

Human rights in Italy in the rulings of the Supreme Court, the Constitutional Court and Supranational Courts (Part II)

The analysis which has already been advanced in part one of this article¹ commenced with a general presentation of rules related to the protection of human rights in the Italian legal system and its core basis – the constitutional principles. In this respect four principles were identified and examined: the principle of human dignity; the personalistic principle; the solidarity principle; and the equality principle. The issue of a new generation of rights was likewise discussed, i.e. rights which were “derive[d] from the protection progressively accorded by the legislator or by the jurisprudence”, such as the right to a healthy environment or the right to privacy. The analysis on this issue was then followed by the evaluation of the contribution of the Supreme Court in enucleating human rights. In this regard the following rights were inspected: the right to life; the right to die; the right to personal identity; the right to sexual identity; the right to sexual freedom; the right to health (as a right of personal integrity); the right to privacy; the right to oblivion; as well as the right to the reasonable duration of a trial.

In this Part, the Author continues his analysis by examining such issues as: the protection of rights in general (1) and at the regional level (3); the legal status of aliens (2); as well as the integration between the Italian constitutional order and supranational legal orders (4). Lastly, in final conclusions all issues hitherto presented are recapitulated.

¹ Part I of this article was published in “Studia Prawa Publicznego” 2013, no. 4, p. 15-53.

1. The protection of rights

In terms of the constitutional tools to safeguard fundamental rights against possible interference coming from public powers or private individuals, it is necessary to make reference to the *saving law clause* and the *saving jurisdiction clause*, conceived by Constituent framers to the guardianship of some fundamental liberties (the saving law clause in such cases has an absolute character, since it is only up to parliamentary statutes, therefore excluding normative sources of secondary rank – to establish hypotheses (“cases”) in which and procedures (“ways”) through which restrictions of liberty will be admitted; the saving jurisdiction clause gives judges the sole authority to determine by means of a motivated act an intervention limiting personal liberty) – to the jurisdictional and administrative guarantees².

These belong to the group of *jurisdictional guarantees* of rights:

- the principle according to which everyone can act in judgment for the protection of his/her own rights (Art. 24, para. 1 of the Constitution, which recognizes the *right to access to justice*)³;

- the proclamation of *defence* as an “inviolable right in every state and degree of the proceedings”, to be guaranteed to the less wealthy through the predisposition to their advantage of special institutes to act and to defend themselves before every jurisdiction (Art. 24, para. 2 and 3);

- the provision of the *reparation of the judicial errors* (Art. 24, para. 4 of the Constitution). On this matter, the Constitutional Court has affirmed that “the last paragraph of Art. 24 of the Constitution enunciates a principle of the highest ethical and social value, which must be interpreted, from the juridical point of view, as a coherent development of the most general principle of protection of inviolable human rights (Art. 2) assumed in the Constitution as among those that are at the base of the whole republican order and specifying itself in guarantees constitutionally prepared for single individual rights of liberty, with greater emphasis on those among them that are an immediate and direct expression of the human personality”⁴;

² L. Fanotto, *Le garanzie dei diritti*, in: *Principi costituzionali*, ed. by L. Mezzetti, Turin 2011, p. 498 et seq.

³ Constitution of the Republic of Italy. For an English translation of the text of the Constitution of the Italian Republic of December 22, 1947 (effective from January 1, 1948), cf. http://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf (accessed: 8 III 2014), hereinafter referred to as the “Constitution”.

⁴ Decision of the Constitutional Court (CC) of 15 I 1969, No. 1/1969, <http://www.giurcost.org> (accessed: 8 III 2014).

– the principle according to which “[n]o case may be removed from the court seized with it [...]” (Art. 25, para. 1 of the Constitution), and the principle that “[n]o punishment may be inflicted except by virtue of a law in force at the time the offence was committed” (Art. 25, para. 2 of the Constitution)⁵. The first principle, to which is added the rule according to which “extraordinary or special judges cannot be instituted” (Art. 102, para. 2 of the Constitution), evidently aims to guarantee citizens the fairness and therefore the impartiality of the judge. The second principle enacts, to the citizen’s guarantee against the repressive action of the State, the principle of the non-retroactivity of criminal law, as well as of the peremptoriness and exactness of crime provisions;

– the provision of specific “organs of administrative justice” (the regional administrative courts and the State Council) to which is attributed jurisdiction for the protection of rights towards public administration (Art. 103, para. 1 of the Constitution). Such a disposition is completed by the following Art. 113 of the Constitution, according to which “[t]he judicial safeguarding of rights and legitimate interests before the bodies of ordinary or administrative justice is always permitted against acts of the public administration” (para. 1); “[s]uch jurisdictional protection may be excluded or limited to particular kinds of appeal or for particular categories of acts” (para. 2) and it is incumbent on statutes to establish “which judicial bodies are empowered to annul the acts of public administration in the cases and with the consequences provided for by the law itself” (para. 3)⁶;

– the principles of a fair trial, introduced in Art. 111 of the Constitution by the Constitutional Reform Act of 23 November 1999, No. 2/1999, finalized to guarantee: the contradiction among parties, under conditions of parity, in front of a third and impartial judge (this principle is integrated, in the criminal trial, by the principle of the contradiction in the formation of the evidence)⁷; the reasonable duration of trials; in the criminal trial, the accused’s right to be informed, reservedly and in the briefest possible time, of the nature and the reasons for the accusation (as well as the correlated right to have the time and the conditions necessary to prepare his/her defence).

⁵ Constitution, http://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf (accessed: 8 III 2014).

⁶ Ibidem.

⁷ Constitutional Reform Act, No. 2/1999, <http://www.camera.it/parlam/leggi/99002lc.htm> (accessed: 8 III 2014).

What must be underlined in particular is the choice of the drafters of the Constitution to confirm the “dualistic” system of jurisdiction that had been delineated by the ordinary legislator, in which the distribution of jurisdiction between the ordinary judge and the administrative judge is essentially based on the juridical situation (subjective right or legitimate interest) whose protection is claimed. The fulcrum of the *administrative guarantees* of rights that the citizens can use against the powers of public administration is represented by the principles concerning the organization of public offices (Art. 95 and 97 of the Constitution), by the principle of legality of administrative action (Art. 23 and 97 of the Constitution), by the principles of good practice and impartiality of administrative action (Art. 97 of the Constitution), by the principles of inexpensiveness, transparency, effectiveness of administrative action (act No. 241/1990)⁸, as well as by Art. 28 of the Constitution, according to which servants and employees of the State and the public entities “shall be directly responsible under criminal, civil and administrative law for acts committed in violation of rights” and “[i]n such cases, civil liability shall extend to the State and to such public [entities]”⁹.

2. The legal status of aliens

According to Art. 10, para. 2 of the Constitution, “*the legal status of aliens is ruled by law in accordance with international law and treaties*”¹⁰. Such a constitutional provision, requiring Italian lawmakers to abide by international law, is an example of the so-called *strengthened saving clause*, meaning that the legislator is not entirely free to act when exercising his power, but rather is bound to respect the principles and provisions of international law¹¹.

Art. 10, para. 3 of the Constitution grants the *right to asylum* to foreign citizens who, in their own country, are forbidden to effectively enjoy the

⁸ Act of 7 VIII 1990, Nuove norme in materia di procedimento amministrativo e di diritto di accesso ai documenti amministrativi, No. 241/1990, <http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:1990-08-07;241> (accessed: 8 III 2014).

⁹ Constitution, http://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf (accessed: 8 III 2014).

¹⁰ *Ibidem*.

¹¹ A. Martelli, *La condizione giuridica dello straniero*, in: *Diritto costituzionale*, ed. by L. Mezzetti, Milan 2013, p. 545 et seq.

democratic freedoms guaranteed by the Italian Constitution¹². Art. 10, para. 4 subsequently affirms the prohibition to extradite aliens for political crimes¹³.

The refugee law in Italy only sets forth the legal requirements for an asylum seeker to have the status of a refugee recognized. The main national law sources concerning refugee status are the legislative decree of 19 November 2007 and the legislative decree of 28 January 2008¹⁴. According to this legislation, a “refugee” is “a foreign citizen (or a stateless person) who, for fear of persecution, remains outside the territory of his own country, and cannot or does not want to ask for protection in that country”¹⁵. As a complementary status, the Italian state may grant the “subsidiary protection” in favour of a foreign citizen (or a stateless person) who, even though not fulfilling the requirements to obtain the refugee status, would anyway face serious risks of being harmed should he return to his country of origin.

