECtHR<sup>19</sup>, that – pursuant to an amendment in the code of criminal procedure that was relevant for the case – had considered Italy responsible for «ensuring that the applicant’s sentence of life imprisonment is replaced by a penalty consistent with the

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<sup>13</sup> The ECtHR judgment in this case is *F.C.B. v. Italy* (No. 12151/86, judgment of 28 August 1991). The petitioner was convicted by the *Corte d’Assise d’Appello di Milano*, judgment of 9 April 1984.

<sup>14</sup> *Corte di Cassazione*, Criminal Section V, judgment of 2 February 2007, No. 4395 (case *Cat Berno*).

<sup>15</sup> *Corte di Cassazione*, Criminal Section VI, judgment of 11 December 2008, No. 45807 (case *Drassich*). The ECtHR judgment was issued on 11 December 2007 (case *Drassich v. Italy*, No. 25575/04).

<sup>16</sup> *Corte di Cassazione*, decisions of 29 May 2006 and 19 October 2006 (as for the above-mentioned judgment No. 348 of 2007); *Corte di Cassazione*, decision 20 May 2006, and *Corte d’Appello di Palermo*, decision of 29 June 2006 (as for the above-mentioned judgment No. 349 of 2007). These decisions occasioned the judgments of the *Corte Costituzionale* discussed below.

<sup>17</sup> This outcome was then confirmed by *Corte di Cassazione*, Criminal Section I, judgment of 7 January 2008, No. 31, that reaffirmed that the duty to comply with the international obligations arising from the ECHR is not absolute but always has to be subject to the respect of the ‘principles and rules of the constitution.’

<sup>18</sup> *Corte di Cassazione*, Criminal Section V, judgment of 28 April 2010, No. 16507.

<sup>19</sup> *Sappola v. Italy* (No. 2) (No. 10249/03, Grand Chamber, judgment of 17 September 2009)

principles set out in the present judgment, which is a sentence not exceeding thirty years' imprisonment» (§ 154).

As for the *Corte Costituzionale*, it has marked a historic turning point in the effectiveness of the ECHR in the Italian legal system with its judgments of 24 October 2007, Nos. 348 and 349:<sup>20</sup> in these rulings, the Court for the first time declared a law unconstitutional because it infringed upon the ECHR, which the Court considered to be a *norma interposta* ('interposed standard of review'<sup>21</sup>) between other laws and the Constitution. Since the new text of Article 117(1)<sup>22</sup> of the constitution imposes on the state (and the Regions) to comply with 'international obligations,' any law that is against the ECHR and its Protocols (a major 'international obligation') is automatically against Article 117(1) and then unconstitutional<sup>23</sup>.

Less than one year after these rulings, the *Corte Costituzionale*, in its judgment of April 30, 2008, No. 129, explicitly considered the problem of the lack of a rule on the effectiveness of ECtHR judgments. The Court said that this lack does not violate the provisions of the Italian constitution considered in the petition (Articles 3, 10 and 27).<sup>24</sup> Though the Court also made clear that

<sup>20</sup> For a comment in English, see F. Biondi Dal Monte - F. Fontanelli, '*Decisions No. 348 and 349/2007 of the Italian Constitutional Court: The Efficacy of the European Convention in the Italian Legal System*', 9 *German Law Journal* 889 (2008), available at [http://www.germanlawjournal.com/pdf/Vol09No07/PDF\\_Vol\\_09\\_No\\_07\\_889-932\\_Articles\\_Fontanelli.pdf](http://www.germanlawjournal.com/pdf/Vol09No07/PDF_Vol_09_No_07_889-932_Articles_Fontanelli.pdf). See also Mirate, 'The role of the ECHR in the Italian administrative case law. An analysis after the two judgments of the Constitutional Court No. 348 and No. 349 of 2007', 1 *Italian Journal of Public Law* (2009) 260, <http://www.ijpl.eu/archive/2009/volume-2/the-role-of-the-echr-in-the-italian-administrative-case-law..>

<sup>21</sup> In the Italian constitutional jurisprudence, the *norme interposte* are provisions interposing between the constitution and an ordinary law. They enforce a constitutional provision, therefore, an ordinary law can never be contrary to a *norma interposta*, because otherwise it would indirectly violate the constitution. Now that the *Corte Costituzionale* has said that the ECHR is a *norma interposta*, the ECHR ranks higher than ordinary laws in the hierarchy of sources of law; therefore, ordinary laws will be unconstitutional if they are contrary to the ECHR. The translation of *norma interposta* into 'interposed standard of review' is the one adopted for example by F. Biondi Dal Monte-F. Fontanelli, *supra* note 20.

<sup>22</sup> Art. 117 was completely rewritten by Art. 3 of Constitutional Law 18 October 2001, No. 3.

<sup>23</sup> This core statement by judgments Nos. 348 and 349 of 2007 was reaffirmed by judgments 26 November 2009, No. 311, and 4 December 2009, No. 317.

<sup>24</sup> V. Sciarabba, '*Il problema dell'intangibilità del giudicato tra Corte di Strasburgo, giudici comuni, Corte costituzionale e...legislatore?*', available at [http://www.forumcostituzionale.it/site/images/stories/pdf/documenti\\_forum/giurisprudenza/2008/0004\\_nota\\_129\\_2008\\_sciarabba.pdf](http://www.forumcostituzionale.it/site/images/stories/pdf/documenti_forum/giurisprudenza/2008/0004_nota_129_2008_sciarabba.pdf); Mantovani, 'La sent. n. 129 del 2008 e la "riparazione" delle violazioni dell'art. 6 Cedu', 53 *Giurisprudenza costituzionale* 2679 (2008) 2679.

if the Parliament does not intervene, and the same question is raised again before the Court under the new Article 117(1) (no longer under Articles 3, 10 or 27), the result would likely be different.<sup>25</sup>

To sum up, the picture of the effectiveness of ECtHR judgments in Italy remains contradictory: notwithstanding some very significant case-law innovations, that are probably sufficient to allow us to say that the Italian system is no longer completely lacking in remedies, there is still some resistance to an automatic full enforcement of ECtHR judgments, mainly due to the fact that judges deem it impossible to achieve this result without a legislative intervention.<sup>26</sup>

We will now move to consider what this legislative intervention should provide for. Before that, it still has to be underlined that Article 46 ECHR must be read and interpreted together with Article 41, which reads: 'If the Court finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.' Also Article 13 has to be considered, according to which 'Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority ... .'

