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The Poisoned Chalice: An Italian view on the Kamberaj case

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The Poisoned Chalice: An Italian view on the Kamberaj case

Giuseppe Bianco and Giuseppe Martinico*

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I. GOALS OF THE PAPER

What will the impact of the accession of the EU to the European Convention on Human Rights (ECHR) system be on the relation between national common judges ("giudici comuni", i.e. administrative, civil and criminal courts) and the European Courts (i.e. the European Court of Justice and the European Court of Human Rights)?

Recently, in the *Kamberaj*[1] case, the Court of Justice of the EU (CJEU) clarified that "*Article 6(3) TEU does not govern the relationship between the ECHR and the legal systems of the Member States and nor does it lay down the consequences to be drawn by a national court in case of conflict between the rights guaranteed by that convention and a provision of national law*" (para. 62)[2].

The case originated from a preliminary question raised by an Italian judge, the Tribunale of Bolzano, which had invoked Art. 6 TEU to disapply national provisions conflicting with the ECHR - by analogy with what happens with EU law.

This question makes sense if contextualised in a scenario - like the Italian one - where the possibility of extending the *Simmenthal* doctrine[3] to the EHCR has been seen as a chance to empower national judges *vis-à-vis* their Constitutional Court.

By being empowered to disapply national law conflicting with the ECHR, national judges would acquire new competences and open a breach in the centralised system of review of legislation. This is because the Italian Constitutional Court, since 2007 - as we will see - has considered the ECHR as an interposed norm (i.e. an external source able to serve as its standard of review for the validity of national laws).

The Italian case is an interesting example to verify the well-known inter-court competition described by Karen Alter[4]. In addition, it gives an account of one of the potential novelties induced by the EU accession to the ECHR.

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[1] CJEU, C-571/10, *Kamberaj*, not yet published.

http://curia.europa.eu/juris/document/document.jsf?docid=121961&mode=req&pageIndex=1&dir=&occ=first&part=1&text=&doclang=EN&cid=1534635

[2] See also CJEU, C-617/10, Åkerberg *Fransson*, , not yet published, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62010CJ0617:EN:HTML *"As regards, first, the conclusions to be drawn by a national court from a conflict between national law and the ECHR, it is to be remembered that whilst, as Article 6(3) TEU confirms, fundamental rights recognised by the ECHR constitute general principles of the European Union's law and whilst Article 52(3) of the Charter requires rights contained in the Charter which correspond to rights guaranteed by the ECHR to be given the same meaning and scope as those laid down by the ECHR, the latter does not constitute, as long as the European Union has not acceded to it, a legal instrument which has been formally incorporated into European Union law. Consequently, European Union law does not govern the relations between the ECHR and the legal systems of the Member States, nor does it determine the conclusions to be drawn by a national court in the event of conflict between the rights guaranteed by that convention and a rule of national law*" (para. 44).

[3] Judgment of the Court of 9 March 1978, *Amministrazione delle Finanze dello Stato v Simmenthal SpA.*, Case 106/77, European Court reports 1978, p. 629.

[4] K. Alter, "Explaining National Court Acceptance of European Court Jurisprudence: A Critical Evaluation of Theories of Legal Integration", in A. Slaughter, A. Stone Sweet and J.H.H. Weiler (eds.), *The European Court and National Courts—Doctrine and Jurisprudence: Legal Change in its Social Context*, Hart Publishing, Oxford, 1997.

Literature has been concentrating its efforts on understanding the future relation between the Strasbourg and Luxembourg Courts. However, our intent is to focus on national judges as the pivot of the present and future interpretative triangle (CJEU, ECtHR and national judges) of the European multilevel order in the area of fundamental rights protection.

In this sense, the *Kamberaj* case is emblematic of how courts operating in the multilevel legal order look at this issue from different perspectives. Constitutional Courts want to preserve their institutional mandate by reducing - so long as possible - the *Simmenthal* exception. Lower courts, however, want to extend such an exception in order to empower themselves: to pursue their aim they seek the CJEU's support. In this respect, the question posed via the apparently "friendly" preliminary reference procedure to the Luxembourg Court might be seen as a sort of a "poisoned chalice" to make the Italian Constitutional Court's position more isolated and problematic, and to involve the Luxembourg Court in a purely domestic controversy.

Quite wisely, in *Kamberaj* the CJEU avoided entering the "trap" created by the *a quo* judge. It concluded that "*the answer […] must therefore be that the reference made by Article 6(3) TEU to the ECHR does not require the national court, in case of conflict between a provision of national law and the ECHR, to apply the provisions of that convention directly, disapplying the provision of national law incompatible with the convention*" (para. 63).

It also maintained clear that it will have a role in the issue of the determination of the direct effect of the ECHR by saying that: "*That provision **[Art. 6 TEU]** of the Treaty on European Union reflects the settled case-law of the Court according to which fundamental rights form an integral part of the general principles of law the observance of which the Court ensures (see, inter alia, Case C-521/09 P Elf Aquitaine v Commission [2011] ECR I-0000, paragraph 112)*" (para. 61).

From the CJEU's reasoning one can infer that: (1) the Lisbon Treaty does not automatically put the ECHR and EU law on an equal footing before national judges; and (2) the direct effect of the ECHR also depends on how the CJEU interprets Art. 6 TEU[5].

If this is true, it would not make sense to try to anticipate the conclusions the CJEU will reach (nobody has the "crystal ball"). They will probably depend also on the role the CJEU will be accorded in the final text of the agreement concerning the EU accession.

Instead, this study will attempt to present the issue of the "treatment" of the ECHR and EU law before national judges as a heated one, before and probably still after the accession. In order to do so, we will not deal with the accession as such. We will rather present the situation at the national level in a retrospective manner and then seek to make some forward-looking conclusions.

