Italy

Constitutional Court at the crossroads between constitutional parochialism and co-operative constitutionalism. Judgments No. 348 and 349 of 22 and 24 October 2007.

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INTRODUCTION

It is never too late. In two decisions handed down at the end of October 2007,[1] the Italian Constitutional Court seems finally to have begun to take seriously one of the Italian Constitution's fundamental principles: the openness to international law which is embodied in Articles 10, 11 and – the provision chosen by the Constitutional Court in the judgments being examined – 117, paragraph 1 of the Constitution, which was added by the constitutional revision of 2001.[2] In particular, the two decisions focus on the relationship between the Italian constitutional legal order and the Convention for the Protection of Human Rights and Fundamental Freedoms (the European Convention on Human Rights, as amended; hereinafter, the 'ECHR'). The final outcome of the two judgments was that an Italian statute providing awards of compensation for the expropriation of buildable land was declared unconstitutional because it conflicts with the ECHR as interpreted by the European Court of Human Rights.

In spite of certain differences in the reasoning employed, the analysis of the two judgments will be carried out in parallel. First, the relevant domestic law and

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[1] Constitutional Court, judgment No. 348, 22 Oct. 2007 and No. 349, 24 Oct. 2007.

[2] Art. 10, para. 1, prescribes that 'the Italian legal order complies with the norms of international law generally recognised.' Art. 11 provides that: 'Italy rejects war as an instrument of aggression against the freedoms of other peoples and as a means for settling international controversies; it agrees, on conditions of equality with other states, to the limitations of sovereignty necessary for an order that ensures peace and justice among Nations; it promotes and encourages international organizations having such ends in view.' In accordance with Art. 117, para. 1 (added by the constitutional revision of 2001): 'legislative powers shall be vested in the State and the Regions in compliance with the Constitution and with the constraints deriving from EU legal order and international obligations.'

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the constitutional case-law relating to the land expropriation saga will be briefly summarised. Secondly, the legal and procedural background of the two judgments will be described. Thirdly, we will analyse the state of the relevant case-law of the Constitutional Court and of the ordinary courts relevant to the relationship between the national legal order and the ECHR. Fourthly, the final outcome of the judgments will be considered and comment made on the Court's reasoning for both the decisions. Finally, a few concluding remarks will be dedicated to investigating the dangers and advantages of the new outlook of the Constitutional Court, from now on, and how it affects the difficult issues concerning the resolution of conflict between legal systems.

Relevant domestic law and practice as regards expropriation

Before embarking in the analysis of the relevant domestic law as regards the amount of compensation for expropriation, it is perhaps not superfluous to make brief reference to the expropriation procedure for public interest according to Italian law.[3] The said procedure is articulated in four essential steps.

Firstly, the public administration has to subject the private property to a 'expropriation constraint', which means the private owner cannot freely dispose of his property anymore because it is officially destined to be expropriated. Secondly, the administrative authority must officially declare, by a specific administrative act, the public interest in the property. This condition is expressly provided for by Article 42, paragraph 3 of the Constitution as a pre-requisite of a lawful expropriation.[4] The expropriation procedure continues with its third phase, which consists in determining the compensation for the expropriation to be paid to the private owner. In the fourth and last stage the public administration adopts the administrative act called an expropriation decree, i.e., a legitimate order of expropriation by which the property is legally transferred by the private owner to the State.

With regard, more particularly, to the amount of the compensation for expropriation, section 39 of Law No. 2359/1865 provides that where land has been expropriated, the compensation to be paid should correspond to its market value at the time of the expropriation. Article 42 of the Constitution, as interpreted by the Constitutional Court,[5] allows for the payment of compensation for expropriation in an amount less than the market value of the land. Law No. 865/1971 (supplemented by section 4 of Legislative Decree No. 115/1974, which subse-

[3] The last main relevant law is the 'Testo unico' of 8-6-2001, n. 327.

[4] Art. 42, para. 3 of Italian Constitution provides that: 'Private property, in cases determined by law and with compensation, may be expropriated for reasons of common interest.'

[5] *See*, *inter alia*, Constitutional Court, judgment No. 138, 6 Dec. 1977.

quently became Law No. 247/1974, and by section 14 of Law No. 10/1977) laid down new criteria according to which compensation for any land, whether it was agricultural or buildable land, should be assessed as though it were agricultural land.

In judgment No. 5/1980, delivered on 25 January 1980, the Constitutional Court declared Law No. 865/1971 unconstitutional on the ground that it afforded the same treatment to two very different situations, by providing for the same form of compensation for buildable and agricultural land.[6] After judgment No. 5/1980 had declared Law No. 865/1971 unconstitutional, the Italian Parliament enacted Law No. 385/1980, of 29 July 1980, which reaffirmed, but this time on a provisional basis, the criteria that had been declared unconstitutional. Law No. 385/1980 provided that compensation should be paid in the form of an advance, to be supplemented by a payment calculated on the basis of a subsequent law that would lay down specific compensation criteria for buildable land.

In judgment No. 223/1983, of 15 July 1983, the Constitutional Court declared Law No. 385/1980 unconstitutional on the grounds that it made the award of compensation for the expropriation of buildable land subject to the enactment of a future law and that it reintroduced – even if only on a provisional basis – compensation criteria that had been declared unconstitutional. In connection with this, the Constitutional Court reiterated that the legislature had to accept that a law that had been declared illegal ceased its effectiveness immediately, and stressed the need to draw up provisions for substantial awards of compensation for expropriation (*serio ristoro*).

As a result of judgment No. 223/1983, section 39 of Law No. 2359/1865 came back into force. Consequently, the compensation payable for buildable land was to correspond to the land's market value.[7] Section 5 *bis* of Law No. 359/1992 introduced a 'temporary, exceptional and urgent' measure aimed at stabilising public finances, to remain valid until structural measures were adopted. That provision applied to any expropriation under way and to any pending proceedings related thereto. Section 5 *bis* provides that the compensation payable for the expropriation of buildable land is to be calculated using the following formula: market value of

[6] The scope of a decision of the Constitutional Court declaring a law illegal is not limited to the case in question but is *erga omnes*. It is retroactively applicable in that the law declared unconstitutional can no longer produce any legal effects or be applied starting from the day after the publication of the decision (Art. 136 of the Constitution, taken in conjunction with section 1 of Constitutional Act No. 1 of 1948 and section 30(3) of Law No. 87/1953). When the Constitutional Court declares a law unconstitutional, the legislative provisions that had previously been applicable come back into force (*reviviscenza*), unless they also have been declared unconstitutional.

