

A FURTHER ARGUMENT IN FAVOUR OF
THE CONSTRUCTION OF A GENERAL THEORY
OF THE DOMESTIC IMPACT OF JURISPRUDENTIAL SUPRANATIONAL LAW.
THE GENESIS AND THE FIRST STEPS OF ECHR
AND EU LEGAL ORDERS

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The goal of this paper is to demonstrate that, if it is true that before the Europe's enlargement to the east the distance between the domestic impact of European Convention of Human Rights (ECHR) and EU law was very broad, this was not the original situation which characterised the origins of the two supranational organisations. More specifically, with particular regard to the genesis of the two European Courts, it will be argued that, at the time of its foundation, the ECtHR had at least the same (if not greater) potential for intrusiveness towards Member States sovereignty than the ECJ did. If the following years have told a different history, this was fundamentally due, as it will be seen, to two factors; the first one is an unexpected "acceleration" of the ECJ; the second one the concomitant "slow-motion" start up of the ECtHR.

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I. INTRODUCTION

The goal of this article¹ is to further elaborate on the research output of a previous work² where I have speculated on the possibility to propose the construction

¹ The article is part of a broader project run with Giuseppe Martinico, whose final output is the monograph *The Interaction between Europe's Legal System*. Northampton: Edward Edgar Publishing, 2012. Print.

² Pollicino, Oreste. "The Relationship between Member States and the European Courts after

of a general theory of the domestic impact of the jurisprudential supranational law.

At the basis of the said construction would be, *inter alia*, the emerging and the consolidation of a growing trend in the more recent case law of the European Court of Justice (ECJ) and the European Court of Human Rights (ECtHR). More specifically, in the previous mentioned research, it was asked whether two European Courts have (involuntarily) started to converge in terms of their own “idea” of the domestic impact of EU law and ECHR in the legal orders of the States parts of the two supranational organizations.

In this respect, it has been argued that the said trend of convergence exists and seems to find its roots in the two opposite ways in which the two European Courts have reacted to the challenges emerging from the enlargement of the European Union and of the Council of Europe towards Eastern Europe. In fact, on the one hand, the ECtHR has opted for an acceleration of judicial activism according to which the Strasbourg judges have started to insist on a primacy and, consequently, a greater intrusiveness of the European Convention of Human Rights (ECHR) on the domestic legal orders; on the other hand, the ECJ seems to have privileged, since the great enlargement of 2004, the appraisal of national constitutional values even of the single Member State.

Elsewhere³ the above mentioned investigation related to said process of convergence identified at European level has been integrated by an analysis rooted in the national dimension with the aim being to verify if the same trend is emerging in the way ordinary and constitutional judges treat EU law and ECHR law.

Enlargement: toward a General Theory of Jurisprudential Supranational Law?.” *Ybk Eur L* 29.1 (2010): 65-111. Print.

³ Beside the monograph before mentioned see also: Martinico, Giuseppe, and Oreste Pollicino, eds. *The National Judicial Treatment of the ECHR and EU Laws. A Comparative Constitutional Perspective*. Groningen: Europa Law Publishing, 2010. Print. In Italian, see also: Martinico, Giuseppe. “Il trattamento nazionale dei diritti europei: CEDU e diritto comunitario nell'applicazione dei giudici nazionali.” *Rivista Trimestrale di Diritto Pubblico* 3 (2010): 691-734. Print; Pollicino, Oreste. *L'allargamento dell'Europa a est e rapporto tra Corti costituzionali e Corti europee. Verso una teoria generale dell'impatto interordinamentale del diritto sovranazionale?*. Milan: Giuffrè, 2010. Print.

In this article, the main attempt is to put another stone in the construction of a general theory of the domestic impact of jurisprudential supranational law by looking, instead, at the genesis of the two supranational organizations.

More specifically, the goal of this paper is to demonstrate that, if it is true, as it has been said above, that before the Europe's enlargement to the east the distance between the domestic impact of European Convention of Human Rights (ECHR) and EU law was very broad, this was not the original situation which characterised the origins of the two supranational organisations.

More specifically, with particular regard to the genesis of the two European Courts, it will be argued that, at the time of its foundation, the ECtHR had at least the same (if not greater) potential for intrusiveness towards Member States sovereignty than the ECJ did. If the following years have told a different history, this was fundamentally due, as it will be seen, to two factors; the first one is an unexpected "acceleration" of the ECJ; the second one the concomitant "slow-motion" start up of the ECtHR.

II. THE REASONS OF A CHOISE: THE UNDERVALUETED ORIGINAL SIMILARITIES BETWEEN THE TWO SUPRANATIONAL ORGANIZATIONS WITH REGARD TO THEIR RESPECTIVE IMPACT ON THE MEMBER STATES LEGAL ORDERS

The choice to begin a comparative study aimed to investigate the evolving nature of the European Union legal order and the European Convention of Human Rights (ECHR), with particular regard to their impact on the domestic legal systems, by analyzing the two supranational organizations from their foundations cannot escape one principal objection. It could be in fact easily objected that, up until the mid 1970s, when the ECJ finally decided to take the protection of fundamental rights in the European Community "seriously"⁴ and started to make express reference to the ECtHR's case law,⁵ the similarities between the two mentioned legal orders under

⁴ See Weiler, Joseph, and Nicholas Lockhart. "Taking Rights Seriously": The European Court and Its Fundamental Rights Jurisprudence." *CML Rev* 32 (1995): 51. Print.

⁵ See Bogdandy, Armin von. "The European Union as a Human Rights Organization? Human Rights and the Core of the European Union." *CML Rev* 37 (2000): 1307-1338. Print; Douglas-Scott,

investigation were so few as to make an in-depth comparison between them almost pointless.

However, on a closer examination, this objection does not seem so well grounded. On the one hand, in fact, it does not take into due account several structural aspects of the two European integration processes which, already *ab origine*, made, as it will be seen, the two supranational organizations closer.⁶

On the other hand, the mentioned objection does not seem to pay enough attention to the original nature of the two European Courts.

The aim of this paper is, by taking into account the above identified overlooked elements, to demonstrate that, in spite of considerable points of divergence, the two European systems seem to share common roots with regard to their establishment, their mission and, especially, their impact on the Members States legal orders.

Sionaidh. "A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights *Acquis*." *CML Rev* 43 (2006): 629-665. Print; Ahmed, Tawhida, and Israel De Jesus Butler. "The European Union and Human Rights: An International Law Perspective." *Eur J Intl L* 17.4 (2006): 771-801. Print; Alston, Philip, and Joseph Weiler. "An 'Ever Closer Union' in Need of a Human Rights Policy." in Alston, Philip et al., eds. *The EU and Human Rights*. Oxford: Oxford UP, 1999. Print; Weiler, Joseph. "Does Europe Need a Constitution? Reflections on Demos, Telos and the German Maastricht Decision" *Eur LJ* 1 (1995): 219-240. Print.

⁶ See De Burca, Gráinne. "The Road Not Taken: The EU as a Global Human Rights Actor.", 1, available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1705690>. Web. 26 Sep. 2012: "The traditional narrative commences with the total absence of any reference to human rights in the three founding European Community Treaties in the 1950s and describes the gradual emergence and progressive advancement of a powerful EU human rights regime over the ensuing decades. The European Court of Justice is placed at the center of this narrative, as a heroic and solitary actor which through its pioneering case law over time has encouraged and cajoled the main political actors into accepting human rights as a key element of the EU constitutional framework. The silence of the founding Treaties on the subject is explained on the basis that human rights concerns were unrelated to the project of economic integration being undertaken, or that the task of human rights protection was left instead to the Council of Europe's European Convention on Human Rights. The classic accounts of EU engagement with human rights thus depict a long, slow trajectory over more than fifty years from a limited economic Community in which considerations of human rights were deliberately delegated to the Community's 'sister' organization, the Council of Europe, to the emergence of a powerful political entity in which the protection and promotion of human rights has become a central commitment... This paper suggests however that, at least in relation to the EU, the high point in terms of political support for the creation of a powerful, supranational human rights regime was in fact reached in the early 1950s, and that progress in recent decades has been much more hesitant and deeply contested."

