

THE ROLE OF THE ECHR IN THE ITALIAN ADMINISTRATIVE
CASE LAW. AN ANALYSIS AFTER THE TWO JUDGMENTS OF THE
CONSTITUTIONAL COURT NO. 348 AND NO. 349 OF 2007.

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Abstract

Italian administrative courts are developing a new attitude in implementing Conventional rights and in considering the Strasbourg case law as a key element for their decisions. On this regard, the article, after an overview of the traditional approach of the Italian Council of State to the European Convention and a brief analysis of the two judgments of the Constitutional Court No. 348 and No. 349 of 24 October 2007, focuses on the results of a research into the administrative case law, which refer, after the two constitutional judgments, to the ECHR. In particular the study underlines the administrative case law which already takes into account the new relationship with Strasbourg case law and the present domestic reception process of the European Convention in the Italian legal order. The new growing attitude of the Italian administrative courts is, nevertheless, compared with the still existing traditional position in some administrative judgements, in which the ECHR provisions, as interpreted by the European Court, are even now very reluctant to apply Convention provisions directly and to follow the European case law.

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1. Introduction

In 2007 the French Council of State handed down 102 decisions (judgments and advices) which refer to the European Convention on Human Rights (ECHR) as a legal source capable of forming the solution of the case¹. This is a typical example of the effective cooperation of the French supreme administrative court as a principal actor in the so called “*dialogue des juges*”, showing an existing and effectual relationship between national courts and the international jurisdiction of the European Court of Strasbourg². A “dialogue” which is one of the most important tools for the realisation of a common minimum standard of protection of human rights in Europe.

In the same year, 2007, the Italian Council of State handed down just 39 decisions that, directly or indirectly, concerned the ECHR. Research, carried out using the search engine of the official

¹ See on this J. Andriantsimbazovina - L. Sermet, *Jurisprudence administrative et Convention européenne des droits de l'homme*, Rev. Fr. D. Adm. (2008) 743.

² Recently French scholars often refer to the expression “Dialogue des juges” to describe the growing attention paid by the Conseil d’Etat in relation to the European and Community case law. On this regard see in particular F. Sudre (dir.), *Le dialogue des juges*, Cahiers de l’Institut de Droit Européen des Droits de l’homme, n° 11, Faculté de droit de Montpellier, 2007. The essential link between the Strasbourg case law and the national courts is considered as a key element of the system of guarantees for the human rights in Europe also by S. Cassese, *La Convenzione europea dei diritti dell’uomo e i diritti amministrativi nazionali*, D. Pubbl. Comp. Eur. (2001) 313.

web site of the Italian Council of State³, shows that in the majority of its judgments, the Italian administrative supreme court referred to the Convention only in order to exclude the relevance of the Conventional provisions submitted by the complainants, without giving a thorough opinion on the actual application of these provisions in the case.

This datum is interesting when considering the true role played by the ECHR in the Italian administrative case law as an international legal source to which the courts are accustomed to referring in their judgments (or, to which they are simply not accustomed) with regard to the safeguarding of fundamental rights.

First of all, one may notice that the lack of attention paid by the Italian Council of State to the ECHR provisions and to the Strasbourg case law comes primarily from the “ancient dilemma” which affected the status of the ECHR in the Italian legal sources system.

The legal authority of an international treaty in the Italian system normally derives from the nature of the source through which the treaty itself has been ratified. Thus the European Convention, incorporated into the Italian system through an ordinary law (law No. 848 dated 4 August 1955), formally took the authority of an ordinary statute adopted by the Parliament⁴. In principle the Convention’s provisions could have been derogated by posterior conflicting legislation.

Considering the particular content of the ECHR and its aim of protecting human rights, the need to guarantee a pre-eminence of the Convention over the other domestic statutes was underlined several times by national scholars, who tried to identify a Constitutional provision adequate to provide a superior authority to the treaty⁵.

³ The official web site of the Italian Council of State is www.giustizia-amministrativa.it.

⁴ See B. Conforti, *Diritto internazionale* (1999) 316.

⁵ A detailed analysis of the several solutions proposed by the Italian scholars can be found in G. Sorrenti, *Le Carte internazionali sui diritti umani: un'ipotesi di «copertura» costituzionale «a più facce»*, cit., 349.; P. Mori, *Convenzione europea dei diritti dell'uomo, Patto delle Nazioni unite e Costituzione italiana*, Riv. Dir. Int. (1983) 311; M. Ruotolo, *La «funzione ermeneutica» delle convenzioni internazionali sui diritti umani nei confronti delle disposizioni costituzionali*, Diritto e società (2000) 293; G. Cataldi, *Rapporti tra norme internazionali e norme interne*, cit, 395; A.

A pure and simple legislative status might unavoidably contrast with the “constitutional” core of the human rights and fundamental freedoms enshrined in the European Convention⁶.

Until the reform of Title V enacted by the constitutional law No. 3 dated 18 October 2001⁷, the Italian Constitution did not contain any specific provisions concerning the rank and the effects in the domestic legal order of the international treaties such as the European Convention on Human Rights.

Until this time, the entire “suffered history” of the ECHR in our domestic legal order can be described as a long search for a constitutional identity for the European Convention. An identity which scholars tried to give the ECHR by deriving a constitutional foundation from several provisions of the Italian Constitution.

This is not the place to describe in detail the critical path followed by the ECHR rights in Italian law in search of a “constitutional” identity consistent with their fundamental contents⁸.

The scholars’ attempts to look for a constitutional (or at least supra-legislative) status for the European Convention on Human Rights were overtaken by the Constitutional reform of 2001 with the provision of the new Article 117, par. 1, according to which legislative power belongs to the State and the regions and is to be exercised in accordance with the Constitution and within the limits set by the European Union law and the International obligations⁹. In this provision the international obligations, i.e. the

Cassese, *Commento agli artt. 10 e 11*, in G. Branca (ed.) *Commentario alla Costituzione* (1975), 480.

⁶ On this G. Sorrenti, *Le Carte internazionali sui diritti umani: un’ipotesi di «copertura» costituzionale «a più facce»*, Pol. Dir. (1997) 349.

⁷ The constitutional statute law No. 3 dated 18 October 2001, published in the *Gazzetta ufficiale* No. 248, 24 October, 2001 provided a new order of legislative and administrative competences between the State and the Regions. In this work, as we have already seen in the introduction and we’ll see hereinafter too, it is particularly important the provision of the new Article 117, par. 1, which refers to exercise of the legislative powers by the State and the regions in accordance with the International obligations.

⁸ On this issue see also S. Mirate, *Giustizia amministrativa e Convenzione europea dei diritti dell’uomo*, (2007); and more recently S. Mirate, *A new status for the ECHR in Italy*, Eur. Publ. L. (2009) 89.

⁹ The Article 117 was reformed by the constitutional statute law No. 3 dated 18 October 2001, published in the *Gazzetta ufficiale* No. 248, October 24, 2001. On this subject, see *ex multis* F. Pizzetti, *Il sistema costituzionale delle autonomie locali*

European Convention, become a limit to the exercise of the legislative powers by the State and the Regions: if the limit were not respected, the national law could be declared unconstitutional inasmuch as it was in breach of Article 117, par. 1.

As already well known, with two judgments dated 24 October 2007¹⁰ the Italian Constitutional Court held that the provision of Article 117, par. 1, must be considered a constitutional rule granting superior legal authority to the European Convention over and above ordinary domestic statute law.

A domestic law in contrast with the provisions of the Convention, as interpreted by the European Court, violates Article 117, par. 1, of the Italian Constitution and must be declared unconstitutional by the Constitutional Court¹¹.

The solution, adopted in the two judgments by the Constitutional Court, is almost “revolutionary”, since it underlines

(*tra problemi ricostruttivi e problemi attuativi*), *Le Regioni* (2005) 35; R. Caranta, *La tutela della concorrenza, le competenze legislative e la difficile applicazione del Titolo V della Costituzione*, *Le Regioni* (2004) 990; A. Mattioni, *Sull'idea di una "nuova" potestà concorrente della Regione*, *Quad. Cost.* (2003) 33; G. Cartei – V. Ferraro, *Reform of the fifth title of the Italian Constitution. A step towards a federal system?*, *Eur. Publ. L.* (2002) 445; E. Ferrari, *Planning, building and environmental law after the recent Italian devolution*, *Eur. Publ. L.* (2002) 357; S. Cassese, *L'amministrazione nel nuovo titolo quinto della Costituzione*, *G. D. A.* (2001) 1193. About the administrative competences in the constitutional reform of 2001 see also C. Tubertini, *Public administration in the light of the new title V of the Italian Constitution*, *Eur. Publ. L.* (2006) 35.

¹⁰ See the judgments Corte Cost., 24 October 2007, n. 348 and n. 349, in *www.cortecostituzionale.it*.

¹¹ Under Italian law the Constitutional Court can pass judgment on the constitutionality of national laws, regional laws and government acts having the force of law (such as the “law-decree”, or “decreto legge”, and the “legislative decree”, or “decreto legislativo”). The most common way to bring cases before the Constitutional Court is the “ricorso in via incidentale” (interlocutory appeal). When a case is discussed in a Court, the parties or the judge can raise the question of the constitutionality of a law that must be applied in the case. If the judge decides the question is relevant to the case, he or she must refer the question to the Constitutional Court and at the same time suspend the proceedings until the Court has decided the preliminary question. The Constitutional Court can reject or sustain the question. In the latter case, such as in the two judgment No. 348 and No. 349 dated 2007, the law is declared unconstitutional and can no longer be applied. See on this J. S. Lena – U. Mattei, *Introduction to Italian law* (2002) 54.

the new consideration accorded to the ECHR and to the European case law in the Italian courts, in recent years.