One point shall be made clear: This study does not intend to examine the broader issue of the rapprochement between the legal orders of the EU and the European Convention on Human Rights . It rather concentrates on how national judges treat the norms of the

[5] CJEU, C-571/10, *Kamberaj*, not yet published,

http://curia.europa.eu/juris/document/document.jsf?docid=121961&mode=req&pageIndex=1&dir=&occ=first&part=1&text=&doclang=EN&cid=1534635

ECHR as compared with how they treat EU law.

This paper builds on the similarities and differences between the national judicial treatment of the ECHR and EU laws in the context of the Italian experience[6]. It examines whether national judges treat the ECHR and EU law in the same manner, and to what extent they facilitate the convergence of these laws. In this respect, the goal of the project is to study the judicial application of the ECHR and EU law to analyse the vertical relationship between national judges (both constitutional and common judges) and these external legal sources. As we shall see, the Italian case is particularly interesting, in that it displays an evolving case-law brought by common courts towards further permeability by the European laws.

II. THE DECISION OF THE CJEU

The *Kamberaj* case is a perfect illustration of the relevance of EU law in fundamental rights disputes to the relationships amongst different courts. The Tribunale of Bolzano (Italy) sent a preliminary reference to the Court of Justice of the European Union. The questions simultaneously involved national judges in their relationship with the EU judge, and potentially with the European Court of Human Rights, and with the Italian Constitutional Court.

At the origin of the proceedings is Mr Servet Kamberaj. He is an Albanian citizen and has resided and worked in the Autonomous Province of Bolzano for almost twenty years. Consequently, he has been granted a residence permit for an indefinite period.

The dispute was related with the "sussidio casa", the benefits he received from the *Istituto per l'Edilizia sociale della Provincia autonoma di Bolzano* (the Social Housing Institute of the Autonomous Province of Bolzano). Article 2(1)(k) of Provincial Law No. 13 of 17 December 1998 provides for housing benefits for low-income tenants, in order to assist them with their rents. The funds are divided amongst all applicants, according to their belonging to a linguistic group. The Trentino-South Tyrol Region has, in fact, a special status, due to the presence of Italian-, German-, and Ladin-speaking communities. The Presidential Decree No. 670 of 31 August 1972, of constitutional status, stipulates that the Autonomous Province of Bolzano has to allocate its financing in a manner proportional to the size and the needs of each linguistic group, and this includes funds for welfare, social and cultural activities.

The Provincial law bases its housing benefits allocation on the latest census, and on the declaration of belonging to a linguistic community each Italian national over the age of 14 and residing in the Province of Bolzano has to provide. When they apply for the housing benefits, European Union citizens residing and working in the Province have to declare that they belong to, or wish to elect, one of the groups. Every year, the Giunta Provinciale (the Government of the Province) determines the amount of funds to be allocated to third-country nationals and stateless people, according to their numbers and needs, and provided that they have resided permanently and lawfully in the provincial territory for at least five years and worked there for at least three years. Decision No.

[6] For a comparative analysis see: G. Martinico, "Is The European Convention Going To Be "Supreme"? A Comparative-Constitutional Overview of ECHR And EU Law Before National Courts", *European Journal of International Law*, 2012, 401-424 and G. Martinico - O. Pollicino, *The Interaction between Europe's Legal Systems: Judicial Dialogue and the Creation of Supranational Laws*, Edward Elgar, Cheltenham Glos, 2012.

1885 of the Government of 20 July 2009 relating to the amount of funds for third-country nationals and stateless persons for 2009 established that, as to the weighted average, their size was to be given a multiplier of 5, and their needs a multiplier of 1.

For the years 1998 to 2008, Mr Kamberaj was the recipient of housing benefits accorded by the Social Housing Institute of the Autonomous Province of Bolzano. However, in 2010 he was informed that his application for the year 2009 had been rejected. This was because the budget for third-country nationals available pursuing to Decision No. 1885 was exhausted.

Mr Kamberaj then decided to bring a legal action against the Autonomous Province of Bolzano, its Giunta, and its Social Housing Institute. He claimed that he was discriminated against, and that the difference in treatment with respect to housing benefits between third-country long-term residents and Union citizens was forbidden *inter alia* by Directives 2000/43[7] and 2003/109[8]. In bringing his claims to the court, he was assisted by several NGOs.

The Tribunale of Bolzano, with an interlocutory measure, granted the benefit sought, for the period August 2009 to June 2010[9]. It noted that the resolution of the dispute involved issues of interpretation of European Union law. Hence, it stayed the proceedings and used the preliminary reference procedure to refer to the Court of Justice seven questions. Of these, five were considered by the Grand Chamber to be inadmissible, either on the grounds that the claim lay outside of the scope of the invoked Directive 2000/43 or because the question bore no relation to the actual facts or to the purpose of the proceedings pending before the referring court.

As regards the substance of the matter, the Court of Justice recalled the requirements that Directive 2003/109 imposes on the third-country national to obtain the status of long-term resident. Arts. 4 and 5 stipulate the substantive criteria of a five-year legal, continuous residence, and of sufficient resources and a sickness insurance; whereas Art. 7 spells out the procedure to follow. The Court then left it to the Tribunale of Bolzano to determine whether the applicant, in fact, fulfilled the aforementioned requirements (para. 68).

In case of a positive finding, Mr Kamberaj will be considered as a long-term resident. Thus, he will be eligible to claim equal treatment with nationals of the Member State concerned, pursuant to the principle enshrined in Art. 11 of Directive 2003/109.

Subsequently, the Luxembourg Court assessed whether the allocation mechanism for housing benefits employed by the Province of Bolzano was in compliance with the principle of equal treatment. The Grand Chamber noticed that, since 2009, a multiplier of 1 had been used for both the needs and the numerical size of the first group (Italian nationals and EU citizens). Instead, for the second group (third-country nationals), a multiplier of 1 had been employed only for their needs, whereas their size has been

[7] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin. OJ L 180, 19.07.2000, pp. 22-26.