[7] *See*, for example, *Corte di Cassazione*, Section I, judgment No. 13479, 13 Dec. 1991; *Corte di Cassazione,* Section I, judgment No. 2180 of 22 Feb. 1992; and *Corte di Cassazione,* Plenary section, judgment No. 3815 of 29 Aug. 1989.

the land plus the total of the annual rent over the last ten years, divided by two, minus a 40% deduction. In such cases, the compensation corresponds to 30% of the market value. On the basis of paragraph 7 *bis* of section 5 *bis*, the 40% deduction can be avoided and a 10% addition is provided when the basis for the expropriation is not an expropriation order but a so-called 'appropriative occupation' (*occupazione appropriativa*). This happens when public works have been carried out in the occupied area using an urgent procedure which is not followed, as in the normal case, by a legitimate order of expropriation, which, as we have seen, generally concludes the ordinary expropriation procedure. Another case of non-application of the 40% deduction is when the expropriation took place before section 5 *bis* came into force.[8] In such cases, the resulting compensation corresponds to 50% of the market value.

The Constitutional Court has held section 5 *bis* of Law No. 359/1992 and its retrospective application to be compatible with the Constitution on account of the urgent and temporary nature of the Law.[9] In particular, the Court has held that the criteria for calculating the compensation award were not in conflict with the Constitution because the private owners are assured a not 'risible economic relief', according to the social function assigned to property rights by Article 42, paragraph 3, of the Constitution.

In contrast, as will be seen in the next section, which recalls the main arguments of the referring judges, the European Court of Human Rights has more recently expressed a different view on the same issue. In particular, in relation to the normal expropriation procedure, the compensation payable for buildable land must have a reasonable link with the land's market value. In this regard, according to the case-law of the European Court of Human Rights, it is not the land's current market value that is relevant, but rather the value at the time when the expropriation procedure began.[10] In relation to the case of unlawful expropriation,[11] the compensation payable for buildable land must correspond, according to Strasbourg's judges, to the land's market value,[12] plus reimbursement for the loss of profits and payment of damages.

[8] *See* the Constitutional Court's judgment No. 283/1993, of 16 June 1993.

[9] Judgment No. 283/1993, and judgment No. 442/1993, of 16 Dec. 1993. To this it should be added that eight years later, the Code of Expropriation Provisions (Presidential Decree No. 327/2001, subsequently modified by Legislative Decree No. 302/2002), which came into force on 30 June 2003, codified the existing provisions and the principles established by the relevant case-law in respect of expropriation. Art. 37 of the Code reiterates the main criteria for calculating compensation for expropriation as set forth in section 5 *bis* of Law No. 359/1992.

[10] *See Belvedere Alberghiera* (Appl. No. 31521/96) ECHR, 30 Oct. 2003; *Carbonara ventura* v. *Italy* (Appl. No. 24638/94) ECHR, 11 Dec. 2003.

[11] The case-law of the European Court of Human Rights does not include the procedure provided by para. 7 *bis* of Art. 5 *bis* of Law No. 359/1992 which has been called '*espropriazione appropiativa*'.

[12] *See S. Scordino* v. *Italy* (Appl. No. 36813/97) ECHR , 26 March 2006.

Procedural background of the Constitutional Court's decisions

As it is well-known, the Italian Constitutional Court can consider an issue regarding the suspected unconstitutionality of a law in two ways. The first possibility (*giudizio in via incidentale*) is that the ordinary judge can suspend a pending case in front of him and petition the Constitutional Court when he has serious doubts about the constitutionality of a law which must be applied in that case. The second possibility (*giudizio in via principale*) is that the State or a Region (never individuals), in the absence of a pending case, directly questions the Constitutional Court about the asserted unconstitutionality of regional or state law affecting the jurisdiction, respectively, of the State or of the Region(s).

In the two cases under analysis, the issue of constitutionality was addressed to the Constitutional Court by the first procedure described above. More specifically, the ordinary judges in the two cases alleged, first of all, that section 5 *bis* of Law No. 359/1992, by imposing a disproportionate burden on account of the inadequate amount of the expropriation compensation, violated the right to property protected by Article 1, Protocol 1 of the ECHR.[13] Secondly, they also complained that the retrospective application of section 5 *bis* of Law No. 359/1992 violated the right to a fair trial protected by Article 6, paragraph 1 of the ECHR.[14] According to the ordinary judges' view, these conflicts with the ECHR should not have led, as requested by the private parties in front of them, to a judicial decision on the non-application of the law in question, but rather to its annulment by the Constitutional Court. This annulment would have been justified, *inter alia*, by the asserted breach of Article 117, paragraph 1 of the Constitution, which demands that regional and state laws must comply with the Constitution and the constraints under the EU legal order and other international obligations. Among the latter should certainly be included the obligations deriving from the ECHR.

In relation to the alleged violation of Article 6 of the ECHR, the ordinary judges recalled that recently the European Court of Human Rights held, in rela-

[13] Art. 1, Protocol 1 ECHR: 'Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.' With regard to the same provision, the applicants also complained of an interference by the legislature in the judicial process on account of the enactment and application to their case of section 5 *bis* of Law No. 359/1992. They complained, among other things, that they did not receive a fair hearing because, when the amount of their expropriation compensation was determined, the question submitted to the national Courts had been settled by the legislature and not by the judiciary.

[14] Art. 6, para. 1 of ECHR: '1. In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing within a reasonable time by [a] ... tribunal ...'.

tion to the contested provision, that by modifying the law applicable to awards of compensation in respect of expropriations that were underway and to the related pending judicial proceedings, other than those on which a final ruling regarding the principle of compensation had been given, 'section 5 *bis* of Law No. 359/1992 applied new compensation rules to situations that had arisen before it came into force and had already given rise to claims to compensation – and even to proceedings pending on that date – thereby producing a retrospective effect.'[15] Although, according to the European Court, the legislature is not precluded in civil matters from adopting new retrospective provisions to regulate rights arising under existing law, it has also affirmed that: 'the principle of the rule of law and the notion of fair trial enshrined in Article 6 of the Convention preclude any interference by the legislature – other than on compelling grounds of the general interest – with the administration of justice designed to influence the judicial determination of a dispute.'[16] Therefore, in the eyes of the referring courts, the application of the Law to pending cases was in violation of the fair trial clause of Article 6 of the Convention.