On the whole, these provisions imply that, when the Court finds a violation of the Convention by a Member State, in principle it is that State that, through its 'internal law,' shall grant the individual 'an effective remedy' that allows the State to remedy the violation, thus 'abid[ing] by the final judgment of the Court.' Only subject to the failure by the State law to afford full redress, the Court, *if necessary*, can 'afford just satisfaction.' but the priority is given to the domestic remedy.<sup>27</sup> Such remedy must necessarily be more effective than merely the award of damages; it must, if possible, put the

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<sup>25</sup> Actually, in the same trial that led to judgment No. 129 of 2008 of the *Corte Costituzionale* (the *Dorigo* controversy), the Court of Appeal of Bologna has raised a new question of legitimacy (decision of 23 December 2008), this time referring to Art. 117(1). But currently, the question is not even pending yet before the *Corte Costituzionale*, so it is still going to take time before the new judgment on the case by the *Corte Costituzionale* comes up [last checked 18 June 2010].

<sup>26</sup> To be sure, there have been some limited innovations by the legislature, about which see M. Salvadori, 'Convenzione europea dei diritti dell'uomo e ordinamento italiano', 2 *Diritto e Politiche dell'Unione Europea* 128, 138 (2008).

<sup>27</sup> B. Randazzo, 'Giudici comuni e Corte europea dei diritti', in P. Falzea and A. Spadaro and L. Ventura (eds.), *La Corte Costituzionale e le Corti d'Europa* 217, 235 (2003).

individual in the exact position he would be without the violation (*restitutio in integrum*<sup>28</sup>): otherwise, there would have been no reason for the drafters to provide for this double level, when they could have just provided for a monetary recovery in any situation, and not just on a subordinate level like they did<sup>29</sup>.

But given that 'abiding' by the final judgment of the ECtHR means affording individuals something more than mere monetary indemnification, how far goes this *something more*? Now comes a choice between a zero-option (the one chosen so far by Italy, where the domestic judgment remains in force with its *res judicata* effect, even if it is found to be tainted by a violation of the Convention) and an extreme one, which is the central question of this article. As for the countries that have complied with the duty provided for by Article 46 ECHR, their solutions can all be considered intermediate between the former and the latter. These countries have adopted a combination of the two main remedies that can be imagined here: the suspension of the enforcement of the relevant domestic judgment and some form of reopening of the trial that brought to that judgment.

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<sup>28</sup> See Committee of Ministers, *Supervision of the execution of judgments of the European Court of Human Rights – 3rd annual report 2009* (issued in April 2010), 18 available at [www.coe.int](http://www.coe.int). See also the ECtHR judgment *Stoichkov v. Bulgaria* (No. 9808/02, 24 March 2005), where the Court found in violation of Art. 5 (1), ECHR the imprisonment of a person to enforce a judgment that the Court had found tainted by a violation of the Convention. See also the partly dissenting opinion of Judge Zupančič in *Cable and Others v. United Kingdom* (Nos. 24436/94 and others, judgment of 18 February 1999), according to which 'the national legislation ought to provide for retrial of cases in which the proceedings have been found not to comply with essential procedural requirements. That, I think, is the purpose of the Article 41 words referring to the reparation allowed by internal law.'

It must be taken into account, though, that 'so far the ECtHR has not been prepared to deal separately with the complaint that a previous Court judgment has not been (properly) executed' (T. Barkhuysen-M.L. van Emmerik, *supra* note 8, at 21: the Authors refer in particular to the relatively old case *Olsson v. Sweden (No. II)*, No. 13441/87, 27 November 1992, where the applicants 'asked the Court to condemn Sweden for a violation of Article 46, which the Court refused.') For some criticism towards the judgments where the Court seems to order the liable State to afford the "*restitutio in integrum*", see P. Pirrone, *supra* note 3, at 70.

<sup>29</sup> The view that compensation is an insufficient remedy as a general rule, was embraced by the very recent ruling of the Grand Chamber of the ECtHR *VgT v. Switzerland (No. 2)* (mentioning in this sense, 'among many other authorities, *Sozzari and Giunta v. Italy* [GC], Nos. 39221/98 and 41963/98, § 249 ... and *Assanidze v. Georgia* [GC], No. 71503/01, § 198 ...). The case was about a failure by Switzerland to enforce a previous judgment of the Second Section of the Court, of 28 June 2001, *VgT v. Switzerland*, No. 24699/94.

To conclude, the different variables that can be combined in order to give more or less effectiveness to ECtHR's judgments are the following: (a) requirements for suspension or reopening of domestic judgments (any violation or just the ones deemed most serious); (b) judges afford these measures with discretion or they are obliged to afford them automatically when the state is found in violation of the ECHR; (c) possible consequences of suspension and reopening (all the effects of the judgment can be nullified, or only some; a new trial may be ordered or the proceedings may be deemed concluded by the decision of the Strasbourg court); (d) remedies are afforded only for criminal trials, or also for civil and administrative proceedings.

### III. 'EXTREME OPTION': ACADEMIC EXERCISE OR LIKELY FUTURE?

Without considering all the different possible combinations of these variables, let us focus on the *maximum solution*. This option is seldom considered, because at first sight it seems to be very unlikely to be put into effect, at least in the near future. It would consist in a rule like the following: *any time* the ECtHR finds *any violation* of the ECHR, committed in a domestic trial or proceeding *of any kind* (criminal, civil, or administrative), states shall *automatically* suspend the enforcement and *all* the effects of the judgment issued at the end of that proceeding, and allow *without condition* the reopening of that proceeding before a domestic court or other appropriate tribunal.