[8] Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents. OJ L 16, 23.1.2004, pp. 44–53.

[9] A. Allamprese, G. Bronzini, “Cittadini stranieri e discriminazione nell'accesso a prestazioni sociali a carattere essenziale: la Corte di Giustizia UE valorizza la Carta di Nizza”, 4 May 2012, p. 1. Available at www.cgil.it/Archivio/Giuridico%5CNota_a_sent_CGUE_Kamberaj_2-5-2012.doc .

multiplied by 5. The result was that the budget allocated to the second group was "*smaller than that for Union citizens and thus likely to be used up more quickly than theirs*" (para. 72). With a somewhat circular reasoning, the Autonomous Province attempted to state that the difference in the methods employed demonstrated that the two groups were in different situations. The Court of Justice easily dismissed the argument: When third-country nationals fulfil all the requirements to qualify for the benefit, they are in the same situation as Union citizens with the same economic need (para. 75).

Third-country nationals were therefore treated unfavourably. The Luxembourg Court addressed the contentious issue of whether such a difference in treatment fell within the scope of Directive 2003/109. Article 11(1)(d) of this piece of legislation provides that "*[l]ong-term residents shall enjoy equal treatment with nationals as regards […] social security, social assistance and social protection as defined by national law long-term residents are to enjoy equal treatment with nationals as regards social security, social assistance and social protection"*. The national judge had to examine if the housing benefits of the provincial law are considered as part of social security, social assistance or social protection, since the Directive makes an express reference to the national law definitions of these concepts.

Nonetheless, the Directive's deference to the different notions across Member States cannot go so far as to allow the latters to undermine the very effectiveness of European legislation. In this respect, the Luxembourg judges highlighted the reference to the Charter of Fundamental Rights of the European Union contained in the preamble to Directive 2003/109 (para. 79). This reference was a "special feature"[10] of the Directive, which arguably played a significant role in the reasoning developed by the Court.

The third recital of the Directive affirms that the latter "*respects the fundamental rights and observes the principles recognised in particular by […] the Charter of Fundamental Rights of the European Union*". The Court then recalled that after Lisbon, Art. 6(1) TEU grants the Charter the same legal value as the Treaties. And it also mentioned Art. 51(1) of the Charter, which – in a somewhat "equivocal language"[11] – obliges Member States to abide by the Charter when implementing EU law[12].

At this point, the Court of Justice purposefully recalled the need for Member States to respect Art. 34 of the Charter of Fundamental Rights of the European Union. The latter, at paragraph 3, stipulates: "*In order to combat social exclusion and poverty, the Union recognises and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources, in accordance with the rules laid down by Community law and national laws and practices*". This gives a clear hint to the Tribunale of Bolzano.

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[10] A. Guazzarotti, "Direct Effect, Drittwirkung and Principles of EU Law: A Bottom Up Perspective", Paper presented at *Supremacy and Direct effect in a Multilevel System of Protection of Fundamental Rights: A Reconceptualization*, Brescia, 18 January 2013, p. 4.

[11] S. Robin-Olivier, "Horizontal effect of general principles and fundamental rights after the EU Charter entry into force", Paper presented at *Supremacy and Direct effect in a Multilevel System of Protection of Fundamental Rights: A Reconceptualization*, Brescia, 18 January 2013, p. 1.

[12] Art. 51(1) of the Charter stipulates: "*The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers*".

In case of a determination in favour of the applicant, the final question concerned the possibility for the Province of availing itself of an exception to the application of the principle of equality. Art. 11(4) of the Directive provides indeed for a derogation: States can choose to apply the principle of equality in social assistance and social protection only to core benefits. No derogation is however possible with respect to social security benefits. The Province argued that it could justify the difference in the calculation methods on the ground of an Art. 11(4) derogation, since housing benefits were not amongst core benefits.

In this regard, the Court elaborated a lengthy reasoning in various stages. Firstly, it noted that the list of core benefits stipulated in Art. 11(4) – and which did not comprise housing benefits – was not exhaustive. Secondly, the derogation must be interpreted strictly, since the general rule aims at integration of third-country national and equality. Furthermore, Italy had not stated it wished to make use of the derogation at the moment it implemented Directive 2003/109. Thirdly, the Luxembourg judges excluded that the reference to national law in recital 13 of the preamble in relation to social assistance could be relevant, since it only applied to the modalities for granting core benefits.

In sum, the Court applied a teleological interpretation of the Directive, in light of Art. 34(3) of the Charter. It argued that, in so far as the "sussidio casa" worked towards the objectives stated in that provision (the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources), it must be deemed as one of the core benefits. The definitive findings were in any case left to the domestic court, which has to consider "*the objective of that benefit, its amount, the conditions subject to which it is awarded and the place of that benefit in the Italian system of social assistance*" (para. 92). The light that the Charter of Fundamental Rights can shed on other pieces of European legislation can have quite a significant impact on their interpretation, and represents a "promising effect", prospectively also for private relationships[13]. The potential of this part of the decision is of paramount importance. As it has been argued, "[e]ven if in the discrete form of consistent interpretation, *Kamberaj* can be seen as creating new positive obligations through the integration of the Directive with the Charter"[14].

The effect in this instance is all the more apparent as it deals with the system of social rights protection of the Charter. Provisions such as Art. 34 have a strong pan-European spirit of solidarity, and can be used as a sort of a "constitutional parameter" to interpret other norms and deliver sizeable practical results for a growing portion of the resident population[15].

So much for the substance. In the next paragraph we are going to explore the real subject matter of this article: its "systemic" dimension.