The aim of this article is to analyze whether and how that “revolution” in the new constitutional approach to the ECHR is able to influence and to increase the attitude of our administrative courts in implementing Conventional rights and in considering the Strasbourg case law as a key element for their decisions. For this purpose, the study, after an overview of the traditional approach of the Italian Council of State to the European Convention and a brief analysis of the two judgments No. 348 and No. 349 of the Constitutional Court, will focus on the results of the research into the administrative case law, which refer, after the two constitutional judgments dated 24 October 2007, to the ECHR. In particular the article will underline the administrative case law which already takes into account the new relationship with Strasbourg case law and the present domestic reception process of the European Convention in the Italian legal order. The new growing attitude of the Italian administrative court will be, nevertheless, compared with the still existing traditional position in some administrative judgements, in which the ECHR provisions, as interpreted by the European Court, are even now – for many and different reasons we will see – very reluctant to apply Convention provisions directly and to follow the European case law.

2. The traditional position of the Italian case law vis-à-vis the ECHR: the Constitutional Court and the Court of Cassation

In order to illustrate the traditional position of the administrative case law towards the European Convention and the interpretation of its provisions given by the Strasbourg Court it is worth recalling the original attitude of the other Italian courts (in particular of the Constitutional Court and the Court of Cassation) in the same relationships with the ECHR legal system.

Until the two judgements No. 348 and No. 349 of 2007, the Constitutional Court had a traditional position based on a dualistic relationship between the domestic law and the

international legal order¹². The Court afforded to the ECHR the same status of the ordinary law, through which it was ratified in Italy. None of the constitutional provisions invoked by the scholars were ever considered by the Court as a possible foundation for granting recognition of a supra-legislative rank to the Convention.

Only in one judgment, never followed in the later case law, did the Constitutional Court consider the ECHR a legal source with “untypical competence”, which cannot be derogated by conflicting posterior legislation¹³. Nevertheless, in its constant case law the Constitutional Court held that the ECHR did not have a constitutional value in domestic law¹⁴. The outcome was that the Constitutional Court and the other Italian courts were very reluctant to apply Convention provisions directly.

In a different way the Court of Cassation has repeatedly changed, in the course of the time, its case law concerning the rank and the effects of the European Convention on Human Right in the domestic law.

In the earlier judgments, the Court started from a position similar to the traditional constitutional case law concerning the mere ordinary law status of the ECHR deriving from the nature of the statute law, through which the Convention was ratified in Italy.

Nevertheless in the case law the issue of the order of the ECHR in domestic law was closely linked to the other pragmatic issues about the direct effects of the Convention’s provision on the case finding. For a long time the Court of Cassation ascribed to the European Convention a merely programmatic value. In addition to the status of ordinary law, the Court recognized to the ECHR a binding effect only for the “High Contracting Parties”,

¹² See on this F. Salerno, *Il neo-dualismo della Corte costituzionale nei rapporti tra diritto internazionale e diritto interno*, Riv. Dir. Int. (2006) 340.

¹³ Constitutional Court sent. 19 January 1993, No. 10, Giur. It. (1993) I, 1, 1613; Giur. Cost. (1993) 52, with comment by E. Lupo, *Il diritto dell'imputato straniero all'assistenza dell'interprete tra codice e convenzioni internazionali*.

¹⁴ The leading case can be considered Constitutional Court sent. 22 December 1980, No. 188, F. I. (1981) I, 318; Giur. Cost. (1980) 1612; Riv. Dir. Int. (1981) 672. Among the following sentences, which support the same position, see for example Constitutional Court sent. 10 February 1981, No. 17, Giur. Cost. (1981), I, 87; sent. 1 February 1982, No. 15, *ibid.*, 1982, I, 85; sent. 30 July 1997, No. 288, *ibid.*, 2630; sent. 12 December 1998, No. 399, *ibid.*, 1998, 3454.

and not directly for the citizens, though they are affected by the fundamental freedoms and human rights safeguarded by the Convention¹⁵.

A turning point in respect to this original case law is represented by the *Polo Castro* case of 1989, in which the Court of Cassation began to consider the nature (programmatic or self-executing) of the single ECHR provisions. The Court discussed whether the Convention norms can be qualified as directly applicable, if they may have a binding value, if they may define complete and precise rights and obligations which can be enforced without the intervention of a legislative act from the State.

The Court underlined the need to check the effects of each Conventional right in the domestic system in order to establish the actual relationship between the international provision and the national statute laws¹⁶. A further step in the Cassation case law was the *Medrano* case of 1993¹⁷. In this case the Court followed the 1993 judgment of the Constitutional Court¹⁸ and it underlined that the ECHR benefited from a “particular force of resistance” with regard to posterior conflicting legislation, due to its particular nature of “general principles of the legal system”. This could depend, according to the Court, on the specific context of the case in question, as well as the nature and scope of the right or obligation that is to be directly applied.

Unlike the constitutional case law, in the Cassation case law this solution did not remain isolated, but was followed by another judgment of the Civil Court of Cassation in 1998, in which the ECHR was considered a source of rights and obligations for all the individuals in domestic law, having an atypical competence and a particular force of resistance to a contrasting statute law¹⁹.

¹⁵ See Court of Cassation, Pen., Section I, sent. 23 March 1983, G. P. (1984) III, 226; sent. Section V, 12 February 1982, *ibid.*, 1983, III, 20.

¹⁶ See Court of Cassation, United Sections, sent. 8 May 1989, Riv. Int. dir. U. (1990) 419; *Cassazione penale*, 1989, 1418.

¹⁷ See Court of Cassation, Pen., Section I, 10 July 1993, *Medrano*, Cass. Pen. (1994) 439, with a comment by G. Raimondi, *Un nuovo status nell'ordinamento italiano per la Convenzione europea dei diritti dell'uomo*.

¹⁸ See the above mentioned Constitutional Court sent. 19 January 1993, No. 10.

¹⁹ See Court of Cassation, Civ., Section I, 8 July 1998, No. 6672, Riv. It. D. Pubbl. Com. (1998) 1380, with a comment by A. Marzanati, *Convenzione europea dei diritti dell'uomo e ordinamento interno*, concerning the provision about an estate

The issue of the relationship between the conventional human rights and the domestic law is also dealt with by the Court from the different point of view of the need to take into account the Strasbourg case law.

In this regard it is worth considering the Cassation case law about the right to a due process within a reasonable time, as guaranteed in Article 6 ECHR and, in domestic law, in the Law No. 89 dated 24 March 2001, known as the "Pinto Act", which provides the right for individuals to bring proceedings before the competent national courts - specifically the Court of Appeal and the Court of Cassation - with the aim of obtaining a fair compensation in the event of excessively lengthy proceedings²⁰.

In applying the "Pinto Act", the United Sections of the Court of Cassation recognized the direct influence in domestic law of the Convention's right to a reasonable timeframe in jurisdictional proceedings, not only as enshrined in Article 6 ECHR, but also as interpreted by the European Court of Human Rights. The Strasbourg case law, according to the Court of Cassation, must have in respect to the right to a due process within a reasonable time a binding effect on the national case law²¹.

In recent years a part of Court of Cassation case law tried to answer the problem of the status and the effects of the ECHR in domestic law referring to the model of Community law and the principle of its precedence over national laws. The Court has recognized the power of national courts to discard a law contrary

tax in contrast with the right of private property laid down in Article 1 Protocol 1 ECHR.

²⁰ According to the Section 2 of the Law No. 89 of 24 March 2001, known as "Pinto Act", "Anyone sustaining pecuniary or non-pecuniary damage as a result of a violation of the Convention for the Protection of Human Rights and Fundamental Freedoms, ratified by Law no. 848 of 4 August 1955, on account of a failure to comply with the 'reasonable-time' requirement in Article 6 § 1 of the Convention, shall be entitled to just satisfaction".

On this see S. Wolf, *Trial within a reasonable time: the recent reforms of the Italian justice system in response to the conflict with Article 6(1) of the ECHR*, Eur. Publ. L. (2003) 189.

²¹ See the leading cases Court of Cassation, Civ., United Sections, 26 January 2004, No. 1340 and No. 1339, Resp. Civ. Prev. (2004) 463, note by S. Mirate, *Quando la giurisprudenza europea «si impone ai giudici nazionali»...La legge Pinto e i nuovi orientamenti della Corte di cassazione*.

to the European Convention on Human Rights. The link between ECHR effects and the principle of the precedence of Community law is founded by the Court on Article 6, par. 2, of the Treaty on European Union, according to which “The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms” as general principles of Community law.

According to this case law, a national court which is called upon, within the limits of its jurisdiction, to apply the provisions of the European Convention is under a duty, arising from Article 6, par. 2, of the European Treaty, to give full effect to those provisions, if necessary refusing of its own accord to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for the court to request or await the prior setting aside of such provisions by legislative or other constitutional means²².

The solution of giving national courts the power to discard a law contrary to the ECHR, even though it is adopted in other systems, such as the French one²³, has been considered - as we will see - by the Constitutional Court, in the two judgements No. 348 and No. 349 of 2007, in contrast with the provision of the new Article 117, par. 1, of the Italian Constitution.

²² See Court of Cassation, Civ., Section I, sent. 19 July 2002, No. 10542, F. I. (2002) I, 2606, note by R. Fuzio; sent. 11 June 2004, No. 11096, Corr. Giur. (2004) 1467, with a comment by R. Conti, *La Cassazione ritorna su occupazione appropriativa e rispetto della Cedu*; Tax Section, sent. 3 September 2004, No. 17837, Riv. It. D. Pubbl. Com. (2005) 275.

