ARTICLES

THE EUROPEAN CONVENTION ON HUMAN RIGHTS IN THE ITALIAN SYSTEM: FROM A RIGHT APPROACH TO A STRATEGIC LITIGATION

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Abstract

The article analyzes the impact of the European Convention on Human Rights and of its Court's judgments in Italy, ranging from a legal perspective to a political and social one. In fact, after decades of scarce cultural impact of the ECHR and its jurisprudence, in the last few years the Italian system passed from an individual right approach to a strategic implementation of the Convention.

In the first part, the article resumes the systematically stronger role of the ECHR in Italy from the legal and institutional point of view. In the second one, it examines the case-law against Italy and some classes of judgments (prohibition of torture and mass expulsion, immunity of parliamentarians, freedom of religion, ill-treatment by law enforcement officers) where it is possible to find an increase in the use of the ECHR as a legal instrument for political and cultural challenges.

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1. Introduction: the significance of supranational judicial reviews of human rights in Italy

1.1 The judicial protection of human rights in Italy

Italy is considered, broadly speaking, a Western democracy where human rights have been protected and guaranteed since its foundation. Already in the Fundamental Law prior to the Constitution (Statuto Albertino)[1] there was a catalogue of rights, although only from a liberal and not a welfare perspective. The Constitution in force, approved in 1948 after the Second World War, provides for both a catalogue of rights and for the system necessary for their recognition[2]. People living in Italy could claim such protection before the judiciary, that has to be independent

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[1] G. Rebuffa, *Lo Statuto Albertino* (2003).

[2] The two parts interact and must be read as a complete and unique text, cfr. M. Luciani, *La Costituzione dei diritti e la Costituzione dei poteri. Noterelle brevi su un modello interpretativo ricorrente*, in AA.VV., *Scritti in onore di Vezio Crisafulli*, vol. 2 (1985).

from other institutional actors and subjected only to law (Art. 101, 104 Const.). Judgments could be appealed twice, but the second time only for reasons regarding the application of the law, and not the merit. Separate from the judicial system, the Constitutional Court has been evolving as a Court of human rights. In its original concept, its role was to void Acts or portions of Acts in conflict with the Constitution, guaranteeing the application of Kelsen's hierarchical criteria. For this reason, the Italian Constitution does not allow people to claim directly to the Constitutional Court. There are only two ways to generate a decision by the Constitutional Court: judges, during proceedings where the Act that is allegedly unconstitutional could be enforced, can ask if the Act is unconstitutional or not (*ricorso in via incidentale*); Regions and State can contest the legitimacy respectively of a regional or state Act, in the two months after their publication (*ricorso in via principale*). So, according to the Italian Founding Fathers, the Constitutional Court should act as court of human rights only indirectly, in a different way from Spain or Germany, for example, where people are able to address claims directly to the *Tribunal Constitutional* and the *Bundesverfassungsgericht*. But the evolution of the role of the Constitutional Court should be seen as moving in the direction of protection of constitutional rights. The doctrine is quite homogeneous in recognizing a specific role of the 15 judges of the Constitutional Court in promoting a culture of human rights both in specific and in general cases[3]. When it acts, it does not forget the specific case hidden in the *ricorso in via incidentale*, and often it suggests to the ordinary judge the way to solve the case. Moreover, systematically it tends to review the reasonability of legislation, especially regarding the egalitarian principle[4].

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[3] L. Carlassare, *I diritti davanti alla Corte costituzionale: ricorso individuale o rilettura dell'art. 27 L. n. 87/1953* (1997); R. Romboli, *Ampliamento dell'accesso alla Corte costituzionale e introduzione di un ricorso diretto a tutela dei diritti fondamentali*, in A. Anzon, P. Caretti, S. Grassi (eds.), *Prospettive di accesso alla giustizia costituzionale*, 631-643 (2000); U. De Siervo (ed.), *1956-2006: cinquant'anni di Corte Costituzionale*, spec. V (2006); V. Onida, *La Corte, i diritti fondamentali e l'accesso alla giustizia costituzionale*, 1797-1807; L. Califano, *Corte costituzionale e diritti fondamentali* (2004); P. Bilancia, E. De Marco (eds.), *La tutela multilivello dei diritti* (2004); L. Califano (ed.), *Corte costituzionale e diritti fondamentali* (2004).

[4] V. Boncinelli, *I valori costituzionali fra testo e contesto: regole e forme di razionalità del giudizio costituzionale* (2007); G. Zagreblesky, *Corte costituzionale e principio*

2.1 The impact of international judicial reviews of human rights

Such an indirect judicial review of human rights has been supported by the communitarian and international system. The EU system, in whose foundation Italy played a central role, has created a very strong system of protection of rights thanks to the jurisprudence of the European Court of Justice and the legislation on new rights (such as environment and privacy, that do not appear expressly in the Italian Constitution). In spite of its restricted competence on economic matters, the EU has been growing more and more as a system that protects human rights in a wider sense.

But, in theory, the revolution in the review of human rights for Italians is represented by the European Convention on Human Rights (hereinafter the ECHR) and its jurisprudence. In fact, the reform in adjudicating the European Court of Human Rights (hereinafter the ECtHR) by individuals represents in the Italian system the first case of direct claim for individuals. Nevertheless, the impact of the ECHR is quite ambiguous and unclear, and its application by the domestic judiciary has not been immediate and univocal. We will try to explain why.

Italy was among the ten countries that founded the Council of Europe in 1949. The ECHR was signed by the Republic of Italy on 4 November 1950 and ratified in 1955. Since 1973, when Italy made declarations under Art. 25 and 46 acknowledging the right to individual petition to the European Court of Human Rights, an impressive number of applications against Italy have been deposited at the Court, the majority of which have focused on administration of justice.

But the real impact of the ECHR has been confined for a long time to a limited number of matters, and only in sporadic but new cases it deals with other issues.

Only in the last years a strategic approach to the ECHR is arising, moving from litigations concerning individual claims to litigations that are able to challenge the political and social structure.

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d'uguaglianza, in N. Occhiocupo, *La Corte costituzionale tra norma giuridica e realtà sociale*, 103-120 (1978); AA.VV, *Il principio di ragionevolezza nella giurisprudenza della Corte costituzionale: atti del Seminario svoltosi in Roma, Palazzo della Consulta nei giorni 13 e 14 ottobre 1992* (1994).

This paper will focus on such a shift toward a more intentional use of the ECHR as a juridical instrument for changing the political and cultural system.

2.3 The problematic role of the ECHR in the domestic system

The first reason why the ECHR has been for a long time almost ignored by everyone except lawyers and public agents is the problematic role of the Convention in the internal system[5]. The reason rests mainly in the fact that the Italian Constitution does not provide for the automatic reception of international treaties and does not specify the status they acquire, once ratified, in the hierarchy of norms.

International agreements cannot be applied domestically until they are introduced into internal law by means of a specific Act of Parliament authorising the ratification of the treaty and containing an "order of execution" of its provisions. As the Italian Constitution lacks an explicit provision which regulates the hierarchical position of international agreements once they are ratified, it was deemed that they assume in the domestic system the same rank as legislative Acts which provide for their ratification and execution. For this reason, ECHR has been considered as a common international agreement, that – as any other – carries the force of ordinary law providing ratification and execution (Art. 72 Const.)[6].

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[5] On that point, the doctrine is quite enormous. See among others M. Cartabia (ed.), *I diritti in azione: universalità e pluralismo dei diritti fondamentali nelle Corti europee* (2007); V. Starace, *La Convenzione Europea dei Diritti dell'Uomo e l'Ordinamento Italiano* (1992); G. Brunelli, A. Pugiotto, R. Bin, P. Veronesi, *All'incrocio tra Costituzione e CEDU* (2007); B. Randazzo, *Le pronunce della Corte Europea dei Diritti dell'Uomo: effetti ed esecuzione nell'ordinamento italiano*, in N. Zanon (ed.), *Le Corti dell'integrazione europea e la Corte Costituzionale italiana* (2006); A. Guazzarotti, *La CEDU e l'ordinamento nazionale: tendenze giurisprudenziali e nuove esigenze teoriche*, in *Quaderni costituzionali*, 3 (2006); F. Donati, *La Convenzione europea dei diritti dell'uomo nell'ordinamento italiano,* in A. Pisaneschi, L. Violini (eds.), *Poteri, garanzie e diritti a sessanta anni dalla Costituzione. Scritti per Giovanni Grottanelli De' Santi*, 965 ss. (2007).

[6] Art. 11 provides that Italy can dismissed part of its sovereignty to international systems in order to promote peace and justice. Such article has been used to explain, constitutionally speaking, the participation to CEE before, and to CE and EU now. But it seems it does not fit to explain the participation

Since the entry into force of law no. 848 of 4 August 1955 (ratification and execution of the European Convention on Human Rights) the ECHR constitutes an integral part of the Italian legal system. The Italian courts, however, have for a long time been reluctant to apply the Convention immediately, considering its provisions as merely programmatic[7].

Jurisprudence tended to give the Convention a certain primacy over ordinary law, implicitly recognizing its "quasi-constitutional" rank. Given that the Convention does not *per se* possess primacy over ordinary legislation, the question has arisen whether it is subject to the rule of the *lex posterior derogat legi priori* and whether its provisions can be derogated by subsequent statutory norms.

Only recently have both the Constitutional and Supreme Court of Cassation solved the question stating expressly that the Convention's provisions cannot be derogated or abrogated by means of subsequent ordinary laws. In judgment no. 10 of 1987, the Constitutional Court stated that the Convention's provisions "derive from an atypical competence of the State, as such unsusceptible to being abrogated or modified by means of ordinary law"[8]. The Supreme Court of Cassation, in 1993, in the case of *Medrano*[9], recognizes in the Convention's provisions a

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to the ECHR. As the Constitutional Court said recently in judgments nos. 348 and 349/2007 (interpreting Art. 11 Const. in a contested manner) ECHR is not a real international system erected to promote peace, so it can not be justified by Art. 11 Const. See E. Cannizzaro, *Gerarchia e competenza nei rapporti fra trattati e leggi interne*, in *Rivista di diritto internazionale*, 351-372 (2007).

