

The Role of the European Convention of Human Rights and Fundamental Freedoms in the Italian system

1. Introduction:

Goal of this paper is to analyze the role that the European Convention of Human Rights and Fundamental Freedoms (ECHR) has in the Italian legal system.

The analysis follows a chronological criterion that does not only take into account the constitutional jurisprudence, but also the interventions of the national law-maker and some fundamental positions adopted by the administrative justice, especially after the entrance into force of the Lisbon Treaty, on 1st December 2009.

The present work does not include neither the analysis of the European Court of Human Rights' rulings and their execution process by Italy, nor the deepening of some notorious connected cases, like Medrano's (1993), Dorigo's (1998) and Scordino's (2004), that, according to the writer, would groundlessly overload the paper.

Part I: the ECHR in the Italian system

2. The general framework:

After the Second World War the theme of the protection of human rights assumes a fundamental role in the international public debate. Apart from the development of international organizations, like the United Nations Organization (San Francisco, 1945) and the signature of universal treaties, such as the Universal Declaration of Human Rights (Paris, 1948), the European dimension assumes the leading role in this field, as from the 50s.

On 5th May 1949 ten European States, including Italy, gave birth to the Council of Europe, a regional organization with the aim of establishing a common judicial space of liberty and democracy among the member States that nowadays includes 47 members, even beyond the European geographical borders.

On 4th November 1950 the European Convention of Human Rights and Fundamental Freedoms (ECHR) is adopted, establishing a series of rights that refer both to the national constitutional traditions of the member States and to the supranational instruments already working in the complex framework of international relations. A peculiarity of the Convention is the establishment of a European Court of Human Rights (ECtHR), adopted with the Protocol n. 11, signed in Strasbourg on 11th May 1994.

The evolution of the so-called “Strasbourg system” has given a great contribution to the development of a multilevel protection order in which a plurality of actors operates at the same time and in the same context: the Council of Europe and the ECHR, the European Union and its judicial and legal systems, the national Constitutions and laws, and, of course, the international system built up as from the foundation of the UNO.

3. The jurisprudential path of the Constitutional Court:

The ECHR has been adopted in the Italian system by ordinary law n. 848 of August 4, 1955 and has, since the beginning, produced a series of problems regarding its capacity to modify the national legal set-up and to be properly inserted in the Italian system. The Constitutional Court has given its contribution in clarifying the issue by the adoption of some fundamental sentences that it is useful to have in mind.

With the sentence n. 188, 1980 the Court affirms that the international treaties and the conventional rules have got the same value of ordinary laws. This means that the principles contained in the ECHR do not have a “stronger” power with respect to those established by national laws.

The Court excludes the effectiveness for the ECHR of article n. 10 and n. 11 of the Italian Constitution, because the first is exclusively referred to the consuetudinary law and the second to the European Union law.

Another important decision by which the Court assumes a different position – that will not be confirmed in the future anymore – is the n. 10, 1993; for the first and last time the Court admits the possibility for the ECHR to resist to following internal laws that have conflicting content and same rank (in the sources' hierarchy). The ECHR would have an “atypical capacity”, due to the peculiar content of its predispositions.

The strong position adopted with the former ruling is mitigated by the n. 388, 1999, by which the Court recognizes the complex network of relations between the principles established in the ECHR and those of the Italian Constitution. The two texts would integrate the level of rights' protection and a great role would be recognized to the interpretation operated by the national judge.

Finally, at the end of the nineties, it seems more and more difficult to affirm that the ECHR can be considered at the same level of the internal rules, due to the universal vocation of its principles and to the particular attention reserved to the topic of the protection of human rights.

4. The orientation of the Italian law-maker:

The contribution of the internal law-maker is important to understand the role that the ECHR has assumed in the national context.

With the constitutional law n. 3 of October 18, 2001, article n. 117 of the Constitution is deeply modified, by the imposition for the State and the Regions of respecting the obligations deriving from the EU and the international systems. The new text of the law sets-up a mechanism of prevalence of the conventional rules over the internal ones, in case of contrast with the formers. A national law in contrast with an international convention would hence be unconstitutional.

The ordinary law n. 89 of March 24, 2001 (Law “Pinto”), instead, highlights the growing importance of Strasbourg jurisprudence; it obliges the national judge to adopt the criteria established by the ECHR with regard to the calculation of the duration of the processes, after that it incurs the right to be refunded.