The Supreme Court affirmed that Art. 10, para. 3 of the Constitution is of full and immediate applicability¹⁶. Hence, while there currently exists no specific law to actualize such a constitutional provision, the Supreme Court upheld the right of everyone to claim the application of the Constitution¹⁷. More precisely, the Court’s position implies the right for any alien to enter Italian territory and obtain a temporary residence permit; however, as long as there is no law to actualize the Court’s verdict, aliens can only refer to the application of refugee law.

¹² Constitution, http://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf (accessed: 8 III 2014).

¹³ *Ibidem*.

¹⁴ Legislative Decree of 19 XI 2007, Attuazione della direttiva 2004/83/CE recante norme minime sull’attribuzione, a cittadini di Paesi terzi o apolidi, della qualifica del rifugiato o di persona altrimenti bisognosa di protezione internazionale, nonché norme minime sul contenuto della protezione riconosciuta, No. 251, <http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legge:2007-11-19;251!vig> (accessed: 8 III 2014); Legislative Decree of 28 I 2008, Attuazione della direttiva 2005/85/CE recante norme minime per le procedure applicate negli Stati membri ai fini del riconoscimento e della revoca dello *status* di rifugiato, No. 25, <http://www.camera.it/parlam/leggi/deleghe/08025dl.htm> (accessed: 8 III 2014).

¹⁵ Legislative Decree of 28 I 2008, Attuazione della direttiva 2005/85/CE recante norme minime per le procedure applicate negli Stati membri ai fini del riconoscimento e della revoca dello *status* di rifugiato, No. 25, Art. 2, <http://www.camera.it/parlam/leggi/deleghe/08025dl.htm> (accessed: 8 III 2014).

¹⁶ Decision of the Supreme Court (SC) of 23 VIII 2006, No. 18353/2006, <http://www.itagiure.giustizia.it> (accessed: 8 III 2014).

¹⁷ Decision of the Supreme Court (SC) of 23 VIII 2006, No. 18353/2006.

According to some scholars, the right to asylum adopted by the Italian Constitution would entail a wider concept than merely that of refugee status or of “subsidiary protection”; in fact, this would imply just an objective absence of civil liberties in the country of origin, although there was no serious risk for the person. Thus, the right to asylum would in reality be a *genus*, while refugee status or the right to “subsidiary protection” would only be two minor *species*. Indeed, refugee status has to be based on a well-founded fear of being the victim of specific persecution for reasons of race, religion, nationality, political opinions or membership of a particular social group in the country of origin.

Additionally, scholars believe that Art. 32, para. 3 of the legislative decree No. 25/2008 actually grants another right: the right to protection for serious humanitarian reasons, a right that should be considered subsidiary to both refugee status and the right to “subsidiary protection”¹⁸. This right can also be directly claimed in courts, in accordance with the above legal framework: in line with this consideration, public administrations are not allowed to exercise their discretionary powers.

It shall be added that, according to Art. 117, para. 2 of the Constitutional Charter, the Parliament has the duty to regulate the right to asylum, as well as the legal status of non-European Union-citizens (non EU-citizens) and immigration rules. Furthermore, the Italian Constitutional Court, in interpreting Art. 2, 3 and 10, para. 2 of the Constitution, has extended to aliens the fundamental rights granted to Italian citizens, assuming that those rights are of any person’s concern, every human being, conceived as a “free living being”¹⁹. Moreover, it shall be noted that the Constitution expressly qualifies some fundamental rights as belonging to “everyone” (hence to both citizens and aliens) (Art. 13, 14, 15, 19, 21, 24, 32); whereas in other cases, it explicitly circumscribes its application only to “citizens” (Art. 3, 4, 16, 17, 18)²⁰.

¹⁸ Legislative Decree of 28 I 2008, Attuazione della direttiva 2005/85/CE recante norme minime per le procedure applicate negli Stati membri ai fini del riconoscimento e della revoca dello *status* di rifugiato, No. 25, <http://www.camera.it/parlam/leggi/deleghe/08025dl.htm> (accessed: 8 III 2014).

¹⁹ Decisions of the CC: of 15 XI 1967, No. 120/1967; of 3 IV 1968, No. 21/1968; of 2 VII 1970, No. 144/1970; of 10 VII 1974, No. 244/1974; of 10 II 1994, No. 62/1994; of 29 V 1995, No. 219/1995; of 22 III 2001, No. 105/2001; of 4 VII 2001, No. 231/2001; of 23 V 2003, No. 198/2003; of 28 XI 2005, No. 432/2005, <http://www.giurcost.org> (accessed: 8 III 2014).

²⁰ Constitution, http://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf (accessed: 8 III 2014).

According to some scholars, equality of treatment for aliens constitutes a *principle* but not an imperative rule. In that view, in fact, “the lawmaker is not forbidden to impose special legal burdens on aliens, as long as their establishment is grounded on reasonable motivations due to the peculiar status of foreign citizens”²¹. This position is also sustained by the Constitutional Court. In fact, the Court’s jurisprudence confirmed on the one hand that foreign citizens are to “enjoy all the Constitution’s fundamental rights”, and on the other hand that, because of the specific condition of “aliens”, they inevitably fall within a separate legal framework for matters such as entry, circulation and residence. In line with this view, aliens are subject to special bounds and it is primarily the Parliament that has to determine them on account of several public interests such as national security, public health, international law, and national immigration policy. The legislator, then, disposes significant discretion in ruling this area of law, the only imperative guideline being the reasonableness of the decisions taken²². In this decision, for example, the Court found itself legitimate to uphold the law qualifying drug-smuggling-related convictions as a motive to reject renewals to permit of stay, when those convictions are based on plea bargains not providing evaluation of the dangerousness of the convicted person; on that, the Court noted how it does not appear manifestly unreasonable to make the alien’s entry and stay conditional on the non-committance of serious crimes²³.

In the decision of 29 July 2008, No. 368, the Constitutional Court instead declared unconstitutional the law according to which aliens (non EU-citizens²⁴) were to be excluded from disability allowances if they do not meet the income requirements set for long-term residence (legislative decree of 8 January 2007, No. 3, incorporating the European Union directive 2003/109)²⁵. The Court deemed it manifestly unreasonable to tie the granting of social allowances to criteria concerning the issue of permits of stay which, in addition, demand the subsistence of regular incomes. Such a provision was found in breach of Art. 32 and 38 of the Constitution²⁶.

²¹ R. Bin, G. Pitruzzella, *Diritto costituzionale*, Turin 2013, p. 478.

²² Decision of the CC of 7 V 2008, No. 148/2008, <http://www.giurcost.org> (accessed: 8 III 2014).

²³ Decision of the CC of 7 V 2008, No. 148/2008.

²⁴ According to European Union treaty law, EU-citizens benefit from different and more favourable treatment if compared to Third-Country nationals.

²⁵ Decision of the CC of 29 VII 2008, No. 306/2008, <http://www.giurcost.org> (accessed: 8 III 2014).

²⁶ Decision of the CC of 29 VII 2008, No. 306/2008.

Among other decisions of particular relevance is that issued by the Supreme Court on 9 September 2009, according to which “the legal condition of aliens applying for a residence permit grounded on humanitarian reasons constitutes a subjective right pertaining to the category of fundamental human rights”²⁷. Following the Court’s reasoning, the established general rule is that the jurisdiction to rule on such matters belongs to ordinary civil courts and not to administrative tribunals. In addition, the general protection framework set forth by Art. 2 with regard to fundamental rights fully guarantees the right of everyone to appeal rejections of humanitarian residence permit applications. Consequently, only the Parliament possesses the power to define the balance to be struck among all the different interests involved (the humanitarian reasons of the applicant, the national security of the host state, etc.), whereas public administrations can only verify, case by case, the effective subsistence of the legal requirements.

Generally speaking, the law tends to jointly administer the legal status of aliens together with the rules concerning immigration. The main source is the legislative decree No. 286/1998, a legal text which has often been modified and revised, notably by two acts: the Act No. 189/2002, concerning the deportation of immigrants (several times the Constitutional Court was asked to scrutinize the legitimacy of this act²⁸), and the Act No. 94/2009²⁹. Evidently, the field of immigration law is characterized by a high level of fragmentation and uncertainty. Most likely, the reasons for this are to be found in parliamentary political and ideological divisions, which make it extremely hard to build consensus on the matter. Additionally, the legal discipline of aliens embraces at least three sectors: immigration law, the legal status of regular migrants, and the legal status of illegal migrants.

²⁷ Decision of the SC of 9 IX 2009, No. 19393, p. 14, para. 3, <http://www.stranieriinitalia.it/briguglio/immigrazione-e-asilo/2009/settembre/sent-cass-19393-2009.pdf> (accessed: 9 III 2014).

²⁸ Decisions of the CC of 8 VII 2004, Nos. 222/2004, 223/2004, <http://www.giurcost.org> (accessed: 9 III 2014).

