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Commentary

The Relationships between the Italian Constitutional Order and the ECHR

Tommaso Edoardo Frosini *

The aim of this paper is to underline the relationship between the European Court of Human Rights and the Italian Constitutional order in light of the changes which have occurred, and which may occur, while working towards a unitary order system. A system in which the different rules and principles complement one another, merge together and are integrated by means of further internationalization of constitutional law, or, if you prefer, the "*constitutionalization of International law*".

I would like to briefly trace the positioning of the European Convention of Human Rights (ECHR) within the Italian source of law. The ECHR was approved by bill (n. 848 of 4th August 1955), and it was held to be suitable to revoke previous laws which were incompatible with it, but not to hinder the revocation of later laws which may be in conflict with bill. This requirement was clearly to minimize the reach of the ECHR within our laws. Therefore, for many years, its impact was relatively secondary, notwithstanding its theoretical value. Its constitutional cover appeared problematic. This question has been much debated in doctrine, to

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* Professor of Comparative Public Law Faculty of Law University "Sour Orsola Benincasa" in Naples.

evaluate article 10 Cost., or rather article 11 Cost., and even art 2 Cost., as an "open clause" for rights emerging and being proclaimed in international documents. Since then the new articles 111 and above all, 117, comma primo, Cost. Have been reevaluated.

Let me sum up in order the issues raised.

One part of the doctrine states that the ECHR contains certain dispositions, which codify generally recognised international guidelines or principles. It therefore follows that the conventional dispositions, which constitute the codification of such principles, must come under the application of article 10, comma primo, of the constitution, and are subject to the automatic constitutional level foreseen therein.

Another thesis is that which refers to article 11 Cost. , stating that, just as with institutional treaties of the European Community or Union, even the European Convention on Human Rights would be one of the treaties in which the Italian Republic agrees to limiting sovereignty in order to foster the creation of an international order based on peace and justice between peoples. If this were the case, however, even the ECHR would be subject to all the constitutional jurisprudence on the supremacy of the community norms, including the doctrine of counter limits drawn up by the Constitutional court.

Then there is the thesis of article 2 of the constitution as a clause, in this particular case of the general principles of fundamental rights. This is a thesis, which having not been closely considered even by the constitutional jurisprudence, does today – from the point of view of the doctrine, of common law and partially from that of constitutional law – show significant signs of being available to recognize "new fundamental rights" which are not included in the Constitution. Certainly, opening up the Italian Constitution to recognising new rights under article 2 Cost., which is integrated in the International charter, would lead to delegating to external judges – both at the Court in Strasbourg and the one in Luxembourg – the power to determine the contents of these new rights, thereby simultaneously altering the balance laid down by the Italian Constitution. Therefore, in order

to limit national judges creativity, and the Italian Constitutional court, one makes space for an active European Court.

The new article 111 Cost., is emblematic of the influence of art 6 of the ECHR (equal process and its reasonable time period) and of its interpretation as developed by the Strasbourg Court, so that such a constitutional regulation can be considered a "clause" which automatically "imports" into Italian Constitutional Order, not only the principles of the Convention but also the Strasbourg Court's interpretation.

Finally, the modification of article 117, comma primo, Cost. which now states : " The legislative authority is exercised by the State and the Regions respecting the restrictions deriving from the Community Order and from international obligations." Now, the norm explicitly offers constitutional cover to all international treaties, which determines the resistance to revocation. Therefore, a later legislator must always respect the international treaties which are undersigned and recognised in Italy.

This is the internationalisation of constitutional law, or rather the constitutionalisation of international law. As a result international law is no longer "another" with respect to the order system applicable by a national judge, but it is part and parcel of it. Thereby gradually removing the "state – centred" perspective, and highlighting a new configuration of the theory of the source of law, particularly, the theory of interpretation.

Therefore, the order system, which the judge then refers to on the principles of legality, is made up of procedures, international conventions, and community norms, which means upholding and applying the laws and any norm which make up the objective law.

Article 117, which actually refers to the positioning and constitutional significance of the ECHR, was interpreted by the constitutional court in the sentence n. 348 and 349 in 2007, which marked the start of a new era in the relationship with the ECHR. It is worth looking at these decisions, which have become an important point of reference.

The questions put to the Court regarded the Italian laws of expropriation compensation, which the judge in Strasbourg declared to be incompatible with article 6 ECHR and with article 1 of the additional protocol n. 1. The order for remittance had contested the discipline in the matter of expropriation and employment benefits, ignoring article 42 Cost, and only taking into account article 117, comma 1, Cost., integrated with article 6 ECHR and article 1 of its first additional protocol.

The reasoning was as follows: the new article 117, comma 1, Cost., which imposes on the legislator to respect the limits contained in the community order and the international obligations, must be interpreted as a source of "constitutional cover" for all international treaties, including the ECHR. Given that the Court in Strasbourg decided that the imposed discipline was in contrast with article 6 and with the first additional protocol of the ECHR, the judges argued *a quo* that this was consequently an indirect violation of article 117, Cost.

The Constitutional court made it clear that community judges cannot fail to apply internal norms, which are held to be in contrast with the ECHR, not even when this contrast has been confirmed by the Strasbourg Court. The Court demonstrates the impossibility of assimilating the ECHR into the community law, in particular the impossibility of attributing to the conventional norms the direct effect.