Concerning the alleged violation of Protocol 1, the referring courts emphasised that the consolidated case-law of the European Court of Human Rights requires that any interference with the right to the peaceful enjoyment of possessions must strike a 'fair balance' between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights.[17] In this connection, the European Court of Human rights has already found that the taking of property without payment of an amount reasonably related to its value will normally constitute a disproportionate interference.[18] According to the referring courts, this was precisely the problem with section 5 *bis* of Law 359/1992. In this regard, the judges' main argument was that, by violating Article 1 Protocol 1 and Article 6 of the ECHR, section 5 *bis* of Law 359/1992 was also in

[15] *S. Scordino* v. *Italy* [para. 128].

[16] *S. Scordino* v. *Italy* [para. 126]. *See Zielinski and Pradal & Gonzales* v. *France* [GC] (Appl. Nos. 24846/94 and 34165/96–34173/96) ECHR 1999-VII, para. 57; *Stran Greek Refineries and Stratis Andreadis v. Greece* Series A No. 301-B (judgment of 9 Dec. 1994); and *Papageorgiou* v. *Greece*, ECHR 1997-VI (judgment of 22 Oct. 1997).

[17] *S. Scordino* v. *Italy* [para. 93]. The Court argued in this regard: that 'The concern to achieve this balance is reflected in the structure of Article 1 as a whole, including therefore the second sentence, which is to be read in the light of the general principle enunciated in the first sentence. In particular, there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised by any measure applied by the State, including measures depriving a person of his possessions.' *See Pressos Compania Naviera S.A. and Others* v. *Belgium* Series A No. 332 [38] (judgment of 20 Nov. 1995); *The former King of Greece and Others* v. *Greece* [GC] (Appl. No. 25701/94) ECHR 2000-XII [89-90]; and *Sporrong and Lönnroth* [para. 73].

[18] *See S. Scordino* v. *Italy* [para. 95] and *The Former King of Greece* [para. 8].

breach of Article 117, paragraph 1[19] of the Italian Constitution, which prescribes that 'legislative powers shall be vested in the State and the Regions in compliance with the Constitution and with the constraints deriving from the EU legal order and international obligations.' In other words, it was argued that Italian law, by violating the relevant provisions of the ECHR as interpreted by the European Court of Human Rights, was indirectly in breach of its duty to respect international law imposed on state and regional law by Article 117, paragraph 1 of the Constitution.

State of the relevant case-law relating to the relationship between the national legal order and the ECHR

This was not the first time that the Italian Constitutional Court had been asked to identify the role played by the ECHR in the Italian legal system. In this regard, an important distinction in time should be drawn between the situation before and after the constitutional revision of 2001, which added Article 117, paragraph 1. In order fully to understand the reasoning and the final outcome of the two decisions noted here, it is important to set them in the context of previous case-law in the light of the meaning attributed by Italian constitutional scholars and by the Constitutional Court to the relevant constitutional provisions.

Starting with the first relevant judgments, the Constitutional Court has substantially argued that, in keeping with the dualistic matrix of the Italian legal system, the ECHR, as well as all ratified international Treaties, has the same position in the hierarchy of Italian sources of law as that assigned to the national Act through which it has been included in the internal legal order.[20] Given the fact this has happened for the ECHR – as for all other international Treaties – via an ordinary statute,[21] the Constitutional Court, apart from an isolated decision,[22] has, prior to the judgments analysed here, attributed to the ECHR the legal value proper to an ordinary statutory law. To put it simply, according to this jurisprudential orientation, the ECHR could be abrogated by any successive statutory law that conflicted with it. The abrogative effect, in the absence of any constitutional protection for the ECHR, would result in the *lex posterior derogat legi priori* rule being

[19] Section added in 2001 in the context of the constitutional revision of Title V, related to the relationship between the State and the Regions.

[20] Constitutional Court, judgments No. 188/1980, No. 153/1987, No. 323/1989 and No. 315/1990.

[21] Law 4 -8-1955 n. 848

[22] Decision No. 10/1993 in which the Constitutional Court speaks, in relation to the ECHR and its ratification by ordinary law, in terms of an 'atypical source of law'. This special status enjoyed by ECHR, according to this judgment, would place it in a higher position in the hierarchy of sources of law with respect to the ordinary legal order.

applied in order to solve the conflict between two statutes placed in the same position on the scale of sources of law.

Long before the adoption of Article 117, paragraph 1, legal scholars had tried to find a constitutional basis for the ECHR in order to justify a higher position for the Convention in the hierarchy of law. That basis has been identified by a first group of authors in Article 10 of the Italian Constitution, by a second group in Article 11, and by third group in Article 2 of the Italian Constitution. According to the first thesis, the ECHR would include general rules which are part of the generally recognised tenets of international law, to which Article 10 attributes a special status. This would imply that the ECHR rules, independently of any formal ratification, could find direct access, at a constitutional level, to the Italian legal system through its duty, provided by Article 10, to conform to the tenets of international law.

According to the second group of authors, the ECHR's constitutional foundation could be found in Article 11 of the Italian Constitution, which admits 'the limitations of sovereignty necessary for an order that ensures peace and justice among Nations.' This provision, which was originally intended to represent the constitutional authorisation to join the United Nations, has been used by the Italian Constitutional Court to combine the European Court of Justice primacy doctrine over national (even constitutional) law with the need to protect the fundamental rights on a constitutional level. On this view, the same treatment could be accorded, under the same provision, to the ECHR.

With regard to the third view, the reference to the inviolable rights recognised and guaranteed by Article 2 of the Constitution[23] is taken into consideration. This clause would allow constitutional protection for the 'new fundamental rights' arising after the adoption of the Constitution of 1948. Among these rights, those provided by the ECHR would find a (constitutional) place.