At first sight this option appears extreme. Nevertheless, there are enough arguments to conclude that it could be the best possible choice. The following considerations will explain why moving towards it is appropriate, and probably also inevitable in the long run. Therefore, it would be better if the Italian legislature, when choosing among the different available options, ranging from the minimum to the maximum solution, decided to adhere as closely as possible to the latter.

Certainly the original system created by the Convention did not provide for such an ambitious role for the ECtHR. Until Protocol No. 11 came into force (in 1998), the Court could not even be directly seized by individuals: its jurisdiction was filtered by the Commission of Human Rights. However, especially in recent years, also due to the innovations introduced by Protocol No. 11, the ECtHR has started to have an increasingly important influence on Member States' legal systems, sometimes even urging them to make, or imposing on them, changes in their legislation.<sup>30</sup> The Court of Strasbourg has

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<sup>30</sup> As for Italy, the best known example is Law 24 March 2001, No. 89 (so called *legge Pinto*),

thus now acquired a central position for the protection of fundamental rights, assuming functions typical of a constitutional court as well as of a court of last resort.<sup>31</sup>

The main objections to the maximum solution can be traced to the following three: (a) not all violations are equal: some are less serious, therefore completely quashing a trial in any case of a violation seems to be too drastic; (b) the extreme solution would infringe on the principle of *res judicata*; (c) the approach of the Strasbourg Court is different from that of national courts: indeed, its judgments usually employ a 'fuzzy logic',<sup>32</sup> so they cannot be treated like those of a court of last resort of a Member State. Let us consider each of these arguments in order.

(a) The first objection explains the choice of affording remedies only for criminal judgments, and not for civil and administrative ones. Most European countries have made this choice.<sup>33</sup> The best example is France,<sup>34</sup> whose approach we now consider briefly: pursuant to an amendment introduced by Law June 15, 2000, No. 516, the French code of criminal procedure now allows (Articles 626-1 *et seq.*) the reexamining of a final criminal judgment, if a ruling by the ECtHR found that judgment violated the ECHR or a Protocol

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concerning the reasonable length of the proceedings.

<sup>31</sup> Indeed some authors have started wondering whether a 'fourth level of judgment may be born': see D. Tega, *supra* note 8. By the same author, see also D. Tega, 'Il sistema di protezione Cedu dei diritti e l'ordinamento italiano', in M. Cartabia (ed.), *I diritti in azione. Universalità e pluralismo dei diritti fondamentali nelle Corti europee* 67 (2007).

<sup>32</sup> This argument is made for example by S. Allegrezza, 'Violazione della CEDU e giudicato penale. Quali contaminazioni? Quali rimedi?', in R. Bin et al. (eds.), *All'incrocio tra Costituzione e CEDU: il Rango delle Norme della Convenzione e l'Efficacia Interna delle Sentenze di Strasburgo* 21, 25 (2007).

<sup>33</sup> D. Tega, *supra* note 8, mentions four States that allow the reopening also of civil and administrative proceedings: Bulgaria, Lithuania, Norway and Switzerland. Barkhuysen and van Emmerik, *supra* note 8, at 9, also add Malta, that like Switzerland introduced a special all-embracing provision, valid for all sorts of judgments (criminal, civil and administrative). Also Germany and Portugal shall be now included in the list, after some reforms that took place respectively in 2006 and 2007. About Germany, see two recent articles published in the German Law Journal (and also available on its website, [www.germanlawjournal.com](http://www.germanlawjournal.com)): C. Tomuschat, 'The Effects of the Judgments of the European Court of Human Rights According to the German Constitutional Court', 11 GLJ 513 (2010), and C. Coors, 'Headwind from Europe: The New Position of the German Courts on Personality Rights after the Judgment of the European Court of Human Rights', 11 GLJ 527 (2010).

<sup>34</sup> On the French regime, see M.A. Rogoff, 'Application of Treaties and the Decisions of International Tribunals in the United States and France: Reflections on Recent Practice', 58 Me. L. Rev. 404, 440 (note 193) (2006). See also D. Tega, *supra* note 8.

to it; review is afforded 'when the violation found is of such a nature and gravity that the equitable satisfaction afforded on the grounds of Article 41 of the Convention would not terminate its damaging consequences.'

Review can be requested, within a year from the date of the ECtHR's judgment, by the Minister of Justice, the *Procureur Général* (Attorney General) of the *Cour de Cassation* (Supreme Court), or the person convicted (or his delegate or heirs); the request shall be addressed to a special committee of seven judges of the *Cour de Cassation*. The committee, *if they consider the request well-grounded* (thus not automatically), may refer the question either to the *Cour de Cassation* or to a judge on the same level of the judicial hierarchy as the one that issued the sentence considered unfair by the ECtHR. At any given moment, both the committee and the *Cour de Cassation* may (so it is a *discretionary* decision) suspend the enforcement of the sentence.

The choice of limiting the remedies to the criminal sphere is based on the fact that in this field we are dealing with habeas corpus and individual liberty, therefore it is necessary to afford the maximum level of protection. Apparently, this is a self-evident observation: the protection of individual liberty must certainly be a primary concern. However, this does not mean that the protection of other rights can be disregarded. Indeed there are other *fundamental* rights that are frequently called into question in civil and administrative proceedings: such as, the right to property, the right of privacy, the right to family life, the right not to be discriminated against, or the right to vote. These rights enjoy full protection both by the ECHR and the Italian constitution,<sup>35</sup> therefore to consider them inferior to individual liberty, no matter how *fundamental* individual liberty is, would be an unfair difference in treatment, contrary to reasonableness test.