[7] In 1989, the Supreme Court of Cassation solved the internal dispute on the issue, stating the immediate applicability of those norms of the ECHR which are self-executing, or complete in all their elements (Cass. Sez. Un. November 23, 1988, *Polo Castro*). Notwithstanding the importance of this decision, it should be noted that it can be undermined by the fact that it is up to the judges themselves to decide the self-executing nature of the Convention's specific provisions (it is likely to find opposite conclusions of the jurisprudence concerning the nature self-executing or not of the same Convention's rule. In this sense see Cass., Sez. IV, October 11, 1968, *Biadene*; Cass. Sez. I, April 3, 1973, *Cavallero*; Cass. Sez. I, 20 July 1979, *Papale*).

[8] The Court referred as well to the rules contained in the UN Human Rights Covenants of 1966.

[9] Sentence of July 10, 1993. In the specific case, the Supreme Court of Cassation found a contrast between the expulsion of a stranger, decided in accordance

"particular force of resistance" with respect to ordinary subsequent laws, due to the nature of "the general principles of the legal system" they possess. According to the Supreme Court, this particular nature can be deduced from the Italian Constitution itself[10] as well as from the jurisprudence of the European Court of Justice which recommends that national courts apply the ECHR's provisions as part of communitarian law[11]. Moreover, the Court of cassation said in 4 judgments on a same day in 2004 that Strasburg's jurisprudence has an homogenising role as living law. In a decision of January 25, 2007, the same Court said that the effects of the Court's decisions are constitutive; they generate

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with D.P.R. 9 October 1990 related to drugs, and Art. 8, par. 2 of the ECHR, relating to the right to privacy and family life.

[10] Art. 2 Const: "The Republic recognizes and guarantees the inviolable human rights, be it as an individual or in the social groups expressing their personality [...]" as well as the principle of pacta sunt servanda expressed in Art. 11 "Italy [...]agrees, on conditions of equality with other states, to the limitations of sovereignty necessary for an order that ensures peace and justice among Nations; it promotes and encourages international organizations having such ends in view".

[11] Especially after the inclusion of Letter F within the Maastricht Treaty (1992) which stated: "The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law". Now, the Article 6 of the Treaty of Lisbon say, more strongly, that "The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms [...] Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law". See S. Catalano, *Trattato di Lisbona e "adesione" alla CEDU: brevi riflessioni sulle problematiche comunitarie e interne*, in P. Bilancia, M. D'Amico (eds.), *La nuova Europa dopo il Trattato di Lisbona*, 233-242 (2009). The integration between the ECHR and the European Union highlights the question of the dialogue among Courts (ECJ, ECtHR and Italian courts). On that point, see among others Barbera, Augusto, *Le tre Corti e la tutela multilivello dei diritti* and V. Onida, *La tutela dei diritti davanti alla Corte costituzionale e il rapporto con le corti sopranazionali*, both in P. Bilancia, E. De Marco (eds.), *La tutela multilivello dei diritti*, cit.; T.E. Frosini, *Brevi note sul problematico rapporto fra la Corte costituzionale e le Corti europee*, in Id., *Teoremi e problemi di diritto costituzionale*, (2008); S. Panunzio, *I diritti fondamentali e le Corti in Europa* (2005); P. Falzea, A. Spadaro, L. Ventura (eds), *La Corte costituzionale e le Corti d'Europa* (2003); N. Zanon (ed.), *Le Corti dell'integrazione europea e la Corte costituzionale italiana: avvicinamenti, dialoghi, dissonanze* (2006).

rights and obligations even within the national system. That means that judges must decide in conformity to the Court's jurisprudence, even when this implies reopening proceedings that have been already concluded[12]. Notwithstanding the importance of these decisions[13] in terms of domestic reception of the Convention, it seemed that the Italian judiciary was still in search of interpretative criteria to affirm the primacy of the Convention *vis à vis* ordinary legislation[14].

But we must draw attention to a recent and very significant overruling on such an issue.

A constitutional reform of 2001 (the biggest since the entry into force of the Constitution) revised, among others, Art. 117 Const., specifying that the legislator must legislate in compliance with the constraints deriving from international obligations[15]. Thanks to the cited amendment, the Constitutional Court has changed its traditional position and has given to the ECHR's norms a constitutional significance[16]. In fact, judgements nos. 348 and 349/2007 have definitely settled the hierarchical position of

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[12] Such a Court said that such a continuous inertia constitutes a violation of Art. 46 ECHR and to a denial of justice in our national system (*Dorigo* case, see para. 4).

[13] Other recent decisions of the Court of Cassation confirm this view: Cass. I sez. civ. no. 10542 of 19 July 2002; I sez. civ. no. 28507 of 23 December 2005.

[14] Legal scholars have sustained the Convention should be accepted as *lex specialis* thereby securing its provisions a superior status over subsequent conflicting legislation: *lex posterior generalis non derogat priori specialis*. See B. Conforti, *Diritto Internazionale*, 316 (2007).

[15] "Legislative powers shall be vested in the State and the Regions in compliance with the Constitution and with the constraints deriving from EU-legislation and international obligations."

[16] E. Cannizzaro, *La riforma 'federalista' della Costituzione e gli obblighi internazionali*, in *Rivista di diritto internazionale*, 921 ss. (2006); A. Guazzarotti, *I giudici comuni e la Convenzione alla luce del nuovo art. 117 della Costituzione*, cit., 25 ss.; C. Pinelli, *I limiti generali alla potestà legislativa statale e regionale e i rapporti con l'ordinamento internazionale e con l'ordinamento comunitario*, in *Foro italiano*, V (2004); B. Caravita, *La Costituzione dopo la Riforma del Titolo V* (2004); F. Pizzetti, *I nuovi elementi "unificanti" del sistema italiano: il "posto" della Costituzione e della leggi costituzionali ed il "ruolo" dei vincoli comunitari e degli obblighi internazionali dopo la riforma del titolo V della Costituzione*, S.L. Rossi, *Gli obblighi internazionali e comunitari nella riforma del titolo V della Costituzione*, both in *Il nuovo Titolo V della parte II della Costituzione*, 161-194 and 293-305 (2002).

the Convention[17]. With a highly controversial motivation, the Court established that, since the entry into force of revised Art. 117 Const., any international agreement occupies a median position between the Constitution and ordinary legislation. Referring to the ECHR, the Constitutional Court also said that the ECtHR is the only subject legitimated to interpret its articles, but the Constitutional Court remains the guardian of the supreme principles of the national system.

A second legal reason for the ambiguous role of the ECHR is its overlap with the established and reasonably efficient system of protection of human rights. An influential doctrine underlines that fundamental rights are regulated more in detail in the Italian Constitution, while they are more generally addressed in the ECHR[18], and in general the perception of legal professionals is that Italy has already a high level of protection of human rights. On this subject, the same Constitutional Court, regarding proceedings in *absentia*, recently noted that "the European Convention on Human Rights does not recognize higher guarantees than Art. 111 Const."[19] Such a consideration must be read in conjunction with the subsidiary role of the ECtHR, that constitutes a strong filter for plaintiffs, who have to appeal to national judges prior to the ECtHR. Such a deduction could in part be confirmed by the analysis of legal issues under the scrutiny of the ECtHR. It so happens that Italian cases before the ECtHR concern areas where there is a gap in the Italian system and there is a chronic violation of rights that are not provided for in the Italian Constitution (length of proceedings, expropriations, administration of justice).

Nonetheless, the fact that Italy is sensitive to the discourse of fundamental rights hides some areas where human rights are compromised or their recognition is in doubt.

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[17] D. Tega, *Le sentenze della Corte costituzionale nn. 348 e 349 del 2007: la CEDU da fonte ordinaria a fonte "sub-costituzionale" del diritto*, in *Quaderni costituzionali*, 1 (2008); A. Ruggeri, *La CEDU alla ricerca di una nuova identità, tra prospettiva formale-astratta e prospettiva assiologico-sostanziale d'inquadramento sistematico (a prima lettura di Corte cost. nn. 348 e 349 del 2007)*, http://www.forumcostituzionale.it.

[18] See A. Pace, *La limitata incidenza della C.e.d.u. sulle libertà politiche in Italia*, in *Diritto pubblico*, 1-32 (2001).

[19] Constitutional Court no. 89/2008.

Above all, ill-treatment by police, renditions of individuals suspected of terrorism, mass expulsions without sufficient guarantees for legal and illegal immigrants, freedom of religion – which we will focus on – constitute an alleged failure of Italian legislation and practices that is challenged by claiming the ECHR in a strategic way, more than in an individualistic approach[20].

2. Infringements of the ECHR by Italy

Italian case-law at Strasbourg focuses on violations which reflect structural deficiencies of the domestic legal system, such as length or fairness of proceedings, right to an effective remedy, conditions in prisons, property rights.

These issues are so relevant that the First Report to Parliament of implementation of EctHR decisions submitted by the Government takes into account only cases of expropriation, length of proceedings and fair trial[21]. Moreover, the Report for the year 2008 revealed that the 62% of the Italian infringements regards the violation of Art. 6[22].

Starting from 1973, when Italy made a declaration under Art. 25 accepting individual complaints, contentious cases have dealt almost exclusively with the guarantees of a fair trial stated in Art. 6 of the Convention. In particular, the vast majority of applications as well as judgments against Italy have been related to the reasonable length of proceedings implicitly guaranteed by Art. 6 of the ECHR. The *Capuano* case[23] – in which a just compensation was awarded to the applicant in consequence of the violation of Art. 6 – inaugurated an interminable series of

[20] See the annual reports of Amnesty International, *The situation of human rights in Italy*, 2008, 2009 and 2010.

[21] Presidenza del Consiglio dei Ministri, Dipartimento per gli affari giuridici e legislativi, Ufficio contenzioso e per la consulenza giuridica, *L'esecuzione delle pronunce della Corte europea dei diritti dell'uomo nei confronti dello Stato italiano*, First Report to the Parliament ex law no. 12/2006 for the year 2006.

[22] Presidenza del Consiglio dei Ministri, Dipartimento per gli affari giuridici e legislativi, Ufficio contenzioso e per la consulenza giuridica, *L'esecuzione delle pronunce della Corte europea dei diritti dell'uomo nei confronti dello Stato italiano*, Third Report to the Parliament ex law no. 12/2006 for the year 2008.

[23] ECtHR, *Capuano v. Italy* (no. 9381/81), 25 June 1987.

judgments delivered against Italy[24], which finally led to the configuration of an "Italian problem" within the Convention system[25]. Indeed the Court, risking collapse due to an inundation of complaints presented against Italy under Art. 6, stated in 1999 the "excessive length of proceedings incompatible with the Convention"[26]. The Council, on the other hand, has adopted a series of resolutions putting Italy under surveillance and pressing authorities to adopt necessary reforms. Apart from excessive length of proceedings, observance of Art. 6 has been questioned before the Court with respect to the right to an effective defense[27] and of the institute of trial *in absentia* (*processo in contumacia*)[28].