III. THE ORIGINAL CONVERGENCE AND THE FIRST TREND OF DIVERGENCE

In the general crisis following World War II, “amidst the dust and ashes of what remained of Europe, it was surely a need commonly felt by government leaders and those governed alike to adopt a new order capable of placating the insatiable hunger of the Nation-States and warding off a third, final world war”⁷.

The driving idea behind this common feeling was the need for greater solidarity among European nations which, would have hopefully led to a more highly integrated collaboration than that proposed by the League of Nations, whose greatest failure, among others, was that of not having been able to avoid the bloodshed of a fratricidal world war.

The intention was, in other words, to create a supranational legal system in which the Member States would have finally renounced to their absolute sovereignty, as Luigi Einaudi strongly recommended, almost prophetically, in 1918⁸ and Altiero Spinelli reasserted in 1941, giving shape and soul to that project.⁹

On the basis of these assumptions in 1948¹⁰, during the international conference on the European Federalist Movement¹¹ held in the Hague and attended by 173 delegates representing 16 European countries, Winston Churchill, the Honorary President, expressly emphasized:

“We desire a united Europe, throughout whose area the free movement of persons, ideas, and goods is restored. We desire a Charter of Human Rights guaranteeing liberty of thought, assembly and expression as well as the right to form a political opposition. We desire a Court of Justice with adequate sanctions for implementation of the Charter”.

There could not have been a more authoritative summary of the ties closely binding European nations to the objectives of creating a European common market

⁷ See Spinelli, Altiero, and Ernesto Rossi. *Il manifesto di Ventotene*. 1941. Print.

⁸ See Einaudi, Luigi. “Il dogma della sovranità e l’idea della Società delle Nazioni.” *Corriere della Sera* 28 December 1918. See also Perfetti, Francesco. “Luigi Einaudi, Il Presidente che ha insegnato ad amare la libertà.” *La Comunità internazionale* 63.3 (2008): 411-419. Print.

⁹ See Spinelli, Altiero, and Ernesto Rossi. *Il manifesto di Ventotene*. *supra* note 7.

¹⁰ See Russo, Carlo, and Quaini, Paolo. *La Convenzione europea dei diritti dell’uomo e la giurisprudenza della Corte di Strasburgo*. Milan: Giuffrè, 2006. Print.

¹¹ See *The European Movement and the Council of Europe*, published on behalf of the European Movement. London: Hutchinson, 1949, 35. Print.

with no obstacles to the free circulation of goods on one hand, and, on the other, safeguarding human rights through a Charter that stressed their inviolability and a Court that guaranteed compliance. In brief, Churchill advocated a virtuous synthesis between the common market and the protection of human rights in Europe: in other words, a combination between what is considered to be the basis, respectively, of the European Economic Community and the European Convention of Human Rights.¹²

After several years, and failed attempts to give the fledgling construction of the European Community a wider scope than it would have had under the provisions of the Treaty of Rome,¹³ gradually the two supranational organizations began to follow diverging paths. This trend towards a progressive divergence, however, was not as drastic as many authors have argued. As will be discussed later, in fact, in each of the two European integration process under investigation there inevitably remained at least a germ of the core on which the other was founded.¹⁴

The two most significant factors that led to the mentioned process of divergence were, on the one hand, the progressive deterioration in the immediate post-war years of the relationship between the Soviet Union and the Western powers and, on the other hand, the failure to create a much more ambitious integration at the Community level¹⁵ after France's rejection of the European Defence Community.

¹² Harpaz seems to support this view when he underlines that “formally, the EU was founded as an economic regime, while the ECHR was established as a human rights regime. Yet, they do share a common historical background [...] it is precisely because Europe was not born with the Council of Europe or the European Economic Communities just after the War, but very much earlier, at the convergence of great currents of thought which crossed the continents since Roman law, that it is possible now – literally – to extract the contents of a shared “democratic necessity”. More concretely, both regimes were established in the aftermath of the same ‘constitutional moment’ in European history, namely the end of the Second World War and the resultant collective revulsion to its horrific consequences. Hence both regimes shared a similar *raison d’être*, namely the replacement of the old world order with an order that would guarantee peace, stability and a high degree of protection of human rights”. See Harpaz, Guy. “The European Court of Justice and its Relation with the European Court of Human Rights: The Quest for Enhanced Reliance, Coherence and Legitimacy.” *CML Rev* 46.1 (2009): 73-104. Print.

¹³ The reference is clearly to the failed projects to create a European Defence Community and European Political Community.

¹⁴ See, for the same view, Quinn, Gerard. “The European Union and the Council of Europe on the Issue of Human Rights: Twins Separated at Birth?” *McGill L.J.* 46 (2001): 849-874. Print.

¹⁵ See Padoa-Schioppa, Antonio. *Italia ed Europa nella storia del diritto*. Padua: Il Mulino, 2003, 581-585. Print.

More specifically, with regard to the Soviet Union, Stalin's unscrupulous policies, coupled with worries over German rearmament, caused great alarm in the Western democracies, particularly in England, over a possible Communist encroachment from the East and the possible re-birth of neo-Nazi ideology in Germany.

For these reasons, notwithstanding Churchill's auspices, Britain's post-war Labour government preferred to combine the formation of military-type alliances of a patently anti-Soviet matrix¹⁶ to the creation of an international organization, the Council of Europe.¹⁷ Among other things, the idea behind the creation of the latter was, even symbolically, to put together the Western democracies of the day in order to provide a common front against any temptation to allow a totalitarian ideology to re-emerge. At the same time, the institution of the Council of Europe would have affirmed both the superiority of the western rule of law and the liberal gains made in protecting fundamental rights with respect to the ideology of the Communist model.

Having been devised on the wave of enthusiasm that saw the emergence of the European Coal and Steel Community (ECSC), the idea of a European organization with a highly integrationist vocation was thwarted by the failure of the European Defence Community, into which De Gasperi and Spinelli had only partially managed to "inject" that federalist spirit typical of the Ventotene Manifesto.¹⁸

For this reason, it was decided to return to the more pragmatic logic that had led to the success of the ECSC. Jean Monnet's gradualist strategy became the guiding theme of the Community process of integration, thus laying the foundation for a

¹⁶ The reference is, obviously, to the Western European Union and to the North Atlantic Treaty Organization.

¹⁷ The Statute of the Council of Europe was signed on 5 May 1948, at St James's Palace Hotel, in London, by its ten Founding Members (the United Kingdom, Belgium, Denmark, France, Ireland, Italy, Luxembourg, Norway, the Netherlands and Sweden). See Bertozzi, Stefano. *Crocevia della grande Europa: il Consiglio d'Europa, l'Unione Europea, l'Osce*. Bologna: Clueb, 2001, 17. Print; Robertson, Arthur Henry. *The Council of Europe. Its Structure, Functions and Achievements*. London: Stevens, 1956. Print; Benoît-Rohmer, Florence, and Heinrich Klebes. *Council of Europe Law, Towards a Pan-European Legal Area*. Strasbourg: Council of Europe Publishing, 2005. Print.

¹⁸ See Robertson, Arthur Henry. "The European Political Community." *British Yearbook of International Law* 29 (1952): 383. Print.

common market culminating in 1957 with the Treaty of Rome that instituted the European Economic Community (EEC).