²³ See on this J. Bell, *French Administrative Law and the Supremacy of European Laws*, Eur. Publ. L. (2005) 487 ss.; and also L. Heuschling, *Comparative Law and the European Convention on Human Rights in French Human Rights Cases*, in E. Örüçü (ed.), *Judicial Comparativism in Human Rights Cases* (2003), 23. The Author underlines that in France «the role of international law as a safeguarded for human rights is accepted only by the ordinary courts. In its famous decision on the abortion case in 1975 [CC 15 January 1975, *Interruption volontaire de grossesse*, R, 19], the *Conseil constitutionnel* considered that its jurisdiction as constitutional judge [...] did not include the right to rule whether a statute was compatible with a treaty and, specifically, with the ECHR. [...] Thus every ordinary tribunal, from the lowest to the highest, is entitled, on the occasion of any trial, to protect human rights either by interpreting or by setting aside a statute in conflict with the ECHR».

2.1. The Council of State and the administrative tribunals

Unlike the Court of Cassation, administrative case law has for a long period been very far from this point of view. The administrative courts, and the Italian Council of State foremost among them, have continued until this time to give to the Convention the mere force of an ordinary statute

Aside from some judgements of the administrative tribunals, which expressly recognized a supra-legislative status to the Conventional provisions²⁴, the great part of the administrative case law, and in particular the Council of State, habitually considered the rank of ECHR in relation to the nature of ordinary legislation derived from the law No. 848 dated 4 August 1955, which incorporated the European Convention²⁵.

One may notice that in the administrative case law it is hard to find any decisions which, even if isolated and expressive of a not common position, deal with the solution given by the Court of Cassation, concerning the possibility to discard a law contrary to the European Convention on Human Rights.

Still in a decision of the IV Section in 2004, the Council of State expressly held that it is not possible to recognize to the ECHR a position of supremacy with respect to community law²⁶.

²⁴ See for example TAR Lombardia, Sez. III, 11 April 1996, No. 463, F. I. (1997) 1727, which, following the position of the Constitutional Court in the judgement No. 10/1993 already mentioned, recognized to the ECHR a special rank related to an "untypical competence", with the consequence that the Conventional provisions cannot be derogated by conflicting posterior legislation; TAR Friuli Venezia Giulia, 12 August 1992, n. 377, Trib. Amm. Reg. (1992) 4000, which underlined the need for the national courts to refer to the ECHR in the interpretation of the domestic legislation. A "particular force of resistance" with regard to posterior conflicting legislation has been also afforded to the ECHR by the advice of the Council of State (Adunanza Generale), 1 March 2001, No. 153/2001, Giur. It. (2001) 1733, note by V. Rapelli, *Il 2° comma della XIII disp. Cost. Tra diritto nazionale ed europeo*.

For an analysis on this case law see V. Pugliese, *La Convenzione europea dei diritti dell'uomo nei processi del giudice amministrativo*, G. C. (2003) 329; G. Greco, *La Convenzione europea dei diritti dell'uomo e il diritto amministrativo in Italia*, Riv. It. D. Pubbl. Com. (2000) 33; C. E. Gallo, *La Convenzione europea per i diritti dell'uomo nella giurisprudenza dei giudici amministrativi italiani*, in D. A. (1996) 498.

²⁵ See for instance Council of State, Section IV, 24 March 2004, No. 1559, G. D. A. (2004) 652; Council of State, Section IV, 10 August 2004, No. 5499, available at the official Italian Council of State web site www.giustizia-amministrativa.it.

²⁶ See the already quoted Council of State, Section IV, 10 August 2004, No. 5499.

The case concerned the review on an administrative act (a decision of the Region Puglia adopting a sanitary plan), replaced, according to the mechanism of legislative validation, by a statute law during the pending proceeding before the administrative courts. Notwithstanding the clear position of Strasbourg Court, which developed a body of case law very restrictive in accepting validations²⁷, the Italian administrative court disregarded the European guarantees based on Article 6, par. 1, ECHR, and did not refer to the Strasbourg case law. In the same judgement the Council excluded the application of Article 117, par. 1, of the Italian Constitution, which was invoked by the complainants in order to give the Convention a special status in the domestic legal source system, arguing that the Convention should not be considered an “international bond” for the practise of legislative validation in national law. The only solution given by the Council of State is to refer to the European Convention as an international source having the mere status of the ordinary legislation which ratified it. And the case was decided just on the basis of domestic law.

Analysing the Italian case law, one may argue that the administrative courts normally applied the human rights’ provisions simply as further arguments to reinforce a decision already grounded on national law²⁸. They were not accustomed to referring to the conventional provisions and to taking into account the Strasbourg case law as a relevant legal source of their decisions.

In this regard, it can also be noted that administrative courts, unlike the ordinary courts, are not competent to deal with the fair compensation in the event of excessively lengthy proceedings. The excessive lengthiness of the administrative jurisdictional proceedings is reviewed, according to the Pinto Law, by the ordinary courts too (in first instance claims for just

²⁷ See in particular European Court of Human Rights, 28 October 1999, *Zielinski and Pradal and Gonzales and others v France*, in *www.echr.coe.int*. On this issue see S. Mirate, *Giustizia amministrativa e Convenzione europea dei diritti dell’uomo*, cit. at 8, 352.

²⁸ See for instance Council of State, Section VI, 25 July 2003, No. 4291; Council of State, Section IV, 16 October 2000, No. 5497, both in *www.giustizia-amministrativa.it*.

satisfaction shall be lodged with the Court of appeal; against its decision an appeal shall lie to the Court of Cassation)²⁹.

The right to a due process within a reasonable time is one of the crucial points concerning the influence of the ECHR and the Strasbourg Court on the Italian case law³⁰. Administrative tribunals and the Council of State are not involved in the task of reviewing any violations of the right to a reasonable timeframe, in particular relating to the power to give fair compensation in the event of the breach of the Conventional right. In this sense the administrative courts have been more removed from the Conventional system of protecting the right to a reasonable timeframe in judicial proceedings and thus they have been detached from a constant relationship with Strasbourg case law concerning the need to safeguard a Conventional right so relevant for the Italian legal order.

This is perhaps one of the reasons (together with the belief about a mere ordinary law status of the ECHR) why Italian administrative courts were not really cooperative in the implementation of the European Convention³¹.

Looking at this background, it is now the time to ask whether anything has changed in the administrative courts' attitude towards the ECHR after the two "revolutionary" judgements of the Constitutional Court No. 348 and no. 349 of 2007. How is this pivotal step towards a definitive supra-legislative identity of the Convention in the national system acknowledged by our administrative courts? In order to answer to this question, it is necessary to start by focusing on the contents of the two mentioned fundamental judgements of the Constitutional Court

²⁹ See in particular Section 3 of the Pinto Act, Law No. 89 of 24 March 2001.

³⁰ It comes under the influence of Article 6 ECHR that, by a constitutional statute law No. 2 of 23 November 1999, Article 111 of the Italian Constitution has been reformed this way: "Jurisdiction is implemented through due process regulated by law. All court trials are conducted with adversary proceedings and the parties are entitled to equal conditions before an impartial judge in third party position. The law provides for the reasonable duration of trials".

³¹ An analysis of the relationship between Italian administrative judges and the European Convention on Human Rights, in particular relating to the application of the principle of fair trial, can be found in S. Mirate, *Giustizia amministrativa e Convenzione europea dei diritti dell'uomo*, cit. at 8.

3. The judgments of the Constitutional Court: the ECHR as a parameter for the constitutional review

In the judgment No. 348 dated 24 October 2007, the Constitutional Court declared unconstitutional the Article 5-bis, par. 1 and 2, of the law-decree No. 333 dated 11 July 1992, as applied by the Law No. 359 of 8 August 1992, (and of the following Article 37, par. 1 and 2, of the 'Consolidated Text' on expropriation, Presidential Decree No. 327 dated 8 June 2001) on the refund for legitimate expropriation. The provisions provided for compensation payable for the expropriation of building land, which did not correspond to the market value of the land³².

Pursuant to Strasbourg case law, the Court held that these provisions contravened Article 1 of the First ECHR Protocol (right to private property), because they did not provide a reasonable compensation in relation to the value of the expropriated property. Consequently there was a violation of Article 117, par. 1, of the Italian Constitution.

In the judgment No. 349 dated 24 October 2007, the Constitutional Court declared unconstitutional the Article 5-bis, par. 7-bis, of the same Law No. 359/1992, concerning the compensation awarded for the Italian public administrations' practice of "constructive expropriation"³³. The provision did not grant an adequate mechanism of compensation to the full market value of the property. For this reason it contradicted Article 1 of the First Protocol ECHR and thereby it must be considered in breach of the Article 117, par. 1, of the Italian Constitution.

³² Section 5-bis of Law No. 359/1992 provides a compensation calculated using the following formula. Market value of the land plus the total of annual ground rent multiplied by the last ten years, divided by two, minus a 40% deduction. The 40% deduction can be avoided if the basis for the expropriation is not an expropriation order but a "voluntary agreement" for the transfer of the land. 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.

On this see in particular § 7 of the present study.

³³ The practice of "constructive expropriation" is characterised by an emergency occupation of land by local administrative authorities, without any formal expropriation procedure, the occupation subsequently becoming irrevocable on account of the transformation of the property by the realisation of public works.

On this see in particular § 8 of the present study.

In these two judgments the Constitutional Court has recognized that the disposition of Article 117, par. 1, laid down an obligation to effectively implement the ECHR in the Italian system.

In practise, the Constitutional provision gives priority to the international law, and in this case to the European Convention, over a contradicting domestic law. The domestic law, which contrasts with the need to safeguard a human right protected by the European Convention, can consequently be declared unconstitutional, because of the infringement of Article 117 of the Constitution.

