The Protection of Human Rights and the System of Judicial Review in Italy[1]

1. Introduction

The 1948 Italian Constitution provides the basic provisions regulating fundamental rights and the most important public institutions. This Constitution is rigid, as it possesses higher rank than ordinary legislation. This means that constitutional provisions cannot be amended or derogated by ordinary legislation. Moreover, Article 138 of the Constitution provides a special procedure for constitutional amendment in order to ensure that any constitutional change is the outcome of a meditated decision to be adopted with a relatively broad political and electoral consensus.

Within this system, the Italian Constitutional Court (hereinafter ICC) is called on to review whether legislative acts have been approved in accordance with the procedures stated in the 1948 Constitution (*formal constitutionality*), and whether their content follows to constitutional dispositions (*substantive constitutionality*). This is part of the protection system of the 1948 Constitution.

In particular, the ICC is charged with jurisdiction on:

- cases concerning constitutional legitimacy of legislative acts and acts having the force of legislative acts (Articles 76 and 77 of the Italian Constitution);
- conflicts regarding the allocation of power among the branches of the State 'powers and on those between the State and the Regions, and among the Regions;
- charges brought against the President of the Republic, according to the Constitution;
- admissibility of requests for abrogative referendums of legislative acts (*ex* Article 75 of the Italian Constitution).

Among these functions the most characteristic task of the ICC is to rule on controversies or disputes regarding the constitutional legitimacy of legislative acts and acts having the force of legislative acts. Not only statutes enacted by Parliament, but also legislative decrees (enacted by the Government pursuant to authority delegated by Parliament) and emergency decrees adopted by the Government (Article 77 of the Constitution) are potentially subject to the constitutional review. Legislative acts issued by the Regions and the autonomous provinces, which have their own legislative power in the Italian constitutional system, are also covered by the jurisdiction of the ICC.

The ICC may declares a legislative act unconstitutional. The consequence of this decision is that the challenged act loses effect retrospectively: the act and the relative norms can no longer be applied by any judicial organ or public administration from the day following the publication of the ICC's decision in the Italian Official Bulletin. This decision also precludes the application of the unconstitutional provision to past events. The ICC's declaration is definitive and generally applicable: its effect is not limited to the case in which the question was referred[2].

2. The Most Important Forms of Constitutional Review

In this context, one of the most important types of constitutional review is referred to as *incidental*: here the question of a law's constitutionality arises as an incident to ordinary legal proceedings, and is certified to the ICC by the ordinary (non-constitutional) judges presiding over these proceedings. This explains why before the ICC legislative acts are considered not only in the abstract, but also in relation to their possible applications and consequences in concrete cases. This kind of judicial review is indirect one, whereby ordinary judges within

the framework of a judicial controversy may only raise a question of constitutionality where the legislative act deemed unconstitutional needs to be applied. For these reasons, ordinary judges are called on to act as filters. They may refer a question of constitutionality only if their doubt on the constitutionality of the given act is “not manifestly unfounded” and the question of constitutionality affects legislative acts that are to be applied in the case at hand.

In other words, in this context ordinary judges play a crucial role, as they have been depicted as gatekeeper of the Italian system of constitutional review. It is not by chance that referrals are inadmissible and the ICC does not consider their merits if the ordinary judges fail in exercising their role as gatekeepers. This is the case when the ordinary judges: do not explain why the resolution of the matter is relevant in the case over which they are presiding; the constitutional question is inherently contradictory; the case does not involve an act having the force of law. When the ICC reaches a decision on the merits of a referred question regarding the constitutionality of a legal provision, it will issue a decision that either sustains (*pronuncia di accoglimento*) or will reject the challenge (*pronuncia di rigetto*). In the former cases, the Court declares the lecgislative act unconstitutional.

3. The Interaction between the European Law (EU and ECHR) and the Italian Constitutional Order

This is even more relevant when considering the role of the ICC in relation to the protection of human rights, as established by the Italian Constitution and supranational legal documents, like those regarding to the European Convention of Human Rights, as interpreted by its Court in Strasbourg (ECtHR) and the European Union, which implies the role of the Court of Justice in Luxembourg (CJEU).

The dialogue between the ECtHR and the national Courts entails the State judges’ fundamental function of participating in the development of the European system of human rights protection. The ECHR does not explicitly provide a role for national Courts in the implementation of the principles concerned. Their involvement is nevertheless implied in several Articles of the Convention as well as in important principles produced by the Strasbourg jurisprudence. The example is precisely given by the rules regulating the principle of subsidiarity, through which the States’ Courts are eminent actors in ensuring the national safeguard of human rights, and the margin of appreciation, which allows national authorities, including judges, a certain measure of discretion with respect to the construction and fulfilment of the obligations arising from the ECHR.

It should also be noted that the interaction between the Convention and national legal orders varies depending on many other aspects, such as the status afforded to the Convention’s provisions within the State’s law, the national system of human rights protection, the institutional role played by domestic Courts in each Member State and, last but not least, the emergence of an European legal tendency, what is called the ‘consensus approach’, in matters raising human rights issues.