The EEC was characterized by an economic vocation that, in the opinion of many, did not exclude but merely postponed the project of a supranational integration of Europe with a more generalized vocation including both social and political aspects.¹⁹

With specific regard to the genesis of ECHR, seminal studies²⁰ which focused on the rationale behind the institution of the Council of Europe, and more specifically, the adoption of the ECHR, have argued that the almost exclusive intention of the founding members was, by using a symbolic language full of ideological implications, to give preeminence to the creation of a system of fundamental values at the basis of the Western democracies.

The said interpretation, which is clearly a retrospective attempt to preserve the *status quo* of the rationale at the basis of the international treaties drawn up to establish the Council of Europe and the ECHR, if it may be acceptable with regard to the institution of the Council of Europe,²¹ it is instead without doubt questionable as far as the ECHR is concerned.

Recently, in fact, it has been carried out²² a critical reading of the eight volumes of the Convention's *travaux préparatoires* which confirmed what could have already been suspected from looking at both the different degrees of democratic stability characterizing the Founding Nations²³ at the time the text was being negotiated and the unequal level of openness towards international law of the constitutions of the founding Member States. There was by no means a unanimous

¹⁹ See Alarcón Caracuel, Manuel Ramon. "La necessità di un capitolo sociale nella futura costituzione europea." *Lavoro e diritto* 4 (2000): 607-619. Print.

²⁰ See Robertson, Arthur Henry. *The Council of Europe*. *supra* note 17, at 4.

²¹ See Simpson, Brian. "Britain and European Convention." *Cornell Intl L J* 34.3 (2001): 523-554. Print; Greer, Steven. *The European Convention, Achievements, Problems and Prospects*. Cambridge: Cambridge UP, 2006. Print.

²² Nicol, Danny. "Original Intent and the European Convention on Human Rights." *Public Law* (2005): 152-172. Print.

²³ See Moravcsik, Andrew. "The Origins of the Human Rights Regime: Democratic Delegation in Post-War Europe." *International Organization* 54.2 (2000): 217-252. Print.

consensus on the degree of integration to which the Convention should have aspired, so the final result was a compromise of the founding members' different positions.

As in fact pointed out from the preparatory works, nine out of fifteen members of the Consultative Assembly looked upon the institutions of Strasbourg "as a nucleus [...] which may develop into a future federal organisation of Europe".²⁴ A rather more intergovernmental approach acted as a counterweight to the spirit of integration within the Assembly and guided the work of the Committee of Ministers.²⁵

Similarly, alongside those nations that were striving for closer integration at the international level, others, first among them Great Britain, claimed that the role of the Convention should be to create a purely symbolic effect to reassure Europe that no further totalitarian regimes would re-emerge there in the future.²⁶ Not only did such a conviction surface continuously even in the comments made by some of the English judges when criticizing the ECtHR's²⁷ evolutionary approach in later years, but also the same conviction was most clearly expressed in the British government's opposition to the wishes of some original signatory States to provide for a court that would ascertain whether or not rights protected by the Convention had been violated. Bearing in mind the fact that most of the founding Nations, beginning with Great Britain, were convinced that the level of protection their respective national legal systems afforded fundamental rights was much greater than

²⁴ See *Travaux préparatoires*, 1, 32, cited by Nicol, Danny. "Original Intent and the European Convention on Human Rights." *supra* note 22, at 156.

²⁵ As it was stated "the Committee of Ministers tried to exclude 'human rights' from the agenda of the Consultative Assembly. The Assembly promptly reinstated the item, and ended up proposing the Convention". See Nicol, Danny. "Original Intent and the European Convention on Human Rights." *supra* note 22, at 155.

²⁶ Or, as literally emerges from *Travaux préparatoires* "to reassure the ordinary man that never again can the terrors of those totalitarian regimes overwhelm him". See Nicol, Danny. "Original Intent and the European Convention on Human Rights." *supra* note 22, at 157.

²⁷ Lord Hoffmann polemically underlined this when he wrote: "[W]hen we joined, indeed, took the lead in the negotiation of the European Convention, it was not because we thought it would affect our own law, but because we thought it right to set an example for others and to help to ensure that all the Member States respected those basic human rights which were not culturally determined but reflected our common humanity". See Lord Hoffmann, Rt Hon. "Human Rights and the House of Lords." *MLR* 62.2 (1999): 159-166. Print.

the minimum standard guaranteed by the Convention, this attitude should not be surprising.

In the end, the founders States agreed about the creation of a court empowered to monitor violations of the Convention by Member States. The British government, in exchange, however, obtained an undertaking that the States would have benefited of the option to accept the right of the individual to petition the European Commission on Human Rights. Furthermore UK succeeded in ensuring that the competence of the Court to accept the said would have been only optional, and would have required the specific approval of the Member States.

In light of the above observations, it would be rather simplistic to consider the ECHR mechanism merely and exclusively as an ideological one, aimed “only” at maintaining the *status quo*.

IV. DISTINCTIVE FEATURES OF THE TWO LEGAL SYSTEMS WITH REGARD TO THEIR IMPACT ON THE MEMBER STATES LEGAL ORDERS

As it has emerged above, the EC and the ECHR systems, as far as the objectives and original spirit envisioned by the respective founding Fathers are concerned, were not so far distant from one another as it could be thought. Indeed, a closer look at them shows that even in reference to their original characteristic of their respective impact on the domestic legal order, they were not so distant either.

In both cases, their “genesis” comes from international law and in both cases it is characterized by distinctive features which, *ab initio*, enhanced their potential intrusiveness towards the sovereignty of their Member States in comparison with the “normal” features of “classic” international law.

A. *The ECHR system*

As for the ECHR, the *sui generis* nature of its content²⁸ finds immediate implications in the privileged position it attributes individuals with respect to the

²⁸ That is an international instrument that concerns itself with a field of law traditionally reserved to constitutional law, namely the protection of individuals *vis à vis* the State.

regime that characterises international law *tout court*, where the “actors” are generally the States.

Even the ECtHR, in a judgment from the 1970s, pointed out the *sui generis* characteristics of the ECHR when it emphasized that “unlike international treaties of the classic kind, the Convention comprises more than mere reciprocal engagements between contracting States. It creates, over and above a network of mutual, bilateral undertakings, objective obligations which, in the words of the Preamble, benefit from a “collective enforcement”.²⁹

Certainly the possibility of individual petition and the provision for an international court entitled to be the authentic interpreter of the Convention and in a position to deliver binding judgments against States that violate it, enhanced since the beginning the potential intrusiveness towards the contracting members of the ECHR legal system.

However, the original potentialities of inter-State petitions should not be underestimated. Such a mechanism is distinctive because it recognizes by law that a Member State has the right to ascertain before a court whether or not a contracting State is responsible for violating Convention provisions. The decision to introduce an inter-State petition was extremely daring. It provided that each contracting State “is entitled – and politically even called upon – to act as a guardian of legality in instances where another State party is seen as breaching the provisions of the ECHR”.³⁰

In effect, this is an exception to the rule of *consensus* that generally governs procedures for resolving controversies in international law as provided for in Article 33, Chapter VI, of the Charter of the United Nations, whereby States have the right to choose the means they use to settle a dispute with another State.³¹

²⁹ ECtHR, 18 January 1978, *Ireland v U.K.*, no. 5310/1971, para. 239.

³⁰ Martinico, Giuseppe, and Oreste Pollicino. *The Interaction between Europe's Legal System.* *supra* note 1, at 144.

³¹ See Wildhaber, Luzius. “The European Convention on Human Rights and International Law.” *ICLQ* 56.2 (2007): 217-231. Print.