²⁹ Legislative Decree of 25 VII 1998, Testo unico delle disposizioni concernenti la disciplina dell’immigrazione e norme sulla condizione dello straniero, No. 286/1998, <http://www.camera.it/parlam/leggi/deleghe/98286dl.htm> (accessed: 9 III 2014); Act of 30 VII 2002 concerning the deportation of immigrants, No. 189/2002, <http://www.camera.it/parlam/leggi/02189l.htm> (accessed: 9 III 2014); the Act of 15 VII 2009, Disposizioni in materia di sicurezza pubblica, No. 94/2009, <http://www.parlamento.it/parlam/leggi/09094l.htm> (accessed: 9 III 2014).

3. The protection of rights at the regional level

According to Art. 123 and 116 of the Constitution, particularly after the amendments that reformed Title V of Part II of the Constitution³⁰, each region has to adopt a statute. Regional statutes do not constitute a homogeneous category, neither in terms of their structure nor their contents: some of those statutes have a preamble (Marche, Emilia-Romagna and Piedmont), others don't. Every statute, whether in the preamble or in the first articles, outlines principles, objectives and purposes that should guide the political and legislative activity of each regional government. Some of the most relevant principles to be recalled are: peace, refusal of violence and war, democracy, respect for human dignity, and the values of the social community³¹.

More specifically, regional statutes include both classical fundamental rights (political, social and civil rights) and "new rights". Within this last category, one can find references to: the rights of vulnerable categories, such as children, elderly people, and disadvantaged people; rights connected to bioethics, peace, and environmental protection; the rights of future generations; the rights of the "family" (conceiving the family as something wider than one founded on marriage); specific rights for immigrants (such as the right to vote in administrative elections).

The fact that regional governments have started to enforce provisions setting forth rights ancillary to those already established at the constitutional level has triggered debate among scholars. For some this "new course" is to be seen favourably, while for others, regions are simply not sanctioned to contemplate additional rights to those protected by the Constitution. The Constitutional Court has expressed its position on this topic with some important decisions³². These decisions dealt with the provisions of some regional statutes: the Statutes of Umbria and Tuscany were criticized by the national government because of some provisions

³⁰ Constitutional Reform Act of 22 XI 1999, No. 1/1999, <http://www.parlamento.it/parlam/leggi/990011c.htm> (accessed: 9 III 2014); Constitutional Reform Act of 18 X 2001, No. 3/2001, <http://www.parlamento.it/parlam/leggi/010031c.htm> (accessed: 9 III 2014).

³¹ The debate concerning the inclusion of fundamental rights in regional statutes has gained momentum especially after three landmark decisions issued by the Constitutional Court. Cf. Decisions of the CC of 29 XI 2004, Nos. 372, 378 and 379/2004, <http://www.giurcost.org> (accessed: 9 III 2014); M. Belletti, *Percorsi di ricentralizzazione del regionalismo italiano nella giurisprudenza costituzionale*, Rome 2012, p. 142.

³² Decisions of the CC of 29 XI 2004, Nos. 372, 378 and 379/2004, <http://www.giurcost.org> (accessed: 9 III 2014).

that envisaged the recognition of the rights of unmarried people living together as a couple; while the Statutes of Emilia-Romagna and Tuscany were criticized as including provisions aimed at promoting the right to vote for immigrants.

Although regional statutes' provisions have been contested for several reasons, the Court deemed the questions "clearly inadmissible", and refused to decide on the merits of the cases. Indeed, the Court affirmed that "the role of general representation of the interests of local communities would justify some «extra contents» in the statutes and that those «extra contents» could be expressed by general provisions"³³. Nevertheless, the Court also highlighted that all regional statute provisions establishing new rights, even if part of a formal source of law, "do not have any practical legal effect, because they express only the political sensibility of the regional community of people at the moment of the approval of the statute"³⁴. In its decisions, the Constitutional Court referred to regional statutes as a source of "reserved and specialized competence", meaning that in any event these source of law shall respect every constitutional principle and provision³⁵. The Constitutional Court also added that regional statutes shall not be considered regional constitutions³⁶. Consequently, the provisions of the statutes, even if general or setting forth principles, do not function as interpretive instruments for other legal sources.

Analysing these cases more specifically, it appears evident how the main issue is not the nature of the provisions contested, but rather the fact that the region, in enforcing such provisions, exceeded the limits of regional legislative competence. More specifically, those provisions stated that "the Region, in accordance with the constitutional principles, promote the right to vote for immigrants"; the Region pursues "the recognition of forms of relationship different from traditional marriage"; the Region pursues "the respect of ecology, environmental protection and cultural heritage, the protection of biodiversity, the promotion of a culture of respect for animals" as well as "the protection and valorisation of historical, artistic and landscape patrimony"³⁷. Additionally, the Region pursues

³³ Decisions of the CC of 29 XI 2004, Nos. 372, 378 and 379/2004.

³⁴ Decisions of the CC of 29 XI 2004, Nos. 372, 378 and 379/2004.

³⁵ Decision of the CC of 23 V 2003, No. 196/2003, <http://www.giurcost.org> (accessed: 9 III 2014).

³⁶ Decision of the CC of 29 XI 2004, No. 372/2004, <http://www.giurcost.org> (accessed: 9 III 2014).

³⁷ Statute of Region Tuscany of 19 VII 2004, <http://www.regione.toscana.it/regione/statuto> (accessed: 9 III 2014).

“the promotion of economic development, free competition in business, innovation, research and education, in respect of the principles of social cohesion and environmental sustainability”³⁸. Finally, the Region pursues “the valorisation of free enterprise and public enterprise, the role and the social liability in business” as well as “the promotion of cooperation as an instrument of economical democracy and social development”³⁹.

The deep meaning of those decisions can be understood if the fears and doubts expressed by the government in contesting the legitimacy of the provisions of regional statutes are considered. The first concern was that with those provisions regions could ignore or elude constitutional provisions (Art. 117, para. 2 of the Constitution) on exclusive state legislative competence (for example, in the field of the environmental protection, voting rights, commercial laws, etc.). For these reasons the Constitutional Court stated that the regional provisions being contested had only a political or cultural influence and not a legal effectiveness⁴⁰.

Hence those provisions have only the meaning to permeate, culturally and politically, regional policies and actions: they can not affirm any regional power in contrast to constitutional provisions. Conversely, there are also some other statute provisions that did not exceed regional legislative competence. Those statutory provisions can relate to the very foundation of regional legislative activity (for example, in the field of healthcare, health organization, scholastic organization, social services, etc.), or also to fields strictly related to the protection of fundamental rights.

The fact that regions are also competent to regulate some rights, follows, *a contrario*, from Art. 117, para. 2 lit. m of the Constitution, i.e. it follows from the existence of the national exclusive legislative competence to “determine the essential level services”⁴¹. This means that national legislation has to select the essential level in the right protection of a right that must be granted in the whole national territory, while regions, according to Art. 117, para. 4, can intervene with legislative acts approved on the basis of statutory provisions. In this respect regional rights have the purpose of expanding the minimal (or essential) protection level set forth by the national legislator in fields such as healthcare, social protection or education.

³⁸ *Ibidem*.

³⁹ *Ibidem*.

⁴⁰ Decision of the CC of 29 XI 2004, No. 372/2004, <http://www.giurcost.org> (accessed: 9 III 2014).

⁴¹ Constitution, http://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf (accessed: 8 III 2014).

Some other regional provisions concerning rights aim to bring national provisions into effect, especially with regard to vulnerable categories, such as immigrants, returning migrants, gypsies, detainees, people discriminated because of sexual orientation, the poor and people subject to harassment.

Regions seem to be very careful about the enforcement (or refusal to enforce as the case may be) of rights (the rights of consumers or security rights) as illustrated by the actions taken by their administrative offices. There are in fact provisions specifically dedicated to the implementation of communications and the sharing of public information.

The statutes contain provisions on several typologies of rights, “*rights for objectives*” and “*policy rights*”. By the first term all the outcomes are meant that regions typically identify, such as the valorisation of the human personality, respect for human dignity and human rights, and the improvement of the rights (especially voters’ rights) of regional inhabitants who reside abroad. The second expression intends to select some new rights and policies – such as health care and assistance, environment and territory, infrastructures, labour and economic development, culture and instruction – which regions are primarily involved in.

Moreover, recurring provisions of regional statutes on rights concern the all-encompassing protection of gender equality (for example, on the access to public offices) and the removal of any discrimination. Those provisions, according both to administrative judges and the Constitutional Court, are directly applicable to every person, and hence every citizen can claim them⁴².

