Section:	**Rights, Constitution and ECHR** – Relations between legal orders
Title:	*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*
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Judgments of reference:	Cons.Stato, sez.IV, judgment no. 1220 of 2 March 2010 and Tar Lazio, sez. II-bis, judgment no. 11984 of 18 May 2010
Parameters of the Convention:	Arts. 6, 13 and 1, Prot. 1 to the ECHR
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Recent years have been marked by an increase and overlap of the means of fundamental rights protection in Europe and, in particular, the Italian legal system experienced a stabilization phase with regard to its relationship with the European Union and, especially, with the European Convention of Human rights.

The latter, particularly, at the turn of the new millennium, was the subject of repeated attention by ordinary courts, especially the *Corte di Cassazione*. Indeed, Italian courts tried several times to grant effects to the Convention superior than those of ordinary law that it was traditionally provided with. In particular, it was claimed that Articles of the Italian Constitution - those occasionally deemed to be of relevance (Arts. 2, 10 and 11) - contain a reference to ECHR, so that, consequently, the judge was empowered not to apply the internal law in conflict with ECHR or jurisprudence of ECtHR (see, among recent cases, *Cassazione, Sezioni Unite Civili*, judgment of 23 December 2005, no. 28507 and *Cassazione Penale*, judgment of 3 October 2006, no. 32678).

It is generally known that with the two judgments nos. 348 and 349 of 2007 the *Corte costituzionale* finally clarified that, in the light of Art. 117, par. 1 of the Italian Constitution introduced by constitutional law no. 3 of 2001, the ECHR should be given intermediate effect, ranked between law and Constitution. Accordingly, any judge, when deciding on a conflict between ECHR and internal rules, can not but raise the objection of unconstitutionality, save the option of interpretation in line with the Convention.

This argument, despite some weaknesses, has the strength to explain that the *Corte costituzionale* had the exclusive power to settle such conflicts with the exclusion of any power of judges to set aside the application of the internal law. This conclusion was drawn from either the idea that the ECHR had a special constitutional legal value, or as embedded in EU law (by virtue of what was provided at that time by Art. 6 of the TEU). Such a power was denied to judges also as regards the monitoring, equally reserved to the *Corte Costituzionale*, of the compatibility between the principle accepted in each case by the ECHR and the Italian Constitution.

It is therefore in this framework, later reasserted by the *Corte Costituzionale* (see judgments nos. 239, 311 and 317 of 2009 and no. 93 of 2010), that two recent judgments have been rendered by administrative judges. Such rulings, that took into account the new amendments introduced by the Lisbon Treaty, revised what the *Corte Costituzionale* held, leading, above all, to a controversial solution like that initially precluded to ordinary judges.

With the first judgment (*Sezione IV*, no. 1220 of 2 March 2010) the *Consiglio di Stato*, in settling a complicated case which had originated in possession of land taken without an expropriation order, had to interpret Art. 389 of the Code of Civil Procedure in the light of the ECHR. According to the article mentioned, when the *Corte di Cassazione* overrules a judgment without remanding the case back to the lower court, "the judge who delivered the contested judgment" has the competence to decide on the claims for restitution and any other claim consequent to that judgment. The *Consiglio di Stato* observed that this article has to be read as much as possible in accordance with the protection of the applicant's right to an effective defense, in order to comply with Arts. 6 and 13 ECHR. In particular – and this point was the focus of first researchers – the *Consiglio di Stato* stressed that the principle of effective protection is deductible not only from Art. 24 of the Constitution, but also from the articles cited in the Convention "… that became directly applicable, in national systems, after the amendment of Art. 6 of the TEU introduced by Lisbon Treaty, entered into force on 1 December 2009".

The *Consiglio di Stato* added nothing to this point. However, the *Tribunale Amministrativo Regionale of Lazio* (hereinafter referred to as TAR of Lazio), taking into account the considerable consequences that may stem from that judgment, clarified what was unexpressed therein (*Sezione II-bis*, no. 11984 of 18 May 2010). In particular, the question for the TAR of Lazio to consider was whether Art. 43 of the Code of legislative provisions and regulations on expropriation in the public interest (*Testo Unico sulle espropriazioni*), also concerning the occupation of land without an expropriation order, was applicable to a case originating before it came into force. The Tar, after recalling its case-law and the previous judgments of the *Consiglio di Stato* on this subject, argued in support of the applicability of said article, on the grounds that it offers a stronger protection for individuals that lost title to land according to the constructive-expropriation rule (*accessione invertita*). To that effect, the TAR of Lazio also recalled the Strasbourg Court that, as is generally known, has always disapproved of the amount of compensation provided in cases of constructive expropriation, for being lower than the market value of the property, as well as in general the compatibility of such a rule with Arts. 6 and 1, Prot. 1 of the ECHR.