In its case-law, the Constitutional Court has not shown any great enthusiasm towards these attempts to give special constitutional protection to the ECHR. In relation to Article 10 of the Constitution, the Constitutional Court has specified that the privileged constitutional status enjoyed by the tenets of international law as generally recognised rules is not extendable to international obligations – as is the case of the ECHR – undertaken by the State with an international Treaty.[24] Regarding Article 11, the Constitutional Court, treating the issue as if it were be-

[23] *Art. 2* of the Italian Constitution provides that: 'The Republic recognises and guarantees the inviolable rights of the person, as an individual and in the social groups where human personality is expressed. The Republic expects that the fundamental duties of political, economic and social solidarity be fulfilled.'

[24] *See* Constitutional Court, judgments No. 48/79, No. 32/60, No. 104/69, No. 14/64, No. 323/1989.

yond dispute and recalling a 27-year old precedent,[25] affirmed that no international Treaty – irrespective of its subject area – can entail any limitation on sovereignty under the terms provided by Article 11 of the Constitution. In relation to interpreting Article 2 of the Constitution as an open clause suitable to give constitutional protection to new fundamental rights, the Constitutional Court did not assess the issue with specific reference to the ECHR. In more general terms, it clarified that the guarantee provided by Article 2 is intended to refer only to the rights expressly enunciated in the Constitution and to those directly connected to them.[26]

At the end of the 1990s, the Constitutional Court, without changing its opinion about the place occupied by the ECHR in the Italian sources of law hierarchy, began looking at the relationship between the Italian constitutional legal system and the ECHR in a different and complementary way. In particular, in decision No. 388/1999 the Court seems to have drawn a distinction, in relation to the sources of international law, between the content, the material area on which the international Treaty is concluded, and its container, the ordinary statute which transforms the international source into a national law. In this regard, it is argued by the Constitutional Court that, in the case in which the content is characterised by the aim to protect human rights, those rights independently from the position of the container, should enjoy a constitutional guarantee. In other words, starting from this decision, the Constitutional Court seems more interested in looking not only, from a formal(istic) point of view, at the static position of the ECHR in the hierarchy of the sources of law, but, from a substantial and axiological point of view, and due to its fundamental rights-based content, at its suitability to complement the recognition of inviolable fundamental rights protected by Article 2 of the Constitution.[27]

The constitutional scenario thus described has been integrated by the adoption, in 2001, of new Article 117, paragraph 1 which provides, as already noted, that 'legislative powers shall be vested in the State and the Regions in compliance with the Constitution and with the constraints deriving from the EU legal order and international obligations.'

There have been three main readings of this provision by Italian constitutional scholars. According to the first thesis, nothing really has changed in the relationship between the Italian legal order and sources of international law.[28] On this

[25] Constitutional Court, judgment No. 188/1980.

[26] Constitutional Court, judgment No. 98/1979.

[27] *See* to this regard D. Tega, 'La Cedu e l'ordinamento italiano', in M. Cartabia (ed.), *I diritti in azione* (Bologna, Il mulino, 2007), p. 67 et seq., at p. 76.

[28] C. Pinelli, 'I limiti generali alla potestà legislativa statale e regionale ed i rapporti con l'ordinamento internazionale e con l'ordinamento comunitario', in F*oro Italiano* (2001), p. 194 et seq.

view, Article 117 paragraph 1 only refers to the relationship between state laws and regional laws and its purpose would not have been that of governing the new hierarchy of their respective sources of law.

A second, different interpretation has identified in the new provision the cause for a radical change from a dualistic to a monistic matrix of the Italian legal system. In other words, pursuant to Article 117, paragraph 1, all international Treaties to which the Italian state is a party, and the ECHR in particular, would enjoy the same special status in the national legal order as that awarded to general norms of international law by Article 10.[29]

A third thesis argues the 'middle way'. The constitutional provision grants immunity to abrogation by subsequent domestic law to international Treaties which have been incorporated into the Italian legal order by Act of Parliament.[30] In this view the dualistic matrix of the Italian legal system remains intact. This means that an ordinary law in conflict with the ECHR would be subject to review by the Constitutional Court for its potential violation of Article 117, paragraph 1 of the Constitution.

Until the decisions analysed here, the Constitutional Court never had the opportunity to clarify whether or not Article 117, paragraph 1 of the Constitution changed the relationship between the Italian constitutional legal order and the sources of international law. In the meanwhile, making almost no reference to 'new' Article 117, paragraph 1, some ordinary judges, in the new millennium, have started looking at the relationship between the ECHR and the national legal order in a surprising, if not revolutionary, way. The Tribunal of Genoa,[31] followed by other Courts of first and second instance, in order to solve a conflict between ordinary national laws and ECHR principles, has started to apply the same solution according to which, since the adoption of the historic decision of the Constitutional Court in *Granital* in 1984,[32] the ordinary judges have applied the priority of EC law in cases of conflict between national law and EC law.

The latter approach, supported also by the highest ordinary and administrative Courts',[33] has mainly been founded on the consideration that, due to the incor-

[29] *See* A. D'Atena, 'La nuova disciplina costituzionale dei rapporti internazionali e con l'Unione europea', in *Rassegna Parlamentare* (2002), p. 916 et seq.

[30] *See*, among others, M. Luciani, *Le nuove competenze legislative delle regioni e statuto ordinario*, in <www.associazionedeicostituzionalisti.it>, and, more recently, M. Cartabia, 'La Cedu e L'ordinamento italiano, rapporto tra fonti, rapporti tra giurisdizioni', in R. Bin, G. Brunelli, A. Puggiotto and P. Veronesi (eds.), *Proceedings of the Seminar Amicus Curiae: All'incrocio tra costituzione e Cedu. Il rango delle norme della Convenzione e l'efficacia interna delle sentenze di Strasburgo* (Ferrara, 9 March 2007).

[31] Tribunal of Genoa, 23-11-2000; Court of Appeal of Rome, 11-4-2002; Court of Appeal of Florence, 20-1-2005.

[32] Constitutional Court, judgment, 6 June 1984, No. 180.

[33] Corte di Cassazione section I, 19-07-02, No. 10542; Corte di Cassazione, section I, 11-06-2004, No. 11096; Corte di Cassazione United Sections, 23-12-2005, No. 28507; Consiglio di Stato, section I, 9-4-2003, No. 1926.

poration of the ECHR in the European dimension through the bridge provided for by the general principles of EC law mentioned in Article 6 of the Treaty of the European Union, it seems logical to provide the same constitutional protection to EU and ECHR law. In other words, this brave new judicial approach interpreted the famous paragraph 16 of the landmark decision of the European Court of Justice in *Simmenthal*[34] as applying also to ECHR law by analogy.

