

ITALY AND THE ECHR
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Prof. Stefania NINATTI and Marilena GENNUSA

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1. INTRODUCTION

What is the real role played by the European Convention on Human Rights (ECHR) in the Italian system of sources of law? This question has engaged Italian scholars¹ and case law

¹ On this issue, see Cocozza F., *Diritto comune delle libertà in Europa*, Giappichelli, Torino, 1994; Sorrenti G., *Le Carte internazionali sui diritti umani: un'ipotesi di "copertura" costituzionale a più facce*, in *Pol. Dir.*, 1997, 349 ss.; Pace A., *La limitata incidenza della C.e.d.u. sulle libertà politiche e civili in Italia*, in *Convegno in occasione del cinquantenario del Consiglio d'Europa per la protezione dei diritti umani e delle libertà fondamentali in onore di Paolo Barile*, Accademia Nazionale di Lincei Roma, 2001; Montanari L., *I diritti dell'uomo nell'area europea tra fonti internazionali e fonti interne*, Torino, Giappichelli, Torino, 2002; AA.VV.,

since the 1950s, given the difficulties there are to grasp the legal features of the relationship existing between the ECHR and the domestic legal order. According to the initial approach of the Italian constitutional court (ICC), the ECHR, like every international treaty, should have been recognized as having the same legal authority as the internal act of ratification. Since the ECHR was ratified through an ordinary law (law no. 848/1955), the ICC recognized it as a source of law belonging to the level of ordinary statute, despite the fact that its content, the protection of human rights, belonged by its very nature to the constitutional law. ICC Judgement no. 388/1999 shed some light on this unsatisfactory theoretical legal framework – established through a rather “monolithic” ICC case law² –, stating that the domestic and international provisions on human rights are complementary, to the extent that the content of the former must be used to interpret the latter, and *viceversa*. It is clear, though, that the legal framework was still extremely confused.

In this context, the 2001 Italian constitutional reform significantly amended Art. 117, para. 1 It. Const. According to this new paragraph, legislative power must be exercised by the State and the Regions in compliance not only with the Constitution, but also with the obligations deriving from EU legislation and international obligations.³ At first, it did not

La Convenzione Europea dei Diritti dell’Uomo. Profili ed effetti nell’ordinamento italiano, Giuffrè, Milano, 2002; Zanghi/Vasak, (a cura di), *La Convenzione Europea dei Diritti dell’Uomo: 50 anni d’esperienza. Gli attori e i protagonisti della Convenzione: il passato, l’avvenire*, Giappichelli, Torino, 2002; AA.VV., *La Corte Europea dei Diritti Umani e l’esecuzione delle sue sentenze*, Editoriale Scientifica, Napoli, 2003; AA.VV., *La Corte costituzionale e le Corti d’Europa*, Giappichelli, Torino, 2003; Bultrini A., *La pluralità dei meccanismi di tutela dei diritti in Europa*, Torino, Giappichelli, Torino, 2004; Tega D., *La Cedu e l’ordinamento italiano*, in Cartabia (edited by), *I diritti in azione*, Bologna, Il Mulino, 2007, p. 67 ss. and at last, in general, see Tesouro G., *Costituzione e norme esterne*, *Il diritto dell’Unione Europea*, 2/2009, p. 195 ss.

² The only exception can be seen in the decision no. 10/1993, where the ratification law was allowed with an “atypical competence” which cannot be derogated by subsequent conflicting legislation.

³ On this issue, see Sorrentino F., *Nuovi profili costituzionali dei rapporti tra diritto interno e diritto internazionale e comunitario*, in *Dir. pubbl. comp. europ.*, 2002, p. 1335 ss.; Conforti B., *Sulle recenti modifiche della Costituzione italiana in tema di rispetto degli obblighi internazionali e comunitari*, in *Foro it.*, 2002, V, 229 ss.; Luciani M., *Le nuove competenze legislative delle regioni a statuto ordinario*, in

appear that this reform could actually affect the aforementioned ICC case law: accordingly the ordinary and administrative judges persistently approached the question regarding the ECHR legal status in very different ways.