Last, but not least, the ordinary law n. 12 of January 9, 2006 (Law “Azzolini”) introduces the competence of the Government to execute the sentences of the ECtHR, making the procedure equal to that already adopted for the Court of Justice of the European union (ECJ). All of these interventions have the goal to demonstrate the growing influence of the ECHR and the Strasbourg system in general over the national set-up.

Part II: the new order imposed by the “twins sentences”

5. The sentence n. 348, 2007 of the Constitutional Court:

The most important watershed with refer to the role of the ECHR in the national system has been set-up by the Constitutional Court with the two “twins sentences”, n. 348 and n. 349, 2007.

In the first one the impossibility is reasserted to equalize the ECHR principles to the EU law, since even the reform of the fifth part of the Italian Constitution, particularly in the new article n. 117, confirms the distinction between “communitarian system” and “international obligations”; in the latter case the limitation of sovereignty recognized to the former cannot be granted.

The Court hence excludes the possibility for the national judge “not to apply” the rules conflicting with the ECHR, while this right has been recognized for EU law since the 80s.

The most relevant news introduced by the sentence is the statement that new article n. 117 of the Constitution, when establishing the duty to respect the international obligations, becomes concretely operative only through the integration of a parameter, whose the ECHR is an example.

This means that a rule conflicting with the ECHR would indirectly be in violation of article n. 117: a new level in the sources' hierarchy is established: over the ordinary law, but inferior with regard to the Constitutional provisions.

The Court highlights also the role played by the ECtHR, that is charged to interpret the provisions of the ECHR; the principle of supremacy of the constitutional audit is reaffirmed, since it is up to the Constitutional Court to declare the possible incompatibility of the norm to integrate the parameter and hence to decide if deleting it from the system.

6. The sentence n. 349, 2007 of the Constitutional Court:

In the second of the twins sentences, the Court recognizes the ECHR as being part of the so-called “principles of the EU law”, based on the tradition of the national constitutional systems of the EU member States. Nevertheless, the relationship between the ECHR and the national legal systems goes on being disciplined by “one-to-one” relations, since the Council of Europe remains totally extraneous and independent from EU system.

The Court reaffirms in part what already stated in the former ruling, especially focusing on the new level of hierarchy established by the new configuration of the article n. 117, that substantially gives the ECHR provisions an “intermediate” status half-way between the Constitutional rank and the ordinary laws. An innovative element is the configuration of what can be called a “new counter-limits theory”, following the lucky definition created for the counter-limits in EU law.

It would consist in the fact that the Constitutional Court reserves the right to declare the unconstitutionality of the integration parameter in case of conflict between the Constitution and ECHR norms.

This faculty had already been declared in relation to EU law, but in this case it would be strengthened, since the constitutional control would concern not only inviolable rights and fundamental principles – as for EU law – but all conventional text.

The national judge would have the duty to ask the Court to resolve probable conflicts, bearing in mind that the rules established by the ECHR must be applied in the framework of overall protection built by the provisions of both the two texts (Constitution and ECHR itself).

Last but not least, the Court highlights the political responsibility in signing the Convention, meaning that eventual contrasts with the internal system should be previously taken into account by Governments – for example by affixing reservations when signing.

Part III: the ECHR after the Lisbon Treaty and the consequences for Italy

7. The relations between the European Union and the ECHR:

The entry into force of the Lisbon Treaty, on 1st December 2009, established a new role for the ECHR, since article n. 6 of new Treaty on the European Union provides it with the qualification of “general principles of the EU”, making it part of EU law. Moreover, the treaty affirms that the EU “shall accede” the ECHR, establishing the normative basis for a process that is not concluded yet. At the moment, hence, the EU is neither yet part of the ECHR nor of the Council of Europe, even if the accession procedure is on the right way.

The qualification provided to the ECHR of “general principles” of EU law poses a series of problems, since it certifies the belonging of the Convention to EU law, but does not allow it to be put at the same rank of derived law (regulations, directives and so on...) nor of the treaties, even if nobody would say that the “general principles” could be denied by any kind of national or supranational norm!

At the same time, article n. 6 gives the Nice Charter (Charter of Fundamental Rights of the EU, signed on 7th December 2007 in Nice) the same value of the treaties, creating an ulterior level of protection and complicating the framework. Actually, in case of overlapping, the Nice Charter

would guarantee the strongest level of protection, even if most of times the two texts contain more or less the same provisions.

The Treaty of Lisbon seems to have partially changed the conditions imposed by the Court with the “twins sentences” and the administrative law seems to be the first to have caught this change.

