Section: **Rights, Constitution and ECHR** – Relations between legal orders

Title: Between continuity and new scenarios: the effectiveness of the ECHR in the light of the Italian Constitutional Court's Judgments nos. 80 and 113 of 2011

Author: **GIORGIO REPETTO**

Judgment of reference: Corte Costituzionale, Judgments nos. 80 and 113 of 2011

Parameters of the Convention: Arts. 6 and 46 ECHR

Keywords: Fair Trial; Relations Between Legal Orders; European Union; Methods of Interpretation

1. The framework of relations between the ECHR and the Italian legal order, as outlined by the *Corte Costituzionale* (Italian Constitutional Court) in the (so called) "twin" judgments nos. 348 and 349 of 2007, had the merit of resolving some doubts as to the effectiveness of the Convention within the internal legal system, after the amendment of Art. 117 of the Italian Constitution. However, several questions have been raised, especially as regards, on the one hand, the legal basis of the effectiveness of the Convention in internal law and, on the other, the criteria of balancing and integrating national and conventional laws.

As regards the first point, the approach set out by the *Corte Costituzionale*, focused on the exclusion of the connection between ECHR and Art. 11 of the Constitution and consequently the inability of ordinary judges not to apply the internal law in conflict with the Convention, has been criticized by administrative judges. First the *Consiglio di Stato*, with judgment no. 1220 of 2010, and later more widely the *Tribunale Amministrativo Regionale* of Lazio, with judgment no. 11984 of 2010, remarked that the ECHR is part of

Community law in the light of Art. 6 of TEU as amended by Lisbon Treaty, which entered into force on 1 December 2009. As a result, the two administrative courts held that the ECHR has acquired the same direct and preeminent effectiveness that the Community law has always been provided with. In so far as said Article states that the Union accesses to the Convention (par. 2) and reasserts that the rights guaranteed thereby constitute general principles of the Union's law (par. 3), it would have drawn, in the administrative judges' view, the effectiveness of the ECHR into Community law. Consequently, national judges would not be allowed to refuse to apply the national law in the case of a conflict with a principle contained in the Convention, without its constitutionality being ascertained (on these judgments see *Did the Lisbon Treaty afford direct effect and primacy to the ECHR in the Italian legal order? The Consiglio di Stato and the Tribunale Amministrativo Regionale of Lazio seek new (and questionable) solutions*, on diritti-cedu.unipg.it).

As to the criteria for balancing national and Convention rights, however, the *Corte Costituzionale* had to clarify what it held, deepening the relation of integration of rights that was based, in the two judgments nos. 348 and 349, exclusively on the framework of the sources from which they stem. It should be remembered that the judgments cited, in order to harmonise ECHR rights and the corresponding constitutional rules, primarily indicated the criterion of formal compliance by the lower law (in this case the ECHR), with respect to the higher ranking law (the Constitution). On these grounds, the *Corte Costituzionale*, in particular since the judgment no. 317 of 2009, has founded the consideration for which "the overall result of the integration of guarantees in the legal system has to be positive, that is, from the effects produced by every single ECHR rule in the Italian legal system an additional protection must stem for the entire system of fundamental rights" (see par. 7 *Considerato in diritto*). In the following case-law, the attention on the substantive consequences of the integration between guarantees also moves towards the ground of the more general level of integration between systems, sometimes also directly brought up. As a consequence, the *Corte Costituzionale* had to increasingly deepen the aspects concerning the "system" in relation with the ECHR, as well as the issues connected with the effectiveness of guarantees.

For each of these points, the *Corte Costituzionale*, with the judgments nos. 80 and 113 of 2011, further strengthened the arguments held in the "twin judgments", while deepening them pursuant to new guidelines.

2. In the judgment no. 80 the issue concerned compatibility with the Constitution of Art. 4 of Law no. 1423 of 27 December 1956 and Art. 2-*ter* of Law no. 575 of 31 May 1965, in so far as they do not allow, on application by one party, that the proceedings on preventive measures are held in open court. More specifically, the *Corte di Cassazione*, the referring court, complained about the breach of Art. 117, par. 1 of

the Constitution for the non-applicability of the publicity rule regarding hearings held before it in the proceedings on preventive measures, in accordance with a principle steadfastly set out by the ECtHR but implemented by the *Corte Costituzionale* with judgment no. 93 of 2010 only as regards the proceedings of first and second instance.