Therefore the most appropriate approach would be to afford the broadest effect within the domestic jurisdictions to European judgments, without distinction between criminal, civil or administrative proceedings (this view was confirmed by *VgT v. Switzerland (No. 2)*, No. 32772/02, judgment of June 30, 2009 by the Grand Chamber of the ECtHR).

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<sup>35</sup> Respectively: the right to property, in Art. 42, Italian Constitution and Art. 1, Protocol No. 1 to the ECHR; the right of privacy, in the general clause of Art. 2, Italian Constitution (or in Articles 14 and 15, according to a different construction), and Art. 8, ECHR; the right to family life, in Art. 29, Italian Constitution, and Art. 8, ECHR; the right not to be discriminated against, in Art. 3, Italian Constitution, and Art. 14 ECHR; the right to vote, in Art. 48, Italian Constitution, and Art. 3, Protocol No. 1 to the ECHR.

The idea that it is possible to rank violations, from the most to the least serious, is used also to make a distinction *within* the different sorts of defects that can affect a *criminal* judgment. In particular, some authors<sup>36</sup> have argued that not all violations found by the ECtHR should lead to a reopening of the trial, but only the most serious ones (basically, violations of the right to defense): other violations should never (basically, excessive length of the proceeding or violation of the right to a public trial), and a third group (basically, tainted evidence), only if they significantly affected the outcome of the judgment, which has to be ascertained case by case.

Leaving out the second group<sup>37</sup>, as for the third one a distinguished scholarship has dispelled a common misunderstanding: it is an error of logic to distinguish among evidence that is *more or less* decisive for a conviction. Either some evidence is decisive, or it is not, but *tertium non datur*. In other words, it does not exist any evidence that *partially* affects the outcome of a judgment.<sup>38</sup> But if the category of 'partial evidence' fades, so does the need for a case-by-case distinction based on how much the tainted evidence influenced the outcome of the judgment. Therefore, if the Court finds some tainted evidence irrelevant for the outcome of the judgment it is reviewing, it shall rule that there was no violation of the ECHR. In any other case, the violation exists, so we must adopt some domestic measures to remedy the violation with no exception, and these measures must include a retrial or reopening or review of the proceeding.<sup>39</sup>

(b) The second argument for excluding the automatic effectiveness of ECtHR judgments is that it would imply a systematic exception to the principle of *res judicata*: this would be unacceptable because of the legal uncertainty it would engender. The choice is between maintaining in effect a tainted decision, for the sake of a principle that, no matter how fundamental, already has a number of exceptions,<sup>40</sup> and removing the unfair effects of that sentence, in order to effectively protect fundamental rights.

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<sup>36</sup> Among others, see S. Allegrezza, *supra* note 32.

<sup>37</sup> Yet both the violation of the right to a public trial and the excessive length of a proceeding could actually influence the outcome of a decision.

<sup>38</sup> P. Ferrua, *Il Giusto Processo* 127, 128 (2005).

<sup>39</sup> See the *VgT No. 2* judgment, *supra* note 29, that mentions, 'among other authorities, *Gençel v. Turkey*, No. 53431/99, § 27, 23 October 2003; *Öcalan*, [No. 46221/99], § 210; and *Claes and Others v. Belgium*, Nos. 46825/99, 47132/99, 47502/99, 49010/99, 49104/99, 49195/99 and 49716/99, § 53, 2 June 2005.'

<sup>40</sup> In Italy, when a final conviction is based on a law that is later declared unconstitutional, Law 11 March 1953, No. 87, Art. 30(4) stipulates that all the effects and the enforcement

The principle of *res judicata* is certainly essential for legal certainty, which cannot be sacrificed. However, certainty is adequately protected when everybody knows that a petition to Strasbourg can have such a consequence, and providing for that in a law would be enough to dispel all doubts. Moreover, legal certainty seems to be better protected by a clear and generally applicable rule, if drastic, like the one considered, than by a case-by-case distinction, maybe sometimes more equitable in the outcome but certainly not granting legal certainty, like what we have now, with courts providing for exceptions on a case-by-case basis without a clear underlying rationale.

Maybe this conclusion appears too drastic when we deal with minor violations, because it increases the risk of quashing, with no exception allowed, even very important judgments because of trivial violations. However, it is necessary to reconsider what is deemed to be a trivial violation, and there is also the need 'to take seriously' many procedural rights, and thus to acknowledge that the violation of apparently minor rights can invalidate the whole trial and the decision.

After all, some authors have correctly argued that it is the ECHR system itself that requires the putting aside of the principle of *res judicata*: the fact that the Court 'may only deal with the matter after all domestic remedies have been exhausted' (the fundamental rule of Article 35 ECHR) necessarily implies that it considers only judgments that are final in the domestic jurisdiction.<sup>41</sup>

To be sure, these remarks inevitably lead to an even more radical conclusion: the reopening of the trial and the suspension should be afforded not only in case of procedural violations, but also when the violation arises from the *result* of a domestic decision, *per se* fair from the formal point of view (with respect to the violations provided for by Article 6(3), ECHR), but unfair from the substantive point of view, that is to say, on the *merits*.

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of the judgment are suspended, no matter if it is final. The *Corte di Cassazione* (*supra* note 15, case *Drassich*) also stated that 'when it comes to the point of striking a balance between the two constitutional values of *res judicata*, on the one hand, and of "fair" trial, on the other . . . , it is necessary that the latter prevail.' The principle of *res judicata* has been considered subject to exceptions also within the EU system (Case 119/05, *Luahini* [GC], [2007] ECR I-6199; very recently, Case 2/08, *Fallimento Olimpiclub*, [2009] ECR I-00000). To date, as was said, the Italian Constitutional Court considers the EU and the ECHR systems substantially different, so this conclusion cannot be extended to ECtHR judgments, though it is important that the ECJ accepts the possibility of putting aside the principle of *res judicata* when that is necessary to meet what the Italian constitution calls 'international obligations.'