B. *The EEC legal order*

As Weiler and Haltern³² pointed out, “the European legal order was begotten from public international law in the normal way that these things happen: there was a communion among some Member States – the high contracting parties – which negotiated, signed and subsequently ratified the constituent Treaties that brought into being, first the nascent European Coal and Steel Community and then its twin sibling, the European Economic Community and the Euratom”.

Nonetheless, there are particular characteristics of the original genetic code that already existed at the foundation of the Community legal order which are not found in “ordinary” international treaties. These characteristics are common to those features which belong to the so called “institutional” international law adopted by international organizations³³.

Among the powers attributed to these organizations, there may be on occasion a true attribution of the competence to enact regulations. The said “regulations” or “decisions” can be defined, as it has stated³⁴, by three concurrent characteristics. In the first place, these are laws with external relevance and are not for the internal functioning of the organization by which they have been enacted. Secondly, they are measures that have been unilaterally adopted by institutional bodies belonging to the same organisation. Thirdly, they are obligatory and binding, in contrast to recommendations or other examples of soft law adopted in international law.

Article 189 (now 288 TFEU, ex Art. 249 TEC) of the Treaty of Rome attributed, since the beginning, many of the above mentioned characteristics to EC directives and regulations alike. Both kind of legislation enhanced, *ab origine*, the

³² See Weiler, Joseph H., and Ulrich Haltern. “The Autonomy of the Community Legal Order – Through the Looking Glass.” *Harvard Intl L J* 37 (1996): 411-417. Print. See also, for an opposite view, Spiermann, Ole. “The Other Side of the Story: An Unpopular Essay on the Making of the European Community Legal Order.” *Eur J Intl L* 10.4 (1999): 763-789. Print.

³³ See for this classification Dupuy, René-Jean. *Le droit international*. Paris: PUF, 1966. Print. See also *Id. Communauté internationale et disparité de développement – Cours général de droit international public*. Recueil des Cours de l'Académie de droit international de La Haye, Vol. 165, 1979, 9-20. Print.

³⁴ De Witte, Bruno. “Retour à «Costa». La primauté du droit communautaire à la lumière du droit international.” *Cahiers de droit européenne* 20 (1984): 425-454. Print.

power of Community law to impinge on Member State legal orders. This does not mean, however, that the founding moment of the European integration process had a supranational or even constitutional nature, as has been claimed.³⁵ The genesis was and remains in the field international law.³⁶

The ECJ identified the distinctive characteristics of the EC legal order in its judgment in *Costa v Enel*, i.e., the Founding Fathers' will to institute a Community

“of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community” (par. 3).

On a more critical reading, however, as it has been argued above, those features do not appear sufficient to render it *ab origine* autonomous, new and *sui generis*.

The EC legal order was conceived, at its genesis, as a sub-system of international law with a marked potential for impinging on the sovereignty of the Member States. It would only have acquired a supranational character *in itinere*, as a result of the ECJ's much more creative jurisprudence.

V. THE ORIGINAL INTERNATIONAL NATURE OF THE TWO EUROPEAN COURTS

The ECJ, like the ECtHR, was conceived as an international court with exclusive power to interpret the respective founding Treaties. Neither Court was attributed *ab origine* power to void national legislation that contrasted provisions of the respective founding Treaties. In addition, the founding States rejected part of the

³⁵ See Oppermann, Thomas. *Europarecht*. Munchen: Beck, 1991, 196. Print; Bengoetxea, Joxerramon. “Institutions, Legal Theory and EC Law.” *Archiv für Recht und Social Philosophie* 77 (1991): 195. Print; Dowrick, Frank Ernest. “A Model of the European Communities' Legal Systems.” *Ybk Eur L* 3.1 (1983): 169, 224. Print.

³⁶ This thesis is supported by Joseph Weiler who, in 1982, observed that “the Constituent instruments of the Communities were traditional multi-partite International Treaties. Although including certain novel institutional features they were, in line with precedent, expected to be interpreted in accordance with the normal canons of treaty interpretation, one of which is a presumption against loss of sovereignty by States”. See Weiler, Joseph H. “The Community System: The Dual Character of Supranationalism.” *Ybk Eur L* 1.1 (1981): 267, 270. Print.

original project proposed by the French delegation to attribute power to the ECtHR to nullify national laws contrasting with ECHR provisions.

Although the text of the ECHR is not completely telling to this regard, it has always been maintained that ECtHR judgments were intended to have only a declaratory effect and not a constitutive one. Article 46 of the ECHR provides that judgments can only verify whether or not a contracting State has violated provisions of the Convention. If it has, the contracting State is obliged to restore when possible the claimant's situation as it was prior to the violation, using the ways and means of its choice.

If, during negotiations for drafting the ECHR, the powers attributed the ECtHR were scaled down with respect to those initially proposed, because, in particular, of the English fear concerning a possible "government of judges", it would be certainly inappropriate to conclude the Community founding Fathers' original idea was to attribute considerably more incisive powers to the ECJ than those classically attributed international courts. Quite to the contrary: the ECSC Treaty provided that the prime objective of the ECJ was to prevent the High Authority from abusing its huge powers.

Within the EEC institutional framework, the ECJ had the power to make only declaratory rulings verifying a Member State's lack of compliance with Community law and to nullify judicial rulings but *solely* as regards Community law (ex Art. 263 TFEU, formerly Art. 230 TEC). Proceedings were to be filed by "institutional" privileged actors, and by individuals under certain conditions that were (and still are) rather difficult to satisfy.

With regard to the preliminary ruling procedure, if the mechanism had been a truly innovative instrument with respect to the *status quo* of international law, the original aim of the said mechanism was to favour the dialogue between national and ECJ judges only with respect to the interpretation of Community law and the validity of secondary Community law.

It is well known that, despite those original aims, the ECJ³⁷ has been able, over the years, to interlace, through the preliminary reference procedure, a relationship of cooperation and at times of complicity with national judges. In other words, the ECJ was able to change *de facto* the content of the dialogue. It persuaded national judges to request ECJ judges to rule on compliance of national laws with Community law.

This acceleration process characterized the first decades of ECJ law.³⁸ Its fundamental stages saw the transformation of Europe³⁹ through the masterpiece of a judicial body capable of conveying Community law from its genesis in international law to a supranational dimension.

To sum up, at a closer look, by comparing the original characteristics the founding Fathers wanted to attribute to the ECHR and the ECtHR, the impression emerges that in both cases they intended instituting an international court with the same powers and limits as those attributed to an international judge. Furthermore it is arguable that the ECtHR had a greater potential for intrusiveness towards Member-State sovereignty than the ECJ did, at least *ab origine*. This is especially true with regard to the possibility of individual petition, even though it had to be accepted by the Member States.

If the destiny of the European Courts in the following years was quite different than that planned at their genesis, this was fundamentally due to two

³⁷ See Tizzano, Antonio. *La Corte di giustizia delle Comunità europee*. Naples: Jovene, 1967. Print.