Also the number of petitions relating to property rights has become considerable. Hundreds of petitions question the lawfulness and the conformity to the Convention of the institute of constructive expropriation (*occupazione acquisitiva* or *accessione invertita*), which has permitted the Italian public administration to take possession and property of lands without respecting the formal procedure for expropriation[29].

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[24] Among this, see the ECtHR, *Ciricosta and Viola v. Italy*, 19753/92, 4 December 1995. In its sentence of December 4, 1995, the Court, although not founding in the specific case a violation of Art. 6, elaborated a set of criteria to determine the reasonable length of proceedings and what is due as just compensation.

[25] See V. Esposito, *Il ruolo del giudice nazionale per la tutela dei diritti dell'uomo*, in C. Zanghi, K. Vasak (eds.), *La Convenzione europea dei diritti dell'uomo: 50 anni di esperienza. Gli attori e i protagonisti: il passato e l'avvenire*, 223 (2000); F. Raia, *La durata ragionevole dei processi nel dialogo tra giudici nazionali e Corte di Strasburgo*, in *Quaderni costituzionali*, 4 (2006); G. Verde, *Giustizia e garanzie nella giurisdizione civile*, in *Rivista di diritto processuale*, 2 (2000).

[26] *Bottazzi v. Italy*, no. 34884/97, 28 July 1999; *A. P. v. Italy*, no. 35265/97, 28 July 1999; *Di Mauro v. Italy*, no. 34256/1996, 28 July 1999; *Ferrari v. Italy*, no. 33440/96, 28 July 1999.

[27] See *Artico v. Italy*, (no. 6694/74), 13 May 1980, where the Court condemned Italy for having not assured the effectiveness of the right to free legal assistance (*gratuito patrocinio*).

[28]Such a trial is held when the accused, after being duly summoned, does not appear at the hearing and neither requests nor agrees that it take place in his absence. In *Colozza v. Italy*, no. 9024/80, 12 February 1985 – the leading case on the subject – the Court stated that even in this trial the accused must be effectively informed on the fundamental acts of the trial.

[29] Law no. 85/1978 permits authorities to start building before formal expropriation. Once a scheme has been declared to be in the public interest and the plans adopted, authorities may make an expedited possession order. After the land has been possessed, a formal expropriation order must be made and

Respect for property rights is also consistently invoked before the Strasbourg Court concerning the procedure for enforcement of evictions on the basis of expiration of lease (*sfratto per finita locazione*). In the pilot case of *Spadea and Scalabrino*[30], the Court rejected the applicants' view that the Government's housing policy reflected a breach of Art. 1 Prot. 1, since the "means chosen were appropriate to achieve the legitimate aim pursued". On the other hand, in subsequent similar cases, the Court found violations of Art. 1 of Prot.1 and Art. 6 of the Convention, not due to the measures of suspension and the staggering of evictions *per se*, but in consideration of the excessive length of the enforcement procedures and of the difficulties in accessing justice[31].

With respect to the civil rights, a conspicuous case relates to the civil freedoms of detainees and of those declared bankrupt. A very limited number of cases relate to freedom of expression and freedom of association but in any case not involving serious violations of human rights.

The vast majority of cases filed under Art. 8 relate to the alleged violation of the right of respect for correspondence and/or privacy and family life in connection with the applicants' involvement in bankruptcy procedures. Applicants contested the conformity of the Bankruptcy Act (Royal Decree no. 267 of 16 March 1942), regulating the cited procedure, alternatively or simultaneously on two different grounds: censorship of

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compensation paid. During the 1970s, a number of local authorities took possession of land using the expedited procedure but failed subsequently to issue an expropriation order. The Italian courts were confronted with cases in which the landowner had *de facto* lost use of the land as it had been possessed and building works in the public interest had been undertaken. They elaborated the constructive expropriation rule. Under the rule, public authorities acquire title to the 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 performed. For some comments, see P. Bilancia, *I diritti fondamentali come conquiste sovrastatali di civiltà; il diritto di proprietà nella CEDU* (2002); M.L. Padelletti, *La tutela della proprietà nella Convenzione europea dei diritti dell'uomo*, (2003); F. Buonomo, *La tutela della proprietà dinanzi alla Corte europea dei diritti dell'uomo* (2005).

[30] *Spadea and Scalabrino v. Italy*, no. 12868/87, 28 September.

[31] See *Immobiliare Saffi v. Italy*, no. 22774/93, 28 July 1999. The Court found that the applicant, given the suspension of the enforcement procedure, had been left for eleven years in a state of uncertainty as to when they would be able to repossess their apartment.

correspondence and alleged violation of privacy which derive from the civil incapacities connected with bankruptcy status. As far as the first case is concerned, the Bankruptcy Act (Art. 48) establishes the monitoring of all correspondence from or to the bankrupt person in the interest of creditors. Considering that the measure is applied during the entire procedure and that the latter can last many years, the Court has found the provision as violating the right to secrecy of correspondence as "not proportionate" within the meaning of Art. 8 of the ECHR to the general interest pursued in the provision. On the other hand, the same Bankruptcy Act has been contested as violating private and family life in section 50 where it provides that those declared bankrupt cannot exercise certain professional or commercial activities (such as administrator, lawyer, commercial advisor, notary, tutor) until the conclusion of the bankruptcy procedure.

The Court, in consideration of the fact that the interdiction to exercise the above activities applies automatically, after the inscription in the bankruptcy registry, with no judicial review of the measure, states that the provision is "not necessary in a democratic society" according to the meaning of Art. 8 of the ECHR. Outside the scope of Art. 8, the same provisions are alleged to violate Art.3 of Protocol 1 for civil incapacities (including the right to vote) automatically connected to the bankruptcy status.

The Court found a violation of Art. 8 also in several cases concerning persons convicted for serious crimes[32] whom secrecy of correspondence is compromised by the Italian legislation. Art. 8 was also infringed, in the opinion of the Court, when the censorship of prisoner's correspondence was decided as a consequence of the implementation of the "41*bis*" special regime of detention (see *Labita, Ospina Vargas, Messina, Argenti, Bastone, Leo Zappia, Moni, Musumeci, Salvatore*)[33].

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[32] Starting from *Calogero Diana v. Italy*, no. 15211/89, 15 November 1996, *Domenichini v. Italy*, no. 15943/90, 15 November 1996, *Rinzivillo v. Italy*, no. 31543/96, 21 December 2000, *Madonia v. Italy*, no. 55927/00, 6 July 2000, *Messina v. Italy (3)*, no. 33993/96, 24 October 2002, *Di Giovine v. Italy*, No. 39920/98, 26 July 2001.

[33] *Labita v. Italy*, no. 26772/95, 6 April 2000, *Ospina Vargas*, no. 40750/98, 14 October 2004, *Messina v. Italy (2)* , no. 25498/94, 28 September 2000, *Argenti v. Italy*, no. 56317/00, 10 November 2005, *Bastone v. Italy*, no. 59638/00, 11 July 2006, *Leo Zappia v. Italy*, no. 77744/01, 29 September 2005, *Moni v. Italy*, no. 35784/97, 11 January 2000, *Musumeci v. Italy*, no. 33695/96, 11 January 2005,

It should be added that the Prison Administration Act has been frequently contested under different profiles. As far as the special regime of detention is concerned, applicants have alleged a violation of their right to family life as a consequence of the limitation to family visits. The Court has always rejected this view. On the other hand, the Prison Administration Act has been contested as entailing the violation of other rights guaranteed in the ECHR, *ie*. the prohibition of torture and inhuman or degrading treatment (Art.3[34], no violation found); the right to an effective remedy against the limitations carried out (Art. 6 and Art. 13).

Apart this "traditional" cases[35], in the last years is emerging a series of claims that demonstrates that even the perception of the ECHR is changing, moving from a further jurisdictional step to redress individual damages to a jurisdictional instrument able to challenge the political, civil and cultural *status quo*.

This still few cases can be considered as an emerging strategic litigation, which could inaugurate a political debate for the implementation of general measures in the matter involved.

It is not to say that judgments until now emitted in the traditional issues are not relevant from the perspective of the protection of human rights. More simply, claims are becoming more variegated and are increasingly seen as instruments for some cultural, social and political challenges in the hands of vulnerable people or minorities.

We will summarise briefly how Italy assesses the implementation of the ECtHR rulings in the most relevant infringements from a quantitative point of view, and then we will focus on the "new" claims driven by a more strategic approach.

3. Assessing implementation and policy impact of ECtHR rulings

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Salvatore v. Italy, no. 42285/98, 6 December 2005. The art. 41*bis* regime applies only to prisoners prosecuted or convicted for specific offences – such as in those linked to *mafia* activities – and empowers the judge to suspend application of the ordinary prison regime in whole or in part (art. 41 *bis*, Law no. 354/1975).

[34] See *Labita v. Italy*, cit.

[35] Statistics of the ECHR's organs show this that, since 1959 to 2009, 60% of judgments regards the length of proceedings, 15% the protection of property, 12% the right to a fair trial, 6% the right to respect for private and family life and 7% other matters (see ECtHR, *Country Statistic on 1 January 2009*).

3.1 Actors and institutions involved in the implementation of the ECHR

Since the entry into force of law no. 12/2006 (*Disposizioni in materia di esecuzione delle pronunce della Corte Europea dei Diritti dell'Uomo*, the so called *Azzolini* law) and its executive order of 1 February 2007, the first actor involved in the implementation of ECtHR decisions is the Prime Minister, although the Department of legal and legislative affairs of the Presidency of Counsel is responsible for the practical execution of judgments.

Such a choice has, above all, a strong symbolic meaning. The principle behind the law is the direct responsibility of the Prime Minister and his Office to comply with the ECHR, in order to give importance and priority to compliance with the Convention, even if, in practice, there is no higher level of compliance.

The *Azzolini* law regulates a new information channel between, on the one hand, the Prime Minister as responsible for governmental activity in foreign affairs and international treaties and as the representative of the Italian State before the ECtHR, and, on the other, Parliament, as a first actor involved in implementing international obligations on human rights.

Using this argument, Act no. 12 tends to testify the Government's attention to applying the ECHR in order to improve its reputation[36] as well as to ensure the best way to protect human rights by the highest organs of the State.