4. The integration between the Italian constitutional order and supranational legal orders

Three main levels of protection of fundamental rights can be identified (apart from the regional) with: a) the Council of Europe and the European Convention for the Protection of Human Rights and Fundamental

⁴² Decision of the Regional Administrative Court of Campania of 7 IV 2011, No. 1985; decision of the State Council of 27 VII 2011, No. 4502; decision of the Regional Administrative Court of Sardinia of 2 VIII 2011, No. 864, http://www.studiolegalefranceschi.it/index.php?option=com_content&view=article&id=34:tar-sardegna-sez-ii-4-2-13-n-854-12&catid=10&Itemid=111 (accessed: 9 III 2014); decision of the CC of 2 IV 2012, No. 81/2012, <http://www.giurcost.org> (accessed: 9 III 2014).

Freedoms (ECHR), signed in Rome in 1950 and ratified in Italy by Act. No. 848/1955⁴³; b) the European Union (EU); and c) the Italian Constitution. This means that a “multilevel system” for the protection of rights in Europe is characterized by the coexistence of different sources, each of which recognizes and protects fundamental rights in different ways with varying degrees of efficiency. From these interconnections can arise conflicts between the different systems (the Court of Justice of the EU at the EU level; the European Court of Human Rights (ECrHR) at the Convention level; and the Italian Constitutional Court at the national level)⁴⁴. In the Italian legal order the principle of the immediate applicability of ECHR provisions may be considered as having been acquired, but this outcome was not automatic: it was the result of a long process of integration⁴⁵. Recently, the Supreme Court has reconstructed the evolutionary process of national jurisprudence for the implementation of the integration progress⁴⁶. The first case in which the Court recognized the direct applicability of ECHR provisions (as a legislative source of law) was affirmed by a decision which dates back to 1967⁴⁷, and this outcome was also upheld by subsequent decisions⁴⁸. This functionality of conventional provisions is derived from provisions of Art. 2 of the Constitution and this clause

⁴³ Act of 4 VIII 1955, *Ratifica ed esecuzione della Convenzione per la salvaguardia dei diritti dell'uomo e delle libertà fondamentali*, firmata a Roma il 4 novembre 1950 e del Protocollo addizionale alla Convenzione stessa, firmato a Parigi il 20 marzo 1952, No. 848/1955, <http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:1955-08-04;848> (accessed: 9 III 2014).

⁴⁴ G. de Vergottini, *Oltre il dialogo tra le Corti*, Bologna 2010, p. 88.

⁴⁵ L. Mezzetti, *Primazia del diritto sopranazionale e supremazia della Costituzione nella giurisprudenza costituzionale degli ordinamenti dell'Europa occidentale (Italia, Germania, Francia, Spagna)*, in: *Diritto costituzionale transnazionale*, ed. by L. Mezzetti, C. Pizzolo, Bologna 2012, p. 56 et seq.

⁴⁶ Decision of the SC of 12 VII 2006, No. 32678/2006 (*Somogyi*), <http://www.cortedicassazione.it/Notizie/GiurisprudenzaPenale/SezioniSemplici/SchedaNews.asp?ID=605> (accessed: 9 III 2014); M. Pietropoli, *L'impatto delle sentenze della Corte europea dei diritti dell'uomo sul sistema italiano*, in: *Diritto processuale dei diritti umani*, ed. by L. Mezzetti, Rimini 2013, p. 279 et seq.

⁴⁷ Decision of the SC of 16 XI 1967, No. 2762/1967, <http://www.italgiure.giustizia.it> (accessed: 9 III 2014).

⁴⁸ Decision of the SC of 14 VII 1986, No. 6978/1982 (*Iaglietti*), <http://www.italgiure.giustizia.it> (accessed: 9 III 2014); decision of the SC of 23 XI 1988, No. 1191 (*Polo Castro*), <http://www.italgiure.giustizia.it> (accessed: 9 III 2014); and – more significantly – decision of the SC of 5 V 1993, No. 2194 (*Medrano*), <http://www.italgiure.giustizia.it> (accessed: 9 III 2014). In this last case there was the direct application of article 8 of the European Convention, as interpreted by the Strasbourg court, and the judges recognized conventional provisions as having a relevant binding force over conflicting national legal sources.

would implicitly attribute to those provisions the nature of a general principle of the Italian legal order. This implies that conventional rules have a particular binding force over national legal sources, even when adopted subsequently. Scholars justify this particular force either by the principle *lex generalis non derogat priori speciali*, or the principle *pacta recepta sunt servanda*. In any case, beyond formalistic and positivistic approaches, the binding force of conventional provisions is due to its nature of general principle in the legal order, upheld by jurisprudence for years, before the constitutional reform of 2001.

This interpretive solution was also echoed by the jurisprudence of the Court of Justice of the EC⁴⁹. Indeed, the Luxembourg court also affirmed that it has the duty to consider the general principle of law set by the European convention (although the European Community wasn't party in it) and that the action of national judges should also be guided by the respect of those principles (even though there were as yet no conditions to appeal to the European Court in Strasbourg).

The crucial relevance of fundamental rights found express recognition in the Treaty on European Union (TEU). The Treaty of Maastricht (1992), Art. 6, provided that, "the Union must respect fundamental rights as guaranteed by the ECHR and as they result from constitutional traditions common to Member States, as general principles of Community law"⁵⁰. This provision was subsequently amended by the Amsterdam Treaty in 1997 and now, after the Lisbon Treaty, it states that the Union is founded on the principles of "liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to Member States"⁵¹. This rule has also provided a procedure to check serious breaches of human and fundamental rights committed by a Member State, which could lead to the suspension of the right to vote

⁴⁹ Judgment of the Court of 14 V 1974, *J. Nold, Kohlen – und Baustoffgrosshandlung contro Commissione delle Comunita' Europee*, case No. 4/73, *Raccolta della Giurisprudenza* 1974, p. 491, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61973CJ0004:IT:HTML> (accessed: 9 III 2014); Judgment of the Court of 13 XII 1979, *Liselotte Hauer contro Land Rheinland-Pfalz*, case No. 44/79, *Raccolta della Giurisprudenza* 1979, p. 3727, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61979J0044:IT:HTML> (accessed: 9 III 2014).

⁵⁰ Treaty on European Union, signed at Maastricht on 7 II 1992 (O.J. of the E.U. 1992, C 191 of 29 VII 1992).

⁵¹ Treaty of Amsterdam, signed on 2 X 1997 (O.J. of the E.U. 1997, C340, Art. 1, para. 8); Treaty of Lisbon signed on 13 XII 2007 (consolidated text Treaty on European Union, O.J. of the E.U. 2012, C 326, vol. 55 of 26 X 2012, p. 13, 19).

for the government's representative of that Member State in the Council (Art. 7 of the EU Treaty, as modified by the Lisbon Treaty). Furthermore, the Charter of Fundamental Rights of the European Union, proclaimed in Nice in December 2000 and now part of the Lisbon Treaty, represents another step towards the protection of human rights and, as set forth by Art. 52, para. 3 of the Charter, "the meaning and scope of those rights shall be the same as those laid down by the said Convention"⁵².

Looking at the national context, a fundamental step in the ECHR integration process was due to jurisprudence. Indeed, the Supreme Court judges recognized the ECHR as an atypical legal source and therefore a source that could not be annulled by an ordinary act. Furthermore, the Supreme Court's judges stated that a national law could not be applied if in contrast with conventional provisions. In the decision of 1 December 2006 in the *Dorigo* case, the Supreme Court affirmed that under Art. 670 of the Penal Code judges are bound to suspend the execution of any sentence on which the European Court of Human Rights has established that the verdict was reached in breach of Art. 6 of the ECHR on the right to fair trial, and that, consequently, the condemned has the right to call for a new trial, *even though the lawmakers have still not established the rules to do so*⁵³.

The recognition of the ECHR as an atypical legal source, and therefore a source that cannot be annulled by a source of law at the ordinary level, was also affirmed by the Constitutional Court⁵⁴. The Court, more recently, also specified a "juridical force" to be applied to international provisions on human rights⁵⁵. Additionally, it was observed that those rights are also expressed in the Constitution⁵⁶, not only by the general provision of Art. 2, which provides rights strictly connected to the protection of human dignity⁵⁷, but also because, beyond the textual coincidence of formal catalogues of rights, we can notice a continuous process of integration and recipro-

⁵² Charter of Fundamental Rights of the European Union proclaimed on 7 December 2000 (O.J. of the E.U. 2012, C 326, vol. 55 of 26 X 2012, p. 391, 406).

⁵³ Decision of the SC of 15 XI 2006, No. 4395, <http://www.cortedicassazione.it/Notizie/GiurisprudenzaPenale/SezioniSemplici/SchedaNews.asp?ID=745> (accessed: 9 III 2014).