In its judgments the Italian Court underlines that the ECHR takes the role of parameter in the constitutional review, not only through the textual application of the human rights clauses, but also through the creative interpretation of these clauses made by the Strasbourg Court in the autonomous reading of the Convention provisions.

The national law could be considered in breach of Article 117, par. 1, of the Italian Constitution in the case of contrast with the European Convention, as interpreted by the European Court of Human Rights.

It is an important acknowledgment for the Italian Court, which expressly recognizes in this way the Strasbourg Court's creative task of reading autonomously the clauses of the Convention and giving them new and updated meanings in order to extend the scope of the human rights and fundamental freedoms' guarantees³⁴.

On the other hand it is worth pointing out that even the cases which gave the Constitutional Court the opportunity to pronounce the two judgments at issue, concerned an interference with the right to peaceful enjoyment of property not only as enshrined in Article 1, Protocol 1, ECHR, but above all as interpreted by the European case law in the light of the proportionality principle between the demands of the general

³⁴ About the autonomous reading of the Convention provisions by the European Court in order to extend the application of the human rights safeguarded by the ECHR see F. Sudre, *Le recours aux «notions autonomes»*, in F. Sudre (ed.), *L'interprétation de la Convention européenne des droits de l'homme* (1998) 93; and also J. Polakiewicz, *The Status of the Convention in National Law*, in R. Blackburn – J. Polakiewicz, *Fundamental rights in Europe* (2001), 33.

interests of the community and the requirements of the protection of the individual's fundamental right.

In this light the European Convention has finally come into the domestic legal order as an international treaty with a supra-legislative rank (due to the provision of Article 117, par. 1, of the Constitution) and at the same time as an original supra-national case law system which Italian courts (and also the administrative courts) have to take into account in protecting Convention human rights.

Overruling its traditional position, the Constitutional Court in the two judgments No. 348 and No. 349 of 2007 has undertaken a lead role in the "Conventional review" on domestic legislation: the national law will be controlled by the Court not only from the domestic point of view of its conformity to the Constitution, but also in respect to the Convention provisions on human rights, as interpreted by the Strasbourg Court.

The control over the conformity of the Italian legislation with the ECHR remains a centralized power of the Constitutional Court, which refused the possibility, indicated by a part of the Court of Cassation case law, to give every national court the power to discard a law contrary to the Convention³⁵.

³⁵ In particular, the Italian Court underlines the existing structural differences between the Community law and the ECHR system. The mere reference to Article 6, par. 2, of the Treaty on European Union, according to which the Union shall respect Convention fundamental rights as general principles of Community law, could not justify, according to the Constitutional Court, widespread control taken by the national courts over domestic legislation contrasting with ECHR guarantees. In this respect, one may agree with the Court. The relationship between the ECHR and the Contracting States is not characterized by the same intensity and strength which typifies the influence of the European Court of Justice on the Member States' legal order through the principle of supremacy of the Community law (imposed by the European Court of Justice since 1978 in *Simmmenthal* (Case C-106/77), Judgment dated 9 March 1978, [1978] ECR 629, and it has been accepted by the Italian Constitutional Court in the *Granital* judgment of 8 June 1984, No. 170). Unlike the Court of Justice, the Strasbourg Court does not have a direct "dialogue" with the national courts through a mechanism of preliminary rulings such as the mechanism provided by Article 234 of the EU Treaty (according to which any court or tribunal of a Member State may, if it considers that a decision on a question of interpretation of Community law is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon).

The relationship between the Human Rights Court and the domestic courts is based on the subsidiarity principle rather than on the principle of supremacy.

The new “Conventional review” provided by the Italian Constitutional Court on the basis of Article 117, par. 1, ECHR includes not only the conformity control of the national laws with the ECHR provisions as interpreted by the Strasbourg case law. The Court also reserves the power to evaluate the conformity of the ECHR provisions and their application by the Strasbourg Court with respect to the Italian Constitution. The Court undertakes the task of verifying whether ECHR provisions in the interpretation given by the Strasbourg Court are compatible with the Constitution.

From this point of view one may infer that the Italian Court aims to uphold its own role of constitutional court in protecting human rights and fundamental freedoms safeguarded in the domestic Constitution³⁶.

The doctrine of the “counter-limits”, dealing with the limits to the implementation of EU law arising from the fundamental principles of the Italian Constitution, as interpreted by the Constitutional Court, now seems to apply in the Convention

Unlike the Court of Justice, the Strasbourg Court has never imposed on the Contracting States the obligation to recognize to national courts the power to set aside subsequent legislation in contrast with the ECHR provisions. According to the doctrine of the margin of appreciation, the European Convention system let the Contracting States free to choose the best way in domestic law to give protection to ECHR rights and to guarantee their supremacy over national statute laws. See on this regard V.V.A.A., *The doctrine of the Margin of Appreciation under the European Convention on Human Rights: Its Legitimacy in Theory and Application in Practice*, H.R.L.J. (1998) 1-36; R.St.J. Macdonald, *The Margin of Appreciation in the Jurisprudence of the European Court of Human Rights*, in *International Law at the time of its Codification, Essays in honour of Judge Robert Ago* (1987) 187.

³⁶ That power of review recalls the position of the Constitutional Court in the relationship between EU law and the Italian Constitution. According to the already mentioned *Granital* judgment of 8 June 1984, No. 17, the Court has in any case reserved the power to check the compatibility of the EC Treaty with respect to the fundamental principles recognized by the Italian Constitution. See also the previous judgment of the Italian Constitutional Court sent. 27 December 1973, No. 183, F. I. (1974) I, 315, note by R. Monaco, *La costituzionalità dei regolamenti comunitari*; and more recently sent. 28 December 2006, No. 454, Giur. Cost. (2006) 6. In all these judgments the Court underlined its power to review the conformity between EU law and “the fundamental principles of the Italian constitutional order and the human rights and fundamental freedoms safeguarded by the Italian Constitution”.

system too³⁷. In conducting a wide-ranging examination as to the compatibility of the Convention provisions with the Constitution, both the two judgments show the Court's willingness to play an effective role in controlling the conformity of Convention norms with the Constitution³⁸.

³⁷ The concept of "counter-limits" was used by the Italian scholars to describe that review on the compatibility between Community law and the fundamental principles of the Italian constitutional order set by the Constitutional Court in the above mentioned judgments. See in this regard, among the others, R. Caranta, *Giustizia amministrativa e diritto comunitario* (1992), 342; M. Cartabia, *Principi inviolabili e integrazione europea* (1995) 119; and more recently G. Greco, *I rapporti tra ordinamento comunitario e nazionale*, in M. P. Chiti - G. Greco (eds.), *Trattato di diritto amministrativo europeo*, II. Ed., (2007), 831, spec. 857.

³⁸ It is worth saying, however, that there is a difference between the two judgments in the way they deal with the constitutional review on the ECHR provisions.

In the judgment No. 349 the issue of the "counter-limits" to the implementation of the ECHR rights does not play a pivotal role in the opinion of the Court. The Court just underlines the need to guarantee a "minimum common standard" in the protection of human rights as a common foundation of a correct and effective relationship between the European Convention and the national legal order, and in particular the Italian Constitution.

The assertion is perfectly consistent with the main character of the ECHR system. Indeed, 'contrary to the European Union Law, the law of the Convention does not require a strictly uniform application throughout Europe. The Convention remains a minimum standard (article 53 of the ECHR) which allows for "margin of appreciation" obliging the national judge to have regard to the peculiar considerations of law and policy in his or her own country'³⁸. In the Conventional legal order the domestic standards should prevail if they are higher than the ECHR standards in protecting human rights and fundamental freedoms.

On the contrary, the judgment No. 348 seems particularly to stress the power of the Constitutional Court to evaluate the compatibility of the ECHR provisions with the Italian Constitution. The Court expressly underlines the need to extend the constitutional review to every feature of the possible contrast between the ECHR provisions and the Italian Constitution. The constitutional review could assess the conformity of the ECHR provisions, as interpreted by the European Court, with references to any "constitutional clause", and not only, such as in the relationship with the EU law, having regard for the "general fundamental principles" of the domestic constitutional order. The Constitutional Court considers the Italian Constitution provisions as a parameter through which to evaluate in domestic law the compatibility of the ECHR rights, enshrined in the Convention and interpreted by the Strasbourg Court. On this regard see in particular M. Savino, *Il cammino internazionale della Corte costituzionale dopo le sentenze n. 348 e 349 del 2007*, Riv. It. D. Pubbl. Com. (2008) 747.

From this point of view one may note that in the constitutional review on the ECHR provisions (as interpreted by the European case law) the Constitutional Court could consider the compatibility with constitutional clauses enshrining a human right or a fundamental freedom. In that case the abstract balance, struck by the constitutional provision, between the protection of the human right and the guarantee of other relevant public interest (such as for instance the balance between the right to private property and the public interest in the expropriation proceedings in Article 42 of the Italian Constitution) is definitively a parameter in the compatibility review on the ECHR in the domestic system. And the master of that balance will be obviously the Constitutional Court itself.

Moreover the Court in the judgment No. 348 has pointed out that this constitutional review deals with the ECHR provisions as the result of the Strasbourg Court's creative interpretation.

This way the Court seems to show the willingness to free itself from a strong influence of the European Court in developing the domestic constitutional case law on human rights and fundamental freedoms. What the Italian Constitutional Court seems to express in that judgment is the need for a leading role in protecting human rights in the domestic law; a need which discloses a natural vocation of the Italian Court to protect the national boundaries in the face of the influence coming from the European case law³⁹.

³⁹ Anyway, in referring to a hypothetical contrast between the interpretation of a human right (especially of its content and its application in balancing with a different public interest) in the Italian constitutional case law and in Strasbourg case law, it is important to underline that the protection of the human rights and fundamental freedom in Europe is guaranteed by a tradition common to the States, the EU and the ECHR.

