Section:	**Rights, Constitution and ECHR** – Relations between legal orders
Title:	*The issue of the non-retrospectiveness between Italian Constitutional Court and European Court of Human Rights*
Author:	**GIORGIO REPETTO**
Judgments of reference:	European Court of Human Rights, *Agrati and others v. Italy* of 7 June 2011, no. 43549/2008; *Corte Costituzionale*, judgments nos. 311 of 2009, 257 and 303 of 2011
Parameter of the Convention:	Art. 6 ECHR
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In 2011 several rulings of the *Corte Costituzionale* (Italian Constitutional Court) in the matter of relations between internal legal order and the European Convention of Human Rights progressively and significantly brought about a new tendency of its jurisprudence. This is due, first, to a greater awareness acquired by the constitutional Court of the instruments contained in the ECHR to settle conflicts between law and fundamental rights, and, secondly, to its continuous contribution in clarifying the general model of the integration between the two systems at issue. Almost all cases on the matter of fundamental rights brought before the *Corte Costituzionale* progressively concentrated on this point. Nevertheless, after the turning point of 2007, many problems remain still unresolved, as demonstrated by the constant changes introduced by the Court "on alternate years". In 2009 the Court, with judgments nos. 311 and 317, deepened the existing relationship between internal law and the ECHR system which in 2007 was grounded in the idea that the latter was a source ranking between Constitution and law. In that occasion the Court also held that "the integration between the protection of fundamental rights stemming from the Convention and that provided for by the Constitution must have as its aim the maximum expansion of the guarantees, also by the development of the implicit potentialities in the constitutional rules that concern the same rights". In other words, the Court pointed out an (at least substantial) equalization between constitutional guarantees and the ECHR. Two years later, in 2011, the *Corte Costituzionale* strengthened the approach of 2007 against the attempts of the administrative Courts claiming the direct application of the Convention as a result of the amendments introduced by the Lisbon Treaty (judgment no. 80). Following this, the Court again made reference to it in order to hold the unconstitutionality of a Code of Criminal Procedure's provision regarding the conditions for the criminal process review, that had already been subjected several times to the monitoring of the Court without, however, being declared unconstitutional. This conclusion was also founded on a

specific decision of the Strasbourg Court and the related obligation to comply with judgments thereof set forth by Art. 46 ECHR (judgment no. 113; on both see G. Repetto, *Between continuity and new scenarios: the effectiveness of the ECHR in the light of the Corte Costituzionale's judgments nos. 80 and 113 of 2011*, on https://diritti-cedu.unipg.it).

In the second half of 2011 constitutional disputes based on the ECHR significantly increased on the previous period. It must be noted that a considerable number of cases were related to the matter of retrospectiveness, either with regard to the favourable criminal rules, or the equally complicated issue of the laws of authentic interpretation. The importance of these decisions lies, first, on the fact that the Court specifies, as will be more widely explained, the conditions of the relationship between the two systems as outlined in 2007 and then revised in the following years.
Secondly, the Court first dealt with the matter of the guarantees in a strict comparison with the European Court of Human Rights, from which deep differences emerged. The strength and the future of the integration between the internal legal order and ECHR initiated in recent years will depend on the development of this debate, maybe in a more direct and significant way than has happened until now.

2. In the first case, settled with judgment no. 236 of 2011 and involving the retrospectiveness of the favourable criminal rules, the question for the *Corte Costituzionale* to consider was whether Art. 10, par. 3 of Law no. 251 of 5 December 2005 was compatible with the Constitution, in so far as it does not extend the application of the new limitation periods, when shorter, to pending proceedings on appeal or before the *Corte di Cassazione*. On this point, it is established case-law of the Court that the mandatory retrospectiveness of the more lenient criminal law does not have a constitutional basis, save the limit of reasonableness (see, *inter alia*, judgments nos. 393 of 2006 and 72 of 2008). Nevertheless, the Court had to consider the important case, submitted thereto, *Scoppola v. Italy*, which had been settled by the Grand Chamber of the Strasbourg Court with judgment no. 17 September 2009 (for a detailed analysis of the case see *"L'evoluzione del principio di retroattività della legge penale più favorevole: un nuovo diritto fondamentale*, by D. Falcinelli, on diritti-cedu.unipg.it). In this judgment, as generally known, the ECtHR overturns its case-law, holding that Art. 7 of the ECHR (*Nulla poena sine lege*) not only sets out the prohibition of retrospective application of the criminal law, but also imposes the obligation of retrospectiveness of the favourable criminal law to the states party to the ECHR: such an obligation, in this case, was placed on the Italian legislator, that had not extended the penalty reductions guaranteed by Law no. 479 of 16 December 1999 to the defendant who has opted for the summary procedure, to the cases already settled with a final judgment.