³⁸ See Rasmussen, Hjalte. "Between Self Restraint and Activism: A Judicial Policy for the European Court." *Eur L Rev* 13 (1988): 28-38. Print; *Id. On Law and Policy in the European Court of Justice*. Boston: Martinus Nijhoff, 1986. Print; Neill, Patrick. *The European Court of Justice: A Case Study in Judicial Activism*, Intergovernmental Conference, Minutes of Evidence, House of Lords, 1996, 218. Print; Weiler, Joseph H. "The Court of Justice on Trial." *CML Rev* 24 (1987): 555-589. Print; Cappelletti, Mauro. "Is the European Court of Justice Running Wild?" *Eur L Rev* 12 (1987): 4-17. Print; *Id.* "The Law-Making Power of the Judges and its Limits." *Monash Univ. L Rev* 8 (1981): 15-67. Print; Keeling, David. "In Praise of Judicial Activism, but What Does It Mean? And Has the European Court of Justice Ever Practiced it?" in Curti Gialdino, Carlo, ed. *Scritti in onore di G.F. Mancini*. Milan: Giuffrè, 1998, 505. Print; Tridimas, Takis. "The European Court of Justice and Judicial Activism." *Eur L Rev* 21 (1996): 199-210. Print; Lord Slynn of Hadley. "What Is a European Community Judge?" 52 *Cambridge L J* (1993): 234-244. Print; Bengoetxea, Joxerramon. *The Legal Reasoning of the Court of Justice*. Oxford: Oxford UP, 1993. Print; Weiler, Joseph H. "A Quiet Revolution: The European Court of Justice and its Interlocutors." *Comparative Political Studies* 4 (1994): 510-534. Print.

³⁹ See Weiler, Joseph H. "The Transformation of Europe." *Yale L J* 100.8 (1991): 2403-2483. Print.

factors; one, the “acceleration” of the ECJ mentioned above, and the other, the concomitant “slow-motion” start up of the ECtHR.

VI. THE EEC LEGAL ORDER: THE FIRST STAGE AND THE ACCELERATION OF THE ECJ

At the beginning of the 1960s, the ECJ was known to be the driving force in the process of European integration.⁴⁰ It utilized the apparently harmless provision according to which it shall ensure that in the interpretation and application of the Treaties the law is observed⁴¹ as an interpretative lever to give a constitutional or at least “supranational” framework to the genetic code of the Community law order that, as has been said, was international by nature.

The Member-States remained silent, leaving the next move up to the Court. With a great deal of creativity and a considerable dose of argumentative audacity, it proposed what was defined as “constitutional doctrine by a common law method”,⁴² not hesitating to re-write the Treaties if necessary. Combing through the original documents of the Treaty of Rome line-by-line shows that it would never have been possible to read into or infer from the structure of the institutions it provided for that

“the European Economic Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign right, albeit within limited fields, and the subjects of which comprise not only the member states, but also their nationals”.⁴³

Least of all it could never be inferred from reading the Treaty that under certain conditions primary and derived sources of Community law have a direct effect and that both sources occupy a position of primacy over Member States’ national and constitutional law.⁴⁴ This primacy has to find immediate application if it

⁴⁰ In the famous description by Eric Stein: “tucked away in the fairyland Duchy of Luxemburg and blessed, until recently, with benign neglect by the powers that be and the mass media, the Court of Justice of the European Communities has fashioned a constitutional framework for a federal-type structure in Europe”. See Stein, Eric. “Lawyers, Judges and the Making of a Transnational Constitution.” *Am J Intl L* 75 (1981): 1-27. Print.

⁴¹ Originally provided by Article 164 EEC and today, substantially, reproduced at Art. 19 TEU.

⁴² Posner, Richard. *Law and Legal Theory in the UK and USA*. Oxford: Oxford UP, 1996, 14. Print.

⁴³ ECJ C-26/62, *Van Gend en Loos* [1963] ECR I-3, 5 February 1963.

⁴⁴ ECJ C-11/70, *Internationale Handelsgesellschaft GmbH v Einfuhr-und Vorratsstelle für Getreide*

is to preserve the useful effectiveness of Community law.⁴⁵ The text of Article 28 TEC (now Art. 34 TFEU) gave no indication that individual Member States could violate its provisions if they were to adopt measures that hinder access and distribution of products in the importing State even though no discrimination is made between national and imported products.⁴⁶ The Treaty of Rome never indicated the possibility of individual petition to verify State responsibility before a national court if the legislator violates Community law.⁴⁷ Furthermore, it never mentioned that national judges are prohibited from ascertaining the invalidity of Community law⁴⁸ because the said prerogative rests solely in the hands of the ECJ judges.

A. The emergence of fundamental rights protection in the EEC legal order

If there is a factor which interconnects the two supranational organizations and justifies making a comparative analysis of the impact of EU and ECHR laws on the Member States' legal orders, that is the emergence of the issue of the protection of fundamental rights even in the Community dimension.

Given the extensive studies already published on this topic, a detailed explanation here is not required, just a few salient points necessary to the analysis will be described. The Treaty of Rome's silence on the protection of fundamental rights is at odds with the wording of the Founding Treaties of both the European Defence Community (5 May 1952), and the European Political Community (26 February 1953). References to human rights protection are evident in both documents.

It may be naive⁴⁹ to think so, but the idea that this absence could be attributed to the founding Fathers cannot be ignored. Given their failure to endow the Community with an ultra-economic vocation, they thought it would be better to follow Jean Monnet's pragmatic approach and first reach their objective of a

und Futtermittel, [1970] ECR I-1125, 17 December 1970.

⁴⁵ ECJ C-106/77, *Amministrazione delle Finanze v Simmenthal* [1978] ECR I-629, 9 March 1978.

⁴⁶ ECJ C-8/74, *Dassonville* [1974] ECR I-1129, 11 July 1974.

⁴⁷ ECJ Joined Cases C-6/90 and C-9/90, *Andrea Francovich and Others v Italian Republic* [1991] ECR I-5357, 19 September 1991.

⁴⁸ ECJ C-314/85, *Foto-Frost v Hauptzollamt Lübeck Ost* [1987] ECR I-4199, 22 October 1987.

⁴⁹ According to the evaluation of Cartabia, Marta. "L'ora dei diritti fondamentali in Europa" in Cartabia, Marta, ed. *I diritti in azione*. Padua: Il Mulino, 2007, 13, 16. Print.

common market, by handing over the “exclusive” protection of human rights to the ECHR.

The silence may also have hidden, as it has been pointed out⁵⁰, the Founding Fathers’ intent to leave protection of fundamental rights in the Community in the hands of Member States whose Constitutions and Constitutional Courts could guarantee compliance. However, at the very beginning, this intent was certainly not shared by the ECJ. The application of Community law would have differed from nation to nation had Community law been subjugated to the national legal orders of the Member-States. This would have irreversibly damaged the Court’s own objective of safeguarding the uniform application of Community law in Member States.

In 1958 the ECJ was invested of a question of this nature in reference to the ECSC Treaty.⁵¹ The Court excluded the possibility of verifying and taking into any consideration whatsoever Community law that violated the founding principles of the German *Grundgesetz*. The fact that “an early almost primitive form of constitutional assertion was the denial of fundamental constitutional values”⁵² has a paradoxical implication.

Everything changed when the ECJ “pulled out of its top hat” the doctrines primacy and direct effect. At that point, in fact, the main aim of ECJ was destined to be reversed. Prior to that moment, any reference to obligations prohibiting Community institutions from adopting laws that impinged on the human rights protection in national Constitutions was extremely risky and to be avoided. Once the principle of primacy of Community law over Member State constitutions was affirmed the Community was instead obliged to commit itself to protecting fundamental rights.

B. *End of the ECJ’s golden age and post-Maastricht prudence*

The so-called “Golden Age” of ECJ jurisprudence experienced its sunset between the end of the 1980s and the beginning of the 1990s.

⁵⁰ *Ibid.*

⁵¹ ECJ C-1/58, *Stork v Alta Autorità* [1959] ECR I- 27, 4 February 1959.

⁵² Tridimas, Takis. “The European Court of Justice and Judicial Activism.” *supra* note 39, at 301.

The Single European Act which in 1987 introduced the rule of majority vote, and the Treaty of Maastricht that, six years later, instituted the European Union, can be considered a clear expression of the will of Member States to regain their legitimate position as Community legislators, by taking away the anomalous role of law maker the ECJ had adopted for itself in the inertia of the Council of Ministers.