Precisely in this new constitutional context the ICC radically modifies its approach on the ECHR legal status. And it is a two-staged change.

The first stage is the so-called “October Revolution” (decisions no. 348 and 349, both delivered in October 2007). In these judgements, the ICC acknowledges the legal status of the ECHR within the domestic legal order in the light of the reformed Art. 117, par. 1 It. Const.⁴ This is its reasoning: first of all, thanks to the reference to the obligations deriving

ww.associazionedeicostituzionalisti.it; Cannizzaro E., *La riforma federalista della Costituzione e gli obblighi internazionali*, in Riv. dir. int., 2001, p. 921 ss.; D’Atena A., *La nuova disciplina costituzionale dei rapporti internazionali e con l’unione europea*, in Rass. parl., 2002, p. 913 ss.

⁴ These landmark decisions declared unconstitutional the national legislation governing the refund for legitimate expropriation and the public administration’s practice of the so-called “constructive (or indirect) expropriation”. Both of these pieces of legislation, in fact, represented a systemic violation of Protocol No. 1, Art. 1 ECHR, according to the ECtHR well-established case-law. Ex multis, see for instance Donati F., *La CEDU nel sistema italiano delle fonti del diritto alla luce delle sentenze della Corte costituzionale del 24 ottobre 2007*, Osservatorio sulle fonti, 1/2008, Conforti B., *La Corte costituzionale e gli obblighi internazionali dello Stato in tema di espropriazione*, in Giur. It., 2008, p. 569 ss.; Condorelli L., *La Corte costituzionale e l’adattamento dell’ordinamento italiano alla CEDU o a qualsiasi obbligo internazionale?*, in Dir. umani e dir. int., 2008, p. 302 ss.; Cannizzaro E., *Sentenze della Corte europea dei diritti dell’uomo e ordinamento italiano in due recenti decisioni della Corte costituzionale*, in Riv. dir. int., 2008, p. 138 ss.; Gaja G., *Il limite del rispetto degli obblighi internazionali: un parametro definito solo parzialmente*, Riv. dir. int., 2008, p. 137; Ruggeri A., *La Cedu alla ricerca di una nuova identità (sentt. 348/2007 e 349/2007)*, in Forum dei Quaderni Costituzionali; Cartabia M., *Le sentenze gemelle: diritti fondamentali, fonti, giudici*, in Giur. cost. 2008, p. 3564; Pinelli C., *Sul trattamento giurisdizionale della Cedu e delle leggi con essa configgenti*, Giur. cost. 2007, p. 3518 ss.; Cicconetti S., *Creazione indiretta del diritto e norme interposte*, in Associazione Italiana dei Costituzionalisti; Rossi L.S., *Recent Pro-European trends of the Italian Constitutional Court*, in Common Market Law Rev., 2009, p. 319 ss.; Bultrini A., *Le sentenze 348 e 349/2007 della Corte: l’inizio di una svolta?*, in Dir. pub. comp. europ., 2008, p. 171 ss.; Tega D., *Le sentenze della Corte costituzionale nn. 348 e 349 del 2007: la Cedu da fonte subordinata a fonte “sub-costituzionale” del diritto*, in Forum dei Quaderni Costituzionali; Giupponi T. F., *Corte costituzionale, obblighi internazionali e “controlimiti allargati”: che tutto cambi perché tutto rimanga uguale?*, in Forum dei