According to Article 6 of the EU Treaty, fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, constitute general principles of the European Union. This link in the human rights protection all over the Europe is now stressed by the new Treaty of Lisbon, which provides that the Union shall accede to the European Convention of Human Rights.

Such a common tradition and future cooperation between States, EU and ECHR (not only at the legislative level, but also at the jurisdictional level) could be the key to avoiding any contrast in implementing human rights and fundamental freedoms in domestic law and in Europe.

Anyway, in the Convention's system, national ordinary courts are primarily in charge of protecting human rights domestically. In accordance with this principle, the Italian Constitutional Court in both the judgments recognizes an obligation upon national courts to interpret domestic rules in the light of the Convention.

Whenever this is not possible, in the case of an unavoidable contrast between the ECHR rights and the domestic statute law, domestic courts must bring the issue before the Constitutional Court in order to obtain a declaration of its unconstitutionality because of the violation of Article 117, par. 1, of the Italian Constitution.

That is, therefore, the role which the administrative courts, as common domestic courts, should undertake to fulfil the task of first "guardians" of the conventional rights in the national system. A role which implies both an actual cooperation with the Constitutional Court, in order to control the unconstitutionality of a statute law contrasting with the ECHR, and an effective attention to the Strasbourg case law's evolution in order to interpret national rules in conformity with and in the respect of the Conventional guarantees.

4. Analysing the Italian Council of State case law referring to the ECHR

The two judgements of the Constitutional Court had the merit of shining a light on the European Convention and on the reception of Strasbourg case law as a legal source able to influence the evolutions of the domestic case law. And indeed, after these two judgements, the administrative case law referring to the Convention has begun to increase considerably.

The following analysis, carried out using the search engine of the official web site of the Italian Council of State (www.giustizia-amministrativa.it), shows a consistent numbers of decisions adopted by our supreme administrative Court in which the ECHR is seriously considered in order to decide the case object of the judgement. The results of the research will be here divided into different paragraphs, showing the decisions which directly follow the solutions given by the Constitutional Court in the specific sector of the indirect expropriation concerned, in

particular, in the constitutional judgments No. 349 of 2007; the decisions which refer to Article 117, par. 1, of the Constitution as a parameter for the constitutional review of a statute law contrasting with the ECHR; the decisions which decide the case concerned according to the guarantees imposed by the Convention for the protection of human rights; the decisions which, on the contrary, recall the European Convention just as a further argument to reinforce a solution already grounded on national law and finally the decisions, unfortunately still present in the administrative case law overview, which get the Convention wrong, misunderstanding its role in relation to the national legal sources or even to the Community law⁴⁰.

4.1. The “indirect expropriation” in the Council of State case law after the constitutional judgement No. 349 of 2007

While the disputes concerning the compensation for the expropriation of building land – the topic raised by the judgement of the Constitutional Court No. 348 of 2007 – fall within the jurisdiction of the civil courts (civil tribunals, Court of Appeal and finally Court of Cassation)⁴¹, the issue of the “indirect expropriation” is, after the judgment No. 349 of 2007, a point dealt with very often in the recent administrative case law.

With the judgment No. 349 the Italian Constitutional Court finally agreed with the European case law about the need to award a full market value compensation in the case of “indirect (or constructive) expropriation”.

Under the indirect expropriation rule (*accessione invertita* or *occupazione acquisitiva*), the public authorities acquire title to the

⁴⁰ Different positions can also be found in the administrative tribunals case law, which, after the two judgments of the Constitutional Court of 2007, more and more refer to the ECHR. Due to problem with available space, the article does not analyze in detail the tribunal’s decisions, which anyway in general can be considered as following the Council of State’s solutions illustrated in the next paragraphs.

⁴¹ On this issue an analysis of the recent judgements of the Court of Cassation about the compensation of the expropriation of private lands could be found in S. Mirate, *La nuova indennità di espropriazione: uno sguardo sulle applicazioni giurisprudenziali dopo la sentenza corte cost. N. 348/2007*, Resp. Civ. Prev. (2009) 539.

land from the outset before formal expropriation if, after taking possession of the land and irrespective of whether such possession is lawful, the works in the public interest are performed⁴². Constructive expropriation has permitted the public administration to take possession and property of lands without respecting the formal procedure for expropriation. Compensation, that is to say damages for the deprivation of the land, was due to the owner in consideration for the loss of ownership caused by the unlawful taking of possession, but Article 5-bis, Subsection 7-bis, Law No. 359/1992, as amended by the Law No. 662/1996, provided that such compensation cannot exceed the amount due on formal expropriation (according to the already seen formula established by Article 5-bis: one-half of the sum of the market value plus the income from the land, less 40%), plus 10%, but without applying the 40% reduction.

In Italian law the original case law rule of the “constructive expropriation” is now provided (and reformed) by Article 43 of the Code of Expropriation Provisions (adopted by the Presidential Decree No. 327/2001, subsequently modified by Legislative Decree No. 302/2002), came into force on 30 June 2003. The new Article 43 authorises the public authority, in the case of taking possession of property of the private land without respecting the formal expropriation procedure, to issue a “deed of expropriation” (a formal decision which is called in Italian law , “*atto di acquisizione sanante*”) valid *ex nunc*. Such deed does not regularise past illegalities, but rather defines the situation with reference to the future, guaranteeing a just balance between the public interest (which must be particularly important and is subject to a jurisdictional supervision) and that of the individual, who is entitled to receive the reimbursement of the market value of the land and overall damages in respect of the prejudice sustained up until the date of issue of the deed⁴³.

⁴² The “*accessione invertita*” or “*occupazione acquisitiva*” (or indirect expropriation rule, as it is called by the European Court of Human Rights) was stated by the Court of Cassation, sitting as a full court, in the judgment of 16 February 1983, No. 1464, *Giur. It.* (1983) I, 1, 1629, note by M. Annunziata, *Un nuovo modo di acquisto pubblico della proprietà: la costruzione di opera pubblica come accessione invertita*.

⁴³ But the legislative reform does not indicate the time within the deed of expropriation must be issued by the public authority.

The European Court of human rights did not consider the “indirect expropriation” rule to comply with the peaceful enjoyment of private possessions safeguarded by Article 1 of Protocol No. 1 ECHR.

In several judgments the European Court reiterated that the first and most important requirement of Article 1 of Protocol No. 1 ECHR is that any interference by a public authority with the peaceful enjoyment of possessions should be lawful. The rule of law, one of the fundamental principles of a democratic society, is inherent in all the Articles of the Convention and entails, according to the Strasbourg Court, a duty on the part of the State or other public authority to comply with judicial orders or decisions against it.

In particular, concerning the constructive expropriation rule, the European Court had reservations as to the compatibility with the requirement of lawfulness of a mechanism which, generally, enables the authorities to benefit from an unlawful situation in which the landowner is presented with a *fait accompli*⁴⁴. The European Court criticized the application of the rule on constructive expropriations that resulted in arbitrary outcomes depriving litigants of effective protection of their rights. The occupation of private land in order to carry out building work that took place without an expropriation order and without compensation infringed Article 1 of the Protocol No. 1 ECHR.

The European Court also underlined the insufficient compensation awarded by the Italian law (in particular by Article 5-bis, Subsection 7-bis, of Law No. 359/1992) to the individuals for the deprivation of their property in the constructive expropriation proceeding. Strasbourg case law focused, in the light of proportionality principle, on checking the existence of a fair balance between the demands of general interest with the protection of the individual’s right to property. Such a balance is not struck when the unlawful deprivation of the private property is paid by the same compensation due on formal expropriation, using a criterion lower than the market value of the land.

⁴⁴ On the European case law see in particular the judgment ECtHR, 17 May 2005, *Scordino v. Italy* and the following judgment for the application of Article 41 ECHR, 6 March 2007, *Scordino v. Italy*; ECtHR, 16 November 2006, *Ippoliti v. Italy*; ECtHR, 19 October 2006, *Gautieri v. Italy*, all in www.echr.coe.int (all documents are in French only).

It is precisely on this issue that the Italian Constitutional Court in the judgment No. 349 has followed the European case law and declared unconstitutional the Article 5-bis, par. 7-bis, of the Law No. 359/1992. The provision did not grant an adequate mechanism of compensation to the full market value of the property. For this reason the Constitutional Court found it be in contrast with Article 1 of the Protocol No. 1 ECHR and thereby in breach of the Article 117, par. 1, of the Italian Constitution.

After the constitutional judgment, the already mentioned Finance Act 2008 (Law 24 December 2007, No. 244) has reformed Article 55 of the Code of expropriation provisions, providing that the compensation in any case of constructive expropriation must be awarded at the full market value of the expropriated land⁴⁵. Therefore that criterion now applies to every constructive expropriation proceeding, started both before and after the entry into force of the Code (30 June 2003).

In the judgment No. 349 the Italian Constitutional Court did not refer to the more general issue of the compatibility of the “constructive expropriation” mechanism with the guarantee of the peaceful enjoyment of possessions laid down in Article 1 of Protocol No. 1 ECHR and the rule of law principle recalled in this regard by the European case law. Recent Italian administrative case law pointed out that the reform of Article 43 of the Code of expropriation provisions has transformed the indirect expropriation rule in a way that complies with the Convention guarantees.

The need for a deed of expropriation to state that taking possession of the land by the public administration, which has to be communicated to the private owner after a complex evaluation of the public interest to the expropriation, is considered by the Council of State a consistent element of the new legislation with respect to the Convention rights, in particular with Article 1 of

⁴⁵ Originally Article 55 of the Code of expropriation provisions, in giving a criterion for the constructive expropriation compensation, referred to Article 37 of the Code, which, as already seen, used a formula on the refund for lawful expropriation (market value of the land plus the total of annual ground rent multiplied by the last ten years, divided by two, minus a 40% deduction) considered by the Constitutional Court in the previous judgment No. 348/2007 in breach of Article 1 of Protocol No. 1 ECHR, and therefore in contrast with Article 117, par. 1, of the Italian Constitution.