By looking at how the Constitutional Court reacted the first time it had the opportunity to take the floor again in the debate, it is possible to imagine that it did not much like the period of its forced silence[35] on the interpretation of the new Article 117 paragraph 1 of the Italian Constitution with regard to the relationship between national law and the ECHR.

The decisions of the Constitutional Court

The final output of the decisions being considered may be summarised as follows.

(a) Article 117, paragraph 1 of the Constitution is identified by the constitutional judges as the correct parameter to give the ECHR a higher status than domestic ordinary laws. This means that in case of conflict between the ECHR and a national statute subsequent to the statute (n. 848/1955) which gave the ECHR effect in the domestic legal system, the judge hearing the case must suspend it and request the intervention of the Constitutional Court.
(b) The Constitutional Court clearly specifies that the exact meaning of the ECHR can be ascertained only as it is interpreted by the European Court of Human Rights. In the cases under discussion, it is the right to property, provided by Protocol 1 and the right to a fair process, contemplated in Article 6, as 'living in the case-law of the European Court of Human Rights', that are taken as parameters to value the constitutionality of the domestic law under judicial scrutiny.

Each of the points mentioned deserves a separate analysis, with a special focus on the first.

[34] ECJ, 9 March 1977, *Simmenthal* C-106/77, in *ECR* I-62, para. 21, according to which: 'Every national Court must in a case within its jurisdiction, apply Community law in its entirety and protect rights which the latter confers on individuals and must accordingly set aside any provision of national law which may conflict with Community law, whether prior or subsequent to the Community rule.'

[35] The Constitutional Court cannot intervene *ex officio*, but only at the request of the parties involved.

A higher status for the ECHR

The Constitutional Court's adherence to the third thesis analysed above in relation to the meaning to be attributed to Article 117, paragraph 1 of the Constitution has a specific goal. It is in fact evident that, by identifying the latter provision as the constitutional parameter which enables the Constitutional Court to ascertain a possible violation of the ECHR by a successive domestic statute, the Court has managed to halt the activist approach adopted in recent years by the ordinary courts. This approach involved putting aside the statutory law conflicting with the ECHR, applying by analogy that which the Constitutional Court finally authorised ordinary judges to do with statutes in violation of Community law, after 20 years of 'bloody war' with the European Court of Justice.[36] In other words, with regard to the interpretation of the ECHR, the Constitutional Court is not willing to be bypassed by the ordinary courts. The first point of the constitutional judges – quoting the relevant decisions of *Corte di Cassazione*[37] – is therefore dedicated to correcting their (ordinary) colleagues, stating how the difficulty of identifying the ECHR role wrongly gave rise to the judicial attitude of directly setting aside any statute in conflict with the ECHR on the main basis of the asserted communitarisation of the ECHR through its reference contained in Article 6 EU. All the remaining arguments of the Constitutional Court focus on trying to explain why this approach is not constitutionally correct.

The constitutional judges recognise that the consolidated case-law[38] of the European Court of Justice has affirmed that the fundamental rights protected by the ECHR are part of the general principles of European law, and that this orientation has been codified in Article 6 of the Treaty of the European Union and extensively in the provisions of the European Charter of fundamental rights. Directly challenging the main grounds of reasoning used by the ordinary judges, the constitutional judges argue, however, that it is nonetheless not possible to apply by analogy to ECHR law the same treatment as reserved to EC law.

This is because, according to the constitutional judges, the ECHR legal system has distinct structural and functional legal features as compared to the European legal order. This difference is confirmed, according to the constitutional judges, by the language of Article 117, paragraph 1, which distinguishes between the constraints deriving 'from the European legal order' and those deriving – only – from

[36] *See Granital supra* n. 32.

[37] As was specified above (*see* para. 4), the *Corte di Cassazione* supported the test of non-application to the case of the statutory law in conflict with the ECHR in decisions No. 672/1998 and especially No. 28507/2005.

[38] The Constitutional Court, as happens very rarely in relation to the case-law of the European Court of Justice, explicitly referred to the relevant decision (ECJ, 26-6-2007, C-305/05 *Ordini avvocati* c. *Consiglio*, para. 29).

'international obligations'. On this point, the Constitutional Court draws an unconvincing distinction, to which we will return later, between 'the EC provisions, which have direct effect, and the ECHR provisions, which are international law sources binding only States, without providing any direct effect in the internal legal order such as to make the national judges competent to put aside the national provisions in conflict with them.'[39] The fact that, in contrast with all other international Treaties, the ECHR legal system has attributed to a Court, to which individuals have access, the competence to interpret the ECHR dispositions and to condemn the States which are not respecting those dispositions, even if it recognised by the Constitutional Court, is not enough to perceive any transfer of sovereignty in the terms provided by Article 11 of the Italian Constitution.

In any case, the Constitutional Court adds, also quoting in this case the relevant case-law of Luxembourg,[40] that the fundamental rights of the ECHR enjoy the status of general principles of EC law only in relation to national rules that are within the scope of Community law. In other words, according to the Constitutional Court, in the situation under discussion, characterised by only a domestic relevance, the Court of Justice would have denied its jurisdiction to ascertain the eventual violation by national law of ECHR fundamental rights in their role of general principles of EC law.[41]

Even though the Constitutional Court is perfectly aware of the 'schizophrenic' nature of the ECHR in domestic law – ordinary law from a formal point of view and constitutional law in its substance[42] –, it denies that the Convention deserves privileged constitutional protection with respect to 'ordinary international law'. We have seen that the doctrine has proposed three possible interpretations in this regard: Article 10, Article 11 and Article 2 of the Constitution.

In relation to the first option, the Constitutional Court, confirming its previous case-law, argues that the privileged constitutional status enjoyed by the tenets of international law as generally recognised is not extendable to international obligations based, like the ECHR, on an international treaty. A different conclusion is possible, according to the constitutional judges, and this is a small opening to a pluralistic and values-based vision in a reasoning dominated by a formal hierarchical approach, only if the international Treaty in question 'reproduces general consuetudinary principles of international law'.[43]

With regard to the second interpretive option, the Constitutional Court states that only the European legal system has the character of an autonomous legal

[39] Constitutional Court, judgment No. 348, para. 3.3.