Rather than the merits of the judgment, the extensive reasoning followed by the *Corte Costituzionale* deserves particular attention. The Court, indeed, objects to the arguments of the private party that, recalling the administrative case-law above cited, preliminarily claimed that the referring court had the power not to apply the provisions contested, on the basis of the direct and preeminent effectiveness that has to be given to the ECHR after the entry into force of Art. 6 of TEU, as amended by the Lisbon Treaty. Firstly, the Court reasserts the reasons that had led it, since the judgment no. 349 of 2007, to absolutely exclude the incorporation of the ECHR in Community law: the substantial diversity between Community law and the ECHR system, as relates to legislation and institutions, which is at the basis of the applicability of Art. 11 of the Constitution; the relevance of ECHR rights as "general principles of the Union's law" restricted only to those cases involving the issue of the interpretation and application of Community rules; the absence of a general framework as to the effects of the ECHR within national legal systems, that remain, in principle, competent to autonomously modulate the relations therewith for the integration of the two systems.

These arguments, in the Court's view, are also valid after the entry into force of Art. 6 of the TEU with the Lisbon Treaty, and the Charter of Fundamental Rights of the European Union that, in Art. 52, par. 3 lays down that the meaning and scope of the rights contained therein shall be the same as those set forth in the ECHR.

Indeed, the Community dimension allegedly acquired by the ECHR may in any case be deduced by Art. 6 cit., considering that access thereto by the EU, even if provided for by said article, has not occurred yet. The same goes for par. 3 of said article, that reasserts that ECHR rights constitute "general principles of the Union's law", but having scope limited only to the cases relevant for Community law, and not (only) for national law. It could be added, in connection with what has often been held by the Court of Justice, that, before said access, the reference to the ECHR in its judgments does not amount to, nor could amount to, an application *stricto sensu* thereof in Community law; by contrast, it is only an interpretative tendency, which is certainly not able to bring about its incorporation in the Union law. Indeed, the *Corte Costituzionale*, providing an articulated and aware reading of Art. 6 of the TEU, specifies that, in the Union law, the protection of fundamental rights is intended to be based on three different sources: the Charter of Rights,

the ECHR (but only after access), as well as the common constitutional traditions. However, the reference to the ECHR is not simply to its text, but also to those "general principles" that it expresses in the same way as the constitutional traditions, and that may be deduced independently from the occurrence of said access, as has actually been the case in thirty years of the Court of Justice's case-law.

In any case, with these arguments the *Corte Costituzionale* has clearly pointed out the groundlessness of any possible direct applicability and pre-eminence of the Convention and the consequent non applicability of the internal law, at least as argued by the *Consiglio di Stato* and *TAR* of Lazio with the aforementioned judgments (even if not all the administrative jurisprudence has ruled in accordance with them: see *TAR* of Lombardia, judgment no. 5988 of 15 September 2010).

Moreover, the *Corte Costituzionale*, rightly clarifies that the reference to the ECHR and the common constitutional traditions that remains in Art. 6 of the TEU, even after the entry into force of the Charter of Nice, has a completely different meaning than that suggested by the private party and, previously, pointed out by the "dissenting" administrative courts. The reference to the general principles as sources of external integration in the Union law, indeed, is also due "*…to guarantee a certain degree of elasticity in the system. In other words, the aim is to avoid that fundamental rights become fixed by the Charter, preventing the Court of Justice from finding new ones, as against the sources indirectly recalled* (see par. 5.2. *Considerato in diritto*). Consequently, also the provision setting out the equivalence between the rights of the Charter and the corresponding rights of the ECHR, contained in Art. 52, par. 3 of the Charter, has to be read to the effect that, besides an interpretation of the Charter "in accordance" with the ECHR, the rights of the latter, by virtue of that provision, do not acquire any particular effectiveness while reproduced in Community law, and in any case when an issue of interpretation and application of Community relevance enters their domain.