[13] S. Robin-Olivier, "Horizontal effect of general principles and fundamental rights after the EU Charter entry into force", *op. cit.*, p. 11

[14] A. Guazzarotti, "Direct Effect, Drittwirkung and Principles of EU Law: A Bottom Up Perspective", *op. cit.*, p. 12.

[15] A. Allamprese, G. Bronzini, "Cittadini stranieri e discriminazione nell'accesso a prestazioni sociali a carattere essenziale: la Corte di Giustizia UE valorizza la Carta di Nizza", *op. cit.*, p. 5.

III. THE IMPACT OF *KAMBERAJ* ON THE MULTILEVEL PROTECTION OF FUNDAMENTAL RIGHTS

The *Kamberaj* decision is arguably more interesting for another aspect: the "systemic" implications of the Court of Justice's ruling. From this point of view, the first question referred by the Tribunale of Bolzano is worth analysing.

Indeed, the Tribunale of Bolzano tried to explore the limits of EU law primacy and the issue of the effects of the ECHR under EU law after the coming into force of the Lisbon Treaty.

The Tribunale asked whether the principle of primacy of European Union law obliges a national court to disapply conflicting provisions of domestic law, even when the latter were adopted in accordance with fundamental principles of the constitutional system of the Member State concerned. The Tribunale had in mind Art. 15 of Decree No. 670/1972, which requires the Province of Bolzano to use its funds for welfare, social and cultural aims, "*in direct proportion to the size of each linguistic group and in accordance with the extent of the needs of each group*". This Decree is of a constitutional level, as apparent from its title, "Testo unico delle leggi costituzionali concernenti lo statuto speciale per il Trentino-Alto Adige". As well known, the EU principle of primacy mandates national judges to disapply domestic law even of constitutional level, to enforce conflicting EU provisions of direct effect. Therefore, the referring court could entertain no doubt in this respect.

Yet, Decree 670/1072 is of a higher nature: it develops Art. 6 of the Italian Constitution. Art. 6 reads "*The Republic protects linguistic minorities by special laws*" and is one of the fundamental principles of the basic law. Thus, it is part of the counter-limits the Italian Constitutional Court, ever since 1965[16], considers as a nucleus untouchable by European Union law, since it comprises the fundamental principles and inalienable rights enshrined in the Constitution. The Tribunale of Bolzano tried to use European Union fundamental rights, as embodied in the Charter and in Directives 2000/43 and 2003/109, to overcome fundamental principles of the national Constitution.

Such an attempt was however doomed. The Court of Justice could easily point to the fact that, under domestic (provincial) law, third-country nationals are not even required to declare that they belong to one of the three linguistic groups. Therefore, the principle of the protection of linguistic minorities invoked by the Tribunale of Bolzano bore no relevance to the proceedings. The Luxembourg judges could thus classify as inadmissible a question which "*[sought], in reality, to obtain from the Court an advisory opinion on a general question*" (para. 46). The first sip of the poisoned chalice was thus eschewed.

The same course of action could not be adopted with regard to the second question raised by the Tribunale of Bolzano. The domestic court asked "*whether, in case of conflict between the provision of domestic law and the ECHR, the reference to the latter in Article 6 TEU obliges the national court to apply the provisions of the ECHR – in the present case Article 14 ECHR and Article 1 of Protocol No 12 – directly, disapplying the incompatible source of domestic law, without having first to raise the issue of constitutionality before the Corte costituzionale (Constitutional Court)*" (para. 59).

[16] Constitutional Court, Decision No. 98 of 16 December 1965, *Acciaierie San Michele* c. *CECA*; and Decision No. 183 of 27 December 1973, *Frontini*.

Advocate General Bot deemed such a question to be inadmissible, too. He saw the question as an issue of incompatibility between a domestic law and directly effective provisions of the ECHR[17]. Then, he recalled that, pursuant to Art. 267 TFEU, the Court of Justice is to give preliminary rulings concerning the interpretation of the treaties and the validity and interpretation of acts of the institutions of the European Union[18]. Consequently, the Court lacked jurisdiction to decide on a case where no EU law provision was at stake[19].

However, the EU provision AG Bot seemed to overlook, was a crucial one. Art. 6(3) TEU stipulates that "*[f]undamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law*". The Tribunale of Bolzano interpreted such a provision to potentially require that a conflict between a domestic law and the ECHR had to be resolved by giving primacy to the latter and disapplying the incompatible national provision. Such a reading appears to imply a sort of incorporation by reference of the ECHR into EU law. The result would thus be that the ECHR, as part of EU law, benefits from the same principles of primacy and direct effect as the rest of EU law does.

From a technical point of view this makes sense. For instance, Bruno de Witte once argued that art. 6 TEU (Lisbon-version) would make the ECHR already binding since it refers to the ECHR as part of the general principles of EU law. In his own words: "*the ECHR […] is now still binding by way of its incorporation in the general principles, but […] will become directly binding on the EU after the Union's accession*"[20].

The new version of Art. 6 TEU reads: "*Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law*"[21]. Now, in our view, although the wording of Art. 6 is clear, it does not deprive the CJEU from having the control on the general principles. In other words, it does not prevent the Court from being the authentic interpreter of general principles, as shown in the *Mangold*[22].

Arguing the contrary might have the effect of making too rigid an instrument (the ECHR) which has been known as a traditionally flexible tool (eg by means of the margin of appreciation doctrine). A confirmation of this might be found by analogy with the common constitutional traditions: The fact that they are a source of inspiration for the general principles of EU law does not mean that the CJEU directly applies them

[17] Opinion of Mr Advocate General Bot delivered on 13 December 2011, para. 38

[18] *Ibidem*, para. 39.

[19] *Ibidem.*

[20] B. De Witte, "The Use of the ECHR and Convention case law by the ECJ", in P. Popelier, C. Van de Heyning and P. Van Nuffel (eds.), *Human rights protection in the European legal order: The interaction between the European and the national courts*, Intersentia, Oxford, 2011, pp. 17-33.