from international obligations ex Art. 117, par. 1 It. Const., the international treaties signed by Italy become an interposed parameter of the judicial review on legislation. Accordingly, the Constitutional Court is the only institution competent to declare unconstitutional an internal law which contrasts with the ECHR. The ordinary and administrative judges, on the contrary, cannot disapply the internal conflicting provision but must refer the question to the Constitutional Court which holds the competence of the Conventional review on legislation. The only power that is granted to the ordinary and administrative courts – indeed, a powerful instrument – is the possibility to provide an interpretation of the conflicting internal law consistent with the ECHR provisions (s.c. “*interpretazione conforme*”, in Italian). Secondly, the ICC states its preliminary power to evaluate the consistency of the ECHR provisions with the Constitution, due to the sub-constitutional status of the interposed norms that derive from the international obligations⁵. If on one hand constitutional supremacy is recognized, on the other hand, the ICC acknowledges the far-reaching monopoly held by Strasbourg to interpret the Conventional provisions. According to the ECHR legal system, in fact, the Strasbourg judge is the only competent body to interpret the ECHR and to guarantee the constant application of the ECHR. In other words, the object of the ICC judicial review is the ECHR as it “lives” in the creative interpretation of the ECtHR and not the bare ECHR provisions by themselves.

After this first ICC judgment, the number of questions of constitutionality grounded on alleged violations of Conventional rights increased, to the extent that the Constitutional Court needed to intervene again in 2009 through two general, “systemic” rulings (decisions no. 311 and 317/2009) aimed at redefining the theoretical framework established in 2007. In a nutshell, the following principles emerge from these judgements,: a) A centralized

Quaderni Costituzionali; Luciani M., *Alcuni interrogativi sul nuovo corso delle giurisprudenza costituzionale in ordine ai rapporti fra diritto italiano e diritto internazionale*, in *Corriere giur.*, 2008, p. 203 ss.; Sorrentino F., *Apologia delle sentenze gemelle*, *Diritto e società*, 2009, p. 213 ss.

⁵ See again judgement no. 349/2007, where it is specified even further that only in this way can a fair balance between the need to respect international obligations and the need not to violate the Italian Constitution through such an interational compliance be struck.

system of conventional review on legislative power with the ICC is confirmed as the only competent court. The ensuing ban for the ordinary and administrative courts to non-apply the internal conflicting provision is also confirmed: on the contrary, they must issue a referral order to the ICC. The Constitutional Court is thereby trying to put a stop to a sort of underlying “diffuse Conventional review on legislation” by the ordinary and administrative judges. b) The binding authority both on ordinary courts and the Constitutional Court – of the ECHR as interpreted by the European Court of Human Rights (ECtHR) is given more and more importance. Such an obligation is however certainly triggered only when the national judge faces the same situations faced by the Strasbourg Court. Accordingly, a kind of autonomous margin of appreciation is left to the domestic judge, because this latter can move away from the ECtHR interpretation if it considers the case in question is different from the one ruled at supranational level. c) The doctrine of Constitutional supremacy is also recognized and it follows that the ICC, when comparing domestic and conventional provisions, is obliged to ensure the highest standard of fundamental rights protection, since a lower level of protection deriving from the ECHR system is not admitted. In this light, the interposed Conventional provision must be consistent with the Italian Constitution and the ICC may adopt its own margin of appreciation in order to pursue the highest expansion of guarantees in the competition between Constitutional and Conventional provisions. This “own” margin of appreciation is undoubtedly different by nature and content from the one provided by the ECtHR, being subject to a balance established to evaluate the fundamental rights considered within the domestic legal context as a whole, in order to prevent the strengthening of one right leading to the weakening of the other.⁶

This is the general framework recently established by the ICC, and in 2010 further cases allowed the constitutional judges to refine their previous statements.

⁶ To look in greater depth into the matter more, see Lamarque E., *Gli effetti delle sentenze della Corte di Strasburgo secondo la Corte costituzionale italiana*, *Corriere Giur.*, 2010, p. 955 ss.

2. THE DUTY TO REFER THE QUESTION OF CONSISTENCY WITH THE ECHR TO THE CONSTITUTIONAL COURT AND THE BAN TO NON-APPLY THE INTERNAL CONFLICTING LEGISLATION.