The *Corte Costituzionale* was therefore asked to rule on the constitutionality of the aforementioned provision on the grounds of that decision. The Court first passed in review all case-law post 2007, recalling the uncontroversial points regarding the rank of the ECHR in the sources of law, specifically its position between Constitution and primary law. Then, it pointed out that ordinary judges do not have the discretion not to apply internal laws when in conflict with the Convention, also considering recent arguments on the value to be given to the ECHR. From the Court's view, indeed, the interpretations of the Convention provided by the Strasbourg Court shall not be

subjected to scrutiny, as "the ECHR provisions… shall be applied with the significance given by the European Court of Human Rights". However, the ECtHR's decisions may be adapted to the peculiarities of the internal legal order, while respecting the substance of European jurisprudence, save a certain margin of discretion by the same Court (see par. 9 of *Considerato in diritto*, also as to judgments nos. 311 and 317 of 2009).

Moving from these premises, the Court examined the question of constitutionality of the contested provision and, with an accurate and refined reasoning, held an "integrated" reading of the relevant guarantees stemming from the Constitution and the Convention. Indeed, the principle of retrospectiveness *in mitius*, while having constitutional rank, meets, unlike the principle of unfavourable retrospectiveness deducible from Art. 25 of the Constitution, with a wider series of limits to its full and unconditional implementation founded on Art. 3 of the Constitution from which it stems. In fact, the Court pointed out those "limitations and derogations that are lawful with respect to the Constitution, if grounded on objectively reasonable justifications and, in particular, on the need to protect interests, opposed to the principle at issue, having equal relevance" (par. 10 of *Considerato in diritto*). The *Corte Costituzionale*, taking note of the new tendency in the ECtHR case-law after the case *Scoppola*, had to consider whether, by drawing the principle of favourable retrospectiveness in the domain of Art. 7 ECHR, it would become absolute, without exceptions, like the principle of non-retrospectiveness of more stringent criminal laws or rather its structural diversity as compared to the latter did not allow a restriction of its effectiveness even in the presence of adequate justifications. This last consideration was deduced by the Court on the close relation that the judgment in the case *Scoppola* (and actually every judgment of the Strasbourg Court) had with the facts examined, so that it was difficult to give it a general effectiveness. To that effect, the Court also highlighted some arguments put forward in the ruling, particularly in so far as it holds that "inflicting a heavier penalty for the sole reason that it was prescribed at the time of the commission of the offence would mean applying to the defendant's detriment the rules governing the succession of criminal laws in time". From this reasoning the *Corte Costituzionale* pointed out that, in reality, the same European jurisprudence indirectly admits that other *lato sensu* "constitutional" requirements may be balanced with the principle of retrospectiveness *in mitius*. If this was not the case, the infringement of the Convention stemming from the *sole reason* – without, therefore, other justifications – of the subsequent mitigation of penalties, with respect to the time of the offence, would not be justifiable.

On the contrary, if the *Scoppola* case introduced a substantial innovation, so that the obligation of retrospectiveness *in mitius* was raised to an absolute principle, the *Corte Costituzionale* observed that Art. 7 ECHR, by integrating the Constitution, would become part of the internal sources "with all consequences in terms of interpretation and balancing ordinarily carried out by the Court in all cases before it" (par. 13 of *Considerato in diritto*, recalling and clarifying judgment no. 317 of 2009): that is to say that the Court does not preclude itself, if the ECtHR continued reasserting what it held, from delimitating the effects of the decisions thereof; in this case, however, it would be in the light of the Constitution, without looking for connection and continuity (even if weak) with the Strasbourg Court's case-law.