[21] The previous version read: "Art. 6.2. *The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law*". [2010] I-00365

[22] C-144/04, *Mangold* [2005] ECR I-9981

or feels bound by the interpretation given by national constitutional courts (as the *Mangold*[23] example again seemingly confirm).

Finally, a case like *Kücükdeveci*[24] appears to demonstrate that even after the coming into force of the Lisbon Treaty (with the consequent entry into force of the Charter of Fundamental Rights), general principles of EU law (as interpreted by the CJEU) will have a crucial role in the case-law of the Luxembourg Court, because of the margin the CJEU has in reshaping them (this is an advantage that the written wording of the principles codified in the Charter of Fundamental Rights of the EU does not present).

IV. *KAMBERAJ* IN CONTEXT

In order to understand the rationale behind – and the revolutionary character of – the preliminary reference raised by the Tribunale of Bolzano, it is necessary to recall the established case-law of the Corte costituzionale. We shall have a quick look at the relation between the ECHR and national law, and then at the interpretation and application given to the Convention before national (especially lower) courts in Italy.

To appreciate the evolution of the case-law of the Italian Constitutional Court, one has to start with the original position of the *Consulta*, which reflected a dualist conception of the relationship between the ECHR and domestic law.

Since the entry of the ECHR into the Italian legal order was enacted via an ordinary law (law 848/1955), the Italian Constitutional Court considered, for a long time and with some exceptions[25], the ECHR as a source provided of the level of statutory legislation with the consequent application of the *lex posterior derogat priori* rule in case of conflict between the law covering the ECHR and another Italian norm.

This was the case until the 1990s, when the *Corte costituzionale* changed its mind, and began to make a distinction between the content and the form of the laws giving effect to international treaties[26]. In other words, since from a material point of view the content of the ECHR aims at protecting rights codified in the Italian Constitution, it seemed to be necessary to readjust the previous case-law.

Another turning point was the constitutional reform dated 2001, adopting a new version of Article 117, paragraph 1. The latter now reads: "*Legislative powers shall be vested in the State and the Regions in compliance with the Constitution and with the constraints deriving from EU legislation and international obligations*".

Indeed, also on the basis of this new provision, as the literature has already stressed[27], the Italian ordinary (*comuni*) judges started disapplying domestic norms conflicting

[23] C-144/04, *Mangold* [2005] ECR I-9981.

[24] Case C-555/07. *Seda Kücükdeveci. v. Swedex GmbH & Co. KG*. On this see: F. Fontanelli, "General Principles of the EU and a Glimpse of Solidarity in the Aftermath of Mangold and Kücükdeveci", *European Public Law*, 2011, pp. 225-240.

[25] See, for instance, decision No. 10/1993, whereby the *Consulta* described the ECHR as an 'atypical source of law'.

[26] See decision No. 388/1999.

[27] F. Biondi Dal Monte, F. Fontanelli, "The Decisions Nos. 348 and 349/2007 of the Italian Constitutional Court: The Efficacy of the European Convention in the Italian Legal System", 7 *German Law Journal* (2008) 889; O. Pollicino, "The Italian Constitutional Court at the Crossroads between Constitutional

with the ECHR[28]. Thus, they extended a mechanism accepted in the *Simmenthal* judgment and aimed at solving the conflicts occurring between EU law provisions provided with direct effect, and national norms.

This practice has induced the Italian Constitutional Court to give two key judgments in 2007 (348 and 349/2007[29]). In these decisions the Italian Constitutional Court clarified the position of the ECHR in the domestic legal system. It decided to tackle this practice, which represented an extension of an important "constitutional exception" to the constitutional supremacy and a derogation from the regime of centralised control of constitutionality. Moreover, in order to challenge such a trend by ensuring, at the same time, the super-primary nature of the ECHR, the Italian Constitutional Court agreed, for the first time in its history, to assess the validity of national provisions using the ECHR as the standard. Thus the Court extended the doctrine of the "interposed norm" ("*norma interposta*")[30]. The message sent by the Constitutional Court to common judges was, in its essence: "Don't disapply, but rather refer a preliminary question of constitutionality to the Constitutional Court!".

Without going into details, the main contents of these two decisions can be summarised as follows:

1. The ECHR has a super-primary value (i.e. its normative ranking is half-way between statutes and constitutional norms);

2. In some cases, the ECHR can stand as "interposed parameter" for reviewing the constitutionality of primary laws, since the conflict between them and the ECHR can result in an indirect violation of the Constitution (Art. 117);

3. This (No. 2) does not imply that the ECHR has a constitutional value; on the contrary, the ECHR itself has to respect the Constitution;

4. The ECHR cannot be treated domestically in the same way as EU law, as we will see below;

Parochialism and Co-operative Constitutionalism. Judgments Nos. 348 and 349 of 22 and 24 October 2007", 4 *European Constitutional Law Review* (2008) 363.

[28] See: Court of Pistoia on 23 March 2007; Court of Genoa, decision of 23 November, 2000; Court of Appeal of Florence decisions No. 570 of 2005 and No. 1403 of 2006, and the State Council (*Consiglio di Stato*), I Section, decision No. 1926 of 2002: '*Some judges had already started applying this method, which comes from the judicial practice of disapplying the internal statutory norm conflicting with Community law. In some recent occasions, even the Supreme Court of Cassation (*Corte di Cassazione*) and the Supreme Administrative Court (*Consiglio di Stato*) had endorsed the use of disapplication in cases of conflict with ECvHR law*', F. Biondi Dal Monte, F. Fontanelli, "The Decisions Nos. 348 and 349/2007 of the Italian Constitutional Court: The Efficacy of the European Convention in the Italian Legal System", *op. cit.*, 891.