The ICC judgement no. 93/2010⁷ is an exemplary application of the aforementioned principles, supported also by the fact that a well-established ECtHR case law on the issue in question and several European judgements against Italy already existed. The Constitutional Court, in decision no. 93/2010, states that the legislation on application of preventive measures is unconstitutional (Art. 4, l. no. 1423/1956 and Art. 2-ter, l. no. 575/1965) as it does not permit that, upon request of the interested persons, proceedings on the application of preventive measures are carried out in public hearings before first-instance courts and courts of appeal (even if the power of the judge to order that the hearing is totally or partially carried out without the presence of the public – if the peculiarities of the concrete case so require – is confirmed). The alleged violation concerned Art. 117, par. 1 It. Const. – through the infringement of Art. 6 ECHR – and Art. 111 It. Cons. regarding the respect of due process of law.

First, the ICC reasoning analyses the ECtHR case law on the protection of public hearings in proceedings under Art. 6 ECHR. From such a case law the following principles can be inferred: a) Judicial transparency is a fundamental element for the safeguarding of fair proceedings; b) The principle of public hearings in proceedings, though fundamental, is not absolute, since the ECHR allows exceptions in the presence of conflicting values (public order, interests of morals, national security, interests of juveniles, etc.). Ordinary courts have to strike a fair balance between the (regular) need for publicity and the (exceptional) need for confidentiality aimed at protecting different values on a case by case basis, evaluating the details of the circumstances at stake. The legislation can certainly *a priori* provide for cases where the presence of the public is excluded in general or with respect to certain types of proceedings, but judges have to maintain a power of concrete balance

⁷ On this decision, see for example Guazzarotti A., *Bilanciamenti e fraintendimenti: ancora su Corte costituzionale e Cedu*, in Quaderni Costituzionali, 2010, p. 592 e ss.

between the conflicting interests: in other terms, the choice to depart from publicity always depends on the case being examined. c) The same can be said for proceedings in which preventive measures are applied, because they can impinge heavily on liberty, property and the economic freedoms of the interested parties, even if these proceedings are characterized by the fact that they are highly technical.

Once these fundamental elements of the issue in question have been clarified, it is an easy task for the ICC to trace them back to the Italian Constitution, even if this latter does not expressly provide for public hearings (while the International Covenant on Civil and Political Rights and the EU Charter of Fundamental Rights do so expressly). After all, the ICC itself had already stated on many occasions that public hearings in proceedings is a fundamental principle inherent to a democratic system founded on popular sovereignty: every judge has to comply with this principle from which its own legitimation derives, according to Art. 101 It. Const.⁸ Without doubt evoking international and supranational acts in order to fill the gap in our Constitution of an express provision regarding public hearings, the ICC seems to describe as “constitutional” a principle which actually stems from outside the Italian Constitution itself⁹. We could, however, read this ICC choice as a clear example of the afore-mentioned program (see the 2009 judgements on this issue) to use the ECHR system as a tool to expand the constitutional protection of fundamental rights

The last step of the ICC reasoning in decision no. 93 was the declaration of unconstitutionality of the conflicting internal norms, as the conflict could not be settled by interpreting the domestic norm in accordance with that pertaining to the Convention.

⁸ Art. 101 It. Const.: «Justice is administered in the name of the people. Judges are subject only to the law.»

⁹ See Conti R., *Corte costituzionale e Cedu: qualcosa di nuovo all'orizzonte?*, in *Corriere giur.*, 2010, p. 624 e ss.

Furthermore, another interesting aspect emerges in this case, since the issue at stake concerns a very controversial legislation that caused some problems for the ordinary judges who had to apply it. This ruling, in fact, ends a lengthy judicial controversy, since some of the lower courts had used the ECHR in order to apply – through an analogical interpretation – the public hearings principle even to cases in which publicity was not expressly provided for. Therefore, in some ways, the Constitutional Court seems to address not only the supranational legal order and the Strasbourg Court, but also – and probably first and foremost – the domestic judiciary.

3. WHICH PARAMETER? ART. 117, PAR. 1 IT. CONST. (IN CONJUNCTION WITH THE ECHR) OR THE DOMESTIC CONSTITUTIONAL LAW?

The reading of the other 2010 ICC decisions facing the question of the relationship between internal sources of law and ECHR appears to be more complex, as the Italian order was not directly involved in the issues at stake. Nevertheless, they give some interesting cues as to the parameters which can be invoked before the Constitutional Court in these cases.