Furthermore, also the second reason, that, in the *Corte Costituzionale*'s view, bars the implementation of the *Scoppola* case in the internal legal order, deserves particular analysis. Indeed, the retrospectiveness *in mitius* as outlined by the ECtHR only concerns the provisions setting forth offences and penalties; it does not include those rules – as, in the case at hand, regards the reduction of limitation periods – not involving the social evaluation of the offence either because they do not make it lawful, or because, in any case, they do not qualify it as less serious. Also in this case, the *Corte Costituzionale* aims to properly adapt the scope of the Strasbourg Court precedent to the relevant constitutional principles, even if not as clearly as the retrospectiveness *in mitius*, thus bringing about the implementation of certain ECtHR rulings in internal law.

Considering the Court's approach, it should be noted that the arguments on the non applicability of Art. 7 ECHR *rationae materiae* (and, consequently, all the reasoning followed in the judgment) does not precede the arguments regarding the constitutional requirements that may restrict the effectiveness and the scope of application of the principle of retrospectiveness *in mitius*. It is obvious that the first point is supported by stronger grounds than the second one, both because it is more coherent with European case-law and for its much more evident preliminary nature than the latter. Most probably, the choice by the *Corte Costituzionale* to follow such a line of argument has the specific significance of suggesting to the Strasbourg Court that it is not important to highlight the inapplicability of the principle developed by the ECtHR in internal law, rather that, in general, the Constitutional Court has (almost) the last word on the balancing act from which the concrete scope of constitutional rules stems.

Such a choice, which may or may not be shared, gives rise to a difficulty, for which the same *Corte Costituzionale* is, even if indirectly, responsible. As generally known, indeed, the Court has accorded a particular effectiveness by judgment no. 113 of 2011 to Art. 46 ECHR (see Giorgio Repetto, *Corte costituzionale e CEDU al tempo dei conflitti sistemici*, in *Giurisprudenza Costituzionale* no. 2/2011), under which states party to the ECHR shall implement the Strasbourg Court decisions. The Court, in the judgment mentioned, only on that article – and not even on the corresponding "substantive" guarantee – based the obligation for the internal law to comply with the ECHR system, as ensured by means of monitoring constitutionality. To that effect, therefore, the same ECtHR's judgment, rather than ECHR's rules, rises to a parameter of constitutionality ranking between law and Constitution. Many difficulties would consequently stem from this approach whether the *Corte Costituzionale* refused in the future to observe the European rulings for internal systematic reasons, having recourse to that national margin of discretion of which it, as well as the legislator and, to a certain extent, ordinary judges, is interpreter and guarantor.

3. A second series of judgments rendered by the *Corte Costituzionale* and the European Court of Human Rights, that gave rise to the question of boundaries of the retrospectiveness, concerns laws of authentic interpretation. It begins, as far as it concerns herein, with the *Corte Costituzionale*'s judgment no. 311 of 2009. In the case at hand, the Court was asked to rule on the constitutionality of a provision contained in the Finance Law for 2006 (more specifically Art. 1, par. 218 of Law no. 266 of 23 December 2005), interpreting Art. 8, par. 2 of Law no. 124 of 3 May 1999 on the transfer of school employees, who up to that moment were employed by for municipalities and provinces, to

the State. Substantially, the measures implementing said provision laid down the rules for the transfer of local authority ATA staff to the services of the Ministry of Education in such a way that the collective agreement in force with the latter, namely the CCNL for schools, was applicable as from the transfer date to the transferred employees, without, however, the latter receiving the salary position corresponding to the length of service completed by them with the transferor. The referring Court, in the present case, alleged the violation of Arts. 117 of the Constitution and 6 of the ECHR, in so far as the regulations at issue involved not only circumstances originating before their entry into force, but also a case that, in the aftermath of the transfer of the aforementioned employees to the State, had already been examined by the previous case-law. This latter, in particular, had held that the contested regulations clearly provided for the recognition of the full legal and economic length of service, without any restriction.