[40] ECJ, 4-10-1991, C-159/90, *Society for the protection of unborn children*, in *ECR* I-4685; 29-5-1998, C-299/95, *Kremzow* in *ECR* I-2629.

[41] Constitutional Court, judgment No. 349/2007, para. 6.1.

[42] Constitutional Court, judgment No. 348/2007, para. 4.3.

[43] Constitutional Court, judgment No. 349/2007, para. 6.1.

order which implies the transfer of a portion of sovereignty from the national to the supranational dimension under Article 11 of the Constitution. In order to support this statement, the constitutional judges, quoting that clearly established precedent mentioned above,[44] emphasised that the constitutional parameter (Article 11) used by the ordinary judges in order to give constitutional protection to EC law is not apt to obtain the same effect for the ECHR because the latter, just as every international Treaty (irrespective of subject-matter) cannot entail a limitation on sovereignty under Article 11. Therefore, according to the constitutional judges 'the ECHR would be "only" a multilateral international public law Treaty which does not entail and cannot entail any limitation on sovereignty in the terms provided by Article 11 of the Constitution.'[45]

In relation to the possible identification of a constitutional basis for the ECHR in Article 2 of the Constitution, and with reference to inviolable constitutionally protected rights, the hope had been expressed that after a long silence on this subject, the Constitutional Court would finally follow the thesis of the speciality *ratione materiae* of the Treaties in the human rights area in relation to all other international Treaties.[46] The truth is that, by basing the priority of the ECHR over conflicting national law on Article 2, the Constitutional Court would have shifted from a formal hierarchy to a substantial one and, consequently, it would have legitimated the judicial trend, inaugurated by the ordinary judges, of setting aside domestic national legislation in conflict with the ECHR. This is exactly what the Constitutional Court wanted to avoid. The silence of the Court in relation to Article 2 of the Constitution is, then, not surprising.[47]

The importance of the interpretation of the European Convention given by the European Court of Human Rights

The second point in the decisions, as mentioned at the beginning of this section, concerns the importance that the constitutional judges have attributed to the interpretation of the ECHR by the European Court of Human Rights. According to the Constitutional Court, the ECHR provisions take shape in the interpretations of the European Court of Strasbourg, characterised as follows: 'the constitutional scrutiny is not based on the text of the ECHR provision, but rather on the interpretation of the provision by the European Court of Strasbourg.'[48] This approach results in a circuit of judicial interpretations on two levels.

[44] Constitutional Court, judgment No. 188/1980 quoted in judgment No. 349/2007.

[45] Constitutional Court, judgment No. 348/2007, para. 6.1.

[46] *See* S. Pinelli, 'Sul trattamento giurisdizionale della CEDU e delle leggi con essa configgenti', in *Giurisprudenza costituzionale* (2008).

[47] Ibid.

[48] Constitutional Court, judgment No. 348/2007, para. 4.6.

One the level of ordinary judges: before raising a question about the constitutionality of a national law in conflict with the ECHR, they are obliged to interpret the national law, insofar as it is possible,[49] in conformity with the ECHR. It is an important reference to the interpretative role played by the ordinary judge as a decentralised ECHR judge who, for the first time in such a clear way, has been assigned a clear constitutional duty to interpret the domestic law in conformity with the international law of human rights.[50]

On a second level, if the ordinary courts do not succeed, they are obliged to refer the matter to the Constitutional Court. The constitutional judges, if they themselves cannot solve the conflict by the consistent interpretation doctrine, must verify if the protection offered to fundamental rights by the European Court of Human Rights is equivalent to that guaranteed by the Italian Constitution, in order to find the appropriate balance between the constitutional obligations stemming from international law and respect for the other constitutional values protected by the Constitution.[51] This implies that the *Solange* doctrine, which has characterised the relationship between certain European constitutional courts and the European Court of Justice[52] and the relationship between the Court of Justice and the European Court of Human Rights,[53] has now also become the basis for a dialogue between the Italian Constitutional Court[54] and the European Court of Strasbourg. Presumably, the certainty of being able to stop the dialogue at any

[49] The same obligation is provided for by Art. 3 of the UK Human Rights Act (1998), according to which: 'So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.'

[50] It is the judicial approach found in other dualistic legal orders, as in Germany or the Scandinavian countries, where the ECHR is placed on the same level as that of an ordinary law. In this regard, *see* for a detailed comparative perspective, L. Montanari, *I diritti dell'uomo nell'area europea tra fonti internazionali e fonti interne* (Torino, 2003).

[51] Constitutional Court, judgment No. 349/2007, para. 6.2 and judgment No. 348/2007, para. 4. It is worth stressing that in a case of conflict between the Constitution and the ECHR, it emerges clearly from the Constitutional Court decisions being discussed here that the former must prevail over the latter. In this case the ordinary law giving effect to the ECHR in the domestic legal order will be declared (partially) unconstitutional.

[52] German Federal Constitutional Court, 29-5-1974 and 22-10-1986; Danish Supreme Court, 6-5-1998; English High Court *Thorburn* c. *Sunderland City Council*, [2002] 3, 2004 WLR 24, and *Mc Whirter & Gourier* v. *Secretary of State for Foreign Affairs* [2003] EWCA Civ 384; Polish Constitutional Tribunal,11-3-2005, K 19/ *Tribunal constitucional*, Declaration of 13-12-2004; Conseil constitutionnel 10-6-2004, n. 2004-496 DC and 27-6- 2006, sent. n. 2006-540 DC, Czech Constitutional Court, 8-3-2006, sent. n. 50/2004,

[53] *See*, generally, N. Lavranos, 'The Solange-Method as a Tool for Regulating Competing Jurisdictions among International Courts and Tribunals', in *Loy L. A. Int'l & Como. L. Rev.* (2008).

[54] The German constitutional court applies similar logic, even though it is more selective in identifying the constitutional principles not overridden by the Strasbourg case-law in the judgment 24-10-2004. *See* F. Palermo, 'Il Bundesverfassungsgerichte e la teoria sellettiva dei controlimiti', in *Quaderni Costituzionali* (2005), p. 181 et seq.

moment encourages the Italian constitutional court to speak more frankly.[55] At the same time, in the relationship between sources of law, although the Italian Constitutional Court is formally applying a logic based on hierarchy, when faced with conflicts between judicial interpretations, it is more ready to apply a substantive and values-based logic founded on a 'contrapunctual'[56] and pluralistic vision of the relationship between legal orders.