The law defines relations between the major actors involved in executing the Strasbourg judgments. It specifies the Prime Minister's tasks and states that he is now responsible for enacting all the governmental duties in; for communicating judgments to Parliament in due time, so that they can be examined by the competent parliamentary commissions; for presenting

[36] In the words of Government, the implementation of Court's decisions is "a prominent objective because of direct effects on the credibility of national system protection of human rights" (Presidenza del Consiglio dei Ministri, Dipartimento per gli affari giuridici e legislativi, Ufficio contenzioso e per la consulenza giuridica, *L'esecuzione delle pronunce della Corte europea dei diritti dell'uomo nei confronti dello Stato italiano*, First Report to the Parliament ex law no. 12/2006 for the year 2006, 20).

every year a report on the state of implementation of judgments[37]. The law is intended to permit Parliament to be regularly informed about judgments and to rapidly adopt legislative measures as they become necessary. After this law, the government asked for permanent representation coagents and the State Lawyers Office (*Avvocatura dello Stato*), to cooperate with the State, marking a starting point, almost in theoretical terms, of a new era of dialogue between Strasbourg and Italy.

Apart from the crucial role of the Prime Minister and his Office, other institutional actors involved in Italy are the Ministry of the Economy, Ministry of Justice, the two Parliamentary Chambers as well as their permanent Commissions. A special Commission for the protection and promotion of human rights is also established in the Senate. Moreover, since 2005 a Permanent Observatory on the judgments of the ECtHR (*Osservatorio Permanente delle sentenze della Corte Europea dei Diritti dell'Uomo*) within the lower Chamber of Parliament (*Camera dei Deputati*) has been established. Since 2006 this organ has regularly collected decisions delivered against Italy and gives legal support both to the Italian delegation to the Parliamentary Assembly of the CoE and to the competent sub-organs in the Lower Chamber. It is worth noting, concerning the role of Parliament, that three letters from the Speakers of both Chambers (published between 2005 and 2006) recalled the obligation to evaluate the compatibility of a new law with the ECHR. The *Direzione generale del contenzioso e dei diritti umani*, a department of the Ministry of Justice, is competent to collect information from each cases; to act as intermediary between Italian institutions and permanent representation of Italy; to manage criminal records; to keep Italian jurisdictional institutions informed about judgments; to communicate systematic violations to the Legislative office of the Ministry of Justice.

Of course a prominent role is played by the ordinary courts, that can judge in a consistent manner with the ECtHR's jurisprudence and can even counterbalance the legislator's inertia. Such a role will likely be improved thanks to the cited integration

[37] Art. 5 par. 3 of law no. 400/1988 as modified by the mentioned law no. 12/2006. For a positive comment on the law see: G. Raimondi, *Nuove disposizioni in materia di esecuzione delle sentenze della Corte Europea: una buona legge*, in *Diritti dell'Uomo. Cronache e Battaglie* (2006).

of the ECHR into the European law, that is in a large manner directly applied by the national judges[38].

The *CSM* (Supreme Counsel for the Administration of Justice in Italy) has a relevant training role, which has grown in the last few years. It decided to include the subject of human rights and the ECtHR's case-law in the curricula of all initial training courses for junior judges, in the annual programme of in-service training and in that of decentralised training courses. Furthermore it promoted the organisation of seminars, both at national and local level, aimed at training people working in the field of family law on the requirements of the ECHR, as interpreted in Strasbourg case-law in this field.

The Permanent representation of Italy is charged with the spreading of information on the Court's jurisprudence and Court's decisions, it acts as a bridge between the Council of Europe and Italy, and, finally, it promotes professional training of lawyers.

The *Azzolini* law can be seen as an effort to link the functions of different branches of the Italian administration in implementing ECtHR jurisprudence, in line with a more open attitude of the Italian institutions towards the Convention system.

This approach is confirmed by recent national case-law.

We have already quoted the two Constitutional Court's judgments on the role of the ECHR in the Italian system (nos. 348 and 349/2007), but we can note in its activity an increasing reference of the ECtHR jurisprudence in the last years, sometimes just in order to strengthen the opinion of the Constitutional Court[39]. This systematic use of the ECHR as a parameter for its opinion is also an effect of its previous decisions nos. 348 and 349/2007. The recognition of the ECHR as *norma interposta*, i.e. as

[38] The role of the judges, at any level, has been essential for the integration of the ECHR into the national system. See, among others, AA.VV., *Il giudice italiano di fronte alla Convenzione europea dei diritti dell'uomo: atti della Tavola rotonda tenuta in Roma il 13 dicembre 1972* (1972); B. Randazzo, *Giudici comuni e Corte europea dei diritti*, in *La Corte costituzionale e le Corti d'Europa*, cit., 261 ss.; D. Tega, *L'emergere dei nuovi diritti e il fenomeno della tutela multilivello dei diritti tra ordinamenti nazionali e Corte dei diritti di Strasburgo*, cit.; G. Zagrebelsky, *I giudici nazionali, la Convenzione e la Corte europea dei diritti dell'uomo*, in *La tutela multilivello dei diritti: punti di crisi, problemi aperti, momenti di stabilizzazione*, cit.

[39] See for example no. 33, 39, 87, 173, 274, 435/2008; 11, 24, 239, 262, 266, 317/2009; 265/2010. As doctrine, see D. Tega, *La CEDU nella giurisprudenza della Corte costituzionale*, cit., 2.

an act that the ordinary legislation cannot contravene unless the violation of Art. 117 Const., generate a case law where the Court must judge the compatibility of an Act with the Constitution *via* the compatibility with the Convention[40].

Apart from that, the judiciary also pays more attention to the ECHR, as interpreted by the Court of Strasbourg. Ordinary judges apart, both the Supreme Court of Cassation and the Council of the State are more familiar with the Convention system and more frequently refer to ECHR Articles, as interpreted by the Court[41].

This is due probably also by the fact that lawyers and lower courts are more used than before to refer to the ECHR respectively in their defence and in their judgments. In that way, when the case goes under the scrutiny of the Court of Cassation or the Councile of the State, they are obliged to refer to the Convention. Another reason is also the already mentioned accession of the European Union in the ECHR system, and therefore the integration of the European Convention among the *bill of rights* of the European Union.

On the topic of the judiciary, the role of judges has been fundamental during this years. First of all, as we already noted in the first para., they have compensated for the lack of clarity regarding the role of the ECHR. Secondly, especially in the last year, they have been progressively more open to judge in a manner that is consistent with the ECHR, giving importance also to the decisions of the ECtHR.

A "physiological" gap remains regarding the knowledge of the Convention system among ordinary judges (especially those acting in peripheral fora) and the highest Courts. It is quite hard still to find quotations of the ECHR system at the lower level of jurisdiction.

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[40] Constitutional Court, no. 1/2011: "In more occasions this Court affirmed that the ECHR rules, in the meaning given by the ECtHR […] integrate, as *norme interposte*, the constitutional parameter expressed by Art. 117, where it provides for the respect of the limits set by international obligations (judgments nos. 348 and 349/2007, 311 and 317/2009, 93/2010)". See also nos. 103, 191 and 196/2010).

[41] Just as example, see Court of Cassation, Judgements nos. 14, 677, 1354, 3927, 6026, 4428, 3716, 4603, 17408, 5172, 9328, 9152/2007; nos. 15887, 23844, 7319, 5136/2008; Council of State, no. 303/2007.

This brief overview on the competence of implementing ECtHR's decisions shows that the traditional three branches of Government are involved. In fact, Italy lacks an independent commission or national institution dedicated to promoting human rights, although Resolution no. 48/134 of the General Assembly of the United Nations has demanded its creation. A bill by the former government (April 4, 2007) has so far come to nothing because of the change of government after the election of April, 2008.

Apart from the general considerations we can draw from the activities and the official statements of the main actors and institutions involved in implementing the Convention, it may be useful at this point to make some reflections that emerge from the interviews conducted[42].

We attempted to contact lawyers, judges, members of national Parliament, professors, members of the Constitutional court, members of the parliamentary Committee on human rights, agents of the Ministry of the Interior and Justice, members of the European Parliament, agents of the Italian representation in Strasbourg.

Members of the national Parliament and the agents of the Ministry of the Interior did not answer when we called back, after initially showing willingness to talk to us. Members of the European Parliament said they are unable to help us, because of the difficulty and the complexity of the interviews we proposed.

However, we were able to talk to one professor of international law, two leading criminal judges, two lawyers not directly engaged in protecting human rights and two Italian agents at the EctHR, one lawyer directly involved with ECtHR and one NGO.

The interviews with Italian agents in Strasbourg and national judges show a positive attitude toward the ECHR system

[42] In detail, interviews are conducted in 2008 with Amnesty International, Italian Division, a President of an Italian Court of Assize, a judge on criminal matters in a forum of the North Italy, a Member of an Italian Court of Assize, a judge on criminal matters in a forum of the South Italy, a Lawyer of the forum of Rome engaged in the protection of fundamental rights, two lawyers not directly engaged in the protection of fundamental rights in the forum of Ancona, a professor of international law, in Rome, two agents of the Italian representation in Strasbourg.

and a greater confidence in the implementation and integration of ECHR within the national system.

Although they consider the knowledge of the Convention rules to be too scarce among lawyers and even among judges and surely among plaintiffs in national proceedings, they believe that in the last years efforts by the CSM, by lawyers' and judges' associations are helping people to become more sensitive and familiar with the Convention mechanisms.

Among the positive evaluations, both the Italian agents in Strasbourg and judges consider the indirect efficacy of judgments to be an adequate instrument, they see the mechanism of control of judiciary executions as being effective, they are looking closely at the Constitutional Court's judgments no. 348 and 349/2007. Negative evaluations regard the use of friendly settlement (used only in a matter of expropriation), the impact of the *Pinto* law on the length of proceedings, the continued complaint about not executing the ECtHR judgments. The two agents in Strasbourg have different opinions on the role of the Italian Representation at the Council of Europe and at the Parliamentary Assembly, while judges ignore them and their activity.

A different opinion regards the articles that are the object of ECtHR proceedings: while the Italian agents in Strasbourg know the entire map of violation, judges refer only to Art. 6. For all of them, it is too early to talk about the effects of a few new laws in matters of criminal procedure (the law regarding the transcription in the *casellario giudiziale*), of simplification in compensation procedures (budget law of 2007), and the Azzolini law.

Judges report some problems in translating the Court's decisions, in explaining them to lower justices, in interpreting the Italian norms in a manner that is consistent with ECHR when a conflict arises between them and the Convention, in knowing cases pending before the Court.