The *Corte Costituzionale*, ushering in a new interpretative tendency in its case-law that is still established today, reiterated that the observance of the ECHR interpretation, as provided by the Strasbourg Court, may meet with exceptions when they are aimed at keeping its substance: indeed, with regard to laws of authentic interpretation, the ECtHR did not preclude the legislator from the opportunity to enact interpretative laws having retrospective effects in civil matters; on the contrary, the only restriction was the ban on implementing them in current disputes, except in case of "epochal historical reasons" (case *Forrer-Niederthal v. Germany*, judgment of 20 February 2003) or even "overriding reasons of general interest" (case *Scanner de l'Ouest Lyonnais and others v. France*, judgment of 21 June 2007). In other cases, the Strasbourg Court allowed laws of auhentic interpretation that, to redress technical irregularities in the interpreted law, were aimed at providing a more corresponding interpretation with the original will of the legislator (as in the cases *National & Provincial Building Society and others v. United Kingdom*, judgment of 23 October 1997 and *Ogis-institut Stanislas and others v. France*, judgment of 27 May 2004). Therefore, the aforementioned exceptions to the principle that precludes the national legislator from enacting laws of retrospective interpretation substantially aim at implementing the ECtHR's case-law on that matter. The *Corte Costituzionale*, in judgment no. 311 cit., recalled its case-law concerning the provisions of law contested and its compliance with the Constitution lying in the "need to harmonise employment relationships that are originally different, according to the principle of equal treatment of comparable situations in the public sector" (par. 9 *Considerato in diritto*). Therefore, from this perspective, the regulations above cited were lawful also under the ECHR, given that the necessity of the administrative structures reorganization, and the related necessity of guaranteeing equal treatment of subjects involved in said reorganization, satisfy those "overriding reasons of general interest" required by the ECtHR's case-law.

However, the reasonable conclusion drawn by the *Corte Costituzionale*, was decisively overturned by the same Strasbourg Court in the case *Agrati v. Italy* of 7 June 2011, concerning the same issue examined by the *Corte Costituzionale*. With a direct and unusually succinct ruling, the arguments of this latter were rebutted by reason of the incompatibility of the alleged need to redress a gap in the law with the delay (more than five years) by the legislator in regulating this matter (which was moreover not controversial, given the well-settled *Corte di Cassazione*'s case-law on this subject) (paras. 62 ff.). Furthermore, the Strasbourg Court held that the margin accorded to national

authorities, particularly the legislator, for assessing the existence of "public interest" reasons under Art. 1, Protocol No. 1 to the ECHR, has to be used in a not unreasonable way, notably when a law of authentic interpretation is justified by a mere financial interest (paras. 79 ff.): although the ECtHR does not qualify in these last terms Art. 1, par. 218 of Law no. 266 of 2005, it points out that there are many doubts as regards the relation thereof with a reason of public interest. As a result, the sacrifice incurred by the applicants, in the Court's view, does not appear justified under the Convention.

The judgment in the case *Agrati v. Italy* (that became final when the Grand Chamber, on 28 November 2011, rejected the request to refer under Article 43 brought by Italy) certainly does not simplify relations with the *Corte Costituzionale* and not only for the obvious reason that it, as often happened, expressely overturns its own precedent. Indeed, as pointed out by critics, the controversial point is the elusive argument by which the Strasbourg Court reduces the margin of appreciation of national authorities until its substance is annulled, while, in such a case – as supported by well-established *Corte Costituzionale*'s case-law – a major consideration of the reasons put forward by national judges would have been more reasonable: the Court could have even denied them, but, by having recourse to an analitycal reasoning on this point and recalling case-law that was, in the judgment at issue, taken for granted, it would have made its decision more acceptable in the national system.