By thwarting any attempt by the ordinary judges to set aside any national law in conflict with the Convention, the Constitutional Court clearly specifies that, on the one hand, the provision of the 'new' Article 117, paragraph 1, has determined the ECHR's passive strength[57] with respect to subsequent national ordinary statutes, but, on the other hand, it has the effect of giving the constitutional Court competence to ascertain an eventual collision between the ECHR and national law. 'The said collision, in fact, does not imply any problem of chronological succession of laws, neither a question of sources of law hierarchy, but rather issues of constitutional illegitimacy.'[58]

The Court rhetorically concludes that Article 117, paragraph 1 'now fills a constitutional gap that existed before its adoption.'[59] This gap arose from the conflict between the constitutional principle of openness to international law as embodied in Articles 10 and 11 (now also Article 117, paragraph 1) of the Constitution and the unfortunate consequence of the status of treaty law in the Italian legal order, in particular of the ECHR, which ran the serious risk of being overtaken by subsequent ordinary domestic law.

Concluding remarks

Nevertheless, it is doubtful whether that gap has been filled; it could have been done in at least two alternative ways.[60] The Constitutional Court, following the line emerging from its latest precedent (in case 388/1999, *supra*) could have taken a different, values-based approach, and, by recognising the substantial constitutional character of the ECHR, could have differentiated its status from that of

[55] F. Palermo, *supra* n. 54 at p. 184 noted, in the same context as, 'the certainty that you can stop at any moment helps to run faster'.

[56] M.P. Maduro, 'Contrapunctual Law: Europe's Constitutional pluralism in Action', in N. Walker (ed.), *Sovereignty in Transition* (Oxford, Hart Publishing, 2003), p. 501 et seq.

[57] In the sense that the ECHR no longer runs the risk of being abrogated by a subsequent national statute law.

[58] Constitutional Court, judgment No. 348/2007, para. 4.3

[59] Constitutional Court, judgment No. 349/2007, para. 6.1.2.

[60] In the Italian constitutional literature, one of the first scholars to have distinguished between the two levels is A. Ruggeri, 'Tradizioni costituzionali comuni e "controlimiti", tra teoria delle fonti e teoria dell'interpretazione', in *Diritto Pubblico Comparato ed Europeo* (2003), p. 102 et seq.

'ordinary' international Treaties. Instead, the Constitutional Court decided to follow an interpretation based on formal logic within the perspective of a hierarchy of sources of law according to which all international Treaties, the ECHR included, are a step higher in that hierarchy. They no longer have the same status as ordinary laws, but, as the Constitutional Court explained: 'they are to a degree subordinated to the Constitution, but are intermediate between the constitution and ordinary status.'[61] This upgrade applies to *all* international Treaties ratified by Italy. Subject to the condition that they are not in conflict with the Constitution, they can then lead to the annulment by the Constitutional Court of *all* subsequent ordinary statutes in conflict with them.

The clarity of this formal hierarchically-based approach has a number of drawbacks. The first one we have already seen: the exclusion of any power for common judges to set aside national legislation in conflict with ECHR and the consequent risk of losing the effectiveness of ECHR law. It would be naïve to think, in this regard, that the *effet utile* is an exclusive prerogative of EC law. If it is possible to agree that the protection of fundamental rights must be assured in the domestic legal order in the most timely and direct way, then the same logic seems, *a fortiori*, applicable to domestic legislation conflicting with ECHR law.

The second drawback is the unavoidable generalisation that every judicial approach based on a certain degree of simplification implies. Is it not quite confusing to put on the same level the ECHR and the '*Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies*', only because they are formally both international Treaties ratified by Italy?[62] More problematically, the choice of putting all international agreements on the same level has the consequence that a hypothetical international treaty ratified by Italy after the ECHR and in conflict with it, because, for example, of a lesser guarantee of the freedom of expression, will have to be considered, by the mere application of chronological criteria, as prevailing over the protection accorded by Article 10 of the ECHR.

More problematic is that equating all treaties elevates international treaties concluded by the government in the so-called simplified form to the level of ordinary treaties. According to authoritative doctrine,[63] these treaties in simplified form

[61] Constitutional Court, judgment No. 348/2007, para. 4.5.

[62] It should be noted in this regard that constitutional legislators supported the adoption of the above-mentioned confusing judicial approach by not reserving, when Art. 117 was drafted in 2001, a 'special treatment' to international treaties concluded in the area of human rights. From a comparative perspective, the latter set of treaties enjoys a special status, on a interpretative level, in the Spanish, Portuguese and Romanian Constitutions.

[63] F. Sorrentino, 'Nuovi profili costituzionali dei rapporti tra diritto interno e diritto internazionale e comunitario', in *Diritto Pubblico Comparato ed Europeo* (2002), p. 1355 et seq.

are binding on the State when they are concluded on the international level, notwithstanding the absence of Parliamentary approval and ratification by the President. Following the interpretation of the Constitutional Court, these treaties will be on the same level as ordinary treaties and will equally limit the normative powers of Parliament, with the little detail that, differently from the former, the latter have never been received Parliamentary approval.

The truth is that behind the form, there is the substance, and in the case of the EHCR, the latter has a constitutional character, as the Constitutional Court itself has substantially admitted, when it noticed the 'substantial coincidence' between the principles contained in the EHCR and those included in the Constitution.[64]

The fact that the ECHR is accorded a higher value in the hierarchy of law sources than ordinary statutes does not mean that it occupies a level equal to that of the Constitution. On the contrary, the Constitutional Court clearly specifies that the status of the ECHR is intermediate, between the ordinary law and the Constitution. It is for this reason that, in the judgments being discussed, the Constitutional Court, having established that ordinary law was in conflict with Article 6 and Protocol 1 of the ECHR, examined the question whether these provisions and the relevant case-law conformed to the Constitution, with a positive result. The final step of the Constitutional Court's reasoning was then, as has been argued above, to declare the Law unconstitutional.[65]

Then again, there is a difference of treatment with European law, which is considered to have constitutional status, and is thus consequently subordinated not to the entire Constitution, but only to its fundamental principles. The emphasis on the above-mentioned differentiation between the obligations stemming from the EU legal order and those deriving from the ECHR is perhaps the weakest point of the decisions. Instead of equating (under Article 117 paragraph 1) ECHR law to every other international law, the Constitutional Court could perhaps better have looked, not to the end, but to the beginning of the Constitution, in order to identify in Article 11 the adequate constitutional parameter for the ECHR, as it has done in the past with regard to European law, thereby adopting a substantial approach aimed at underlining the constitutional nature of the ECHR provisions.