While the case law of ECJ related to human rights protection⁵³ in Community law was being codified, the Member States strongly reasserted that they wanted no excessive intrusion in the few symbolic areas of national sovereignty that were left to them. In fact, the adoption of the principles of proportionality and subsidiarity would have done just that. Several constitutional Courts sent out the same message that, *ex ante*, the Treaty of Maastricht was unconstitutional and that it needed an ad hoc revision of the Constitution in order to ratify it.⁵⁴ Alternatively they evaluated the constitutional adequacy of the Treaty of Maastricht with considerable reserve.⁵⁵ There is no doubt that the “favorable winds” accompanying the origins of the European integration process had changed direction.

As a consequence, the ECJ’s ever attentive attitude to the political context in which it operated, could not help but change as well.

The “constitutional tolerance”⁵⁶ that Member-States had so enthusiastically “exhibited” at the beginning of the process of Community integration began to vacillate. It was now up to the Luxembourg Court to find a way to rekindle the flame

⁵³ See former Art. 6, paras. 1 and 2 of the Treaty on European Union.

⁵⁴ See the French *Conseil Constitutionnel*, dec. 9 April 1992, no. 92-308 DC, and the Spanish *Tribunal constitucional*, dec. 1 July 1992, no. 1236/92.

⁵⁵ See the German Constitutional Tribunal, dec. 12 October 1993, *Maastricht*, 2 BvR 2134/92 and 2 BvR 2159/92.

⁵⁶ According to which, in Joseph Weiler’s words, the constitutional actors in the member State accept the European constitutional discipline “not because as a matter of legal doctrine, as is the case in the federal State, they are subordinate to a higher sovereignty and authority attaching to norms validated by the federal peoples, the constitutional demos. They accept it as an autonomous voluntary act endlessly renewed by each instance of subordination [...] The Quebecois are told in the name of *the people* of Canada, you are obliged to obey. The French or the Italians or the Germans are told: in the name of *the peoples* of Europe, you are invited to obey [...]. When acceptance and subordination is voluntary, it constitutes an act of true liberty and emancipation from collective self-arrogance and constitutional fetishism: a high expression of Constitutional Tolerance”. Weiler, Joseph H. “Federalism and Constitutionalism, Europe’s Sonderweg.” in Nicolaidis, Kalypso, and Robert Howse, eds. *The Federal Version: Legitimacy and Levels of Governance in the US and the EU*. Oxford: Oxford UP, 2001, 54, 69. Print.

of “voluntary obedience” that was worrisomely growing dimmer. The Maastricht Treaty represented, indeed, an attempt at reacting against the activism shown by the EJC in the previous years and evidence of this is represented by the set of Protocols (the so called “Grogan”, “Barber” and “Second Danish Home” Protocols) which represented, according to Curtin, an effort to “hijack” European integration.⁵⁷

In the 1990s the Court had no alternative but to choose the path of self-restraint. *Grogan*⁵⁸ (1991), *Meng*⁵⁹ (1993), *Keck*⁶⁰ (1993), *Kalanke*⁶¹ (1995), *opinion C 2/94* regarding the possibility for the EU to join the ECHR⁶² (1996) and *Grant*⁶³ (1998) are all classic examples of deference to legislative power.

The evolution of the case law of the ECJ in the field of sex discrimination and preferential treatment was used as a model in an attempt made elsewhere⁶⁴ to demonstrate that it had used the strategy of the so-called *majoritarian activism approach* in order to place the impact of its judgments on a graduated scale according to the degree to which the majority of Member States were willing to accept them.

VII. THE ECHR DIMENSION: THE ECtHR AND ITS “SLOW MOTION” START

Exactly when, in the 1960s, with judgments *Van Gend en Loos* and *Costa*, the ECJ was laying down the foundations for the departure of EC legal order from its original roots of international law, a judge of the ECtHR pointedly asked whether the Strasbourg Court still had a future or whether its brief existence⁶⁵ was drawing to an end.⁶⁶

⁵⁷ Curtin, Deirdre. “The Constitutional Structure of the Union: A Europe of Bits and Pieces.” *CML Rev* 30 (1993): 21, 69. Print.

⁵⁸ ECJ C-159/90, *The Society for the Protection of Unborn Children Ireland v Stephan Grogan* [1991] ECR I-4695, 4 October 1991.

⁵⁹ ECJ C-2/91, *Meng* [1993] ECR I-5751, 17 October 1993.

⁶⁰ ECJ C-267/91 and C-268/91, *Keck and Mithouard* [1993] ECR I-6097, 24 November 1993.

⁶¹ ECJ C-450/93, *Kalanke* [1995] ECR I-3051, 17 October 1995.

⁶² ECJ C-2/94, *Opinion* [1996] ECR I-1759, 28 March 1996.

⁶³ ECJ C-249/96, *Grant v South West Trains Ltd* [1998] ECR I-2143, 13 October 1998.

⁶⁴ See Pollicino, Oreste. *Discriminazione sulla base del sesso e trattamento preferenziale nell'ordinamento comunitario*. Milan: Giuffrè, 2005. Print; *Id.* “Legal Reasoning of the Court of Justice in the Context of Principle of Equality between Judicial Activism and Self-Restraint.” *German L J* 5.3 (2004): 283-317. Print.

⁶⁵ The ECtHR has been operative ‘only’ since 1959.

⁶⁶ Rolin, Henri. “Has the European Court of Human Rights a Future?.” *Howard L J* 11 (1965): 442-

At the time Judge Rolin expressed this preoccupation, the ECtHR had ruled on only two cases in six years. In its first case, a judgment was adopted in 1960⁶⁷ whereas, in 1961, it ruled on the merits of a controversy. In 1962, in the second of the cases assigned them, ECtHR judges could only ascertain its irrelevance because, in the meantime, the Belgian government had adopted measures to restore the claimant's position. Another two years were to pass before the Court was assigned a third case, the judgment for which was only delivered in 1967.

With only three cases in eight years, there was reason to be worried.

There are several explanations for the ECtHR's "slow motion" start. The main one is, perhaps, that most founding Member States felt that the level of human rights protection afforded by the legal orders of the Western democracies signatory to the Convention needed no external control. This conviction, one of the reasons the ECtHR started its activity only in 1959, was shared by such countries as France, which had rather drastically decided not to ratify the Convention, and by the majority of the other signatory States that, instead, did ratify it so that it could come into force in 1953.⁶⁸

In the light of what it has been said above, it is not difficult to wonder that the atmosphere surrounding Strasbourg was not the most encouraging when the European Commission for Human Rights entered into effect in 1954.

Neither of the two mechanisms that would have represented the added value of the ECHR over "classic" international law had entered into force by that date because the required minimum number of countries to make a declaration of acceptance was lacking. At that time only Denmark, Ireland and Sweden had accepted the right to individual petition. Of these three, only Denmark and Ireland had accepted the mandatory jurisdiction of the ECtHR. The Parliamentary Assembly of the Council of Europe stepped in to take the initiative. From the outset it had

451. Print. It is, in particular, quite telling that Rolin remarks here: "I hesitate as to whether I deserve the name or the title of judge. I never have been called so much Mr Judge, Judge Rolin and so on. I find it quite nice, I love titles, but I'm afraid that will be the end of it".

⁶⁷ ECtHR, 14 November 1960, *Lawless v Ireland*, no. 332/57.

⁶⁸ Only in 1958 was the minimum number of eight declarations of the acceptance of the obligatory jurisdiction of the ECHR reached.

always been firmly convinced of the need to keep alive the integration spirit characterizing the ECHR's initial work.