Protocol No. 1 ECHR⁴⁶. The European Court has not decided yet any cases under this new legislation.

In its latest judgments the Strasbourg Court has already noted incidentally that the amendment is not completely in conformity with its case-law, in particular in the light of the respect of the rule of law principle. According to the Court, as already mentioned, the first and most important requirement of Article 1, Protocol No. 1 is that any interference by a public authority with the peaceful enjoyment of possessions should be lawful. Although provided now in a statutory provision, the constructive expropriation mechanism, which generally enables the authorities to benefit from an unlawful situation, is considered by the Court not fully compatible with the requirement of lawfulness. The constructive expropriation, in the words of the European Court, «*que ce soit en vertu d'un principe jurisprudentiel ou d'un texte de loi comme l'article 43 du Répertoire*» «*ne saurait donc constituer une alternative à une expropriation en bonne et due forme*»⁴⁷.

Unlike the Court of Cassation, which in some recent judgements questioned the possibility of a contrast between the new disposition of Article 43 and the Conventional guarantees for the respect of the private property – especially because the provision does not provide for the restitution of the land taken without a formal expropriation procedure – and consequently a contrast between the legislative rule and Article 117, par. 1, of the

⁴⁶ See in particular Council of State, Section IV, 16 November 2007, No. 5830 and 30 November 2007, No. 6124, available from the official site of the Italian Council of State www.giustizia-amministrativa.it, which refer to Article 43 of the Code of expropriation provisions in order to prevent future condemnations for violation of Article 1 of the Protocol No. 1 ECHR.

⁴⁷ ECtHR 12 January 2006, *Sciarrotta v. Italy*, in www.echr.coe.int, § 71, available in French only; similarly, among the others, ECtHR 20 April 2006, *Sciscio v. Italy*, and 18 March 2008, *Velocci v. Italy*, both in www.echr.coe.int, available in French only. See also the Interim Resolution ResDH (2007)3, adopted by the Committee of ministers of the Council of Europe on 14 February 2007, in www.coe.int, according to which «The procedure provided by Article 43 is not an alternative to the ordinary procedure provided for expropriation and thus is not generally applicable: on the contrary it is an exceptional measure to be used only in case of demonstrably urgent public interest» and in any case «under no circumstances may acquisition of property be considered automatic on the grounds that public works or other transformations have been carried out».

Constitution⁴⁸, the Council of State held that Article 43 is the direct expression of the respect of the Conventional right of property, as enshrined in Article 1, Protocol No. 1, ECHR. In several decisions the administrative Council underlined that in the present legislative and case law landscape there is not any space for the mechanism of the «indirect expropriation», because of its contrast with the Conventional provisions as interpreted by the European Court, which have, after the two fundamental judgments of the Constitutional Court of 2007, «a direct relevance» in the domestic law⁴⁹.

In particular, since the judgement of the Fourth Section No. 2582 of 2007⁵⁰, the Council of State has always stated the “end” of the indirect expropriation thanks to the legislative rule of Article 43 providing a “deed of expropriation”, which ensures a balance between the public interest to keep the land and the interest of the individual, who is entitled, at the end of a prescribed proceeding, to receive the reimbursement of the market value of the land and overall damages in respect of the prejudice sustained up until the date of issue of the deed. According to the administrative Court, the rule provided by Article 43, without referring, as done in the

⁴⁸ See in particular Court of Cassation, United Section, 19 December 2007, No. 26732, Resp. Civ. Prev. (2008) 2496, noted by S. Mirate, *Prime (non) applicazioni giurisprudenziali dell'acquisizione sanante*; and also Court of Cassation, Section I, 28 July 2008, No. 20543, Urb. App. (2009) 419, noted by G. De Marzo, *Diritto giurisprudenziale tra esigenze di legalità e perduranti incertezze*.

⁴⁹ See, among the others, Council of State, Section IV, 27 June 2007, No. 3752, www.giustizia-amministrativa.it; Id., Section IV, 30 November 2007, No. 6124, F. A. Cons. St. (2007) 3119; Id., Section IV, 16 November 2007, n. 5830, *ibidem*, 3100; Id., Section IV, 3 February 2008, No. 303, Resp. Civ. Prev. (2008) 2502, noted by S. Mirate, *Prime (non) applicazioni giurisprudenziali dell'acquisizione sanante*; Id., Section IV, 10 April 2008, No. 1552, www.giustizia-amministrativa.it; Id., Section IV, 4 December 2008, No. 5984, www.giustizia-amministrativa.it; Id., Section IV, 30 December 2008, No. 6636, www.giustizia-amministrativa.it; Id., Section IV, 17 February 2009, No. 915, www.giustizia-amministrativa.it; Id., Section V, 7 April 2009, No. 2144, www.giustizia-amministrativa.it, which in particular considered Article 43 complying with the Conventional guarantee laid down by Article 1, Protocol No. 1, ECHR only if the domestic rule is interpreted, in accordance with the principle of the rule of law, as granting a pecuniary compensation too; Id., Section IV, 21 April 2009, No. 2420, Urb. App. (2009) noted by S. Mirate, *L'acquisizione sanante: una "legale via d'uscita" per l'occupazione appropriativa?*; Id., Section V, 12 June 2009, No. 3677, www.giustizia-amministrativa.it.

⁵⁰ Council of State, Section IV, 21 May 2007, No. 2582, F. A. Cons. St. (2007) 1463 and also in www.giustizia-amministrativa.it.

past by the case law made “indirect expropriation”, figure as the irreversible transformation of the private land by the public authority, and was created by the Italian legislator expressively to avoid any further contrast with the ECHR guarantees.

The position of our supreme administrative Court, already expressed in a decision of the *Adunanza Plenaria* in 2005⁵¹, is therefore totally positive and acritical towards the compatibility of the new mechanism of the “*acquisizione sanante*” described in Article 43 of the Code of expropriation, to the point of considering the new legislative rule as the “legal way out” from any possible contrast between the domestic law and the right to a private property as granted by the European Court in accordance with the provision of Article 1, Protocol No. 1, ECHR⁵².

Just the purpose of the rule provided by Article 43 to realize «an end definitively to the practice of indirect expropriation»⁵³, brings the Council of State to apply in its case law the mechanism of the “*acquisizione sanante*” to all the cases of occupation of a private land without a fair proceeding by the public authorities, included the cases which already took place before the Code of expropriation came into force (30 June 2003)⁵⁴.

⁵¹ Council of State, *Adunanza Plenaria*, 29 April 2005, No. 2, G. D. A. (2005) 1285, noted by Police, Di Leo, *L'utilizzazione senza titolo di un bene per scopi di interesse pubblico*.

⁵² The expression “legal way out” (“*legale via d'uscita*”) is used in particular by Section IV, 16 November 2007, n. 5830, point 12.2., already quoted, which held that this “legal way out” permits to adjust «la situazione di fatto a quella di diritto, con atti formali ancorati a una compiuta normativa e comunque sindacabili dal giudice amministrativo, quando il bene sia stato “*modificato per scopi di pubblica utilità*”(fermo restando il diritto del proprietario di ottenere il risarcimento del danno. In altri termini, l'art. 43 - in coerenza col principio di legalità affermato dall'art. 42 Cost. in tema di procedimento ablatorio - contiene - secondo quanto ancora affermato dalla decisione n. 5830/2007 della Quarta Sezione del Consiglio di Stato - le imprescindibili disposizioni che, nel caso di motivata prevalenza dell'interesse pubblico, consentono all'Amministrazione di tornare nell'alveo della legalità, così evitando alla Repubblica Italiana ulteriori sentenze di condanna da parte della CEDU».

⁵³ See the resolution of the Ministers Committee of the Council of Europe ResDH(2007)3, adopted on 14 February 2007, which is recalled by the Council of State, Section IV, 21 May 2007, No. 2582, already quoted, § 8.2.

⁵⁴ See on this Council of State, Section IV, 27 June 2007, No. 3752; ; Id., Section IV, 16 November 2007, n. 5830; Id., Section IV, 30 November 2007, No. 6124; Id., Section IV, 4 December 2008, No. 5984; Id., Section IV, 21 April 2009, No. 2420, all already quoted. On the contrary the Court of Cassation, since the judgement

4.2. The reference to the counter-limits doctrine

Right in relation to the issue of the retroactive application of the mechanism provided by Article 43 of the Code of expropriation in order to avoid the consequences of a contrast with the ECHR guarantees in the case of indirect expropriation, the Council of State referred in some decisions to the counter-limits doctrine laid down by the Constitutional Court in the two judgements No. 348 and No. 349 of 2007.

As we have already seen, the Court refers to the counter-limits as a “tool” necessary to safeguard its role in protecting human rights in domestic law. The counter-limits imply, therefore, a sort of “secondary level” of constitutional review (concerning the conformity of the Conventional rules, as interpreted by the European Court, to the norm of the Italian Constitution), done by the Court after the “first level” of review on the compatibility of the national legislation with the ECHR, through the provision of Article 117, par. 1, Cost.

In other words, it seems, reading the two judgements of 2007, that counter-limits are exclusively a matter of constitutional review.

For this reason, it is interesting to analyse the reference to the counter-limits doctrine introduced by the Council of State in two recent decisions of the Fourth Section. The Council, actually, used the counter-limits not in order to check the compatibility of a ECHR provision with the Italian Constitution (a task which is in fact typical of the Constitutional Court), but in order to state a domestic law principle as a limit for the application of the ECHR.