[29] Corte costituzionale, judgments Nos. 348 and 349/2007, available at www.cortecostituzionale.it.

[30] "*Scholars have minted the wording 'interposed provision' to individualize the cases in which a constitutional standard can be invoked only indirectly in a constitutional judicial proceeding, because different primary provisions are inserted between the constitutional standard and the reported provisions (suspected of being unconstitutional)*". F. Biondi Dal Monte, F. Fontanelli, "The Decisions Nos. 348 and 349/2007 of the Italian Constitutional Court: The Efficacy of the European Convention in the Italian Legal System", *op. cit.*, at 897. See: C. Lavagna, *Problemi di giustizia costituzionale sotto il profilo della "manifesta infondatezza"*, Giuffrè, Milano, 1957, at 28; M. Siclari, *Le norme interposte nel giudizio di costituzionalità*, C.E.D.A.M., Padova 1992.

5. The constitutional favour accorded to the ECHR implies the necessity to interpret national law in light of ECHR provisions.

More recently[31], the Italian Constitutional Court confirmed the interpretative favour to be acknowledged to the case-law of the ECtHR. Indeed, the important role of the Strasbourg Court in this context seems to contribute to the special nature of the ECHR itself, which has been conceived as a supra-legislative instrument for the closeness between the wording of its provisions and the language of the Constitution.

Another symptom of the importance of the case-law of the ECtHR in the national legal system is the recent judgment No. 113/2011[32] of the Constitutional Court. The *Consulta* declared Article 630 c. 1 lett. (a) of the Code of Criminal Procedure unconstitutional in the part in which it does not allow the re-opening or review of a case amounting to *res iudicata*, which it found to be in breach of the Convention.

However, a huge distinction still exists between EU law and the ECHR according to the Italian Constitutional Court, and this difference represented the basis of its reasoning:

"*This is because, according to the constitutional judges, the ECHR legal system has distinct structural and functional legal features as compared to the European legal order. According to the Italian Constitutional Court, the EHCR is a multilateral international public law Treaty which does not entail and cannot entail any limitation on sovereignty in the terms provided by Article 11 of the Constitution*"[33].

This explains the different treatment reserved to the ECHR. The latter cannot bring about disapplication and it has to be consistent with the whole Constitution rather than with counter-limits alone (i.e. with some fundamental principles which represent a sort of untouchable constitutional core), as we will see in the next section.

Quite surprisingly, after the Italian Constitutional Court's intervention[34], some domestic common judges continued to disapply national provisions conflicting with the ECHR. One can identify different reasons for that:

1. Sometimes judges demonstrated that they had not understood the Italian Constitutional Court's position or did not know the difference between the ECHR and EU law[35];

2. In other cases, judges showed that they knew the Italian Constitutional Court's position, but misunderstood the meaning of the new Article 6 of the TEU that, after the

[31] Among others, 311/2009, 317/2009 80/2011, available at www.cortecostituzionale.it

[32] Corte costituzionale, sentenza 113/2011, available at www.cortecostituzionale.it

[33] O. Pollicino, "The Italian Constitutional Court at the Crossroads between Constitutional Parochialism and Co-operative Constitutionalism. Judgments Nos. 348 and 349 of 22 and 24 October 2007", *op. cit.* ; D. Tega, *I diritti in crisi*, Giuffrè, Milano, 2012, 51 ff..

[34] I. Carlotto, "I giudici comuni e gli obblighi internazionali dopo le sentenze n. 348 e n. 349 del 2007 della Corte costituzionale: un'analisi sul seguito giurisprudenziale", in www.associazionedeicostituzionalisti.it ; E. Lamarque, "Il vincolo alle leggi statali e regionali derivante dagli obblighi internazionali nella giurisprudenza comune", 2010, in www.associazionedeicostituzionalisti.it .

[35] Tribunale di Livorno, Sez. Lav., ordinanza del 28 ottobre 2008. See I. Carlotto, "I giudici comuni" *supra*.

coming into force of the Lisbon Treaty, paves the way for the EU's accession to the ECHR. In other words, this second group of national judges thinks that, after the coming into force of the Lisbon Treaty, the ECHR has to be considered *ipso iure* as (already) part of EU law and, because of that, provided with direct effect and primacy. This is perhaps the case of the judgment given in March 2010 by the *Consiglio di Stato* (State Council)[36];

3. Finally, there are cases of open civil disobedience of common judges who demonstrate that they know but do not share the Italian Constitutional Court's conclusions[37].

Without going into details and referring to recent well-documented works on the subject[38], one can conceive the Italian case as a case-study demonstrating how a problem of the application of "external" law in the multilevel legal order results in a domestic conflict among national judges (Constitutional Court versus national common judges).

The "confrontation" between the Italian Constitutional Court and the other Italian judges (lower courts but, to a certain extent, also supreme courts, see the mentioned case of the State Council) is still live and open. In 2011 (decision 80/2011) the *Corte costituzionale* gave another ruling which represents the *summa* of its view on the matter[39]. This decision is, again, based on the distinction between EU law (for which it is possible to accept those limitations to the Italian sovereignty recalled by Art. 11 of the Italian Constitution) and the ECHR (for which the application of Art. 11 seems to be misplaced according to the Constitutional Court[40]).

As other Constitutional Courts have already done[41], even the Italian *Consulta* conceived of some ultimate barriers to be opposed to the invasive case-law of the Strasbourg Court, in analogy - to a certain extent - with what happens with EU law.

The Italian Constitutional Court came to a similar conclusion in the decisions of 2007 (Nos. 348 and 349), where it clarified that the favour accorded to the ECHR does not provide it with a sort of "constitutional immunity." Quite to the contrary, the ECHR has to respect the Italian Constitution.