⁵⁴ Decision of the CC of 12 I 1993, No. 10/1993, <http://www.giurcost.org> (accessed: 9 III 2014).

⁵⁵ Decision of the CC of 23 X 2006, No. 393/2006, <http://www.giurcost.org> (accessed: 9 III 2014).

⁵⁶ Decision of the CC of 1 XII 2008, No. 399/1998, <http://www.giurcost.org> (accessed: 9 III 2014).

⁵⁷ Decision of the CC of 29 IV 1999, No. 167/1999, <http://www.giurcost.org> (accessed: 9 III 2014).

cal influence between legal orders (national and supranational), which reciprocally integrate themselves because of the Courts' interpretation.

Those principles were also affirmed by the Supreme Court jurisprudence. In 2005 the Supreme Court stated that, "Act No. 648/1955, in ratifying and making executive the European Convention on Human Rights, has introduced into the national legal order fundamental rights mostly coincident with those set forth by article 2 of the Constitution. Referring to those rights, conventional rights would have a confirmatory nature"⁵⁸. The Court also added that, "conventional provisions would have a particular force that implies the impossibility to apply national law in contrast with conventional provisions of direct applicability"⁵⁹. Additionally, the same decision affirmed that, "ECHR provisions, as ratified in Italy, imply the duty upon national judges to abide by the jurisprudence of the European Court in Strasbourg, even though this entails, through the review of past criminal proceedings, challenging the principle of final sentences' non-alterability"⁶⁰.

It seems important to indicate some other cases, such as the decisions of the Supreme Court of 19 July 2002 and of 23 December 2005, with which the judges expressly recognized that in the event of a contrast between national laws and ECHR provisions, the conventional provisions have to prevail, due to the objective of substantial justice⁶¹. The relevant value of ECHR provisions in national legal orders is also due to the binding force (as they were sources of law) of the decisions of the European Court in Strasbourg, which establishes a state violation of conventional provisions. The nature of source of law applied to the decisions of the Strasbourg court has been confirmed after the amendment to Art. 46, consequent to the approval of the ECHR Protocol No. 14 approved on 13 May 2004 and ratified in Italy by Act No. 280/2005⁶².

⁵⁸ Decision of the SC of 23 XII 2005, No. 28507/2005, <http://www.stranieriinitalia.it/briguglio/immigrazione-e-asilo/2012/gennaio/sent-cass-28507-2005.html> (accessed: 9 III 2014).

⁵⁹ Decision of the SC of 23 XII 2005, No. 28507/2005. See also decisions of the SC of 26 I 2004, Nos. 1338, 1339, 1340, 1341/2004.

⁶⁰ Decision of the SC of 23 XII 2005, No. 28507/2005, <http://www.stranieriinitalia.it/briguglio/immigrazione-e-asilo/2012/gennaio/sent-cass-28507-2005.html> (accessed: 9 III 2014).

⁶¹ Decision of the SC of 19 VII 2002, No. 10542/2002, <http://www.italgiure.giustizia.it> (accessed: 19 I 2014); decision of the SC of 23 XII 2005, No. 28507/2005, <http://www.stranieriinitalia.it/briguglio/immigrazione-e-asilo/2012/gennaio/sent-cass-28507-2005.html> (accessed: 9 III 2014).

⁶² Act of 15 XII 2005, Ratifica ed esecuzione del Protocollo n. 14 alla Convenzione per la salvaguardia dei diritti dell'uomo e delle liberta' fondamentali emendante il sistema

The Act No. 12/2006 (“Execution of the European Court of Human Rights decisions”)⁶³ shall be interpreted from the same perspective. This act establishes that the Prime Minister is to ensure that government activity shall be consistent with European Court decisions. Additionally, the Prime Minister is to communicate any new European decisions to parliamentary commissions, so that they can be examined. He is also required to present to parliament an annual report on the state of implementation of those decisions.

The position of Italian courts to regularly incorporate Strasbourg’s decisions is confirmed by decree No. 289/2005. Under its provisions, each decision due to review an Italian sentence is to be published in conjunction with and as a complement to the original Italian verdict⁶⁴. Verdicts reached by the Strasbourg court that state a violation of any conventional provisions charge the parties with duties and rights. Consequently, any state which has been condemned has the duty to remove the prejudicial effects of its violation of conventional rules; the citizen has either the right to be compensated for the damages he experienced, or the right to obtain the so-called “*restitutio in integrum*” (for example, being put on trial again if, according to Art. 6 of the ECHR, the state was found to have violated the right to a “*procès équitable*”).

Recently, a confirmation of the interpretative results exposed above is offered by the text of Act No. 69/2005, according to which Italy executed the Council framework decision 2002/584/JHA of 13 June 2002⁶⁵. According to Art. 2, para. 1, Italy “shall execute the European arrest warrant, in respect of those rights and principles established by international treaties and the Constitution: a) fundamental rights assured by the ECHR, as ratified by the Act No. 848/1955 (specifically Art. 5 and 6

di controllo della Convenzione, fatto a Strasburgo il 13 maggio 2004, No. 280/2005, <http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:2005;280> (accessed: 19 I 2014).

⁶³ Act of 9 I 2006, Disposizioni in materia di esecuzione delle pronunce della Corte europea dei diritti dell’uomo, No. 12/2006, <http://www.camera.it/parlam/leggi/060121.htm> (accessed: 9 III 2014).

⁶⁴ Decree of 28 XI 2005, Regolamento recante integrazioni al testo unico di cui al decreto del Presidente della Repubblica 14 novembre 2002, n. 313, in materia di casellario giudiziario, No. 289/2005, <http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:presidente.repubblica:decreto:2005-11-28;289!vig> (accessed: 9 III 2014).

⁶⁵ Act of 22 IV 2005, Disposizioni per conformare il diritto interno alla decisione quadro 2002/584/GAI del Consiglio, del 13 giugno 2002, relativa al mandato d’arresto europeo e alle procedure di consegna tra Stati membri, No. 69/2005, <http://www.camera.it/parlam/leggi/050691.htm> (accessed: 9 III 2014).

of the ECHR) and its Protocols”⁶⁶. According to this principle, Art. 18, lit. g imposes the refusal of the handover of detainees if “people have not been judged in the respect of the rights granted by article 6 of the ECHR”. The provisions of Art. 2 and 18 of the Act No. 69/2005 – even expressing principles on extradition (Art. 720, para. 4, of the criminal procedural code; Art. 705, para. 2, lit. a, of the criminal procedural code) and principles on the recognition of foreign judgments on criminal law (Art. 733, para. 1, lit. b and c, of the criminal procedural code) already existent in the domestic legal order – in referring to Art. 5 and 6 of the ECHR, make clear the privileged role accorded to all ECHR rights, whose guarantees are raised to the level of general principles of the legal order.

In the *Somogyi* case, the Supreme Court stated that a final judgment of a national court can not be considered an obstacle to the claim of a *restitutio in integrum* when the trial has been celebrated *in absentia*⁶⁷. This means that it is always possible for someone who claims that the national trial has violated Art. 6 of the ECHR to obtain the condemnation of the State by the Strasbourg court and be put on trial again. Subsequently, in the *Dorigo* case, the Supreme Court, in interpreting Art. 670 of the procedural criminal law code, stated that the domestic judgment of condemnation could not be executed⁶⁸. Indeed, if the Strasbourg court declares a violation of Art. 6 of the ECHR, this verdict provides a basis for the right to stand trial again and, consequently, the first final sentence can not be carried out. After all, it has been observed that overcoming a national final judgment is implied by the ECHR system; the fact that the Strasbourg court may only deal with the matter after all domestic remedies have been exhausted implies that it decides on national final decisions (Art. 26 of the ECHR)⁶⁹.

By interpreting national law in accordance with Strasbourg’s pronouncements, the Italian Supreme Court contributed not only to the

⁶⁶ Act of 22 IV 2005, Disposizioni per conformare il diritto interno alla decisione quadro 2002/584/GAI del Consiglio, del 13 giugno 2002, relativa al mandato d’arresto europeo e alle procedure di consegna tra Stati membri, No. 69/2005.

⁶⁷ Decision of the SC of 12 VII 2006, No. 32678/2006, <http://www.cortedicassazione.it/Notizie/GiurisprudenzaPenale/SezioniSemplici/SchedaNews.asp?ID=605> (accessed: 9 III 2014).

⁶⁸ Decision of the SC of 15 XI 2006, No. 4935, <http://www.cortedicassazione.it/Notizie/GiurisprudenzaPenale/SezioniSemplici/SchedaNews.asp?ID=745> (accessed: 9 III 2014).