Indeed, despite the highly-debated question on openness in judgement no. 311/2009 to a possible use of Art. 10, par. 1 It. Const.¹⁰, if the alleged violation concerns a Conventional norm which enshrines a general principle of international law, the traditional parameter used by ordinary and administrative courts to refer the question to the ICC continued to be art. 117, par. 1 It. Const. In some cases the ECHR (notably Art. 6) was invoked directly and not as an interposed norm between ordinary law and Art. 117, par. 1 It. Const.: the ICC clarified, though, that Art. 6 ECHR is not invocable as a parameter by itself, because it is a

¹⁰ According to the Art. 10, par. 1 It. Const., the Italian legal system conforms to the generally recognized principles of international law.

mere interposed norm that works only in conjunction with an infringement of the Art. 117, par. 1 It. Cons. (order no. 163/2010)¹¹.

Reading two ICC judgements in 2010, though, a doubt emerges regarding the very need to use art. 117, par. 1 It. Const. in conjunction with the ECHR: in other words, one can speculate if these cases, in the end, could not be solved by mere referral to internal constitutional provisions reaching the same outcome, without calling for the application of the ECHR.

In decision no. 187/2010, for instance, the ICC declares the unconstitutionality of Art. 80 of the 2001 Finance Bill (l. no. 388/2000) in the part in which the provision limited the enjoyment of the right to social benefits and economic allowances (including a monthly disability check) only to foreign nationals with a regular residence permit and possessing a residence card.¹²

The unconstitutionality of such a provision is declared under the infringement of Art. 14 ECHR (concerning the prohibition of discrimination) jointly with Art. 1, First Protocol, ensuring the right of property. The ICC, in fact, after a thorough reconstruction of precedents in Strasbourg, none of which concerned Italy but always involved other States, concludes that the ECHR which was adopted, as usual, in the ECtHR interpretation, establishes two different principles: if, on one hand, it allows wide room for national discretion “upstream” as for the assessment of the level of social benefits to be ensured, on the other hand, it claims “downstream” that the allowance regulation, once established, should not be discriminatory. The same statement is even more relevant if we consider the nature of the check at issue, as it is not supplementing a lower salary due to the presence of a certain disability, but it aims at giving individuals the minimum level of sustenance and

¹¹ In order no. 55/2010, in a case where the ECHR was invoked again directly, however, the ICC did not pronounce on the matter.

¹² In the Italian legal system, in order to acquire a residence card one should have lawfully lived in Italy for more than five years.

survival: accordingly, in these cases, it is clearly forbidden to discriminate between Italian citizens and foreign nationals. The ICC, in fact, states that this kind of check – *also in the light of Strasbourg’s statement* – represents an ineluctable standard of equality between citizens and foreigners lawfully living in Italy.

Certainly, this decision reconfirms the already underlined expansive potential of the fundamental rights protection, in which the Italian Constitution and the ECHR are called to provide a positive contribution to ensure the highest standard. And, as already pointed out, the arbiter of the interaction of constitutional and ECHR provisions is only the Constitutional Court itself.

Looking in greater depth at the issue, the question must be asked as to whether the problem cannot be solved by means of a merely “domestic” constitutional parameter. Although the referring judge had alleged exclusively, through the interposition of Conventional norms, that there had been an infringement of Art. 117, par. 1 It. Const., such limits to the monthly disability check could perhaps have been equally declared unconstitutional according to Art. 3 It. Const. As a matter of fact, the ICC itself recognizes that the check is indeed essential to safeguard those vital needs of every human being, whether Italian citizen or foreign national, which the Italian Republic is obliged to promote and protect. This ICC statement seems to imply a State responsibility by itself, without the need to call upon the ECHR system to intervene.