As far as Italy is concerned, in recent years the interaction between the ECHR and the national legal order has been largely monopolized by the jurisprudence of the ICC. In this regard, the ICC has been aided by Article 117(1) of the Italian Constitution, as amended by the 2001 constitutional reform. While affirming the principle that national legislation shall be in compliance with the constraints deriving from international obligations, that reform has made less controversial the problems stemming from the disapplication of the domestic legislation inconsistent with the ECHR. The 2007 ‘twin judgments’ (*sentenze gemelle*) [3] are significant instances of that. With these decisions the ICC affirmed that the so-called ECHR’s system (that is the provisions stated in the ECHR, as interpreted by the Court of Strasbourg) must be included in the new constitutional parameter established by Article 117(1) of the

Italian Charter. This means that the ECHR's system is considered an interposed source of law (*norme interposta*), which retains a sub-constitutional status: the violation of this source results in a violation of Article 117(1) itself. But, this also means that the ECHR's sources are not exempt from constitutional scrutiny, whose scope is far-reaching than that involved in the counter-limits doctrine (*dottrina dei controlimiti*), which operates with regard to the EU's law: while the scrutiny of the EU's law concerns only the fundamental rights and principles of the Italian constitutional order, the ECHR's sources of law are subject to the Italian Constitution as a whole. Consequently, the ICC stated that ordinary judges cannot set aside domestic laws conflicting with the ECHR, as they do in relation to the domestic legislation conflicting with the EU's laws – especially Regulations and self-executive Directives – which have direct effect in the State's law.

The ICC has always distinguished the ECHR's system from the EU, even after the Lisbon Treaty entered into force in 2009. This means that at the national level the new provisions stated in the Article 6(2-3) of the Treaty on European Union neither affects the ECHR's status nor gives national judges the power to set aside domestic legislation incompatible with the Convention. In this respect, though, the Italian ordinary Courts are under three specific duties:

1) they must construe the ECHR's provisions according to the meaning that has been given them by the Court of Strasbourg;

2) they must interpret the domestic law in accordance – as far as possible – with the provisions stated by the ECHR's system; what is called the consistent interpretation (*interpretazione conforme*);

3) whenever such an interpretation is not possible, they must raise a constitutionality issue before the CC on the grounds of violation of Article 117(1).

At the same time, the constitutional jurisprudence has emphasized the role of Article 53 of the ECHR, what Sabino Cassese calls the "constitutional principle of subsidiarity", implying that an higher level of national protection of fundamental rights must prevail over a lower level of European protection.

To be more specific, the ICC has affirmed that protection provided by the ECHR's system must be balanced with other interests protected by the Italian Constitution. That gives the domestic Courts an opportunity to affirm an overall enhancement of protection related to some rights provided by the Convention, without sacrificing others, equally recognized by the Italian Constitution. Yet, if this is true, as a logical consequence, the constitutional principle of subsidiarity also infers that at the national level the respect of obligations stemming from the ECHR cannot result in a protection inferior to that ensured by the Strasbourg jurisprudence.

Thus, with the aim of reconciling these two features, the ICC has established that the higher protection of the rights provided by the ECHR's system might command a further development of the potentialities inherent in the Italian constitutional rules, especially when regulating the same matters. Here national ordinary Courts remain eminent actors, whose role is further strengthened by the margin of appreciation doctrine. This, as the ECtHR declared in the 2011 *SH and others v. Austria* case, is particularly true "where there is no consensus within the Member States, either as to the relative importance of the interest at stake or as to the best means of protecting it, especially where the case raises sensitive moral or ethical issues"[4].

Concerning the relationship between the ICC and the CJEU, one of the most important example is given by the *Taricco* case, which was decided on the November 23, 2016[5]. In

the 2015 *Taricco* judgment, the Grand Chamber of the CJEU faced a question concerning criminal offences for fiscal evasion in Italy. In Italy, these crimes are often committed by elaborate organizations and through intricate operations. As a consequence, public inquiries need a long time and prosecution may become time-barred under the relevant provisions of the Italian Penal Code; which the legislator with a significant reduction of the limitation period had in this case modified. Based upon the rather broad phrasing of article 325 of the Treaty on the Functioning of the European Union (TFEU), the CJEU held that national time limitations should neither prevent effective and dissuasive penalties "in a significant number of cases of serious fraud affecting EU financial interests". In addition, the national time limitations cannot provide for longer periods in respect of frauds affecting national financial interests. The CJEU also added that national courts should verify if these principles are respected. According to the CJEU, this would not infringe article 49 of the EU Charter of Fundamental Rights [6] nor article 7 of the ECHR [7] with regard to pending criminal proceedings.

Therefore, questions were addressed at the ICC, which in its turn asked the CJEU to take into greater account the national principles. The ICC asked if article 325 TFEU requires the disapplication of the relevant national provisions, even in the absence of a sufficiently clear legal basis and when, under national law, time limitations are part of substantive penal law and, thus, subject to the principle of legality in criminal matters. The ICC also asked the CJEU whether the disapplication is mandatory.

The ICC's questions have been affirmed under the preliminary reference procedure (Article 267 TFEU), which opens a way for a more intense dialogue between the ICC and the CJEU in many matters, including those referring to human rights.

In fact, in the last years the ICC has made some effort to frame national constitutional concerns within European legal system, also referencing to Article 4 Treaty on European Union, and Articles 49 and 53 of the EU Charter of Fundamental Rights. But, as said before, the ICC is also ready to activate the so-called counter limits in order to 'limit' the influence of European law (EU and ECHR) on the Italian constitutional order.

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[2] Only recently, the Court started to use some techniques of modulation of the temporal effects of its judgement. However, these decisions are rare and have been harshly criticized. On this point see *Corte costituzionale*, sent. 10/2015.

[3] *Corte costituzionale*, *sent*. 348-349/2007.

[4] SH and Others / Austria, App. No: 57813/00, November 3, 2011, para. 94.

[5] The ruling was published on January 26, 2017.

[6] Principles of legality and proportionality of criminal offences and penalties.

[7] No punishment without law.