8. Contrasts between the Constitutional Court and the Administrative Judges: confirmations and denials of the same principle.

The Constitutional Court seems to deny the new order created by the entry into force of the Lisbon Treaty and, in a series of sentences, reconfirms the set-up of the twins sentences.

In the sentence n. 249, 2009 the Court insists on the role of “interpreter” that the ordinary judge should apply in relation to the possible contrast between conventional and constitutional principles, highlighting the duty to find a compromise; otherwise it would be up to the Court itself to intervene.

In the sentence n. 311, 2009 the Court states once again the impossibility for the judge to directly apply ECHR provisions, focusing on the difference between the latter and the self-executing communitarian rules (e.g. regulations), that does not need any kind of approval or internal adaptation instruments.

Ruling n. 317, 2009 provides an interesting interpretation, already mentioned in the twins sentences, consisting in the “maximum expansion of guarantees”: in case a stronger level of protection is provided by the ECHR, the constitutional reference should be considered as “integrated” and not violated or overtaken.

The same year of the entry into force of the Lisbon Treaty, in 2009, the Constitutional Court does not hence seem to recognize a new role to the ECHR, what is done by the Administrative Judge the following year.

With the sentence n. 1220 of May 2, 2010, the Council of State affirms that ECHR provisions are directly applicable in the Italian system, following the entry into force of the Lisbon Treaty, that

would have substantially made them part of the directly applicable EU law. The Council of State does not say anything about the faculty of the internal judge not to apply national norms conflicting with the ECHR, but this would be the obvious consequence if the Convention assumes the same rank of the EU law in the sources' hierarchy.

On 18th May 2010, the T.A.R. (Administrative Regional Tribunal) of Lazio confirms the position of the Council of State with its pronouncement n. 11984. The Tribunal arrives until denying the former sentences made by the Constitutional Court in 2007, affirming that the Lisbon Treaty has imposed a new set-up impossible to ignore.

Most of doctrine retains the position of the Administrative Judge too audacious and that not so much would have changed since the new European treaty was adopted.

9. The redressing operated by the Constitutional Court in the most recent jurisprudence, between confirmations and news:

The Constitutional Judge intervenes with the ruling n. 80, 2011 stating the validity of its 2007 sentences; the ECHR should be considered as totally external to the framework of the EU, providing a general reference to those universal principles that are in common among the member States but that cannot be put at the same level of the treaties or of any kind of directly applicable law.

The choice made up by the European legislator to differentiate the two levels of protection (ECHR and Nice Charter) is to search in the fact that not all member States have ratified the latter and in the will not to "freeze" a delicate thematic such as that of protection of fundamental rights only in a rigid instrument like a treaty.

By the sentence n. 113, 2011 the Court admits the possibility for an ECHR norm (article n. 46) to prevail on an internal law (article n. 630 c.p.p.), paving the way for a possible direct applicability of the Convention in the internal system and hence a new role in the sources' hierarchy.

Finally, with the ruling n. 303, 2011 it is admitted the possibility for the national judge to stray from ECtHR interpretation of conventional provisions.

The Constitutional Court seems to have accepted that something has changed since the twins sentences and that new and possible scenarios can be figured out with refer to the application of the ECHR in the Italian system.

10. Conclusions:

This work had the intention to investigate the relationship between the ECHR and the Italian system, particularly focusing on the constitutional jurisprudence but without neglecting the interventions of the internal law-maker and the national judge.

To sum up, it seems possible to figure out a new profile for the ECHR that would partially overtake the set-up imposed by the Constitutional Court in 2007.

The ECHR cannot be considered neither at the same level of the treaties nor at the same rank of the Constitution and its provisions cannot hence invalidate national conflicting rules, like stated for the EU directly applicable law. It is finally maintained the sub-constitutional level recognized by the twins sentences.

The step forward is made by recognizing that, in case a conventional principle strengthens the level of protection, this will be integrated with the constitutional provision, being considered at the same rank of the Constitution, in order to guarantee the “maximum level of protection”.

What established by the Lisbon Treaty cannot be considered revolutionary; the recognition of the ECHR as “general principles” must be seen as a recall to the general framework of protection *outside* the field in which EU law operates. The EU level of protection remains granted by the Nice Charter and when the EU will accede the Council of Europe a triple stratification of protection will be imposed (monitored within the judicial competence by the Constitutional Court at national level, the ECJ at EU level, and the ECtHR in the Strasbourg system).