Without entering into the details of this issue, the last remark highlights the ordinary courts’ praxis to use ever more frequently, at least in matters of fundamental rights, the external, Conventional parameter instead of the domestic one, even in cases in which this latter could be profitably used: it perhaps depends on the fact that the external parameter is more open and elastic – as “living” in the ECtHR case law – and therefore more suitable to update the domestic Bill of Rights without encountering the hermeneutic constraints of the domestic Constitutional norms.

The judgement no. 196/2010 seems to follow the same tendency to rely strongly on the supranational order even when the domestic one could have found the tools to solve the

case. In decision no. 196, in fact, the Constitutional Court was called to review art. 186 and 187 of the New Highway Code which provides for car confiscation as a security measure when people are condemned for drink- or under-drugs-driving. Since the Italian Criminal Code qualifies such a confiscation as a security measure, and these latter are ruled by the law in force when they are applied, they could be carried out even retroactively: The problem is that – as explained in the referral order – the referring judge considers car confiscation not as a security measure – as it is lacking in any precautionary aim – but as real punishment, thus incurring in the violation of Art. 7 ECHR – “No punishment without law” (hence the principle of irretroactivity of criminal law) – in conjunction with Art. 117, par. 1 It. Const.

The Constitutional Court agrees with the ordinary judge's reasoning¹³: the judiciary applies car confiscation retrospectively in a very general way, without exception, even if the confiscation at issue can certainly be defined as punishment and not as security measure. The outcome of this reasoning is that, since the contrast of the internal provision with Art. 7 ECHR cannot be repaired through a consistent interpretation, the internal norm is declared unconstitutional¹⁴.

As well as in the previous judgement no. 187, the ECtHR case-law quoted in decision no. 196 concerns neither Italy nor a *car* confiscation case involving another European country, but merely the punitive essence of the confiscation in itself. Even more evident than in the judgement no. 187, in this case the ICC uses the international and internal legal orders as concurring with each other: more exactly, on one hand, it uses both its own case law and Strasbourg's law to show they are aimed at reaching the same effect and, on the other hand,

¹³ Though only with reference to Art. 186, since the question concerning Art. 187 was declared inadmissible as such a provision was not relevant for the ordinary proceedings from which the question was referred to the ICC.

¹⁴ Nevertheless, Art. 186 is indeed declared unconstitutional only in the part in which it refers to Art. 240 It. Criminal Code concerning security measures. If such a reference fades, in fact, car confiscation cannot be any longer qualified as a security measure and therefore it can be no longer applied retroactively.

it uses both the Italian Constitution (although Art. 25 It. Const.¹⁵ was not invoked as a parameter) and the European Convention to prove they are aligned.¹⁶

Also in this case, we are tempted to think that the application of Art. 25 It. Const. alone could have perhaps reached the same outcome as the one achieved through the competition between the domestic and the international norm: the referring court, though, preferred to appeal only on the ground of the Conventional one. The ICC probably does not dislike this choice of the referring judge, since in this way it can play the role of Strasbourg's "main actor", leaving the door open also to the use of internal parameters, if deemed helpful in to solving the case...

Lastly, it must be underlined that an isolated administrative case law (Regional Administrative Tribunal for the Lazio Region and the Council of the State) had called for the direct applicability of the ECHR (and for the non-application of the internal provision in contrast with the Conventional one) relying on Art. 6 of the European Union Treaty¹⁷. As can be noticed, the thorny issue at stake in these judgements is the interweaving of fundamental rights protection at supranational level and the interplay between the ECHR and a legally binding EU Charter of Fundamental Rights, in particular after the EU accession to the ECHR is achieved: an issue, as pointed out also in the Report on EU matters, which is in fact at the top of the ICC agenda.

¹⁵ According to Art. 25 It. Const. «No case may be removed from the court seized with it as established by law. No punishment may be inflicted except by virtue of a law in force at the time the offence was committed. No restriction may be placed on a person's liberty save for that provided by law.»

¹⁶ See par. 3.1.3. in law.

¹⁷ See Regional Administrative Tribunal for the Lazio Region (TAR Lazio), decision no. 11984/2010; and Council of the State judgement no. 1220/2010.