In a recommendation adopted in September 1953⁶⁹, the Parliamentary Assembly "invited" all the governments of Member States to accept the right to individual petition "in order to avoid transforming the complaint of an individual into a dispute between States" and to accept the jurisdiction of the ECHR

"in order that any complaint which the Commission considers legitimate and which it is not able to settle by conciliation, should be referred to a judicial rather than a political institution".

This invitation bore fruit but once again not all Member States accepted it. Individual petition finally entered into effect but only for residents of Belgium, Denmark, Ireland, Sweden, Iceland and the Federal Republic of Germany.

It required more time for jurisdiction of the Court to be accepted. In 1955 Belgium, Holland and the Federal Republic of Germany were added to the three States that had originally accepted it in 1953. In 1958, exactly five years after the Convention entered into effect, the remaining three Member-States accepted the jurisdiction of the Court.

Against this background, it is possible to state that while the ECJ, "tucked away in the fairyland Duchy of Luxemburg and blessed, until recently, with benign neglect by the powers that be and the mass media"⁷⁰ could afford to "re-write" the EEC Treaty, shifting Community law from an international dimension to a supranational one, both the European Human Rights Commission and the ECtHR were struggling to guarantee they could survive in the future, something even the Strasbourg judges, as it has been said, doubted.

It is evident that even the interlocutors of the Luxembourg and Strasbourg Courts differed, given the different objectives the two Courts had at that time. In the first case the interlocutors were and still are the national judges. The ECJ has, since the beginning, successfully attempted to install a relationship of complicity with them. By so doing it managed to convince the national judges to infringe in some

⁶⁹ Recommendation 24 September 1953, no. 52.

⁷⁰ See Stein, Eric. "Lawyers, Judges and the Making of a Transnational Constitution." *supra* note 41, at 1.

cases, especially in Germany and Italy, the constitutional mandate⁷¹ to which they were and still are subject.

By contrast, the Member States political powers were the prime interlocutors of both the European Commission of Human Rights and the ECtHR. On the one hand, in fact, they had to send reassuring messages to the political powers to persuade them to accept the innovative mechanism of individual petition and the Court's mandatory jurisdiction. On the other hand, they had to reassure them that this did not inevitably mean that their internal standard of human rights protection would be challenged in a impartial and external (not domestic) forum. On the contrary, the political powers of the contracting States needed to be reassured that the competent forum for resolving such questions would remain a more political and less neutral one, like the Council of Ministers.

This background of highly charged political tension explains why so few cases were directly dealt with by the ECtHR up to the beginning of the 1970s. When individual petition finally came into effect in 1955, the new mechanism did not live up to the expectations the citizens of contracting States had for its success. They did not understand its added value, perhaps because it had just been introduced. In 1955 only 138 individual petitions were filed with the Commission. In 1956 this number dropped to 104 and in 1957 to 101. Only 96 petitions, the lowest number yet, were filed in 1958, the year before the Court was inaugurated. Predictably the Commission's attitude in the first years of its operation was prudent. This attitude was due in part to its reticence to involve the ECtHR.

More so it was reflected in the vast use the Commission made of the competence it had to declare petitions inadmissible. Up until 1973 the ECtHR had only made ten decisions on the merits, and in only three of these ten cases was a breach of the Convention ascertained.

With so little case law to go on the ECtHR could not extrapolate a doctrine on the predictability and spatial effectiveness of its own precedents. The ECJ had

⁷¹ See Claes, Monica. *The National Courts' Mandate in the European Constitution*, Oxford: Hart, 2006. Print.

managed to do this, as it has been seen, in a completely opposite context right from the start.

A. From the beginning of the 1970s to the reform of Protocol 11

In 1973 things began to stir in Strasbourg. The strategy of reassuring the governments previously mentioned seemed to have borne its first fruits. In that year Italy accepted mandatory jurisdiction, and, a year later, France finally ratified the Convention. The minimum objective to ensure the system's survival seemed to have been reached. Although the attitude of the Commission and the ECtHR remained extremely prudent, they began to plan for the medium to long term.

On the one hand, the Commission further limited its decisions regarding the merit of petitions. On the other hand, it took a less unfavorable stance when choosing the jurisdictional forum of the Court over the political forum of the Committee of Ministers as a seat for controversy resolution. This led to greater activity for the judges of Strasbourg. More cases meant their future was less uncertain. The ECtHR judges started to take on certain identifiable features. From a content viewpoint, in particular, the ECtHR began to emphasize the need for effective protection⁷² of the rights the Convention provided for.

In spite of this evolution, the ECtHR still tended to interpret its powers in a restrictive sense for cases of breach of Convention.⁷³ It also preferred a strategy of reassuring Member State political bodies of over that of fostering dialogue with national judges. The jurisprudence of the Strasbourg Court was very attentive to the impact its judgments had on the legal orders of Member States. This attitude was

⁷² See Waldock, Humphrey. "The Effectiveness of the System." *Human Rights Law Journal* 1 (1980): 1-12. Print.

⁷³ It has been remarked, that until the end of the 1980s the ECtHR "did not even consider itself competent to make recommendations to the condemned State about which steps it should take to remedy the consequences of the Treaty violation". Barkuysen, Tom, and Michiel L. Van Emmerik. "A Comparative View on the Execution of Judgments of the European Court of Human Rights." in Christou, Theodora, and Juan Pablo Raymond, eds. *European Court of Human Rights: Remedies and Execution of Judgments*. London: British Institute of International and Comparative Law, 2005, 1, 3. Print.

“endorsed”⁷⁴ from its very first judgments⁷⁵ through its margin of appreciation⁷⁶ doctrine.

The judges of Strasbourg were committed to safeguarding the principle of constitutional tolerance⁷⁷ in the Member States in the same way that ECJ jurisprudence was after Maastricht. The ECtHR judges, however, continued to neglect to work on the predictability and diachronic coherence of their own jurisprudence.

Meanwhile, thanks to the didactic approach the Luxembourg judges adopted with national judges, they were able both to extend the *res interpretata* effectiveness of their decisions, and turn internal judges into decentralized judges of Community law, to the contrary, “the Strasbourg Court restricted itself to developing the “horizontal” rather than “vertical” aspects of the precedent”.⁷⁸ Because only “horizontal” aspects were developed, national judges were unable to derive anything useful from the evolution of Strasbourg case law to help them overcome the exclusively *inter partes* effectiveness of ECtHR judgments.

There are at least two further reasons why the Strasbourg Court failed to develop this sensitivity, beside the one just mentioned related to its strategy of reassuring Member State political powers. In particular, in comparison to the ECJ

⁷⁴ ECtHR, 7 December 1976, *Handyside v United Kingdom*, no. 5493/72.

⁷⁵ European Commission of Human Rights, 7 May 1956, *Greece v United Kingdom*, no. 176/56, and ECtHR, 1 July 1961, *Lawless v Ireland*, no. 332/57.

⁷⁶ See Letsas, George. “Two Concepts of Margin of Appreciation.” *Oxford J Legal Studies* 26.4 (2006): 705-732. Print; Hoffmann, Florian, and Julie Ringelheim. “Par-delà l’universalisme et le relativisme: la Cour européenne des droits de l’homme et les dilemmes de la diversité culturelle.” *Revue interdisciplinaire d’études juridiques* 52 (2004): 109. Print; Letsas, George. *A Theory of Interpretation of the European Convention on Human Rights*. Oxford: Oxford UP, 2007. Print; Mahoney, Paul. “Judicial Activism and Judicial Self-Restraint in the European Court of Human Rights: Two Sides of the Same Coin.” *Human Rights L J* 11 (1990): 57. Print; Helfer, Laurence. “Consensus, Coherence and the European Convention on Human Rights.” *Cornell Intl L J* 26 (1993): 133-165. Print; Shany, Yuval. “Toward a General Margin of Appreciation Doctrine in International Law?” *Eur J Intl L* 16.5 (2004): 907-940. Print; Benvenisti, Eyal. “Margin of Appreciation, Consensus, and Universal Standards.” *New York University J Intl Law and Politics* 31 (1998-1999): 843-854. Print; Hutchinson, Michael. “The Margin of Appreciation Doctrine in the European Court of Human Rights.” *ICLQ* 48.3 (1999): 638-650. Print; Prebensen, Soren. “The Margin of Appreciation and Articles 9, 10 and 11 of the Convention.” *Human Rights L J* 19 (1998): 13-17. Print; de la Rasilla del Moral, Ignacio. “The Increasingly Marginal Appreciation of the Margin-of-Appreciation Doctrine.” *German L J* 6.7 (2006): 611-624. Print.