Finally, the common hope of the Italian agents in Strasbourg and the judges is for greater and deeper education and training in such a European question, because all of them are persuaded that ECHR is a necessary system of guarantee for individual rights (only one agent notes that the Italian system already offers an exhaustive protection).

A real distance between the daily lawyers' activity and the Convention mechanisms becomes apparent through the

interviews with the two lawyers contacted. They testified to significant ignorance among their colleagues in this field, denying the use of and the familiarity with the Convention's rules and its jurisprudence. In all events, they are very confident in the ECHR as a guarantee above all against internal deficiencies of the administration of justice. They are conscious of the fact that ECtHR jurisprudence can promote legislative reforms, and they hope for reform on the administration of justice.

The professor in international law interviewed reported poor dialogue between the Italian courts and the ECtHR, a scarce influence of its jurisprudence in parliamentary activity (while national judges pay more attention to it). He stated a high level of confidence in the ECHR as a system for promoting the protection of human rights, especially in countries, like Italy, where there is not a direct claim to constitutional courts, and as a system stimulating necessary reforms at national level. He is convinced that in Italy most claims hide a strategic litigation, and that a deeper dialogue is needed between jurisdictional actors.

Finally, the NGO stressed – unsurprisingly – the capital importance of the *Saadi* case, hoping for a new era in relations between internal jurisdiction and ECHR.

3.2 Assessing implementation in the domestic system

As we have stressed more than once, categories of judgment under the Court's scrutiny are quite homogeneous (due process, length of proceedings, infringements of property rights) and so the Court often repeats the same conclusion. Until now, the Committee of Ministers has concentrated on monitoring execution and implementation of judgments relating to infringements of the adequate length of proceedings[43], the functioning of the judicial system in Italy[44], the flat owners' rights to peaceful enjoyment of their possessions by failure to enforce judicial eviction orders[45],

[43] Final Resolutions (1992)26, (1995)82 and (1994)26, Interim Resolutions (2000)135, (2005)114, (2007)2, M/Inf/DH(2008)42 (*Bilan des mesures adoptées par les autorités italiennes pour la période 2006-08 concernant la durée excessive des procédures judiciaires*), Interim Resolutions CM/ResDH(2009)42 and (2010)224.

[44] Resolutions (97)336, (99)437, (2000)135, (2005)114 and (2007)2.

[45] All the judicial decisions in these cases (*Immobiliare Saffi* and others, cit.) have been executed and the applicants have been able to take possession of their

the unfairness of criminal proceedings[46], the inadequate guarantees to secure the lawfulness of emergency expropriations and excessively restrictive compensation rules[47].

Judgments under the supervision of the Committee of Ministers can be gathered under two headings. On the one hand, there are isolated cases. Regarding them, the Committee of Ministers is not demanding a legislative reform, instead it is insisting on a *restitutio in integrum* or a just compensation. Responsibility for execution is held by the Presidency of the Council of Ministers (especially for violations of Art. 1, Prot. 1) and the Ministry of Justice (especially for violation of Art. 6) for the most part, and to a lesser extent the Ministry of Interior and other Ministries.

From the other side, general measures can be decided both at national level, with the involvement of the executive and legislative powers, and at European level, under pressure from the Committee of Ministers. The latter often directly suggests the measures to be taken when infringement of ECHR is reiterative.

In spite of an indirect coercing value of the Court's judgments, even in Italy there is a growing mobilization to make the national system conform to ECHR. There are two reasons for this: firstly, Italy does not want and cannot afford to lose credibility in the international context; secondly, States cannot tolerate the costs of condemnations to compensate a violation of a protected right. This second problem is indirectly confirmed by the political will to modify the *Pinto* law, because of its costs[48]. So, Italy followed the Committee of Ministers' recommendation, in preparation for general and preventive measures of execution. Nonetheless, half of the cases in the agenda of the Committee of Ministers concerns Italy and less than half of demands of friendly settlement is successful.

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property, so no further measure is, in the opinion of the Committee of Ministers, therefore necessary.

[46] Resolutions (99)258, (2002)30, (2004)13, (2005)85; (2007)83; Resolution of the Parliamentary Assembly (2006)1516.

[47] Interim Resolution (2007)3.

[48] The Cabinet of former Ministry of Justice had proposed the need of revising such a law, see the Annual Report 2007 of the Ministry of Justice. Also the Minister in charge considers that the *Pinto* law is not a final solution of the problem (see the speech before Parliament during the opening of the judiciary year 2010, 20 and 21 January 2010).

Maybe it is useful to summarise the general measures taken,

Property rights

Violation of property rights proclaimed by Prot. no. 1, Art. 1 is found when public administration expropriates some part of property from individuals, in a way that, in the Italian perspective, is legitimate. In order to solve this with a general measure, the Code on expropriation which came into force in 2001 minimizes the range of legitimate cases of indirect expropriation and allows an total damage compensation, in harmony with the jurisprudence of Strasbourg. The *ratio* of such reform is expressly the need to make Italian law conform on expropriation with the Court's view on property rights, as the Council of State has shown in its expressed opinion on the bill of this law. In the same way we can read the Council of State's decision no. 2 of 29 April 2005. Moreover, the budget of 2007 introduced the direct accountability of local administrations to compensate for damages consequent to an expropriation.

In spite of these general measures, there is still incompatibility in the views of property rights between the national system and the European system, due to the different provisions of ECHR and Art. 41 of the Italian Constitution, where property rights could be limited due to their social function. The recent judgments of the Constitutional Court no. 348 and 349 do not solve the problem, because they have stated a compatibility between the Italian vision of property rights (*ex* Art. 42 Const.) and the ECHR provision of Art. 1 Prot. no. 1.

Bankruptcy

Following the Resolutions of the Committee of Ministers[49], Italy finally adopted the Legislative Decree n. 5 of January 2006, which contains measures aimed on the one hand at speeding up the procedure and, on the other hand, at eliminating the bankrupt individual's civil incapacities – limitations to electoral rights, freedom of circulation and secrecy of correspondence – as was laid down in previous Arts. 48 and 49 of the Law on Bankruptcy Procedure. The Committee of Ministers welcomed such a reform

[49] See Resolution ResDH (2002)58 adopted on April 2002.

and its immediate effect in erasing many of the restrictions on rights and freedoms criticised in the Court's judgments[50].

Length of proceedings and due process

As is well known, the vast majority of appeals against Italy and almost all of its decisions regard judicial matters. There are numerous new norms which have been introduced to have the administration of justice conform to Strasbourg's decisions. At constitutional level, we have seen the "constitutionalization" of the principles of due process through the new Art. 111 Const., which practically contains all the judicial guarantees safeguarded in Art. 6 of the Convention. Concerning judicial guarantees, a sensitive issue still standing is the need to foresee the revision of criminal trials in consequence of a judgment by ECtHR[51]. On the other hand, different procedures were adopted during the years, for a quick resolution of arrears accumulated, and in the perspective of a deeper and more systematic reform. Measures have included an increase in the number of magistrates with the institution of the "Justice of Peace" (*giudici di pace*) and honorary judges competent for minor civil and criminal litigations (law no. 374/1991); the restructuring of the judicial offices of the court of first instance; the introduction of the so-called abridged sections (*sezioni stralcio*), which have the duty of defining outstanding litigations; a reform of civil process has been in force for 3 years; the extension of special and quicker procedures in more cases (law n. 80/2005); a more rapid ruling for some administrative proceedings (law n. 205/2000). But, in spite of that, proceedings are still too much lengthy.

Nor can the *Pinto* law be seen as a good solution: under pressure from Strasbourg's organs, Parliament issued Law no. 89 of 2001 on the "Measures for speeding up judgments and expectations for a fair compensation in case of violation of the

[50] Interim Resolution CM/ResDH(2007)27.

[51] In this regard, there are several bills pending before the Parliament on the reopening of proceedings, that give the possibility to reopen proceedings yet concluded when a judgement of the ECtHR has ascertain a violation of principles of due process (Art. 6.3 ECHR). One of them is presented by the Minister of Justice (bill no. S1440). It is worth to note that from several years the Italian Government is seeking to introduce such a reform in order to fill a gap in our system, as proofs the previous bill presented by the former Minister of Justice n. S1797.

'reasonable term' of the trial" (*Legge relativa all'equa riparazione del danno in caso di irragionevole durata di un procedimento giudiziario*), called the *Pinto* law. It introduces a compensative remedy providing the possibility to appeal to national courts – specifically the competent Court of Appeal (*Corte d'Appello*) – in order to obtain a just compensation in cases of excessive length of proceedings. Since this year, appeals before Court in Strasbourg have diminished, thanks to the principle of subsidiarity, because the *Pinto* law introduces a mechanism of internal appeal for compensation. But, as already said, such a law cannot be seen as a final solution, as monetary compensation represents an excessive cost for the State and does not solve the problem of length[52].

The way of the reform of the administration of the justice is still long and seems permanent.

In matter of criminal proceedings, the law decree no. 92/2008, converted into the law no. 125/2008, provides for an acceleration of the proceedings; similar reasons are at the basis of the law decree no. 112/2008, converted into the law no. 133/2008. Instead, the law n. 69/2009 provides for some reforms of the civil proceedings.

A bill (no. S1082) is currently pending before Parliament, which specifically aims to expedite the processing of civil cases by a broad reform of the civil procedure with an underlying strategy of reducing the number of trials and of encouraging alternative dispute resolutions. Also measures aimed at improving the structural organisation of the judiciary were adopted by the law decree no. 143/2008 and some courts have already and spontaneously achieved excellent results in this issue, like the Tribunal of Turin[53].

As for the implementation of judicial guarantees, Italy has tried to attenuate its non-fulfillments with the introduction of a

[52] Note that the *Pinto* law, thanks to the flexible reference to the Court's interpretation of Art. 6, introduces in a coercive way the jurisprudence of the Court on Art. 6 in the Italian system (see also for such an opinion Court of Cassation n. 13162/2004 and 8604/2007). The European Court as well finds that the late payment of compensation to the applicant does not afford adequate redress and considers the applicant continued to be a victim of a breach of the "reasonable-time" requirement (see Interim Resolution CM/ResDH(2009)42).