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[36] Consiglio di Stato, sent. 2 marzo 2010, n. 1220. On this decision see: G. Colavitti, C. Pagotto, "Il Consiglio di Stato applica direttamente le norme CEDU grazie al Trattato di Lisbona: l'inizio di un nuovo percorso?", 2010, http://www.associazionedeicostituzionalisti.it/rivista/2010/00/Colavitti-Pagotto01.pdf .

[37] Tribunale di Ravenna, 16 January 2008. On this see Carlotto, "I giudici comuni" *supra*.

[38] I. Carlotto, 'I giudici comuni' *supra*: E. Lamarque, 'Il vincolo' *supra*.

[39] A. Ruggeri, "La Corte fa il punto sul rilievo interno della CEDU e della Carta di Nizza-Strasburgo (a prima lettura di Corte cost. n. 80 del 2011)",

http://www.forumcostituzionale.it/site/images/stories/pdf/documenti_forum/giurisprudenza/2011/0002_nota_80_2011_ruggeri.pdf .

[40] Art. 11 It. Const.: "*Italy rejects war as an instrument of aggression against the freedom of other peoples and as a means for the settlement of international disputes. Italy agrees, on conditions of equality with other States, to the limitations of sovereignty that may be necessary to a world order ensuring peace and justice among the Nations. Italy promotes and encourages international organizations furthering such ends*".

[41] The mentioned German and Austrian cases for instance.

In those decisions, the Italian Constitutional Court specified how the ECHR is considered a particular form of public international law and from this it inferred that the "constitutional tolerance" shown by the Italian legal order towards the ECHR is lower than that shown towards EU law. While "counter-limits" represent, in the Italian Constitutional Court's case-law, a selected version of the domestic constitutional materials (this implies the possibility to decide constitutional conflicts in favour of EU law provisions in some cases), in the case of the ECHR the Italian Court seems to be less generous. It apparently asks the ECHR to respect the entire Constitution as such: "*the need for a constitutionality test on the Convention norm excludes the possibility of having a limited set of fundamental rights that could serve as a counter-limit; indeed, every norm of the Constitution shall be respected by the international norm challenged*"[42].

In a recent judgement, No. 230 of 2012, the Italian Constitutional Court emphasised the specific features of the domestic legal order *vis-à-vis* those characterising the system of the Convention[43], thus remarking the possibility of episodic divergences. The latter materialised in a later judgment, wherein the *Consulta* distinguished its role from the one of the Strasbourg Court in a clear manner[44]. It is worth quoting at length:

"*[the Constitutional Court] has to evaluate how and to what extent the application of the ECHR by the European Court enters the Italian constitutional order. The ECHR norm, when it integrates Art. 117(1) Const., as an interposed norm, becomes an object of the balancing, pursuant to the ordinary operations this Court is called to perform in all disputes in its competence […These] operations do not aim at affirming the primacy of the national order, but at integrating protections*"[45]; "*Differently from the ECtHR, this Court […] performs a systemic evaluation, and not an isolated one, of the values involved by the norm under analysis, and it is therefore obliged to that balancing exercise, which only pertains to itself […]*"[46].

V. INTER-COURT COMPETITION IN ACTION

As we saw, with its decisions Nos. 348 and 349/2007, the *Consulta* declared that all conflicts between Italian law and the ECHR which could not be solved by the means of

[42] F. Biondi Dal Monte, F. Fontanelli, "The Decisions Nos. 348 and 349/2007 of the Italian Constitutional Court: The Efficacy of the European Convention in the Italian Legal System", *op. cit.*, at 915.

[43] A. Ruggeri, "Penelope alla *Consulta*: tesse e sfila la tela dei suoi rapporti con la Corte EDU, con significativi richiami ai tratti identificativi della struttura dell'ordine interno e distintivi rispetto alla struttura dell'ordine convenzionale ("a prima lettura" di Corte cost. n. 230 del 2012)", http://www.dirittocomparati.it/2012/10/penelope-alla-*Consulta*-tesse-e-sfila-la-tela-dei-suoi-rapporti-con-la-corte-edu-con-significativi-ri.html#more .

[44] Constitutional Court, decision No. 264/2012.

[45] Para. 4.2. Authors' own translation. Original text: "esso però è tenuto a valutare come ed in quale misura l'applicazione della Convenzione da parte della Corte europea si inserisca nell'ordinamento costituzionale italiano. La norma CEDU, nel momento in cui va ad integrare il primo comma dell'art. 117 Cost., come norma interposta, diviene oggetto di bilanciamento, secondo le ordinarie operazioni cui questa Corte è chiamata in tutti i giudizi di sua competenza (sent. n. 317 del 2009). Operazioni volte non già all'affermazione della primazia dell'ordinamento nazionale, ma alla integrazione delle tutele".

[46] Para. 5.4 Authors' own translation. Original text: "A differenza della Corte EDU, questa Corte […] opera una valutazione sistemica, e non isolata, dei valori coinvolti dalla norma di volta in volta scrutinata, ed è, quindi, tenuta a quel bilanciamento, solo ad essa spettante […]".

consistent interpretation, were to be settled by the Constitutional Court itself. The Tribunale of Bolzano wished to bring to an end such a centralised control, and explicitly asked the Court of Justice whether the disapplication could be performed directly, "*without having first to raise the issue of constitutionality before the Corte costituzionale (Constitutional Court*" (para. 59).

Confronted with such an express question, the poisoned chalice seemed more difficult to avoid. Yet, the Luxembourg Court succeeded again. It did so in a most sober manner, by arguing that Art. 6(3) TEU does not aim at regulating the relationship between the Convention and the legal order of each country. By the same token, this provision does not provide a solution to the incompatibility between a conventional right and a piece of domestic legislation (para. 62). The Court could thus conclude that the fact that Art. 6(3) TEU mentions the ECHR, does not imply that national judges are obliged to disapply a provision of domestic law contradicting the Convention and apply the latter directly (para. 63).