For example, in a case concerning the possibility for a public authority to proceed according to the *acquisizione sanante* procedure to remove the effects of an indirect expropriation which took place before the 30 June 2003, the supreme administrative court held that Article 43 does not apply when the authority has already been recognized as the owner of the expropriated land by a final judgement of a civil tribunal⁵⁵. The Council of State underlined that the principle of the respect of the *res judicata*, which is the direct consequence of the legal certainty principle,

of the United Section, 19 December 2007, No. 26732, already quoted, excluded any retroactive application of the mechanism provided by Article 43 of the Code of expropriation.

⁵⁵ Council of State, Section IV, 3 February 2008, No. 303, already quoted.

derives from Article 111 of the Italian Constitution on the right to a fair trial. The constitutional status of that principle is considered a limit for the application of the Conventional guarantees. On this matter, the decision expressly recalls the position of the Constitutional Court regarding the counter-limits doctrine. According to the Council, Article 43, which realizes the Conventional guarantee of the respect for private property, cannot be applied in the face of the counter-limit, represented by the need to ensure the legal certainty principle expressed in the *res judicata* rule⁵⁶.

Similarly, in an other judgment of 2008, the same Fourth Section used the counter-limits doctrine to avoid the retroactive application of Article 43 of the Code of expropriation. In this case the Council of State did not follow the majority of the administrative case law, and, according to the different opinion of the Court of Cassation⁵⁷, held that a claim for damages, caused by an indirect expropriation which took place before the Article 43 came into force, ceases to be valid as a result of the statute of limitations in a delay of five years starting from the moment of the irreversible transformation of the private land by the public authority. That is the moment indeed in which the original figure of “indirect expropriation” is realized and the private owner lost the property of his land in favour of the administration. In the judgement the administrative court stated that it is not possible to apply the mechanism of the deed of expropriation provided by Article 43 in cases that occurred before the date in which the provision came into force. According to the Council, even if Article 43, in removing the ancient mechanism of the “indirect expropriation” and providing the new mechanism of the “*acquisizione sanante*”, recognizes the Conventional guarantees laid down by Article 1, Protocol No. 1, ECHR as interpreted by the

⁵⁶ The Council of State in the mentioned judgement held that, applying the counter-limits doctrine set by the Constitutional Court, «il principio dell'irretrattabilità del giudicato, la cui copertura costituzionale è senza dubbio affidata all'art. 111 della nostra Carta, non può ritenersi travolto dalle norme della Convenzione, derivandone altrimenti un'inammissibile contrasto con la Costituzione stessa».

⁵⁷ See among the others Court of Cassation, United Sections, 19 December 2007, No. 26732, above mentioned, and Court of Cassation, Section I, 5 September 2005, No. 18239, G. C. Mass. (2005) 6.

Strasbourg Court, is necessary to respect the counter-limit set by the constitutional domestic principle of legal certainty, from which derives the limitations rule.

In both the judgements, therefore, the Council of State, even if it reaches different conclusions in the two cases, refers to the counter-limits doctrine in order to exclude in the case concerned the application of Article 43 of the Code of expropriation. The provision is considered the answer of the Italian legislator to the need of guarantees afforded by the European Court in interpreting Article 1, Protocol No. 1, ECHR, but its application finds a limit in the face of domestic principles which have a constitutional status, such as the principle of legal certainty. And the balance between the application of the provision which ensure the Conventional rights and the constitutional principles which apply as “counter-limits” is directly struck by the Council of State itself, without bringing the issue before the Constitutional Court.

4.3. The reference to Article 117, par.1, of the Constitution in case of contrast between ECHR and national law

In each case concerning the indirect expropriation and its compatibility with the ECHR, the Council of State in its recent case law refers to the two judgements of the Constitutional Court No. 348 and No. 349 of 2007, and therefore to Article 117, par. 1, of the Constitution as the provision able to grant to the Convention rights a supra-legislative status and so a supremacy on the ordinary statute law⁵⁸.

Besides these cases, it is worth mentioning an ordinance of the Council of Administrative Justice for the Sicily Region, in which the supreme administrative court brought a constitutional issue before the Constitutional Court in a case concerning the possible contrast of a national statute law with Article 6 ECHR and Article 117, par. 1, of the Italian Constitution⁵⁹. The case concerned two provisions (Articles 23 and 87) of the Consolidated Text on the parliamentary election, Presidential Decree No. 361 dated 30 March 1957, in so far as they don't provide for a review

⁵⁸ For the extensive administrative case law on this regard see as examples the decisions already quoted at note 49.

⁵⁹ Council of Administrative Justice for the Sicily Region, ordinance 29 May 2008, No. 489, *www.giustizia-amministrativa.it*.

of the Central Electoral Office's decisions before the administrative courts. The Sicilian Council considers that the lack of review in this case could contravene the right to a fair trial laid down in Article 6 ECHR, and thereby it could be considered in breach of the Article 117, par. 1, of the Italian Constitution. On the issue there is not yet an answer by the Constitutional Court. But a further interesting (and almost curious) consideration is possible in reading the ordinance of the Sicilian administrative court. In the opinion the Council held that the national provisions of statute law are in breach of Article 117, par. 1, of the Constitution, which imposes to the Italian legislator to act within the limits set by the European Union law and the International obligations, with reference to Article 6 ECHR which grants a "constitutional value" to the principle of effectiveness of judicial review (*«che imprime valore costituzionale all'esigenza di effettività della tutela giurisdizionale»*). In referring to a "constitutional value" which derives from the Conventional provision of Article 6, the Council of Administrative Justice seems to take a different position from the solution given by the Constitutional Court in the two judgments No. 348 and No. 349 of 2007 and in its next case law⁶⁰. According to the Constitutional Court, as we have already seen, the ECHR has a supra-legislative rank, but not a constitutional status. It is an interposed parameter between the domestic ordinary law and the Constitutional provision of Article 117, par. 1.; a parameter for the constitutional review of the national statute law. In the above mentioned decision, instead, the Council recognizes to an ECHR provision (Article 6 on the fair trial) the power to give a "constitutional" value to the principle of the effectiveness of the judicial protection. It is hard to say for the time being, without others decisions of the administrative courts which express the same opinion, whether the Council in this decisions had actually intended to give a different vision about the (constitutional?) rank of the ECHR provision, or, otherwise, whether it is just a sort of "misunderstanding" of the recent solution given by the Constitutional Court to the issue of the status of the European Convention in our domestic law. Only by

⁶⁰ See for example Constitutional Court, 27 February 2008, No. 39, www.cortecostituzionale.it. On this A. Ferraro, *Recenti sviluppi in tema di tutela dei diritti fondamentali, tra illegittima espropriazione della funzione propria della CEDU ed irragionevole durata di uno scontro giudiziario*, Riv. It. D. Pubbl. Com. (2008) 651.

analysing the future judgements on this regard, it will be possible to comprehend the actual relevance of the opinion expressed by the Council in the mentioned decision.

4.4. The reference to the Strasbourg Court case law

In the 2008 and 2009 judgments of our Council of State one may notice an increasing attention paid to the Strasbourg case law. For the purpose of this study, we can divided the administrative case law in two different approaches.

In some decisions the supreme administrative courts starts to refer to the European Court judgments as an helpful element to solve the dispute in the case concerned. These decisions are not so many in the period considered here for the research (2007-2008 and the first six months of 2009), but they are very relevant because they show a new attitude of the Council of State in opening to a possible “*dialogue des juges*” which is, as we have seen in the introduction, the key element for the setting-up of a common minimum standard for the protection of human rights all over the Europe.

In a decision of 2008 the Sixth Section of the Council of State referred to the European case law in order to decide about the compatibility with the right to a fair trial enshrined in Article 6 ECHR of a domestic provision which provided a retroactive interpretation of the national legislation on grading in the teaching public sector⁶¹. The opinion given by the administrative court is founded on the Strasbourg case law which requires the existence of a qualified public interest as a condition for the lawfulness of the retroactive legislation⁶².

A direct reference to the Strasbourg case law is present also in a decision of the Fifth Section of 2008⁶³. In relation to the

⁶¹ Council of State, Section VI, 19 August 2008, No. 3944, *www.giustizia-amministrativa.it*.

⁶² It's the same case law concerning the issue of the legislative validations, even if in the case brought to the attention of the Italian Council of State the issue was about the temporal scope of application of the interpretative rule adopted by the Italian legislator. See European Court of Human Rights, 28 October 1999, *Zielinski and others v France*, *www.echr.coe.int*.

⁶³ Council of State, Section V, 25 August 2008, No. 4078, *www.giustizia-amministrativa.it*.

instance about a possible contrast with Article 6 ECHR on the right to a fair trial in a proceeding of competitive public examination, the Council of State rejects the instance in referring to the *Pellegrin* judgment of the European Court⁶⁴. About the application of Article 6, par. 1, ECHR in disputes raised by employees in the public sector over their conditions of service, the Court established an autonomous interpretation of the term “civil service” which would make it possible to afford equal treatment to public servants performing equivalent or similar duties in the States party to the Convention, irrespective of the domestic system of employment and, in particular, whatever the nature of the legal relation between the official and the administrative authority. To that end the Court introduced a functional criterion based on the nature of the employee's duties and responsibilities. The holders of posts involving responsibilities in the general interest or participation in the exercise of powers conferred by public law wielded a portion of the State's sovereign power. The State therefore had a legitimate interest in requiring of these officials a special bond of trust and loyalty. On the other hand, with respect to other posts which did not have this “public administration” aspect, there was no such interest. The Court therefore ruled that the only disputes excluded from the scope of Article 6 § 1 were those which were raised by public servants whose duties typified the specific activities of the public service in so far as the latter was acting as the depository of public authority responsible for protecting the general interests of the State or other public authorities. In the case decided by the Council of State, the supreme administrative court considers the administrative directors, who were involved in the examination proceeding, as public servants who participate to the public authority's power, and therefore excludes the application of the Conventional provision of Article 6⁶⁵.