The court had underlined the proofund differences between the community order (which is constitutionally based on article 11 Cost.), and the ECHR which "does not create a super-national juridical order and therefore does not produce juridical norms which are directly applicable in the member states." These references are, however, essential to show that the non-application of internal directives cannot be justified by the "special" character of the ECHR.

See sentence n. 349 del 2007 which limits itself to acknowledging the *ober dictum* contained in the sentence n. 10 of 1993 "has remained without appeal." Excluding that the ECHR returns to the application of article 11 Cost. and therefore may hypothesise a "transfer of sovereignty" in the field of fundamental rights, the Court notes that the ECHR, like other international treaties,

comes under the application of article 117, comma 1, Cost. Such a provision, which requires the ordinary legislator to respect the "international obligations", implies that the national provision is incompatible with the ECHR and "thereby violates [vaiolets] constitutional parameters."

The internal norms adapting to the ECHR therefore boast a "subordinate position to the Constitution, but an intermediate position between that and the bill". Known as "interposed provisions" (in italian: "norme interposte"). This "constitutional cover" means that a local judge, when faced with a contrast between the internal regulation and the "interposed" one of the convention, which cannot be resolved by interpretation, must then raise the question of the constitutionality of the internal regulation with regard to article 117, comma 1, Cost.

It is then up to the Constitutional Court to apply the "interposed" parameter in their constitutional judgements which would have been taken from the decisions of the Strasbourg Court. Nevertheless, the Court clarifies, this does not mean that "those ECHR provisions interpreted by the Strasbourg Court take on the power of the constitutional regulations and are thereby immune to the control of constitutional legitimacy of this Court." Having been inserted "at a sub-constitutional level" they must conform to the Constitution. In the case of an interposed provision being contrary to the Constitution, "it is the Court's duty not only to declare the inappropriateness of integrating the parameter, but also to expel it from the Italian legal order following the usual procedures."

Therefore, according to the what is stated in the Court's sentences, when the bill is in contrast to a fundamental right, common judges can either; interpret the internal provision in accordance with the international law, obviously, as it has been rewritten into European law; or raise the question of constitutional legitimacy, applying as parameters for judgement, both the constitutional dispositions for human rights, and those corresponding dispositions of the ECHR as interpreted by the Strasbourg Court. The choice of which parameter (either an ECHR regulation, or the corresponding regulation in the

Constitution, or both of these) eventually depends on the juridical orientation which has been developed around the point in question.

This will lead to an ever-increasing relevance of the decisions of the Strasbourg Court even in the field of internal judgement definitions. This could lead to the necessity of facing (and resolving) a problem regarding the interpretation of an ECHR disposition provided by the European Court in the field of a decision taken with regard to other Nations, and how it could become binding for our legislator.

Indeed, one thing is a decision taken in which Italy participated and was able to underline the particularities of our legal system and the principles of our constitutional system, but quite another scenario is the one regarding procedures relating to another nation, perhaps defined by a judicial system quite different to ours.

Finally, a few comments on the effects in Italy of the sentences of ECHR following the decisions of the Constitutional Court previously examined. It is important to highlight what has been done so far. I refer, in particular, to the sentence of the Court of Appeal n. 32678 del 2006, on the *Somogyi* case. This sentence recognised the binding force of the conviction sentences of The EHR Court in the national order *ex* art.46 ECHR ("Binding force and execution of sentences").

What we are looking at is a principle which creates a direct connection between the judgement of the Strasbourg Court and that of the Italian judge, virtually a fourth level of judgement.

Here I'd like to refer to one case, which could significantly influence the domestic jurisdiction of the Parliament. It is the *Savino et autres v. Italy* case of April 2009. This was the case in which the EHR Court declared for the first time with regard to the respect needed for the right to a equal process from the domestic legal system established by parliament. In spite of this, the evaluation is still blocked at a national level by the Constitutional Court (sentence n. 154 del 1985).

There are now numerous conviction sentences issued by the Court in Strasbourg (for violation of art.6 of the ECHR) which

refer to another of the parliamentary prerogatives: that of "irrevocability" *ex* art. 68, comma primo, Cost., In the case *C.G.I.L and Cofferati v. Italy* the Strasbourg Court pointed out the violation of article 6 ECHR by Italy in that the process model, which was considered to be an impediment to a decision, contradicted "the principle of the pre eminence of the rights of a democratic society." Which is basically the principle that every citizen has the right to start an action against any act which is considered to breach his rights.

The parliamentary prerogatives *ex* art. 68 Cost have a legitimate objective which is to guarantee the independence of the free parliamentary mandate, but they must , however, respect the principle of proportionality, and "the right balance which must exist between the needs of the general interest of the community and the safeguards of the fundamental rights of the individual." Given the EHR Court's intervention in questions which have traditionally been considered pertinent to the *interna corporis* of the Parliament, one must reflect on the "potentially revolutionary" consequences these sentences could have on determining the level of autonomy recognised for the Italian Parliament.

In conclusion, after having resisted the regulatory reform of the Parliament and the jurisprudence of the Constitutional court, which has always declared itself incompetent, this "obsession" of the *interna corporis* may now break-down thanks to the intervention of a system belonging to another order. Thus showing how currently this multilevel system for safeguarding rights reorders the priorities.