⁶⁹ Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4 XI 1950, http://www.echr.coe.int/Documents/Convention_ENG.pdf (accessed: 9 III 2014).

evolution of domestic criminal law, but also attests how the European Court is to be considered an indisputable reference for the correctness of the law. The reasoning of the Supreme Court stresses the binding force of both the ECHR and of the Strasbourg court. The two profiles are strictly connected by Art. 46, para. 1 of the Convention, according to which “[a]ny of the High Contracting Parties may at any time declare that it recognizes as compulsory *ipso facto* and without special agreement the jurisdiction of the Court in all matters concerning the interpretation and application of the present Convention”⁷⁰. Moreover, the Supreme Court recognizes the binding force of ECHR because its provisions would be of immediate applicability. Those rules would have a higher level than ordinary legal sources and the judges would avoid applying internal rules in contrast with conventional provisions.

To distinguish a binding force for Strasbourg’s decisions, the Italian Supreme Court highlights the link between the monopoly of the ECtHR in the interpretation of conventional rules (Art. 19 of the ECHR) and the obligation for the state parties of the Convention to execute the decisions of the Strasbourg court (Art. 46 of the ECHR)⁷¹. The valorisation of this link is consistent with the consciousness that the norms of the Convention are something more than the written text. These norms shall be individuated in the interpretation of conventional provisions given by the Strasbourg court. Consequently, the possibility of national jurisprudence to give an autonomous interpretation of conventional provisions must be excluded. According to this, states are free to execute Strasbourg’s decisions (Art. 46, para. 2, of the ECHR), but their action must be consistent with European jurisprudence.

Lastly, in *Drassich* case the ECtHR ruled against the Italian Court’s decision because it deemed there to have been a breach of Art. 6⁷². The ECtHR found, in fact, that in such proceedings Italian judges applied an *ex officio* requalification of the facts, which resulted in a worsening of the original charges, without any confrontation⁷³. Because of the

⁷⁰ Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4 XI 1950, United Nations Treaty Series (UNTS) 1955, vol. 213, No. 2889, p. 221, 246.

⁷¹ Decision of the SC of 15 XI 2006, No. 4935, <http://www.cortedicassazione.it/Notizie/GiurisprudenzaPenale/SezioniSemplici/SchedaNews.asp?ID=745> (accessed: 9 III 2014).

⁷² ECtHR, *Drassich v. Italy*, App. No. 25575/04, Judgment of 11 XII 2007 (Merits and Just Satisfaction), <http://www.duitbase.it/database/sentenze-corte-europea-dei-diritti-delluomo/552-Drassich-c-Italia> (accessed: 9 III 2014).

⁷³ ECtHR, *Drassich v. Italy*, App. No. 25575/04.

ex officio requalification, it became impossible for those charges to be extinguishable by prescription (the prescription terms always refer to the original *nomen iuris*). Furthermore, the requalification was made without informing the defendant and hence without allowing him any lawful reaction. The Supreme Court, by interpreting Art. 521 of the Criminal Code, acknowledged the obligation on each judge to duly pre-inform the defendant and his counsel of any possible modification to the original ascribed charges. Such a provision, read in conjunction with Art. 625-*bis* of the Criminal Code, led the Court to confirm that whenever a requalification occurs, there's no need to set a new trial, but rather that the same one can be resumed in consideration of the new accusations.

More recently, the Constitutional Court, with a decision from 2011, declared unconstitutional the provisions of Art. 630 of procedural criminal law code, because these provisions were not consistent with the provisions of Art. 46, para. 1 of the ECHR⁷⁴. Additionally, the administrative jurisprudence, by virtue of Art. 6 of the TEU (as modified by the Lisbon Treaty), declared the direct applicability of ECHR provisions. The State Council (the Supreme Court of administrative jurisdiction), deciding on an expropriation case, affirmed the necessity to apply "the principles on effectiveness of judicial protection stated by Art. 24 of the Constitution and by Art. 6 and 13 of the ECHR" and specified that the latter are "of immediate applicability further to Art. 6 TEU provisions"⁷⁵. Additionally, the Regional Administrative Tribunal of Lazio highlighted the great importance of Art. 6, para. 2 and 3 of the Treaty on the Functioning of European Union (TFEU) in the definition of the connection between the ECHR legal order and the Italian legal order⁷⁶. According to administrative judges, "the fact of the immediate applicability of conventional provisions among member countries of EU [...] opens new scenarios for the conformative interpretation or for the non-application of national laws in contrast with ECHR provisions, [...] especially when the Strasbourg court has already stated on the question. [...]. This will be valid for all conventional rights and not only for the rights that could have

⁷⁴ Decision of the CC of 4 IV 2011, No. 113, <http://www.giurcost.org> (accessed: 9 III 2014).

⁷⁵ Decision of the State Council of 3 III 2010, No. 1220/2010, <http://www.duitbase.it/database/giurisprudenza-nazionale/716-Consiglio-di-Stato-IV-Sez-n-12202010> (accessed: 9 III 2014).

⁷⁶ Decision of the Regional Administrative Tribunal of Lazio of May 18, 2010, No. 11984, <http://www.altalex.com/index.php?idnot=50310> (accessed: 9 III 2014).

a particular relevance in the European Union legal order"⁷⁷. According to the reasoning of administrative judges, "the recognition of ECHR fundamental rights as internal principles of the EU [...] has some immediate consequences because it leads to the immediate applicability of conventional provisions in European Countries members of EU, and consequently, also in Italy by Article 11" and, now, Art. 117, para. 1 of the Constitution⁷⁸.

As is already known, extensive integration between the ECHR and the Italian legal system has been lacking for years and the ECHR's integration was based exclusively on Italian execution of ordinary legislation and mostly due to the interpretive action of the judiciary. But according to Art. 6, para. 3 of the TFEU, as modified by the Lisbon Treaty, the Court of Justice of the European Union upholds ECHR rules since they are general principles of EU law⁷⁹. This implies that the implemented rights of the ECHR, like EU law principles, become binding under the Italian legal system *ex Art. 11* and *ex Art. 117, para. 1* of the Constitution⁸⁰.

The Constitutional Court followed paths not exactly coincident with those followed by the jurisprudence of the Supreme Court. The jurisprudence of the Supreme Court has often recognized conventional provisions as an atypical legal source and therefore a source that cannot be annulled by an act at the ordinary level. However, this was not at the level of constitutional law. The clearest dividing line was represented by the 2001 constitutional reform that amended Art. 117 of the Constitution, whose first paragraph provides that, "[l]egislative powers shall be vested in the State and the Regions in compliance with the Constitution and with the obligations deriving from EU legislation and international obligations"⁸¹. The Constitutional Court considered this provision the constitutional parameter by virtue of which ECHR's rules specify and integrate the duty of the legislator to respect international obligations⁸². Additionally,

⁷⁷ Decision of the Regional Administrative Tribunal of Lazio of May 18, 2010, No. 11984.

⁷⁸ Decision of the Regional Administrative Tribunal of Lazio of May 18, 2010, No. 11984.

⁷⁹ Treaty of Lisbon signed on 13 XII 2007 (consolidated text Treaty on European Union, O.J. of the E.U. 2012, C 326, vol. 55 of 26 XI 2012, p. 13, 19).

⁸⁰ Constitution of the Italian Republic of December 22, 1947 (effective January 1, 1948), cf. http://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf (accessed: 9 III 2014).

⁸¹ Constitutional Reform Act of 18 X 2001, No. 3/2001, <http://www.parlamento.it/parlam/leggi/01003lc.htm> (accessed: 9 III 2014).

⁸² Decision of the CC of 22 X 2007, No. 348/2007, <http://www.giurcost.org> (accessed: 9 III 2014).

the high value of conventional provisions makes them privileged instruments for the interpretation of domestic law. All of this represents the *humus* of a new approach to the problem of ECHR integration in the Italian legal order. In this context, the Italian Constitutional Court's decisions of 22 October 2007 constitute a new paradigm⁸³.

The Court, in both cases, decided around the provision of Art. 117, according to which state and regions should exert their legislative power in compliance with the constraints deriving from EU legislation and international obligations. It is important to stress that international obligations bind the state not only in its external profile, as a subject of international law, but also in its constitutional profile, since adherence to them is a requirement for the valid exertion of legislative power. In this context, ECHR provisions are considered "interposed rules" and consequently, the Court can exercise "conventional control", enabling it to verify and decide on the contrast between internal rules and conventional provisions. In accordance with this, ECHR rules integrate the constitutional parameter of interpretation and should be considered as "sub-constitutional" norms. Additionally, in the event of conflict between a domestic rule and a conventional one, the national judge shall not simply put aside the domestic provision, but shall ask the Constitutional Court to exercise the power of judicial review to verify the constitutional legitimacy of this provision.