<sup>41</sup> E. Lupo, *La rinolatività delle sentenze della Corte europea per il giudice interno e la solita recente della Cassazione civile e penale*, available at <http://appinter.csm.it/incontri/relaz/14037.pdf>.

Otherwise, protection of fundamental rights will never be really effective and 'serious.'

(c) The last argument is that, since the ECtHR and domestic judges work with different logical categories, it is simply impossible to consider the former as a higher judge in the same hierarchy, because each still belongs to a separate legal system.

It is undeniable that the Strasbourg Court traditionally uses a fuzzy logic:<sup>42</sup> the ECtHR doesn't apply the classic alternative of binary logic used by domestic judges, *guilty/not guilty*, but assesses the overall behavior of the State in a certain situation, considering different aspects, according to the fundamental principle of proportionality. ECtHR doesn't say black or white (*illegitimate/legitimate* behavior), but typically paints in shades of gray (*violation or non-violation in-this-case-but*).

Another difficulty is that the Italian *Corte Costituzionale* has traditionally adhered to the dualist theory of the relationship between the domestic system and the ECHR, confirmed in judgments Nos. 348 and 349 of 2007.<sup>43</sup> However, the more recent trend described above, both on the legislative and the judicial side (involving both the *Corte di Cassazione* and the *Corte Costituzionale*) raises the possibility that this traditional view will soon be overruled. Anyway, now that the ECHR ranks higher than the law in the Italian hierarchy of sources of law (*see* again judgments Nos. 348 and 349 of 2007), meeting the obligations that the ECHR imposes on Italy is no longer avoidable, including the duty to abide by the Court's judgments.

But there is another reason why Italy (together with the other reluctant countries) should arguably change its present approach to ECtHR judgments, that is the need to assure the general consistency of its legal system as much as possible. Even if the domestic and the ECHR systems remain formally separate from a theoretical point of view, the demand for straightforward laws, as accessible as possible to the man in the street, must also be considered. Recent experience in the EU system has repeatedly shown that integration faces serious obstacles if the man in the street views European institutions as remote and difficult to understand. Therefore, if one wants to

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<sup>42</sup> Vogliotti, *La logica sfuocata della Corte Europea dei diritti dell'uomo tra tutela del testimone e salvaguardia del contraddittorio: il caso delle "testimonianze anonime"*, 149 *Giurisprudenza italiana* 851 (1997).

<sup>43</sup> The Court had opened to a higher ranking of the ECHR than the law in its judgment of 19 January 1993, No. 10, but that ruling was not followed by others.

promote integration, it is necessary to make them as close and understandable as possible to the citizens.

The same is valid within the ECHR system: a system that proclaims the Strasbourg Court to be the highest level of protection of fundamental rights, but then does not help in real terms the individual whose claim that Court has accepted, will convey to her the idea that the European remedy is in fact a blunt, ineffective remedy, only able to afford her a 'moral' victory but not to affect what was ruled by the domestic judge.<sup>44</sup> And this also brings a serious danger: that that individual believes the European remedy falls short of the expectations it had given rise to.

Indeed, it is hardly satisfying for her winning a case in Strasbourg (thereby seeing it acknowledged by the Court that, e.g., her detention was (is) unlawful, that the expropriation of her land was against the law, or that she was unlawfully discriminated against because of her gender, or race or religion and so forth), yet realizing then that this acknowledgement does not have the automatic result of finally granting her the right the Court said she was entitled to.

After all, it is not by coincidence that the Convention provides for monetary satisfaction only on a contingent basis, preferring to impose on Member States the obligation to afford an individual the very right the Court found her entitled to. Compensation (by the way usually moderate<sup>45</sup>) does not

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<sup>44</sup> This risk worsens the already 'limited impact' that the ECHR has had on the Italian system of civil and political freedoms: this has been due to a different set of reasons, thoroughly studied by A. Pace, *La limitata incidenza della C.E.D.U. sulle libertà politiche e civili in Italia*, 7 *Diritto Pubblico* 1, 10 (2001). See also M. Janis, *The Efficacy of Strasbourg Law*, 15 *Conn. J. Int'l L.* 39, 39 (2000): 'we should be a little more careful about claiming too much success for the system. For an international legal system, Strasbourg law is, from what we can tell, remarkably efficacious, but it is far from (anything but relatively) perfect'.

<sup>45</sup> M. Janis and R. Kay and A. Bradley, *European Human Rights Law. Text and Materials* 99, 100 (2008). The authors also recall that '[h]esitatingly, the Court has begun to issue remedies beyond declaratory relief and just satisfaction ... . [F]or example, in *Papamichalopoulos v. Greece* [No. 14556/89, 31 October 1995] the Court ordered Greece to reconstitute expropriated property or to pay the applicants the property's current market value.' On non-monetary measures ordered by the Court, see also Colandrea, 'On the Power of the European Court of Human Rights to Order Specific Non-monetary Measures: Some Remarks in Light of the *Assanidze*, *Bronionski* and *Sejdovic* Cases', 7 *Human Rights Law Review* (2007) 396. Together with *Papamichalopoulos*, Ress, *supra* note 5, at 372-373 recalls the following other cases: *Alfatli v. Turkey* (No. 32985/96, 30 October 2003); *Maestri v. Italy*, No. 39748/98, 17 February 2004; *Assanidze v. Georgia* (No. 71503/01, 8 April 2004); *Ilaszu v. Moldova and Russia* (No. 48787/99, 8 July 2004); *Bronionski v. Poland* (No. 31443/96, 22 June

give her back his freedom<sup>46</sup>; it does not clean up her criminal record; it does not give her back the property she was unlawfully dispossessed of; nor does it give her the job she is entitled to; and so forth. To be sure, that compensation is not a sufficient remedy is also proved by the fact that often petitioners do not even request it, even if they should be entitled to it if they win the case.