[53] See on the best practice of Turin S. Sileoni, *Imprevedibilità dell'ambiente normativo e lentezza della giustizia*, in P. Falasca (ed.), *Dopo! Come ripartire dopo la crisi* (2009).

new penal code in 1989. Art. 2 of the law providing the Government the power to issue a new code (*Legge di delega al Governo per l'emanazione del nuovo codice*), expressly stating that the new legislation had to conform with the country's international commitments in the field of human rights, and particularly the Convention. The major legislative measure is represented by Art. 175 of the criminal procedure code. It allows the reopening of cases where due process has been violated and a party was absent. Now, as said above, the government is preparing a more complete bill on this question, while the Court of Cassation and the Constitutional Court have stressed that the Italian system needs a legislative intervention that is more general than Art. 175, that provides only for the proceedings where a party is absent[54].

Detainees' condition

Following the Strasbourg Court's decisions and also the Committee of Ministers' resolutions[55], the Italian Parliament amended the Prison Administration Act in law no. 95/2004 to prevent further violations of the ECHR. New Art. 18*ter* introduces clear grounds for the measures; explicit exemption from the monitoring of correspondence with the ECHR organs; judicial review to cover the monitoring or restriction of prisoners' correspondence[56].

Other normative measures

A government decree imposes on the Minister of justice to include in criminal records the abstract of the Court's decisions for each person involved (d.P.R. 28 November 2005, no. 289). Moreover, the budget for 2007 has simplified the procedure for compensation and has introduced direct accountability of local government in case of violation of ECHR.

The last important normative measure to mention is the reform of real estate leasing by law no. 240/2004 (confirmed by laws no. 86/2005 and no. 23/2006).

Such reforms stressed once again that Strasbourg jurisprudence has influenced Italian policy, determining

[54] See *Dorigo* case, para. 4.

[55] Measures of a general character ResDH(2001)178 and Case of *Calogero Diana* against Italy and six other cases, Resolution ResDH(2005)55.

[56] In condemnations from 2004 the Court gives account of the new legislation, adding that it does not apply retroactively to facts committed before its entry into force.

legislative and administrative reforms, in the field of due process, length of proceedings, infringements of property rights, bankruptcy, special detention, but, until now, not in issues that are generated a wide and suffered national debate also in the public opinion.

4.The Italian legal culture *vis à vis* the ECHR system

It is quite hard to define the roles held by different subjects, whether institutional or non institutional, involved in the implementation of the ECtHR jurisprudence. Neither the activities of NGOs and lawyers' associations, nor the answers to our questionnaires improved our insight into the cultural and political (in a broad meaning) impact of the ECtHR. The fact that politicians and agents of the Ministry of the Interior did not reply to our questionnaires may be interpreted as a first deduction of indifference *vis-à-vis* the ECHR system. If this is so, compliance with ECtHR judgments could be appreciated as an obligation of national institutions to avoid pecuniary condemnations, and not to be wholeheartedly intent on conforming to the ECHR. At a political level, in spite of a rough distinction between conservatives (who are wary of international systems such as ECHR) and liberals (who appear more open to them), there are no real differences in the legislative measures of compliance with the ECHR system. In fact, in both electoral programs for the last parliamentary elections proposed by the left and the right wing one can read the same objective to reduce length of proceedings and to reform the procedural rule in trials. So, declared intentions apart, reforms necessary for Italian legislation to conform have been stated by both liberal and conservative governments, simply under pressure from European institutions like the Committee of Ministers.

From a jurisdictional perspective, the traditional reluctance on the part of the judiciary to give the Convention a predominant domestic position, different from any other international treaty, may be partly explained by the fact that the ECHR's provisions overlap to a great extent with those of the fundamental human rights already protected by the Italian Constitution. As said, provisions on civil rights enshrined in the domestic Constitution. Although there is no provision on privacy, Art. 14 states that "the

domicile is inviolable", Art. 15 affirms the inviolability of "correspondence and any other form of communication", and Art. 29 recognizes family rights. In fact we have seen that Art. 8 was mainly used in specific cases such as for detention and bankruptcy. The right to freedom of thought and conscience (Art. 9 of ECHR) as well as the right of expression (Art. 10 of ECHR) are safeguarded by Art. 21 of the Constitution, stating that "everyone has the right to freely express his or her own thought". The freedom of religion and worship of Art. 9 of the ECHR is protected by Art. 19 of the Constitution, stating the right of everyone "to freely express his religion or beliefs […] in any form, individually or with others, to promote them, and to perform rites in public or in private", and by Art. 8 which recognizes that "all religious confessions are equally free before the law". The rights to freedom of assembly and freedom of association (Art. 11 of ECHR) are granted respectively by Art. 17 and 18 of the Constitution. Concerning the prohibition of discrimination (Art. 14 ECHR), Art. 3 of the Italian Constitution affirms that "all citizens are equal before the law, without any distinction of sex, race, language, religion, political opinions, personal and social conditions". Paragraph 2 of the same article provides that "it is the duty of the Republic to remove the social and economic obstacles which limit the freedom and equality of citizens and prevent the full development of their personality […]".

Although the civil and political rights granted by the Convention generally correspond to those enshrined in the Italian Constitution, some differences between the two texts can be found. For example, apart from various literal divergences concerning some rights as the freedom of religion, thought and conscience[57], that the Italian Constitution does not have any express recognition of the right to privacy or the right to the healthy environment[58].

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[57] As for the freedom of religion, Art. 19 of the Italian Constitution does not include the right to change religion; concerning freedom of thought, Art. 21 Const. protects the right to freely express thoughts and not the freedom of thought *per se*; similarly, freedom of conscience *per se* is not contemplated in the Constitution. Nevertheless the same rights are broadly recognized in the jurisprudence of the Constitutional Court.

[58] This had concrete consequences: in two cases (*Guerra and Others v. Italy*, no. 14967/89, 19 February 1998 and *Giacomelli v. Italy*, no. 59909/00, 2 November

Anyway, we have to recognize the previously mentioned effort of the Court of Cassation and the Constitutional Court to integrate the ECHR provisions into the domestic system, and to assign a higher position with respect to the ordinary law. Such effort has generated a deeper awareness among judges of the importance of the ECHR, and they more frequently quote and recall ECHR's provisions and jurisprudence. In fact, the annual report on activities by the Ministry of Justice for 2007 stresses the most frequent derogation to Italian norms in judgments, when they are in conflict with the ECHR principles as interpreted by the ECtHR. They do, in fact have a binding value for national courts (see Court of Cassation 19.7.2002, no. 10542; 15.2.2005, no. 3033, Court of Appeal, Florence, 14.07.2006, no. 1402).

But the relevance of the Court of Cassation and Constitutional Court can be appreciated also in an other way: more systematically, they push Parliament to assume full responsibility in implementing the ECtHR's decisions by means of general measures, when they show a patent and reiterative violation of the same rights.

This is an illuminating example the *Dorigo* case.

In 1998 the European institutions established a violation of Art. 6 of the Convention for unfair trial[59], especially regarding the sentencing to imprisonment on the basis of evidence collected without warranty for the accused. The opinion was emitted on the basis of the claim made by Dorigo, a person convicted of terrorism on the basis of testimony that was not confirmed during the criminal hearing. Problems arose in the execution of the Strasbourg opinion, because the Italian system lacks any provision consenting renewal of proceedings after a declaration of infringement of ECHR provisions. This Italian lack has been repeatedly denounced by the European institutions[60], as a violation of Art. 46 ECHR.

2006) the right to respect for home, private and family life *ex* Art. 8 has been invoked in relation to environmental issues. So in these cases a significant appeal was made to the ECHR as a supplementary system of justice, due – among other things – to the lack in our system of a specific recognition of rights of privacy and a healthy environment.

[59] EComHR, *Dorigo* c. *Italia*, no. 33286/96, 9 September 1998.

[60] Cfr. ResDH (99)258; ResDH (2002)30; ResDH (2004)13; ResDH (2005)85; ResDH (2007)83 and, in general, ResDH(2000)2 on the reopening of internal

Before the approval of an act by the Italian Parliament amending the criminal code and adding a special case for renewing "unfair" proceedings, both the Court of Cassation and the Constitutional Court were involved in the *Dorigo* case.

Following the steps of the case, after the ECtHR condemnation, Mr Dorigo demanded a declaration of unfairness of imprisonment from the judge and the consequent illegality of his detention. Following the judge's refusal, based on the lack of relative legal provision, Dorigo appealed to the Court of Cassation. The judgment[61] has become a major contribution to the definition of Italian obligations with regard to the ECHR system. Overturning the conclusions of the preceding judge, the Court affirmed the faculty of judges to declare the enforceability of sentencing when the Strasbourg Court had declared that the sentence had been passed on the basis of an unfair trial, even if the legislator had omitted to introduce specific means to reopen the trial. On the contrary, the Italian attitude could be considered, in the opinion of the Court, as violating Art. 46 of the Convention. Such a revolutionary declaration, all told, is the signal of the willingness of judges to counterbalance Parliament's inertia, if necessary to comply with the ECHR's obligation.

Meanwhile, the Court of Appeal of Bologna was asked by Mr Dorigo to reopen the trial on the basis of the Court's judgment. The Court remitted to the Constitutional Court the question of compatibility of Art. 630 of Criminal code (in the cases justifying the renewal of trials, the fact of the Court's judgment is not included) with the ECHR provisions, as interpreted by the Strasbourg Court[62]. The judgment n. 129/2008 is the answer to the Court of Appeal of Bologna. Such an answer could be deemed surprising and unexpected, at first reading, because the Court rejected the question of incompatibility between the absence of a special provision of the renewal of proceedings and the Italian compliance with the ECHR, with respect to Art. 3, 11 and 27 of the Constitution. In fact, the Court threw out the Court of Appeal's arguments, saying that the constitutional parameters invoked are erroneous and that the incompatibility between the obligation to

proceedings; Press release of the Committee of Ministers, October the 19th 2006; Resolution of the Parliamentary Assembly (2006)1516, 11.1.

[61] Cass. Pen., Sez. I, 1 dicembre 2006, no. 2800.

[62] Corte di Appello di Bologna, ord. no. 337/2006, March 22.

reopen proceedings after a Strasbourg judgment and the lack of instruments in the Italian system must be solved by the legislator, and not by the judiciary. Certainly, the Constitutional Court should have emitted a judgment and should itself have added such a special case of revision of trials. But it seemed to prefer to leave the problem to the legislator, and did no more than stress the urgency of a legislative reform of the criminal code. In short, we see here an example of judicial self-restraint, in spite of a contrary tendency of the Court of Cassation in the same affair, probably due to two facts: the wide discretion in choosing the most appropriate mechanism of reopening proceedings (that suggests a legislative reform more than a corrective intervention by the judges) and the call Parliament to act in the ambit of its responsibilities[63].