More recently, the position of the Constitutional Court on the relationships between the Italian legal order, ECHR legal order and EU legal order has been resumed in case No. 80/2011. The Court highlighted two aspects. Firstly, the domestic judge shall interpret internal rules in compliance with conventional provisions⁸⁴. Here the purpose of interpretive conciliation is evident. Secondly, in the case of an interpretive conciliation being impossible, the judges have to appeal to the Constitutional Court⁸⁵. This means that no scope for an immediate applicability of ECHR provisions will be recognized (although some scholars thought differently and some ordinary judges did this). Moreover, according to the Constitutional Court's position: a) only the European Court of Human Rights can interpret conventional rules, and b) in the case of a contrast between ECHR and the Constitution, conventional rules (which are

⁸³ Decision of the CC of 22 X 2007, No. 348/2007; decision of the CC of 22 X 2007, No. 349/2007, <http://www.giurcost.org> (accessed: 9 III 2014).

⁸⁴ Decision of the CC of 7 III 2011, No. 80/2011, <http://www.giurcost.org> (accessed: 9 III 2014).

⁸⁵ Decision of the CC of 7 III 2011, No. 80/2011.

considered sub-constitutional legal sources) do not integrate the constitutional parameter.

Three main consequences emerge from this assumption. Firstly, the impossibility to diverge, even marginally, from Strasbourg's interpretation. Secondly, the peremptory confirmation of the hierarchy of sources existing between constitutional and conventional norms. Thirdly, whenever contrasts arise between the ECHR and the Italian Constitution, the former is to be considered inadequate to integrate the latter's text. Such a position shall be interpreted not as requiring a conventional norm's total annulment, but rather as only implying that the norm is to be set aside just for the case in hand.

After having resumed its conceptualisation of conventional provisions in the Italian legal order, the Court analyses the possible consequences of the Lisbon Treaty. Has ECHR become part of the European Treaty (with the obvious consequences for the structure of the legal sources of law)? The Constitutional Court has excluded this, also because the EU has not yet acceded to the Convention⁸⁶. With this decision the Constitutional Court finds a precise duty for the ordinary judge; indeed, the binding nature of an interpretation consistent with the rules of the Convention means that the judge has the duty to find any possible interpretation that could be in compliance with ECHR⁸⁷. If this interpretation is vain, the judge can ask for the intervention of the Constitutional Court⁸⁸.

The valorisation of the interpretive power of judges is highly significant. Significantly, with the decision of 16 July 2009, the Constitutional Court considers that the previous tentativeness in interpreting internal rules in compliance with conventional provisions is a kind of a "*pre-condition*" to activate a judicial review judgement⁸⁹. In this sense, the Constitutional Court can consider admissible only a question on the constitutionality of a norm that could not have been interpreted in compliance with conventional provisions (in the meaning given them by the Strasbourg court). This technique of interpretation (so-called *adapting interpretation*) was already used by ordinary judges⁹⁰, but significantly, only in

⁸⁶ Decision of the CC of 7 III 2011, No. 80/2011.

⁸⁷ Decision of the CC of 7 III 2011, No. 80/2011.

⁸⁸ Decision of the CC of 7 III 2011, No. 80/2011.

⁸⁹ Decision of the CC of 16 VII 2009, No. 239/2009, <http://www.giurcost.org> (accessed: 9 III 2014).

⁹⁰ Cf. decision of the SC of 26 I 2004, No. 1339 to 1341/2004, <http://www.italgiure.giustizia.it> (accessed: 19 I 2014). With that decision it was imposed on the judge to follow the interpretation of conventional rules given by the Strasbourg court.

consequence of the decision of the Constitutional Court, this technique has become a real bond for the ordinary judge. The Constitutional Court upholds that ECHR's provisions *live* in the interpretation of the Strasbourg court⁹¹ and their main characteristic is the fact that in national orders they are "interposed norms", which shall be interpreted exactly as the Strasbourg court did⁹². Consequently, the domestic jurisprudence, both constitutional and ordinary, is unconditionally bound by the interpretation of conventional rules given by Strasbourg's jurisprudence, and the fundamental steps of this process are the decisions of the Constitutional Court of 22 October 2007⁹³.

From the decisions of 2007 emerged an "*eminent interpretative function*" of the Strasbourg court and the Constitutional Court restates that the ECHR's rules and their interpretation are under the jurisprudence of the European Court of Human Rights⁹⁴. Therefore, it is the sub-constitutional disposition that enters the Italian order and becomes the norm, as the product of interpretation, and not the ECHR's provision. However, the Court, emphasizing the role of the ECtHR, also affirms, in relation to the control over the constitutional legitimacy of domestic legislation, that ECtHR decisions are not unconditionally binding. This means that "the judicial review of legislation has always to be informed to a reasonable balance between the international bounds *ex Art. 117, para. 1* of the Constitution and the protection of other constitutional interests"⁹⁵. So with the decisions cited, the Constitutional Court did not expressly recognize an exclusive interpretive monopoly of the Strasbourg court in determining the exact meaning of conventional provisions.

⁹¹ Decision of the CC of 22 X 2007, No. 348/2007, <http://www.giurcost.org> (accessed: 9 III 2014); decision of the CC of 22 X 2007, No. 349/2007, <http://www.giurcost.org> (accessed: 9 III 2014).

⁹² Decision of the CC of 25 II 2008, No. 39/2008, <http://www.giurcost.org> (accessed: 9 III 2014).

⁹³ Decision of the CC of 22 X 2007, No. 348/2007, <http://www.giurcost.org> (accessed: 9 III 2014); decision of the CC of 22 X 2007, No. 349/2007, <http://www.giurcost.org> (accessed: 9 III 2014); decision of the CC of 25 II 2008, No. 39/2008, <http://www.giurcost.org> (accessed: 9 III 2014); decisions of the CC of 29 VII 2008, Nos. 311 and 317/2008, <http://www.giurcost.org> (accessed: 9 III 2014); decisions of the CC of 26 V 2010, Nos. 187 and 196/2010, <http://www.giurcost.org> (accessed: 9 III 2014).

⁹⁴ Decision of the CC of 22 X 2007, No. 348/2007, <http://www.giurcost.org> (accessed: 9 III 2014); decision of the CC of 22 X 2007, No. 349/2007, <http://www.giurcost.org> (accessed: 9 III 2014).

⁹⁵ Decision of the CC of 22 X 2007, No. 348/2007, <http://www.giurcost.org> (accessed: 9 III 2014).

Later, in the decision of 20 February 2008, the Constitutional Court spelled out its position more clearly to clarify what in the previous year's decisions seemed to have remained untold. The Court affirmed that as, in its view, had already been stated in the 2007 decisions, the special status of the ECHR provisions lies in the fact that with regard to their interpretation, all state parties are bound to abide by ECtHR jurisprudence (except for cases involving matters of constitutionality)⁹⁶. Hence, the absolute interpretative bounds of conventional jurisprudence in the determination of the exact meaning of the ECHR's provisions were confirmed. These bounds did not clearly emerge from the decisions of 2007 but were confirmed by the decisions No. 311 and 317 in 2009⁹⁷. With those cases the Constitutional Court affirmed that unless the ECHR's provisions are in conflict with the Constitution, "it can not interpret conventional rules in a way divergent from that of the Strasbourg court"⁹⁸. The interpretive function of the Strasbourg court is now so deep and eminent as to exclude the possibility for national, and even constitutional, judges to integrate the meaning of conventional provisions that have been already interpreted by the ECtHR. In any case, the possibility still exists that the same court accords to the states the power to uphold an autonomous interpretation of conventional provisions. This, as well specified by the Italian Constitutional Court with the decision of 29 July 2008, can occur when, "*in case of reasons of relevant public interest*", the legislator can avoid the ban to interfere with the administration of justice, stated by Art. 6 of the ECHR⁹⁹.

What emerges from the decisions examined above is the consciousness of national jurisprudence, both of the Constitutional Court and of the Supreme Court, that the text of the ECHR lives through the decisions of the Strasbourg court, which renders it meaningful. This is confirmed by national ordinary jurisprudence. Indeed, it is rare that any national decision, whether asking the Constitutional Court to exercise a judicial review or evaluating the coherence of national legal sources with conventional provisions, in referring to an article of the ECHR, does not also

⁹⁶ Decision of the CC of 20 II 2008, No. 38/2008, <http://www.giurcost.org> (accessed: 9 III 2014).

⁹⁷ Decisions of the CC of 29 VII 2008, Nos. 311 and 317/2008, <http://www.giurcost.org> (accessed: 9 III 2014).

⁹⁸ Decision of the CC of 29 VII 2008, No. 311/2008, <http://www.giurcost.org> (accessed: 9 III 2014).