Another very interesting case was decided by the Sixth Section itself in 2009, concerning the judicial review on the

⁶⁴ European Court of Human Rights, 8 December 1999, *Pellegrin v France*, www.echr.coe.int.

⁶⁵ Similarly Council of State, Section V, 17 September 2008, No. 4401, www.giustizia-amministrativa.it.

technical-discretionary power exercised by the public administration⁶⁶.

As it is known, the scope of judicial review on the administrative action has been a very widely discussed topic in the last years case law. Recently the administrative courts extended the control over administrative action to include the technical or scientific evaluations, which were originally considered by the case law a part of discretion and therefore reviewed only under the traditional ground of *eccesso di potere*, considering the legality of the administrative decision under the aspects of an external control, such as the respect of the duty to give reasons or the instance of *ingiustizia manifesta*, that is manifestly wrong decision. Since a decision of the Council of State, No. 601/1999, technical or scientific evaluations are no longer considered “discretionary”⁶⁷. The control became an “internal control”, which is directed at checking the rightness of the evaluation and of the decision-making process. The new type of review has been accepted by the courts with different attitudes. The administrative case law shows even now decisions which are actually opened to exercise a deeper control over the technical or scientific administrative action and decisions, on the contrary, which are still linked to the traditional review under the classic, more formal, ground of the *eccesso di potere*. In this landscape the decision of 2009, already mentioned, is relevant because it founds the need for an internal control on the technical or scientific administrative evaluations directly on the provision of Article 6, par.1, ECHR. The power of a “full jurisdiction” is afforded to the courts, according to the Council of State, by the reference to the principle of the effectiveness of judicial protection. The principle is enshrined in Article 6 ECHR, as interpreted by the Strasbourg case law, which recognized to the national courts the power to check the administrative decisions not only to determine whether the discretion enjoyed by the administrative authorities has been used in a manner compatible with the object and purpose of the law.

⁶⁶ Council of State, Section VI, 6 February 2009, No. 694, *www.giustizia-amministrativa.it*

⁶⁷ Council of State, Section IV, 9 April 1999, No. 601, G. D. A. (1999) 1179, noted by D. De Pretis, *Discrezionalità tecnica e incisività del controllo giurisdizionale*. See also S. Mirate, *Giustizia amministrativa e Convenzione europea dei diritti dell'uomo*, cit. at 8, in particular 445.

Otherwise the final result will be that the decision taken by the administrative authorities remains in the majority of cases without any effective review exercised by the courts⁶⁸. For these reasons, the Sixth Section of the Council of State in referring to the European case law reviews, in the case concerned, the technical evaluation made by the Commission in a competitive State examination by checking whether the evaluation made by the public authority can be considered right or wrong.

Much more frequent, on the contrary, is the other approach of the Council of State to the Strasbourg case law, used in the decisions just in order to reinforce a solution already grounded on national law. The use of the Convention as a “further argument” was already present in the traditional case law we described previously⁶⁹. As a recent example of this existing position in the administrative case law it is worth mentioning a decision of the Fourth Section No. 1899/2009. The Council of State, dealing with the Article 104 (about the independence of the judiciary) and the Article 105 (about the functions of the High Council of the Judiciary) of the Constitution, underlines that the same principles safeguarded by these constitutional provisions are also expressed by the European Court case law, which held that public authorities must implement final judgments which recognize and protect judges’ rights⁷⁰.

4.5. Misunderstanding the ECHR: some examples in the latest case law

The analysis of the recent administrative case law shows a still permanent attitude of the Council of State in some decisions

⁶⁸ See in particular European Court of Human Rights, 10 February 1983, *Albert et Le Compte v Belgium*; Id., 28 June, 1990, *Obermeier v Austria*, both in *www.echr.coe.int*. The Court expressly underlined in these judgements that in disputes concerning civil rights, such a limited review cannot be considered to be an effective judicial review under Article 6 § 1.

⁶⁹ See on this par. 2.1. For a decision which recently refers to the right to a fair trial mentioning Article 111 of the Italian Constitution paired with Article 6 ECHR, see Council of State, Section V, 30 April 2009, No. 2761, *www.giustizia-amministrativa.it*.

⁷⁰ The reference in particular to the judgements of the European Court of Human Rights, 24 April 2006, *Zubko v Ukraine*, and 20 December 2007, *Ptashko v Ukraine*, available at the official website *www.echr.coe.int*.

to not consider the actual role of the ECHR in the domestic legal system and sometimes even to mix its status up with the Community law. Thus, for example, in a decision of the Sixth Section No. 1383/2008, the Council refers to Article 1 Protocol No. 1 ECHR as a "Community law provision"⁷¹, and in another decision of the Fourth Section No. 6633/2008, in referring to the principle of effectiveness of the judicial protection, recall Article 6 ECHR to which recognizes a relevance in the light of Article 117, par. 1, of the Constitution, not as an international obligation but "as a part of the Community law in force of Article 6 of the Maastricht Treaty"⁷².

Moreover there are still many of decisions in which the administrative court does not consider an instance proposed by the applicant with reference to a breach of a Conventional right. In this case the Council of State finds a solution only on the basis of domestic law, without mentioning neither the provision of the ECHR invoked by the applicant nor the concerning European case law.

On this regard one may mention the decision No. 1080/2008 of the Sixth Section, about a procedural issue regarding the delay for producing case file in the process⁷³. The applicants by the way complained about a breach of the right to a fair trial safeguarded by Article 6 ECHR, but the Council does not consider the ECHR provision, giving an opinion just on the basis of the national legislation and the domestic case law.

Similarly in a series of decisions of the Fifth Section of 2008 about the costs of legal proceedings, the complaint on a violation of Article 6 ECHR is bypassed by the administrative court through

⁷¹ Council of State, Section VI, 3 April 2008, No. 1383, *www.giustizia-amministrativa.it*. See in particular § 5: «le disposizioni comunitarie relative alla tutela della proprietà (prot. n.1 - Art. 1 della Convenzione europea dei diritti dell'uomo)».

⁷² Council of State, Section IV, 30 December 2008, No. 6633, *www.giustizia-amministrativa.it*, see § 4: «rileva il principio di effettività della tutela giurisdizionale, desumibile dall'art. 24 della Costituzione e dall'art. 6 della Convenzione europea dei diritti dell'uomo (rilevante nell'ordinamento nazionale ai sensi dell'art. 117 Cost., in quanto facente parte del diritto comunitario per l'art. 6 del Trattato di Maastricht)».

⁷³ Council of State, Section IV, 13 March 2008, No. 1080, *www.giustizia-amministrativa.it*.

the exclusive reference to the domestic law⁷⁴. The opinion based on the sole national law is quite common in the Council of State in the front of a claim which on the contrary expressly refers to the breach of Conventional provision; and that is both whenever the application is granted⁷⁵ and whenever the application is dismissed⁷⁶.

5. Final remarks

The administrative case law analyzed in this article shows a general attitude of the Italian Council of State to improve on the relationship with the Conventional rights' system⁷⁷.

A pivotal role in the improvement has been definitely exercised by the two judgments of the Constitutional Court No. 348 and No. 349 of 2007, which, finally giving to the ECHR a clear status in the national legal source hierarchy, contribute to define the identity and therefore the role played by this international treaty in the domestic case law.

Of course, the path of our administrative courts towards a real attention to the European Convention's rights and their interpretation by the Strasbourg Court is in the early stages. The misunderstanding mentioned in the last paragraph still shows the distance of our Council of State from an effective familiarity with the *dialogue des juges*, which already inspires most of the decisions of the French *Conseil d'Etat*. On this regard, one may argue some more from the analysis of the Italian case law here described. It seems that there is a difference in the attitude of the different jurisdictional Sections of the Council of State in approaching to the ECHR. Thinking about the number and the contents of the decisions concerning Conventional issue, it is worth underlining a wider attention to the European Convention in the judgments of

⁷⁴ See the judgments Council of State, Section V, 20 May 2008, Nos. 2365, 2367, 2368, 2369, 2372, 2373, 2374, www.giustizia-amministrativa.it.

⁷⁵ Council of State, Section VI, 8 June 2009, No. 3476, www.giustizia-amministrativa.it

⁷⁶ Council of State, Section VI, 19 June 2009, No. 4105, www.giustizia-amministrativa.it.

⁷⁷ This new general attitude is also underlined by P. De Lise, *I diritti umani nella prospettiva transnazionale. Corte europea dei diritti dell'uomo e giudice amministrativo*, in www.giustizia-amministrativa.it.

the Fourth Section, which traditionally deals with the topic of indirect expropriation and of the new mechanism of "*acquisizione sanante*". The familiarity with these issues, raised - as we have seen - firstly by the Constitutional Court in the judgment No. 349 of 2007, seems indeed to imply a deeper familiarity with the ECHR itself. On the contrary, in the Fifth and Sixth Sections case law is more common to find still now a lower knowledge of the Constitutional judgments about the status of the Convention and consequently a sort of reticence in applying the ECHR in cases not concerning Article 1, Protocol No. 1, ECHR and the topic of the expropriation of private land.

This is probably due to the ongoing impact of the two fundamental Constitutional judgments of 2007. An impact which began from the cases concerning the same issues afforded by the Constitutional Court, but which is reasonably destined to influence more and more the future administrative case law, as well as some decisions, which we have mentioned, already adopted by the Fifth and Sixth Sections of the Council of State, demonstrate in referring directly to the Strasbourg case law.