The Court of Justice therefore seemed to discard the theory of the "European-Unionisation" of the ECHR by the means of Art. 6(3) TEU. If the Convention had become part of the EU via the reference contained in such a provision, it would have undoubtedly enjoyed primacy and direct effect before national judges. Consequently, the ECHR and EU law are not on an equal footing.

The issue of the relationship between the ECHR and the Italian legal system was thus left by the Luxembourg Court to the *Consulta*. The Luxembourg Court restrained itself and did not challenge the Italian Constitutional Court's view on this matter. If Art. 6(3) TEU does not govern such an issue, the field is free for Member States – and their constitutional judges – to follow their own approach. This view echoes the one expressed by the Italian *Consulta* in its Decision No. 349/2007: "*the relationship between the ECHR and the legal orders of the Member States, since in this matter there is not a common competence attributed to (nor exercised by) Community institutions, is a relationship variously but firmly regulated by each national order*" (para. 6.1)[47].

On the other hand, the Court affirmed that Art. 6(3) "*does not require […] to apply the provisions of that convention directly*" (para. 63). In our view this the formula used by the CJEU ("does not require") also means that this provision *per se* does not prohibit such disapplication. Therefore, were the Italian *Consulta* to modify its view in the future and allow for direct disapplication by common judges, no obstacle would be imposed by EU law.

The Court of Justice did not miss a chance to emphasise its role as the ultimate arbiter of the potential direct effect to be given to the ECHR under EU law. It took the opportunity to recall that Art. 6(3) TEU reproduced the approach taken by the Court in its jurisprudence, which considers fundamental rights as part of the general principles of law whose respect the Court ensures (para. 61). Likewise, the Luxembourg judges may in the future revise their position. After the European Union's accession to the ECHR, they might take the view that Convention rights will have become an integral part of EU law, beyond being general principles pursuant to Art. 6(3) TEU. The Court could then grant the ECHR primacy and direct effect.

[47] Original text: "*il rapporto tra la CEDU e gli ordinamenti giuridici degli Stati membri, non essendovi in questa materia una competenza comune attribuita alle (né esercitata dalle) istituzioni comunitarie, è un rapporto variamente ma saldamente disciplinato da ciascun ordinamento nazionale*".

Whatever the future developments might be, the *Kamberaj* case demonstrates the potential for interpretative competition inherent in the field of fundamental rights in Europe. In the Italian context, the national common judge considers the disapplication of domestic law required by the EU principles of primacy and direct effect as an expedient way to empower itself *vis-à-vis* the Constitutional Court. Whilst the latter has now come to accept those principles in its case-law (after a long-standing resistance), it has nevertheless ensured that, on the one hand, constitutional fundamental principles are untouchable by EU law, and, on the other, that conflicts with the ECHR are subjected to its exclusive control. Now, however, common judges have begun challenging even those last bulwarks, and seek the collaboration of the Court of Justice in their endeavours. Although the Luxembourg Court has been shrewd enough to avoid the poisoned chalice this time, the upcoming accession might render it inescapable.

VI. CONCLUSION

This paper has demonstrated how the treatment of EU and ECHR laws by national judges can be a heated issue. In this context, the Italian case has displayed a significant evolution in the Constitutional Court's approach to the ECHR. Whilst originally the latter was granted the status of an ordinary statute, after judgments Nos. 348 and 349/2007 it is now considered as a super-primary, interposed norm. The *Consulta* has, however, been particularly concerned to ensure that two principles be preserved. Firstly, incompatibilities between a piece of national legislation and the ECHR must not lead to the direct application of the latter, since it is not part of EU law. Secondly – and consequently –, these conflicts must be subject to the centralised control of the Constitutional Court itself.

Common judges have, however, attempted to go further. The recent *Kamberaj* case is an apt example: An Italian judge sought to use a preliminary reference to the CJEU to overturn the Constitutional Court's jurisprudence on the treatment of the ECHR. Affirming that Art. 6(3) TEU does not require the disapplication of domestic law conflicting with the Convention has allowed the Luxembourg Court to avoid the poisoned chalice. Yet, the EU's accession to the ECHR will probably disrupt such an amiable settlement.

Concluding, what can we learn from *Kamberaj*?

At least two things.

1. One can conceive the Italian situation as a case-study which clearly shows that, in the multilevel legal system, a problem concerning the application of "external" law may result in a domestic conflict among national judges (Constitutional Court versus national common judges).

2. The debate on the direct effect to be given to the ECHR under EU law is very far from being exhausted. Comparing the current scenario with that studied by Neville, McBride and Drzemczewski in the 1970s-80s, it is immediately clear that, today, the issue of ECHR's primacy and direct effect does not depend only on what is written in the constitutions, it is something that seems to go beyond the full control of national constitutions. In this scenario, EU law has also provided national judges (the Italian case is very clear on this) with arguments for reconsidering ECHR's

force, as Keller and Stone Sweet[48], for instance, noticed and as *Kamberaj* once again shows.

[48] "*European integration – the evolution of the EU's legal system, in particular – has shaped reception in a number of crucial ways. First, the ECJ's commitment to the doctrines of the supremacy and direct effect of Community law provoked processes that, ultimately, transformed national law and practice. Supremacy required national courts to review the legality of statutes with respect to EC law, and to give primacy to EC norms in any conflict with national norms. For judges in many EU States, the reception of supremacy meant overcoming a host of constitutional orthodoxies, including the prohibition of judicial review of statute, the* lex posterior derogat legi priori, *and separation of powers notions. These same structural issues arose anew under the Convention*", H. Keller, A. Stone Sweet, "Assessing the Impact of the ECHR on National Legal System", in H. Keller, A. Stone Sweet (eds.), *A Europe of Rights. The Impact of the ECHR on National Legal Systems*, Oxford University Press, Oxford, 2008, at 681.