Things may be different for example in the case of a violation of a single individual's right to vote, because in that case a *restitutio in integrum*, namely the repetition of an election, would damage a huge number of blameless voters and infringe upon the need for certainty, particularly critical in the electoral outcomes. But in all the other examples, none of these downsides applies: no blameless or anyway unprepared person would be involved, even in civil judgments, because everyone should know that the ECtHR could overturn a judgment if it finds it in violation of the Convention; and legal certainty would not be really violated, and in fact an approach like the one proposed here would have the benefit of the clarity afforded by any automatic mechanism. Which by the way suggests that the best way to deal with the issue is via legislative intervention: entrusting this task to the courts would increase litigation, because every individual who won a case in Strasbourg would have to bring a new suit to get Italy to abide by the European judgment, although every time the outcome would be uncertain.<sup>47</sup> And anyway without legislative authorization that judgment would remain in limbo, unenforceable but still existing in the legal system: this is not a desirable scenario.<sup>48</sup>

Finally, it is true that the approach advocated for here would cost money to reorganize the judicial system, and also protract the length of the overall proceeding. Yet the extra money spent would be worth it in order to protect fundamental rights *seriously*, and would also be offset by the money saved on Article 41 compensations.<sup>49</sup> As for the increased duration of proceedings, the

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2004).

<sup>46</sup> Actually, there is a leftover remedy in case of detention, that is the pardon granted by the President of the Republic (Art. 87(11) of the Italian constitution): but it is an exceptional measure and there is no obligation on the President to afford it, so it is not possible to rely on it as a sufficient and effective remedy for our purposes.

<sup>47</sup> Indeed the ECtHR clearly does not have jurisdiction to order domestic courts measures like reopening or review (see, among other authorities, the recent *VgI No. 2* judgment, mentioned *supra*, note 29; *Saïdi v. France*, 20 September 1993, § 47; *Pelladoob v. the Netherlands*, 22 September 1994, § 44).

<sup>48</sup> It is just what happened in the mentioned case *Dorigo*, pursuant to the above-mentioned judgment of the *Corte di Cassazione* No. 2800 of 2007.

<sup>49</sup> *Restitutio in integrum* is alternative to monetary compensation, therefore allowing a

provision for effective remedies cannot be influenced by the incapacity of a state to have an efficient and quick system of adjudication.<sup>50</sup>

In summary, the feeling is that until the Parliament does not bind itself to systematically enforce Strasbourg judgments, like it would with a law like the one proposed in this article, it will always resist enforcing them in individual cases, often choosing to (literally) pay the penalty for violations of European law, rather than conforming to the requested standards. If a judgment were automatically quashed after a finding of a violation by the Strasbourg Court, Italy (and any other country) would lose a major incentive to maintaining the illegitimate *status quo*.

Briefly, the argument proposed, that at first sight can appear to be far-fetched, seems to be the one that can better, more *seriously*, fulfill Italy's international obligations arising from ECHR membership. Anyway, even though one might not want to accept a solution so oriented in favor of European integration, considering the inroads that it makes on the sovereignty of the Member States, let alone hold it to be *imposed* by the Italian constitution, the thesis assumed here should be at least included in the list of the solutions already *allowed* by the Italian constitution, besides being the likely final stage of the relationship between the Italian and the ECHR legal systems.

#### IV. THE BILLS PENDING BEFORE THE ITALIAN PARLIAMENT: A STEP FORWARD AND TWO STEPS BACKWARD

So *quid juris*? We now move briefly to the bills currently pending before the Italian Parliament, aimed at complying with a duty that Italy will not be able to ignore much longer.

Like in the previous sessions, also in the current one, the 16th, several bills have been submitted to the Parliament with this purpose: in particular, two bills have been presented to the Senate (S-839, and S-1156, the latter was

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systematic reopening would let the states save the considerable amount money they currently give to the individuals as the only contemplated restoration.

<sup>50</sup> A different issue is that this solution would also create a great incentive for individuals to file a complaint in Strasbourg, thus overloading even more an already overloaded Court, with the risk of its collapse. Some precautions would definitely need to be found in order to dispel this serious threat. Innovations contained in Protocol No. 14-*bis*, entered into force on 1 October 2009, could be helpful: after Protocol No. 14-*bis*, a single judge can now reject plainly inadmissible applications, and a three judge committee may now declare applications admissible and decide on their merits in clearly well-founded and in repetitive cases.

then withdrawn), and three at the Chamber of Deputies (C-1538, C-1780, and C-2163). Moreover, in another bill (S-1440), proposing a comprehensive amendment of several provisions of the code of criminal procedure, two articles (9 and 33) deal with exactly the same issue. The latter bill is by far the most likely to be passed into law, since it was submitted by the Minister of Justice. All the bills go down a very different path from the one described in this article as preferable, even though it is to their credit that they deal with the matter at all, offering a significant starting point for discussion.

The strongest argument against the pending bills is the choice they all make to allow a review only for criminal judgments, and only for the 'formal' violations of Article 6(3) ECHR (not for violations *on the merits*). Another source of perplexity is that most of the bills subject the review to further conditions, such as the 'decisive impact on the outcome of the trial' that the violation must have in order for the judgment to be reviewed, and the 'condition of imprisonment' in which the petitioner must be: these conditions make it more difficult to exercise an option that should instead be encouraged as much as possible. Furthermore, the second one unreasonably overlooks those subject to a measure of diversion. This choice is made with the understandable purpose of affording a higher protection in a case considered more sensitive, namely when a person is imprisoned, but it ends up treating more favorably a person guilty of a presumably more serious crime, considering he was imprisoned, than the person guilty of a less serious crime, for whom a lesser alternative to detention was considered sufficient. This arguably runs counter not only to the principle of equality (Article 3 of the constitution), but also to the necessary re-educational purpose of punishments (Article 27(3) of the constitution.)