⁹⁹ Decision of the CC of 29 VII 2008, No. 311/2008, <http://www.giurcost.org> (accessed: 9 III 2014).

refer to the position expressed by the Strasbourg court. The necessity for the national judge to conform their jurisprudence to the interpretation of conventional rules stated by the Strasbourg court has been recently highlighted by the Constitutional Court with decisions No. 187 and 196 of 2010¹⁰⁰. In the first case, the Court, in deciding a case about welfare rights and after having recalled the evolution of Strasbourg's jurisprudence, affirmed that "the judicial review of national legislation has to be done considering interpretive results of Strasbourg's jurisprudence about the principle of non discrimination stated by Art. 14 of the Convention"¹⁰¹. In the decision of 26 May 2010, the Constitutional Court affirms that "from the jurisprudence of the Strasbourg court, in particular on interpretation of Art. 6 and 7 of the Convention, the principle can be derived according to which every kind of punitive measure adopted by the State has to respect the limits and regulate the State grant to offences"¹⁰². These decisions clearly show how the role of the Strasbourg court has changed in the last years. The procedure of decisions and the effect of the judgements have not been formally changed, but it is the meaning and the influence of the interpretive activity of this court on national jurisprudence that has changed markedly.

The decisions cited above confirm the position of those scholars who had asserted years ago that the decisions taken in Strasbourg, even in absence of any formal provision or rule in this sense, will have a universally recognized binding force. Consequently, they could both determine the illegitimacy of national provisions in contrast with ECHR ones and orient and influence the interpretation of national legal sources.

Conclusions

The globalization of human rights, and in particular the protection of the principle of human dignity, implies not only a close synergy between the international and domestic order in Italy to protect rights and promote human dignity, but also makes them inviolable in any place and at

¹⁰⁰ Decisions of the CC of 26 V 2010, Nos. 187 and 196/2010, <http://www.giurcost.org> (accessed: 9 III 2014).

¹⁰¹ Decision of the CC of 26 V 2010, No. 187/2010, <http://www.giurcost.org> (accessed: 9 III 2014).

¹⁰² Decision of the CC of 26 V 2010, No. 196/2010, <http://www.giurcost.org> (accessed: 9 III 2014).

any latitude; a tendency which seems to occur even before the pre-requisites for making these rights acceptable everywhere (such as peace, prosperity, equality, solidarity) are created and some sort of degree of their effectiveness is established. The criterion to distinguish between *absolute constitutional principles* and *relative constitutional principles* is based on refractoriness, which is typical of the former, and usability, a feature of the latter, to become the subject of weighting and balancing in case of conflict. In this sense, the Italian constitutional system features two absolute principles: an instrumental one and a material one. The nature of the absolute constitutional material principle is human dignity and the constitutional absolute instrumental/procedural principle is represented by the proposition contained in the provision (Art. 11 of the Constitution) that conveys within the constitutional fundamental principles of the domestic block of constitutionality, the international and regional blocks of constitutionality, and in particular the principle that is at the pinnacle of both blocks, human dignity, drawing it from the merits of the principles and values expressed by the international and regional community.

The international block of constitutionality is formed by the Universal Declaration of Human Rights, its essential core, the Charter of the United Nations, the International Bill of Rights (New York Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights, both of 1966, accompanied by the optional Protocols thereto), as well as the core treaties of international law of human rights¹⁰³. In Europe, as recognized by the Court of Justice in its Opinion No. 1 of 14 December 1991, in relation to the nature of the European Community, the Treaty on the European Union and the Treaty on the Functioning of the European Union, although concluded in the form of international agreements, are the first two elements of the Constitutional Charter of the community of law that is the European Union¹⁰⁴. The third element of the constitutional

¹⁰³ Universal Declaration of Human Rights of 10 December 1948, Unated Nations General Assembly Resolution 217A (III); General Assembly Official Records, 3rd. sess. 1948, p. 71 et seq.; Charter of the United Nations signed at San Francisco on 26 VI 1945, in: *Basic Documents of the United Nations*, ed. by L.B. Sohn, London 1956, p. 1 et seq.; International Covenant on Civil and Political Rights signed at New York on 26 XI 1966, UNTS 1976, vol. 999, No. 14668, p. 171 et seq. (for Optional Protocols see UNTS, vol. 999, p. 302; UNTS, vol. 1642, p. 414 et seq.); International Covenant on Economic, Social and Cultural Rights signed at New York on 16 XII 1966, UNTS 1976, vol. 993, No. 14531, p. 3 et seq. (for Optional Protocol see UN Doc. A/63/435, C.N.869.2009.TREATIES-34).

¹⁰⁴ Court of Justice of the European Union, Opinion of 14 XII 1991, No. 1/91, European Court Reports 1991, p. I-6099 et seq.

charter of polycentric nature must be identified with the Charter of Fundamental Rights of the European Union, to which the Treaty of Lisbon has accorded the same legal value as the Treaties (Art. 6 of the TEU)¹⁰⁵. The block of constitutionality is complemented by the European Social Charter¹⁰⁶, by the European Convention for the Protection of Human Rights and Fundamental Freedoms, to which the Union is party pursuant to Art. 6 of the TEU as amended in Lisbon, by case law of the European Court of Human Rights and by the constitutional traditions common to the Member States, showing this complex the typical elements of a formal constitution and the structural components characterizing a substantial Constitution.

The axiological dimension of international and regional legal systems permeates and pervades the structure of the fundamental principles enshrined in the national Constitution, the fundamental principles within the international block of constitutionality and within the regional blocks of constitutionality, operating in a relationship of mutual complementarity and harmony with the fundamental principles of the national constitutional system. Three large constitutional sets, animated by a movement towards mutual convergence, are destined to merge into a single pool of legal culture. This is, beyond hesitation and indecision, skepticism and doubts, an irreversible phenomenon, namely that the constitutional court, the Supreme Court of Cassation and supranational courts are called to govern in order to reach a common identity and to achieve a reconciliation of the right to justice.

PRAWA CZŁOWIEKA WE WŁOSZECH W ORZECZNICTWIE SĄDU NAJWYŻSZEGO, TRYBUNAŁU KONSTYTUCYJNEGO I TRYBUNAŁÓW PONADNARODOWYCH (CZĘŚĆ II)

Streszczenie

Zgodnie z wielowarstwowym systemem ochrony praw człowieka włoski porządek konstytucyjny wyznacza zasady odnoszące się do ochrony praw i podstawowych wolności. Cała pierwsza część Konstytucji, ujęta w cztery rozdziały, poświęcona została uznaniu fundamentalnych zasad i zapewnieniu gwarancji praw politycznych,

¹⁰⁵ Treaty of Lisbon signed on 13 XII 2007 (consolidated text Treaty on European Union, O.J. of the E.U. 2012, C 326, vol. 55 of 26 XI 2012, p. 13, 19).

¹⁰⁶ European Social Charter signed at Turin on 18 X 1961, European Treaty Series, No. 035, <http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=035&CL=ENG> (accessed: 21 X 2013).

gospodarczych, społecznych i kulturalnych. System uznania praw i wolności został dodatkowo uzupełniony przez indywidualizację obowiązków obywateli, a także pozostałych członków społeczeństwa.

Na mocy postanowień zawartych w tytule V części II Konstytucji regionalne i lokalne organy samorządowe zostały wyposażone w funkcje i kompetencje związane z ochroną praw człowieka. Nie bez znaczenia w zakresie ochrony tych praw pozostaje jurysprudenca Trybunału Konstytucyjnego i Sądu Najwyższego. W drodze stałego dialogu z Trybunałem Sprawiedliwości Unii Europejskiej oraz z Europejskim Trybunałem Praw Człowieka linia orzecznicza tych instytucji przyczyniła się znacząco do integracji i rozwoju praw pierwotnie uznanych w tekście Konstytucji. Czyniąc użytek z postanowień, które umożliwiają wprowadzenie do wewnątrz krajowego porządku prawnego praw i wolności wyznaczonych w instrumentach międzynarodowych (art. 2 i 117 ust. 1 Konstytucji), Trybunał Konstytucyjny i Sąd Najwyższy przyczyniły się do poszerzenia katalogu praw konstytucyjnych we Włoszech. Innymi słowy, sądy te skutecznie wykorzystały potencjał zawarty w oryginalnych postanowieniach Konstytucji, by na podstawie wolności zagwarantowanych przez społeczność międzynarodową na gruncie prawa pozytywnego i orzecznictwa sądów ponadnarodowych inkorporować nowe prawa do włoskiego porządku konstytucyjnego.

Słowa kluczowe: prawa człowieka – Włochy – konstytucja – Trybunał Konstytucyjny – Sąd Najwyższy