Indeed, the constitutional case-law following the case *Agrati v. Italy* does not seem to adapt the principles on the matter of authentic interpretation to the Strasbourg Court decision. That is, for instance, judgment no. 257 of 2011, that examines constitutionality, also with regard to Art. 117 of the Constitution, of Art. 2, par. 5 of Law no. 191 of 23 December 2009. The law contested provides for authentic interpretation of previous regulations on credits of contributions for farm workers against the claimants' interests in the main proceedings. As in the previous case, the *Corte Costituzionale* tries to set out the principles laid down by the ECtHR's case-law in order to offer a wide interpretation of the exceptions to the prohibition of retrospective laws. Eventually the Court draws the conclusion that, obviously taking into account that this issue should be referred to specific cases, the necessity to ensure the legal certainty, that is undermined by an objective interpretative uncertainty and not supported yet by well-established case law, is an objective of undoubted general interest also under the ECHR. The same goes for judgment no. 303 of 2011 concerning the constitutionality of Art. 32, pars. 5, 6 and 7 of Law no. 183 of 4 November 2010 (known as "*collegato lavoro*"). According to these regulations, *inter alia*, the new provisions on flat-rate damages resulting from the conversion of fixed-term employment relationships have to be applied to all current disputes. In this case, herein considered only as regards the indirect infringement of the ECHR, the Court holds that ECHR principles may not be applied by reason of the horizontal and between-individuals nature of the relations subject to the foregoing regulations, to which, therefore, the employment relationships with public authorities may not be related. While this case does not concern the issue of authentic interpretation, but merely rules with retrospective effects, the Court finds that the lack of benefits for the state as a consequence of the retrospective measures is the suitable criterion to exclude the infringement of the ECHR. Furthermore, regardless of that, in any case there are requirements that may justify the adoption thereof: "the reasons of general

interest may be related, in the present case, to the necessity of economic protection for fixed-term workers that is more suitable to the need of certainty in legal relations amongst all parties concerned in production processes, even in order to overcome the inevitable differences in the way the previous system was applied (par. 4.2 of *Considerato in diritto*). This framework is further complicated by the judgment of the European Court of Justice (Grand Chamber) regarding the case *Scattolon v. Ministero dell'Istruzione, dell'Università e della Ricerca* (Case C-108/10). The Luxembourg Court held that the rights related to the maintenance of the length of service claimed by ATA school staff are also protected by Union Law, particularly by Directive 77/187/EEC on the safeguarding of employees' rights in the event of transfers of undertakings.

Also in the present case the criterion that seems to lead the Court's reasoning is that of a distinguishing "between legal orders" with reference to the European rulings: the Court tries to transpose some fixed points of the Strasburg case-law within the internal legal order, in order to adapt them – sometimes excessively "shaping" them – to its precedents, thus demonstrating their substantial continuity with the Strasburg case-law, in spite of the apparent differences in their premises. As a consequence, it should be noted the limited number of cases in which the Strasbourg Court found "overriding reasons of general interest" (internal commotion, succession of states, etc.) as opposed to the wide range of internal cases in which the *Corte Costituzionale* found the existence of the same requirements: compliance with the authentic will of the legislator, the need for equal treatment, legal certainty etc. Perhaps the problem could be found in the continuing uncertainty that characterises both Courts on the width and the way to use the margin of appreciation. On this subject, the *Corte Costituzionale* is constantly in search of a conceptual continuity that is, however, sometimes more declared than demonstrated, while the Strasbourg Court has established a line of defense of its external guarantor role: this approach has certainly guaranteed the success of the Court as long as it could rely on a low level of integration with the states party to the Convention, but that should be revised, as it is increasingly required to provide interpretations that have to be transposed by internal courts.

Domestic Law

Art. 1, comma 218, law of 23 dicembre 2005, no. 266 ("*legge finanziaria 2006*"); Art. 2, comma 5, law of 23 dicembre 2009, no. 191 ("*Legge finanziaria 2010*"); Art. 32, commi 5, 6 e 7, law of 4 novembre 2010, no. 183 ("*Deleghe al Governo in materia di lavori usuranti, di riorganizzazione di enti, di congedi, aspettative e permessi, di ammortizzatori sociali, di servizi per l'impiego, di incentivi all'occupazione, di apprendistato, di occupazione femminile, nonché misure contro il lavoro sommerso e disposizioni in tema di lavoro pubblico e di controversie di lavoro*")

Case-Law

ECtHR, *SCM Scanner de l'Ouest Lyonnais e altri v. France*, decision of 21st June 2007, appl. no. 12106/03; *Raffineries Grecques Stran e Stratis Andreadis v. Greece* of 9th December 1994; *Zielinski e altri v. France*, of 28th October 1999; *Forrer-Niederthal v. Germany*, of 20th Febraury 2003; *National & Provincial Building Society, Leeds Permanent Building Society e Yorkshire Building Society v. United Kingdom* of 23rd October 1997; *Ogis-institut Stanislas, Ogec St. Pie X e Blanche De Castille e altri v. France* of 27th May 2004.

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