Doubts are also raised by the choice of two bills not to allow the suspension of the effects of the sentence, and in general of all the bills to ignore totally the other effects of the conviction, different from the punishment itself, such as the inclusion of the conviction in the criminal records, the effects on subsequent punishment in case of a relapse into crime, and so forth, that cannot be overlooked. In this case, too, there would be little benefit of winning the case in Strasbourg, if one cannot remove *all* the effects of the relevant domestic judgment, thus having a contradictory outcome: satisfaction for a sentence found unfair, but at the same time preservation of that sentence and its effects.

Moreover, even the three bills that provide for a suspension of the judgment, take into consideration only the detention, and make the suspension subject to the assessment, on a case-by-case analysis, that 'an

unlawful detention could result.' Also in this case, there would be a disparity of treatment with somebody whose conviction is struck down by the court of appeal or the *Corte di Cassazione* (with remand). Indeed in these cases the code of criminal procedure prescribes, with no exception, the release of the defendant if he was imprisoned pursuant to a precautionary measure (Article 300(1)), while in the bills examined not only is release discretionary and not automatic nor immediate, but precautionary measures may even be adopted *ex novo*. Even if such measures would be based on a reasonable and understandable need, their employment would seriously risk compromising 'compliance' with the European judgment.

To conclude, there is one last question: are the choices made by these bills just less effective in granting the domestic enforcement of ECtHR judgments, but good enough to meet the 'duty to abide by' them, or instead do they fall short of the minimum threshold of protection? If the answer is the latter, in case one of those bills were signed into law with no substantial amendment, that law would be against Article 46 ECHR, and therefore, after judgments Nos. 348 and 349 of 2007, automatically unconstitutional.

#### V. CONCLUSION: LOOKING FOR A RACE-TO-THE-TOP IN THE PROTECTION OF INDIVIDUAL LIBERTIES, IN THE POST-LISBON TREATY ERA

In any case, even if one does not want to accept the suggested solution, it is very important that the legislature carefully considers the different options it has in order to comply with the duty provided for by Article 46 ECHR. It is also a good chance to promote the process of European integration in an area where it seems to be able bring many advantages. Indeed, a solution like the one suggested here would allow the ECtHR to play the leading role as a guardian of fundamental rights that is due to it, but that it has not been able to play at its full potential, also because of the lack of a mechanism like the one described in this article.<sup>51</sup> A Court finally at its full potential would raise on its turn the standards that all EU Members have to meet in the protection of the fundamental rights afforded by the ECHR.

On the contrary, if the amendments are too narrow, the ECtHR could find them insufficient. As far as Italy is concerned, the *Corte Costituzionale* would probably have then to engage in an 'activist' jurisprudence to fill the gaps in protection left by the Parliament (after all, it is what has happened so far).

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<sup>51</sup> To be sure, this gap couples with other reasons: see Pace, *supra* note 44.

But most of all, an intervention by the Parliament to grant full effectiveness to ECtHR judgments seems necessary to make sure that it is really worth it, for the Italian nationals (but again, this conclusion is valid for any other State's nationals), to take on the burdens of a petition to the Strasbourg Court, and to make sure they do not estimate those burdens superior to the benefit they could gain.

Indeed, independent of what one thinks of European integration, it seems necessary to consider that today the Court of Strasbourg is the European court that can better protect fundamental rights (at least those it provides for). In other words, the road to an effective and *serious* protection of fundamental rights in Europe starts from individual States and necessarily passes through Strasbourg, but that cannot be the last stop: in order for the road to be completed, it is necessary to go back to the individual states, and fully accomplish what was held in Strasbourg.

Those who are in favor of fostering European integration could find some supporting arguments in *The Federalist Papers*, a classic of the American political thought. Many of the issues and problems discussed there in the context of the American debate over the adoption of the federal constitution are relevant to today's Europe.

But even though one has a more Jeffersonian attitude, and mistrusts the growth of federal power, both in the US and in the EU, this passage from Federalist No. 21 by Hamilton is probably worth considering: 'The most palpable defect of the existing confederation, is the total want of a SANCTION to its laws.<sup>52</sup> In Federalist No. 22, he also added: 'Laws are a dead letter, without courts to expound and define their true meaning and operation. The treaties of the United States, to have any force at all, must be considered as part of the law of the land. Their true import, as far as respects individuals, must, like all other laws, be ascertained by judicial determinations. To produce uniformity in these determinations, they ought to be submitted, in the last resort, to one SUPREME TRIBUNAL.<sup>53</sup>

In fact, both the EU and the ECHR system do have their own supreme judicial bodies, and their impact on the law of Member States is ever increasing. Nonetheless, Hamilton's warnings indirectly draw our attention to the problem we have dealt with in this article. Hamilton did not specifically dwell upon the importance of a uniform enforcement of judgments.

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<sup>52</sup> A. Hamilton, *The Federalist No. 21*, in A. Hamilton and J. Jay and J. Madison, *The Federalist* (J. R. Pole ed.) 110 (2005).

<sup>53</sup> A. Hamilton, *The Federalist No. 22*, *supra* note 52, at 121.

Evidently, he must have seen it as obvious, implicit in his call for a uniform judiciary. Indeed a uniform judiciary cannot come without a similar uniformity and effectiveness in the enforcement of judgments. After all, 'laws are a dead letter, without courts,' but courts are a dead letter as well, without a proper enforcement of their dictates.

In response to that, one could argue that Hamilton was describing a federal government, which Europe is not, and actually several people, among intellectuals and ordinary people, oppose its evolution into a federal organization. But an innovation like the one considered here should not worry them: indeed the ECtHR only works one-way, namely *against* Member States, thus allowing only an increase in the level of respect of citizens' fundamental freedoms by Member States, and never the opposite, *i.e.* an expansion of government's power to the detriment of individual liberty.

Also, it shall not be forgotten that the ECHR only provides for civil and political rights: what really troubles the 'Jeffersonians' is the expansion of economic and social rights by means of federal action, but the idea discussed here would not imply any change as far as these rights are concerned.