3. Judgment no. 113 of 2011 was rendered with regard to a different issue, but still remains current and relevant. The question, in that case, concerned the much-discussed compliance of Art. 630 of the Code of Criminal Procedure with the Constitution. More specifically, the article mentioned regulates the cases of review of the process, without including the case of a process that, once concluded, has been deemed unfair by the Strasbourg Court for violation of Art. 6 of the ECHR. The *Corte Costituzionale*, that had already ruled on this subject with judgment no. 129 of 2008, pointing out the groundlessness of the question raised with regard to Arts. 3, 10 and 27 of the Constitution, returned to this issue arising from a similar case, in which the defendant had been convicted on the basis of statements made by their co-defendants, who had not been examined during the adversarial proceedings, as they had made use of the right to remain silent at the trial. The referring court, in this case, found that the bar to reopening the trial breaches Arts. 117,

par. 1 of the Constitution and 46 of the ECHR, which provides that member states "abide by the final judgment of the [Strasbourg] Court in any case to which they are parties".

The question of constitutionality, raised in these terms, seems to be intended not so much to allege the violation of a substantive right contained in the ECHR (in that case Art. 6, par.3, lett. D), but rather to give effectiveness to the decision of condemnation reached by the Strasbourg Court. Because of the impossibility to claim the full *restitutio in integrum*, as internal law does not guarantee any remedy for the circumstances in which the applicant is to apply, and deeming evidently unsatisfactory only pecuniary compensation, the referring court asks the *Corte Costituzionale* to act as guarantor of the effective implementation of the Strasbourg Court's judgments; accordingly, it will have to rule on the unconstitutionality of the provision contested as a direct consequence of the systematic violation of the ECHR found, on this subject, by the Strasbourg Court.

In this way, however, the *Corte Costituzionale* has to consider not only the lack of guarantees in a specific case (that it had previously dealt with), but also the issue, more complicated and fraught with consequences, of the remedies to adopt in the event that internal law may not guarantee full and effective compensation for the right of the Convention that has been breached. Indeed, in analysing the case, the Court first points out the impossibility of providing an interpretation of Art. 630 of the Code of Criminal Procedure so that the legal concept of the process review, as outlined by the same code, will be compatible with the purpose of the protection which is on the basis of the Convention guarantee. The review, indeed, seems to be completely incompatible with the approach of the Strasbourg Court, which is focused on the elimination of errors during the trial (such as its fairness) and can be rectified exclusively with the *restitutio in integrum* of its reopening. Such incompatibility is due to two factors: firstly, the review is intended to redress an unfair assessment by the judge of elements of fact "external" to the trial (while unfairness under Art. 6 of the ECHR is internal to the conducting thereof); secondly, the review is inspired by the need to acquit the person convicted (on the contrary, according to the Strasbourg Court, the reopening of the trial shall not be preceded by a prognosis of the acquittal of the defendant).

At this point, after finding a "systematic" contrast between national law and Convention law, the *Corte Costituzionale* considers that the binding of member states to the judgments of the Strasbourg Court under Art. 46 of the ECHR is a suitable instrument to ensure the pre-eminence of ECHR law over all legislative impediments, as well as, in the case examined, the full effectiveness of the ECtHR rulings. Since the judgment no. 129 of 2008 cited above, the *Corte Costituzionale* has urged the national legislator to amend Art. 630 cit., so that it conforms to the principles set out by the European legislator. While awaiting these

amendments, judges had to adopt only partially satisfactory instruments, with the intention of avoiding, at the very least, that individuals in the same circumstances as the applicant undergo all the effects of a conviction. Aware of the insufficiency of these solutions, as well as the continuing inaction of the legislator, the *Corte Costituzionale* holds, therefore, the unconstitutionality of Art. 630, cit. in the light of the obligation of compliance imposed upon states under the ECHR.

In this way, the Court finds itself opening a privileged channel for the transposition in the legal system of those guarantees introduced by the ECtHR that are not only in conflict with an individual provision of law, but meet, as it were, with a particular degree of resistance in the legal order: because, for instance, as in the case before the Court, they are not only in contrast with a specific provision of law, but are incompatible with the purpose of an entire regulation or legal instrument, or because they require an as yet non-existent implementation technique, or even because they concern administrative practices that can only in part be modified by ordinary laws.