So, broadly speaking, politicians generally seem to underestimate the impact of the ECHR in the Italian legal culture and legislation: traditionally, there are no significant political debates on such issues, nor is there a genuine intention to comply with the ECtHR decisions, as the example of inertia of Parliament and the judiciary's substitution of Parliament can prove, nor are there any significant differences between the two political coalitions in their attitude towards ECHR. A similar indifference could be seen until recently in the media's attitude.

This notable absence, until now, of cases that directly affect the legal culture and the main characteristic of the society – i.e. cases concerning cultural pluralism, minorities and people "different" from the majority – shows how marginal the impact is of the ECHR in building a pluralistic culture in the Italian system.

Such a conclusion can be explained by several factors: a strong cultural identity and homogeneity of society that derives from a common language, a pre-eminent religion and a common *Weltanschauung*; a basic protection of human rights, both for citizens and foreigners; a society's automatism in considering the ECtHR as an ulterior judge for exactly the same questions.

Regarding the first factor, the Italian society only in the recent years is confronting with minorities and pluralism. Only

[63] A third reason could be the fact that in Parliament was pending, at the time of this judgment, more than one bills on such issue, the last of them submitted by the Government on September 2007 (Bill n. S1797). See *supra* footnote 53.

"historical" minorities are acknowledged and protected by the Constitution – in Art.6 – and by special regional laws, which have the force of the Constitution[64]. Measures for their integration include: the possibility for them to use their mother tongue in legal proceedings and before the public authorities; bilingual education; quotas in public institutions. As said, the protection mentioned is afforded only to the so called "historical" minorities, that is minorities living in border areas of the country having a strong link with the territory (mainly French-speaking, German and Slovenian communities).

Just in the 80s "new minorities" began to settle and live in the country. They were mainly immigrants from the poorest countries of North Africa and the Mediterranean. In the year 2008, there were more then 4.000.000 of immigrants in Italy, with an annual increasing of 458.644 persons (plus 13,4% in respect to the previous year). If in 2005 the legal immigrants were 2.670.514, such an amount has double in the last three years, with (4.330.000). For the first time, in 2008 Italy has been over the European average regarding the impact of foreigner residents on the total population[65]. At the beginning of 2010, they stay in Italy 4 .235.000 immigrants, with a esteem of 1 immigrants per 12 inhabitants[66].

The presence of these new minorities has ushered in far-reaching changes from a sociological point of view. For the first time since the creation of the Italian state, the society has become pluralistic, and values and lifestyles have begun to diversify considerably.

From a legal point of view, resident aliens enjoy the fundamental rights enshrined in the national Constitution, with the exception of a few rights and freedoms reserved for citizens, such as the right to vote. In general their integration in the social and political life seems to be far from established, but this is more

[64] Regions with special Statute are Valle d'Aosta, Trentino Alto Adige, Friuli Venezia Giulia, Sardegna, Sicilia.

[65] Data extracted from the XIX Report on immigration elaborated by the Caritas/Migrantes, *Immigrazione, Dossier Statistico 2009*.

[66] Data extracted from the XX Report on immigration elaborated by the Caritas/Migrantes, *Immigrazione, Dossier Statistico 2010*.

a sociological and economic problem than a legal one[67]. In fact, they do have access to justice as every citizen, enjoying also legal aid if disadvantaged from an economic point of view. So, the same filter of internal remedies prior to going before the ECtHR also applies to aliens and immigrants. In those few cases where they do not have sufficient administrative or jurisdictional remedies they seek justice from the ECtHR, such as in matters concerning mass expulsions or expulsions for terrorist threats. As we will see more deeply, some recent decisions in cases of mass expulsions of immigrants to Lybia and refoulement of individuals who risk ill-treatment and torture in their country represent a starting point for the ECtHR jurisprudence on minorities and vulnerable groups in Italy.

Immigration and secularization are bringing also in a homogeneous society like Italy the problem of pluralism, common to the other Western democracies.

This growing pluralism has another set of consequence on religious matter and multiculturalism. Also in this case we can noun a couple of ECtHR's judgments very relevant even at the cultural and political level.

We have already explain the importance of the second factor.

In relation to the last one, it may explain why, for example, non-istitutional actors as activists, interest groups and religious, cultural or other associations are so inert. In fact, there is no specific system or structure of legal support for individuals seeking to address rights claims in Strasbourg. The only way is to pay a lawyer (or to turn to legal aid with the right to *gratuito patrocinio*). Although we are seeing the rise of lawyers associations specialised in the protection of human rights and, in general, NGOs who work to improve the promotion of the defence of disadvantaged people, such efforts are still at an early stage.

[67] Committe of United Nation for the elimination of racial discrimination on March 2008 talked of "factual segregation" of Roma (CERD7ITA/CO/15). A further evidence of the lack of integration is given by the high rate of aliens in prison. They represent 30,15% of detainees; while more frequent convictions relate to exploitation of prostitution and drug trafficking. See FIDH, *Rapporto sull'Immigrazione*, *ibidem*.

This consideration can justify the near absence of claims concerning minorities and immigrants, as well as the proliferation of claims that constantly regard the same issues.

But, as anticipated, one can note a growing applications submitted in a strategic litigation that are challenging also the Italian legal culture, besides the legislation and administration. These applications show a deeper interest by civil society on matters regarding the ECHR.

If we read the relevance in the media of the cases that we are going to analyze, in proportion to the other cases, and in conjunction with the activism of some NGOs and lawyers in these rulings, we can conclude that there is a development of a strategic litigation in claims before the ECtHR.

5. Mobilizing European human rights law in Italy: From a right approach to a strategic litigation

In the opinion of the Italian government there are three reasons for the increasing number of applications to the ECtHR: a more sensitive "rights approach" and a deeper knowledge of concrete possibilities of justice; the pathological dysfunctions of the internal system; a non-genuine exploitation of the Convention system[68].

Each one of these reasons is credible and useful in clarifying the strategies underlined in Italian cases. The above-mentioned traditional cases can be explained in a "rights approach" perspective, more than as strategic claims in order to change the legal and cultural *status quo*. Plaintiffs are more interested in demanding an individual measure, than in changing laws or political attitudes.

The fact that most cases concern the same issues means that there is an instrumental use of and a right approach to the ECHR and that Italian lawyers and the professional class are somewhat relaxed in their attitude to traditional issues where they expect to win the case. Applicants, acting individually in most cases, are motivated above all by the expectation of monetary compensation,

[68] Presidenza del Consiglio dei Ministri, First Report to Parliament ex law no. 12/2006 for the year 2006, cit., 25.

and in minor cases by the hope of improvement of personal conditions.

The absence of a culture of strategic litigation could be deduced also from some data.

Traditionally, the most claims approached in a strategic perspective has been defended by lawyers. Most of them come from the same jurisdiction as the plaintiffs, apart from some exceptions where claimants choose specialised lawyers. As we will see, only recently a third party or parties, mainly representing a NGO, intervened in order to support the plaintiffs in his or her strategic claim.

Regarding the nationality of plaintiffs, a scarce minority are foreigners, but in general their cases do not concern foreign status matters. Only cases regarding mass expulsions or extraditions, as we are going to see, was brought by a foreigner and concerns a real foreign matter.

Until recently, most of the appeals are made by individual plaintiffs, and is hard to find as main actor an association[69] or a collective claim[70].

Instead, recent initiatives can be interpreted as strategic litigations directed at changing legislation and challenging the cultural context on minority issues, immigration, cultural pluralism. In these cases, the applicants have sometimes been defended by a specialist lawyer, there are collective applications, there are third party in support of the reason of one main party, and, more in general, public opinion, NGOs, political institutions pay a great attention to them.

These claims can be read in a perspective of strategic litigation because, more or less intentionally, they have generated significant participation by national associations of lawyers or NGOs, as well as political parties and the media, seeking to better promote the protection of fundamental rights in specific sectors.

Such recent cases may be the signal of an evolution in the perception of the ECHR system in the Italian legal culture, although they are still isolated cases, and very marginal with

[69] *Grande Oriente d'Italia di Palazzo Giustiniani v. Italy*, no. 35972/97, 2 August 2001 and *Grande Oriente d'Italia di Palazzo Giustiniani v. Italy (2)*, no. 26740/02, 31 May 2007.

[70] *Guerra and others*, cit.

respect to traditional cases concerning the administration of justice.

It denotes, in fact, that a culture of ECHR rights is hardly emerging, and people claiming in Strasbourg do that only in the few matters that lawyers are able to deal with.

The situation has partially changed thanks to the commitment of leading lawyers and scholars and the legislative reforms (*Azzolini* law above all[71]) aimed at spreading Strasbourg case law and procedure. Jurists associations (among which we signal for its strong commitment the *Unione Forense per la Tutela dei Diritti dell'Uomo*) have the merit of having promoted strategic litigations with the aim of recalling the attention of Strasbourg institutions and the Italian government to the dysfunctions of the domestic judicial system. Jurists' human rights associations have multiplied over the years: a Consultative Organ for European Justice (*Consulta per la giustizia europea dei diritti dell'uomo*) reuniting 29 different associations (including the *Unione forense*) was constituted in 1986 with the aim of bringing the instruments for the protection of human rights to the attention of lawyers' and magistrates' associations.

A premise is necessary before analyzing the claims that represent an evidence of a strategic approach toward the ECHR.

The relevance of the applications that we are going to examine is not due to their effective impact. We do not refer to them in the perspective of their concrete findings, but under the preliminary aspect of the willingness of the applicants to use the instruments of the claim before Strasbourg as a way to challenge the legal culture and the administration of the country, or, vice verse, their broad effect in introducing a political and cultural debate in the national context.

6. The prohibition of torture, the prohibition of mass expulsion, the immunity of parliamentarians, the ill-treatment and excessive force by law enforcement officers, the freedom of religion: a new era for the ECHR integration into the national system?

[71] See para. 3.1.

The claims before the ECtHR that we come to analyze have in common only the fact that they represent, from a strategic point of view, a challenge to the legal, political and cultural context in Italy.

They are very different from each other: they regard asylum matter, immigrants' rights, parliamentarians' immunity, freedom of religion and the abuse of power by the police, but in every case they are seen as a starting point or a step among others to mobilize public opinion and political actors in some sensitive matters.

6.1 The cases concerning the prohibition of torture as consequence of extradition

Firstly the cases on prohibition of extradition represent a new approach to the ECHR on the part of Italian lawyers, moving from an 'individual' slant to strategic litigation. Before discussing the impact of such cases, we will describe them briefly.

The *Saadi* case is the first judgment on asylum matters against Italy.