Of course, we must not confuse the EU and the ECHR systems: even if there is a federal evolution of the former, this does not mean that this innovation necessarily reflects on the latter, since the two systems remain separate and the ECHR system is made of 20 more countries that are not part of the EU. But things may be viewed differently if one considers a future change in the relationship between the EU and the ECHR systems: the accession of the EU to the ECHR. Such accession is provided for by the Treaty of Lisbon,<sup>54</sup> recently entered into force<sup>55</sup>, and will soon be put into practice according to the procedures provided for by Protocol No. 8 to the Treaty of Lisbon.

Actually, as for Italy, it is true that, even after judgments Nos. 348 and 349 of 2007, the ECHR is still subordinate to the Constitution in the Italian legal system, and that these two judgments have not allowed judges to cease to apply laws contrary to the ECHR, without first raising the question of their legitimacy to the Constitutional Court; it is also true that some rulings by the *Corte di Cassazione* have clearly ruled out the so called 'communitarization' of the ECHR;<sup>56</sup> and it is equally true that the ECJ had ruled against the accession

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<sup>54</sup> Art. 1, number 8), that amends Art. 6 of the Treaty on EU; the accession to the ECHR is provided for by para. 2 of the newly written Art. 6.

<sup>55</sup> As was mentioned above, the Lisbon Treaty entered into force on December 1, 2009.

<sup>56</sup> These rulings are recalled *supra*, notes 16 and 17.

of the EU to the ECHR *without a relevant amendment of the Treaty*.<sup>57</sup> However, when accession occurs (in the very near future), the situation may change.<sup>58</sup>

The consequences of the accession will go on being analyzed in depth,<sup>59</sup> but some Italian courts<sup>60</sup> have already started to say that EU Member States (all members of the ECHR, too) have now a heightened obligation to abide by the judgments of the ECtHR, since this obligation is now for them an obligation under EU law: today, every *level* of the Community is bound to abide by the Convention.<sup>61</sup>

In particular, these judgments have explicitly stated that now that the ECHR is (about to be) part of the EU law, the ECHR provisions are directly applicable in each Member State, therefore judges shall not apply domestic laws that violate these provisions.

Some authoritative views oppose this construction,<sup>62</sup> though it seems to be bound to gather momentum: but even if it did not, anyway the problem of

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<sup>57</sup> ECJ, Opinion 2/94, *Accession by the Communities to the Convention for the Protection of Human Rights and Fundamental Freedoms*, of 28 March 1996.

<sup>58</sup> As confirmed by the second Annual Report (2008) by the Italian government on the Enforcement of ECtHR judgments, (available at [www.governo.it](http://www.governo.it)): 'If the Treaty of Lisbon enters into force, all the provisions of the Convention would become directly applicable in the Member States' legal systems, with the same status and applicability as EU law (...) and would no longer be subordinate to the constitution, as they are now, because they would be applied by virtue of Art. 117(1).'

<sup>59</sup> For two comments previous to the entering into force of the Lisbon Treaty, see M.E. Gennusa, *La Cedu e l'Unione Europea*, in M. Cartabia (ed.), *supra* note 31, at 91; G. Zagrebelsky, *La prevista adesione dell'Unione Europea alla Convenzione europea dei diritti dell'uomo*, available at [http://www.europeanrights.eu/getFile.php?name=public/commenti/Adesione\\_Zagrebelski.doc](http://www.europeanrights.eu/getFile.php?name=public/commenti/Adesione_Zagrebelski.doc). Very recently, see also M.G. Bernardini, *L'Europa dopo Lisbona: cosa cambia?*, in [www.federalismi.it](http://www.federalismi.it) (2010, No. 11).

<sup>60</sup> *Consiglio di Stato*, Section IV, judgment of 2 March 2010, No. 1220; *TAR Lazio*, Section II bis, judgment of 18 May 2010, No. 11984, both available at [www.giustizia-amministrativa.it](http://www.giustizia-amministrativa.it).

<sup>61</sup> About this issue, see A. Ruggeri, *Anora in tema di rapporti tra CEDU e Costituzione: profili teorici e questioni pratiche*, 39 *Politica del Diritto* 443, 452 (2008): the author observes that the EU law can be the 'vehicle' of the Convention. To be sure, some authors think that Italy is already bound to the full enforcement of ECtHR judgments: Ubertis, *Conformarsi alle condanne europee per violazione dell'equità processuale: doveroso e già possibile*, 3 *Corriere del Merito* (2007) 595.

<sup>62</sup> A. Celotto, *Il Trattato di Lisbona ha reso la CEDU direttamente applicabile nell'ordinamento italiano?* (in margine alla sentenza n. 1220/2010 del Consiglio di Stato), in [neldiritto.it](http://neldiritto.it), No. 49 (2010). But see the response by R. Sestini, *Il Trattato di Lisbona ha reso la CEDU direttamente applicabile nell'ordinamento italiano?*, in *margine del Prof. Alfonso Celotto sulla sentenza n. 1220/2010 del Consiglio di Stato*, in [www.giustamm.it](http://www.giustamm.it) (June 2010).

the effect of ECtHR's judgments will not be able to be kept out of the legislative agenda for much longer. When Italy finally decides to amend the law currently in force, nothing prevents it from choosing to follow the approach we have described. In fact, this seems to be by far the best solution.

In conclusion, maybe it is still going to take a long time, with a lot of going forward and going back; but whether Europe becomes a federal polity or not,<sup>63</sup> there are strong reasons to think that the solution argued for here would be a good choice. So let's put it into effect now.

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<sup>63</sup> In 2003, Valéry Giscard d'Estaing, Jean-Luc Dehaene and Giuliano Amato tried to do something similar just to what Hamilton, Madison and Jay had done between 1787 and 1788, trying to persuade European states to ratify the Constitutional Treaty. As is well-known, the outcome was quite different.