⁷⁷ Which is, then, a further component shared by both the ECHR and the European legal order.

⁷⁸ See Nicol, Danny. “Lessons from Luxembourg: Federalisation and the European Court of Human Rights.” *Eur L Rev* 26 (2001): 3, 7.

position, the ECtHR had two disadvantages at the “starting gate”. First of all, the EC Treaty did not specify whether ECJ judgments should be accorded *erga omnes* or *inter partes* effectiveness. Instead, Article 53 of the ECHR (corresponding to Art. 46 in the current text) clarified that ECtHR judgments are only binding on the Member States according to which they are delivered.

The difference in degree of argumentative boldness needed to extend the area where its jurisprudence is binding lies in the difference between a *praeter* and *contra legem* interpretation. Secondly, a judgment of the ECtHR is “genetically” destined to focus on the individual case. By contrast, thanks to the instrument of preliminary reference, the ECJ is in a position to deliver judgments of a general and systematic significance. It leaves the burden of deciding on specific questions to the national judges who have no channel of institutional dialogue with Strasbourg.

This briefly describes the course of evolution within the ECHR. Over the years the “new” mechanism of the individual petition started to be fully metabolized. At the beginning of the 1990s, the Council of Europe started its eastward expansion. In just a few years the number of Member States of the ECHR more than doubled, making any reform of the system a task that could no longer be postponed.

The renowned Protocol no. 11⁷⁹ increased both the number of petitions and the potential for supranationality inherent in the original ECHR system. Adopted in 1994, it entered into force in 1998. This brought the paradox that, from an original scenario characterized by a lack of case law, there gradually emerged a different situation in which it started to be difficult for the ECtHR to support its ever-increasing caseload. The scenario was the opposite of that present at beginning of its activity.

One year before the entry into force of Protocol no. 11, in 1997, the Commission received 14,166 petitions, of which 703 were declared admissible.⁸⁰ Up

⁷⁹ See, among others, Cohen-Jonathan, Gérard. *La réforme de la Cour européenne des droits de l'homme: actes de la table ronde du 28 mars 2003*. Bruxelles: Bruylant, 2004. Print; Pinelli, Cesare. “Judicial Protection of Human Rights in Europe and the Limits of a Judgment Made System.” *Diritto dell'Unione europea* (1996): 987. Print; Bultrini, Antonio. “Corte europea dei diritti dell'uomo”, *Dig. IV (discipline pubblicistiche)*. Turin: UTET, 2000, 148. Print.

⁸⁰ See Tomuschat, Christian. “The European Court of Human Rights Overwhelmed by Applications:

to 1997 the Court had delivered 107 judgments. The Court was made up of “part-time” judges who received no regular pay but only a *per diem* for their stay in Strasbourg. Clearly nothing more could be expected of them.

VIII. CONCLUSIONS

The analysis of the reactions of the ECHR to the entry into force of protocol 11 and the concurring enlargement to the east of the Council of Europe⁸¹ falls outside the main focus of investigation of this article.

It is enough to say that, elsewhere⁸², has been argued that the ECtHR has reacted to the Council of Europe’s enlargement to the east with a more explicit understanding of itself as a pan-European constitutional court, as a result of both the exponential growth of its case load and the realistic possibility for it to ascertain systemic human rights violations in CEE countries. Second, the progressive self-perception of the European Court of Strasbourg’s constitutional role has led to the consequence of increasing the acknowledgement of the (relative) primacy of the European Court of Human Rights’ interpretation of domestic national law.

On the other hand, it would be also outside the scope of this work to speculate why, as a consequence of the enlargement of the European Union to the east and the entry into force of the Lisbon Treaty, absolute, radical supremacy no longer seems to be a cornerstone of EU law⁸³ and the ECJ is more and more committed to (working on) a self-restriction of the principle of primacy when it comes to the protection of the fundamental principles of one or more Member States.⁸⁴

Problems and Possible Solutions.” in Wolfrum, Rüdiger, and Ulrike Deutsch, eds. *The European Court of Human Rights Overwhelmed by Applications: Problems and Possible Solutions*. Berlin/Heidelberg: Springer-Verlag, 2009, 1-18. Print.

⁸¹ In 1989, the Council of Europe was an exclusively Western European organisation counting 23 Member States. By 2007, its membership had grown to 47 countries, including almost all the former communist states of Central and Eastern Europe.

⁸² Pollicino, Oreste. “The Relationship between Member States and the European Courts after Enlargement: toward a General Theory of Jurisprudential Supranational Law?.” *supra* note 2.

⁸³ Bogdandy, Armin von, and Stephan Schill. “Overcoming absolute primacy: Respect for national identity under the Lisbon Treaty.” *CML Rev* 48 (2011): 1417-1453. Print.

⁸⁴ The best answer to the “counterlimits doctrine” of the “old” European Constitutional Courts.

If, looking at the post-enlargement era, the said opposite jurisprudential trends in the two supranational courts brought to make shorten the existing distance between the domestic impact of EU law and ECHR, the present article has tried, looking at their foundation, to demonstrate as, in origin, the two systems, with regard their impact on national law, were not as distant from one another as might be thought.

This is true for various reasons.

The founding Fathers of both organizations shared an undeniable common vision of the their mission and their aims.

Secondly the genesis of both legal orders came from international law of an institutional nature rather than a relational one. Both legal orders, in particular, since the beginning have been characterized by particular features which made their potential of intrusiveness toward the member states sovereignty higher than what could be attained by the “classic” international law. Both European Courts were conceived as law bodies of international law but with *ad hoc* instruments that led to let emerge a potential of a supranational character. This potential would be developed differently in Strasbourg and Luxembourg jurisprudence in the years to come.

At the beginning of their activity the two European Courts moved in equal yet contrary directions.

On one hand, after a several-year period in which the judges of Luxembourg settled into their role, a “historic” judicial acceleration took place which transformed the DNA of Community law order by “injecting” it with strong doses of supranationality in defiance of its genesis in international law.

On the other, this research shows that the ECtHR did not start its activity under the best auspices, especially because of the perplexities and fears many contracting Member-States had. For these reasons it started in “slow motion” delivering judgments on only a dozen cases in as many years. As we have seen the Strasbourg judges and the Commission members had more important priorities to

worry about than to build, as it was happening at the same time in Luxembourg, a “constitutional doctrine by a common law method”.⁸⁵

In particular, in order to guarantee ECHR mechanism’s very survival they had to lay the foundations using the only arguments could dispel Member-State fears. These were arguments of international law that demonstrate maximum deference possible to High Contracting Political Powers.

Only when the minimum objective of “survival” was reached in the mid 1960s did the ECtHR begin to believe more in its role as authentic interpreter of the Convention and in its case law, consequently, began to refer to the Convention’s evolution and to the need of safeguarding its results.

⁸⁵ See Posner, Richard. *Law and Legal Theory in the UK and USA*. *supra* note 43, at 14.