Within this framework, and not a particular source of controversy, according to the TAR "some consideration should be drawn on the new value of the principles above cited as set out by the ECHR and that the Code on expropriation expressly accessed to; such principles shall constitute a guideline for interpreters when applying the Union's law". More specifically, the TAR considers that what is held by the *Corte Costituzionale* with the judgments nos. 348 and 349 "will undergo new and more incisive developments after the Lisbon Treaty will come into force". Indeed, said Treaty, in Art. 6 of the TEU, both in so far as it sets forth that "The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms" (par. 2), and "fundamental rights, as guaranteed by the European Convention… as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law" (par. 3), would have given rise to "consequences of extraordinary relevance. In fact, as a result of these new provisions, the Convention is directly applicable in the internal legal systems of states party to the European Union, and therefore also in the Italian legal system by virtue of Community law, and in Italy under Art. 11 of the Constitution".

The innovative arguments of such a reasoning, that completely overturn what was held in the judgments nos. 348 and 349 above cited, clearly shows the complete disapproval of judges towards the drawing of issues concerning the conflicts between internal law and the ECHR into the monitoring of constitutionality.

In this respect, however, many doubts still remain on the congruity of the reasoning followed by the two judgments mentioned.

Firstly, the reference to par. 2 of Art. 6 TEU is definitely overestimated. Indeed, it is unquestionable that from this article it may be deduced only that those obstacles that previously were interposed between the EU and ECHR have been eliminated, but certainly not that the access of the first to the latter occurred. The access, as a deed of international relevance, should stem only from an agreement between subjects having equal relevance (in this case, the EU and the Council of Europe). Consequently, the effects of Art. 6 are limited, to this aspect, within the EU.

Secondly, with reference to Art. 6, par. 3 TEU an objection can be raised to the reasoning followed by the TAR that it is not innovative as compared with the original text of Art. 6 TEU (according to which "fundamental rights, as guaranteed by the European Convention … shall constitute general principles of the Union's law"), but it reasserts the same substance, in so far as it pertains the question at issue, without changing it. Today, as in the past, according to the *Corte Costituzionale* in the two judgments above cited, it is possible to talk about the ECHR as embedded in EU law only as regards those principles of protection that the Court of Justice has expressly accepted and, above all, only as for the application and/or interpretation of the relevant rules of Community law. There are no reasons, as in the past, from which to infer that the ECHR is today completely part of Community law and its effects are produced, through Community law, within the internal legal systems, even without passing through the interpretation or application of Community law.

Thirdly, even after the access to the ECHR has been formally completed, well-founded objections may be made against such a conclusion as regards the full and unconditional effectiveness that the Convention would allegedly acquire by means of the Community law. Indeed, the result would be the absence of any distinction between Community acts (subject to the ECHR) and internal acts, adopted outside the scope of Community law. For the latter acts, their subjection to the ECHR through Community law would end up constituting a surreptitious way to circumvent the division of competences between member states and the Union: indeed, areas that would be the unquestionable competence of states, only through coming into contact with ECHR rights, would fall within the scope of Community law, barring the ECHR from having any autonomous relation with member states.

This last argument raises a further question. When the TAR and the *Consiglio di Stato* argue that the ECHR has become part of Community law, they implicitly hold that the interpretation of the Convention, to which direct effect should be given in the Italian legal order, is that provided by the Strasbourg Court. However, where does this leave the interpretations of the ECHR provided by the Court of Justice, which are not infrequently in conflict with those of the Strasbourg Court? Which of them, in this case, will be binding for internal legislation?

Finally, the most puzzling point of the judgments analysed concerns the effective necessity, for both courts, to make use of such haphazard theoretical arguments in consideration of the issues involved in the cases before them. In fact, it is astonishing that the inevitable consequence stemming from the framework of relations between ECHR and Community law as above outlined, and consisting in the non-applicability of the internal provision, would not have been drawn by the two courts in either case. Rather, it should be noted that the conclusion in both judgments, more than a direct and preeminent effectiveness of the ECHR, seems to depend on a mere interpretation of the internal provisions of law in compliance with the Convention. Moreover, as regards the judgment of the TAR, the issue of the interpretation of Art. 43 of the Code on expropriation cited had already undoubtedly been settled by the same court the previous year even without making reference to the ECHR (see par. 10).

In the end, it is not easy to foresee what these two judgments will lead to, but it seems that, due to the doubts they raise, they represent more a stumbling block than the beginning of a new tendency in jurisprudence.

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