Reading the judgment, ultimately, the impression is that the *Corte Costituzionale* wanted to consolidate that relation of integration, not only formal, between legal orders, but rather linked to the substantive definition and regulation of the specific instruments of protection, making sure that those principles set out in the Strasbourg Court's judgments are not hindered by the peculiarity or diversity of the corresponding instruments of national law. In this way, the effectiveness of the ECHR acquires a greater relevance in comparison with that, in terms of the legal relationship between legal orders, was conferred thereto by the judgments nos. 348 and 349 cit. It is, in fact, clear that, if the recourse to Art. 46 of the ECHR was generalized, it would be possible, in all cases similar to that analyzed, to have a sort of automatic "transformer" of the ECHR law in internal law, guaranteed by the same Constitution. In this case, the possibility to lay down limits inferred by the Constitution would increasingly be an extreme hypothesis, if not completely abstract.

Precisely this consequence should provoke reflection as to the possible outcomes of this kind of relation between legal orders. The systematic recourse to the "transformer" of Art. 46 of the ECHR, may indeed lead to a reduction of those techniques (for instance, the various interpretative judgments, primarily those that suggest the content of a gap in the law) usually used by the *Corte Costituzionale* to shape the relation between the substantive regulatory content of the Constitution and the orientation of the interpretations in the legal system. In other words, if the primary objective is considered, in the Court's view, the compliance of internal law to a need for guarantees arising from the monitoring of Strasbourg, and such an objective, because it is established "from outside" of the legal order, is pursued independently from

systematic concerns, and rather precisely to fill gaps in the legal system, it is necessary to consider criteria and limits that, in such a scenario, will lead the interpretation of the *Corte Costituzionale*.

Judgment no. 113 cit. offers an explanation of the problem. The interpretative ruling of the Court is knowingly rendered in the absence of any internal necessity in the rules before the Court. Indeed, Art. 630 cit. is deemed an appropriate *sedes materiae,* but certainly not to be necessary in order to introduce the principle set out by the European jurisprudence, considering that the interpretation of the Court does not have to deal with the purpose of the review, as regulated by the procedure code. As clearly stated in the judgment, "the review…is the legal concept, among those currently existing in the criminal process system, that has aspects of greater assonance, as compared with that to be introduced, in order to guarantee the compliance of the legal order to the parameter of reference" (par. 8 *Considerato in diritto*). In the ascertainment of the diversity between the two legal concepts, therefore, simply mitigated by the requirement of the straightforward "assonance", any recall to the criterion of intrinsic logic of the system, that has always been a limit for those interpretative rulings of the Court not in line with the needs of coherence and interpretative continuity between Constitution and legal instruments, becomes impossible.

This does not mean, however, that the judgment considered leads to an arbitrary result. Indeed, it appears knowingly (and reasonably) remedied to the evident absence of the mandatory rhymes, changing the terms of reference of the Courts' interpretation from the law to the Convention. In the framework of this judgment, the compliance of the coherence and continuity requirements is no longer restricted within the legal system, because it may sometimes not be able to remedy a lack of guarantees. In such cases, requirements of coherence and continuity may not remain inside the legal order, but rather have to turn to the exterior thereof, absorbing the need for guarantees required by the ECHR system. Ultimately, it seems in this judgment that the intrinsic logic of the system, and more generally, the evolution of the legal order, will not be restricted in the future to the relation between the law and the Constitution. In fact, as happened until now, it will receive increasingly more contributions that will come from the european supranational level, particularly from the jurisprudence of the Strasbourg Court. A result that might be favourably accepted, but that also requires a change in the techniques and interpretative instruments that have until now led the interpretations of the *Corte Costituzionale*.

Domestic Case-Law

Corte cost., decisions nos. 348 e 349 of 2007, 129 of 2008 e 317 of 2009; Cons. Stato, dec. no. 1220 of 2010; TAR Lazio, dec. no. 11984 of 2010; TAR Lombardia, dec. no. 5998 of 2010; Corte cass., dec. no. 2800 of 2007

Bibliographical References

A. Ruggeri, *La Corte fa il punto sul rilievo interno della CEDU e della Carta di Nizza-Strasburgo*, in www.forumcostituzionale.it; O. Pollicino, *La Corte cosituzionale, su un rinvio della Corte di cassazione, richiama all'ordine il Giudice amministrativo in merito all'asserita diretta applicabilità della CEDU*, in www.dirittocomparati.it; F. Fiandanese, *Il seguito interno delle pronunce della Corte EDU: la giurisprudenza della Corte costituzionale e dei giudici comuni. Analisi dei casi*, in www.rivistaaic.it .

(Translation edited by dr.sa M.Cristina Mancioli, April 2013)