The reasons adduced by the Court to justify the exclusion from Article 11 are indeed not completely convincing, to be honest. The formalistic approach ac-

[64] Constitutional Court, judgments No. 388/1999, No. 129/1967, No. 7/1967.

[65] It should be noted in this regard that the interpretation of the European Court of Strasbourg, which was analysed earlier (*see* para. 3) concerning the amount of compensation in case of expropriation, despite the final outcome of the decisions under discussion, was not at all consistent with the relevant constitutional case-law which attributes more importance to the constitutional value of the 'social function' of the right to property than the Court of Strasbourg does. It was by highlighting this concept that the Constitutional Court has in the past held section 5 *bis* of Law No. 359/1992 and its retrospective application to be compatible with the Constitution (*see* above, para. 3)

cording to which, as we saw earlier, the ECHR, 'as every international Treaty – cannot entail any limitation on sovereignty in the terms provided by Article 11 of the Constitution', seems to forget several key 'small details'.

When the Constitution was drafted, the Founding Fathers who wrote about limitations of sovereignty in Article 11 had Italy's entrance into the United Nations in mind. In this respect, it is possible to argue that, especially in the light of the latest reforms in ECHR judicial procedures, the latter has a greater impact on the limitation of national sovereignty than the United Nations. Moreover, it is possible seriously to doubt the Constitutional Court's qualification of the ECHR as a 'multilateral international public law Treaty', since the European Court of Human Rights has underlined the peculiar nature of the ECHR in relation to other Treaties,[66] defining it as 'a constitutional instrument of European public order (*ordre public*)'.[67] Apart from this 'self-qualification argument', it should be objectively noted that it does not seem enough to cite, as the constitutional judges did, a 27-year old precedent,[68] pursuant to which the ECHR may not entail any limitations on sovereignty in the terms provided by Article 11 of the Constitution, in order to justify the exclusion of the constitutional protection provided by Article 11. In 27 years many things have changed,[69] thanks mainly to Protocol XI, which in 1998 made European Court jurisdiction compulsory over individual complaints, eliminated the jurisdiction of the Council of Ministers to decide complaints on their merits, suppressed the role of the Commission to filter claims, and made the hearing procedure entirely public (earlier, 95% of complaints were decided in a confidential way). In this sense, the Constitutional Court seems to forget that ECHR law, more than a legal act which could be statically 'photographed', is a dynamic process, a constitutional work in progress, which is constantly emerging, thanks mainly to the growing constitutional character of Strasbourg case-law, and which is slowly showing more of its constitutional nature.[70]

[66] In the decision *Ireland* v. *United Kingdom*, 18-1-1979 (para. 239), the Court had the occasion to clarify that 'Unlike international Treaties of the classic kind, the Convention comprises more than mere reciprocal engagements between contracting States. It creates, over and above a network of mutual, bilateral undertakings, objective obligations which, in the words of the Preamble, benefit from a "collective enforcement".'

[67] European Court of Human Rights, 23-3-1995. *Loizidou* v. *Turkey*, para. 75.

[68] Decision No. 188/1980, quoted in decision No. 349/2007.

[69] The following reflections about the constitutional change of ECHR belong to A. Guazzarotti-A. Cossiri, *La CEDU nell'ordinamento italiano*: *la Corte costituzionale fissa le regole* in <www.forumcostituzionale.it>.

[70] In relation to the emerging constitutional character in Strasbourg case-law, it is enough to recall the recent attitude of the European Court of identifying in its judgments, where there was a finding of a violation of the Convention, of what it considers to be an underlying systemic problem and the source of that problem. In these cases, the court, in order to assist States in finding the appropriate solution, suggests which are the appropriate general measures to adopt in order to solve

Another 'historical' component undervalued by the Constitutional Court is that, Italian participation in the system of protection of fundamental rights provided by the ECHR might be considered more functional to the achievement of constitutional goals, embodied in Article 11, of the guarantee of peace and justice among nations, than the European Economic Community originally was, as it was oriented, at least directly, to economic-based goals.

Most of all, the refusal of the Constitutional Court to assimilate the status of European law and ECHR law under the 'common constitutional roof' of Article 11 has the consequence of creating a double standard with the protection of the fundamental rights embodied in the ECHR, depending upon whether they apply only to domestic situations (in which case they have an intermediate level between ordinary statutes and constitutional law) or to situations of European law relevance (where, through their qualification as general principles of European law, they have a constitutional status). It is evident that, by creating a situation of reverse discrimination, this may lead to a violation of the constitutional principle of equality embodied in Article 3 of the Italian Constitution.

In the end, despite these criticisms, it would not be fair to underline only the negative sides of the path taken by the Constitutional Court with these decisions. Its main positive effects could be that now the Constitutional Court, qualifying itself as the only Tribunal competent in Italy to solve conflicts between ordinary laws and the ECHR, is forced to take up the challenge to become the arbiter of the protection of fundamental rights in that critical area in which the constitutional dimension encounters the supranational and the international ones. This could, perhaps, lead to an attenuation of the judicial hesitation which the Court has, up to now, shown, and to its taking an active role in the new season of European co-operative constitutionalism. It is not a coincidence that 4 months later, after 50 years, in the middle of February 2008,[71] the Constitutional Court requested a preliminary ruling under Article 234 from the ECJ.

It was a long wait, but not 'waiting for Godot'.

the systemic problem. *See*, European Court of Human Rights, 22-6-2004, *Bioniowsky,* ric, 31443/96. This new proactive approach was oriented towards Italy, for the first time, some months later, with the judgment of 10-11-2004, *Sejdovic*, ric. 56581/00.

[71] Italian Constitutional Court, decision no. 102/2008, 15 April 2008.