This pivotal case has been followed by other nine identical judgements, emitted just one year after[72]. All the cases involve Tunisian citizens living in Italy, convicted by an Italian or a Tunisian (military, in the most cases) court and therefore expelled in their country in order to pay for some crimes (mostly related to terrorism activities) and in order to remove from the Italian territory persons considered dangerous. In front of the risk to be detained in a country that, on the basis of the reports of governmental and non governmental institutions (Human Rights Section, U.S. Department of State, International Red Crux, Amnesty International, Human Rights Watch), does not guarantee the protection of prisoners from torture, the applicants demanded in the most cases asylum to the Italian authorities. The latter, not only rejected the demand or ignored the interim measures taken by the Court *ex* art. 39, but also continued in expelling them. As in these nine cases the Court's opinion was inspired by the *Saadi* judgment and recalled it, we can focus only on this first case.

[72] *Ben Khemais v. Italy*, no. 246/07, 24 February 2009; *Abdelhedi v. Italy*, no. 2638/07, *Ben Salah v. Italy*, no. 38128/06, *Bouyahia v. Italy*, no. 46792/06, *C.B.Z. v. Italy*, no. 44006/06, *Hamraoui v. Italy*, no. 16201/07, *O. v. Italy*, no. 37257/06, *Soltana v. Italy*, no. 37336/06, all of them emitted on 24 March 2009.

Nassim Saadi, a Tunisian living in Italy on the basis of a residence permit, was arrested on suspicion of involvement in international terrorism (Article 270 *bis* of the Criminal Code), among other offences, and was placed in pre-trial detention. In a judgment of 9 May 2005 the Milan Assize Court took the view that the acts of which he was accused did not constitute international terrorism but criminal conspiracy. It sentenced the applicant to four years and six months' imprisonment for criminal conspiracy and for the offence of forgery. The applicant and the prosecution appealed. In the meantime, on 11 May 2005, two days after the delivery of the Milan Assize Court's judgment, a military court in Tunis sentenced the applicant in his absence to twenty years' imprisonment for membership in a terrorist organisation operating abroad in time of peace and for incitement to terrorism. On August 8, 2006 the Minister of the Interior ordered him to be deported to Tunisia, applying the provisions of law decree no. 144 of 27 July 2005 (entitled 'Urgent measures to combat international terrorism' and later converted to law no. 155 of 31 July 2005). On 11 August 2006, the deportation order was confirmed by a judicial order. On the same day, the applicant requested political asylum. He alleged that he had been sentenced in his absence in Tunisia for political reasons and that he feared he would be subjected to torture and 'political and religious reprisals'. In a decision of 16 August 2006 the head of the Milan police authority (*questore*) declared the request inadmissible on the ground that the applicant was a danger to national security. On 15 September 2006 the Milan police authority informed the applicant orally that as his asylum request had been refused, the documents in question could not be taken into consideration.

On 14 September 2006 the applicant asked the ECtHR to suspend or annul the decision to deport him to Tunisia, alleging that deportation to Tunisia would expose him to the risk of inhumane treatment contrary to Article 3 of the Convention and to a flagrant denial of justice (Article 6 of the Convention). In addition, it would infringe his right to respect for his family life (Article 8 of the Convention). He also claimed that the court's decision had disregarded the procedural safeguards laid down in Article 1 of Protocol no. 7 to the Convention.

The Italian government denied the "substantiality" of the risk of torture in Tunisia, stressing the international treaties that

this country had entered into and the diplomatic assurances by the Tunisian authorities that the rights of the accused would be respected upon his return. In fact, the prohibition of non-refoulment *ex* Art. 3 ECHR has been interpreted to ban extradition of individuals to States where there is a real risk of torture, and inhuman or degrading treatment.

From the *Soering*[73] and *Chahal*[74] cases, the concept of the "real risk" has become the criteria to permit or prohibit the transfer of an individual to a country. Especially the *Chahal* case represents a cornerstone on this matter.

The case concerned a Sikh activist who had entered the UK illegally but subsequently benefited from a general amnesty for illegal immigrants. After having been charged with conspiracy to kill the Prime minister of India, a deportation order was issued. But he claimed the deportation would violate Art. 3 ECHR because of the lack of guarantees from the risk of torture.

Expressly, in this case the Court affirmed the "real risk" doctrine, stating that, "whenever substantial grounds have been shown for believing that an individual would face a real risk of being subjected to treatment contrary to Article 3 if removed to another State, the responsibility of the Contracting State to safeguard him or her against such treatment is engaged in the event of expulsion […]. In these circumstances, the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration. The protection afforded by Article 3 is thus wider than that provided for by Articles 32 and 33 of the United Nations 1951 Convention on the Status of Refugees" (par. 80).

This doctrine has been used also in the *Saadi affaire*, also in order to proof the non existence of a real risk in this case. This was the argument hold by the UK as third party intervened in the proceedings.

In fact, unlike the traditional Italian cases before the ECtHR, in *Saadi* there was a third party involved in the proceedings. The UK chose to intervene in order to defend a relative value of the prohibition of torture, as it did in the *Chahal v. United Kingdom* and *Ramzy v. Netherlands* cases. In accordance with Italy, it claimed

[73] *Soering v. the United Kingdom*, no. 14038/88, 7 July 1989.
[74] *Chahal v. United Kingdom*, no. 22414/93, 15 November 1996.

that the climate of international terrorism called into question the appropriateness of the ECtHR's jurisprudence on States' non-refoulement obligation under Art. 3 of the ECHR. The UK opinion was highly controversial, because it recalled that the prohibition on torture must be balanced against the right to life of innocent civilians in an age of increasing international terrorism, and in consequence an absolute prohibition on torture is something different from an absolute prohibition on refoulment and, when national security is implicated, the standard of evidences should be raised from a substantial risk to a more-likely-than-not test (par. 122).

In substance, while the Italian government insisted in the "diplomatic assurances" provided for the Tunisian authorities, the UK government asked the Court to overturn the *Chahal* judgment, in part because of the new international threat of terrorism, in part because of the rigidity of the standard imposed in the *Chahal case*, which, in its opinion, "had caused many difficulties for the Contracting States by preventing them in practice from enforcing expulsion measures" (par. 117).

The ECtHR rejected the entire arguments provided for the two governments.

Firstly, it rejected the statements regarding the "diplomatic assurances", saying that they may not be sufficient, if there is evidence of cruel treatments. To obtain such evidence, the Court used reports from Amnesty International and Human Rights Watch. In the opinion of the Court, in fact, diplomatic assurances are not *per se* a sufficient guarantee of the ban on torture, but it has to be proved by their practical application, and the reports from ONG affirm the contrary idea of the practice of torture in Tunisia.

Secondly, the Court reaffirmed the *Chahal* opinion and insisted the absolute nature of the prohibition on torture and, subsequently, the absolute nature of the prohibition on refoulment. With its words, "[s]ince protection against the treatment prohibited by Article 3 is absolute, that provision imposes an obligation not to extradite or expel any person who, in the receiving country, would run the real risk of being subjected to such treatment. As the Court has repeatedly held, there can be no derogation from that rule[…] It must therefore reaffirm the principle stated in the *Chahal* judgement […] that is not possible to weigh the risk of ill-treatment against the reasons put forward for

the expulsion in order to determine whether the responsibility of a State is engaged under Article 3, even where such treatment is inflicted by another State" (par. 138).

In sum, while the Court acknowledged the challenge in protecting societies from terrorism, it reaffirmed the absolute concept of prohibition of inhuman or degrading treatment or punishment, that "enshrines on of the fundamental values of democratic societies" (par. 127) and must be maintained even in times of emergency, war or terrorism.

Therefore, on 28 February 2008 it concluded that there was strong evidence that Saadi, after his expulsion to Tunisia, would be tortured and it reaffirmed its existing jurisprudence about Art. 3 on the absolute value of prohibition of torture, noting that the serious threat represented by the non-extradition of the convicted "does not reduce in any way the degree of risk of ill treatment": "the argument based on the balancing of the risk of harm if the person is sent back against the dangerousness he or she represents to the community if not sent back is misconceived. The concepts of 'risk' and 'dangerousness' in this context do not lend themselves to a balancing test because they are notions that can only be assessed independently of each other. Either the evidence adduced before the Court reveals that there is a substantial risk if the person is sent back or it does not […] For that reason it would be incorrect to require a higher standard of proof, as submitted by the intervener, where the person is considered to represent a serious danger to the community, since assessment of the level of risk is independent of such a test" (par. 139).

In spite of this judgment, Italy seems to be proceeding with refoulement of persons convicted for terrorist crimes to countries where they will probably suffer cruel and unusual punishment.

While the *Saadi* case has not challenged national practices and legislation, it is nevertheless very relevant in the Italian context from the perspective of mobilisation of civil society. For the first time, NGOs followed the proceedings, as they later did in the case of mass expulsions to Libya. In fact, contrary to the opinion of the United Kingdom and the Italian government, a wide mobilisation of NGOs arose to defend Mr. Saadi. Amnesty international, AIRE Centre, the International Commission of Jurists, Interights and Redress were engaged in a strong press campaign. Although the ECtHR did not agree to include their

written submissions in the trial, NGOs attended the 11 July 2007 hearing with a report signed by them. They also applauded the final judgment, as reported, among others, by the CIR and Amnesty International.

6.2 The cases of mass expulsion to Lybia

The other relevant case concerning the protection and rights of immigrants is the case of mass expulsions to Lybia[75].

Italian law no. 189/2002 states that illegal immigrants should be kept in centres pending their identification with a view to being granted asylum – whenever the conditions are met – or to being expelled from the country. Asylum seekers and immigrants are deprived of their personal liberty and held for weeks in centres pending their identification or waiting for their expulsion. The centres are generally overcrowded and do not offer appropriate sanitary and hygienic conditions. In spite of some efforts by the Italian institutions[76], the CPTAs' conditions were criticized by the United Nations Committee against torture[77], the International Federation of the League of human rights, Amnesty International, the Commissioner of European Council for human rights. Cases of serious mistreatment of people staying in these structures by the police and social workers have been reported[78]. After such pressure from international organizations, the former government decided to establish an independent commission with a mandate to find solutions on the issue.

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[75] For a comment on these cases and on the *Saadi* case see S. Sileoni, *Proctecting Individuals from Non-Majoritarian Groups in Italy, in Protecting Individuals from Non-Majoritarian Groups in the European Court of Human Rights: Litigation and Jurisprudence in Nine Countries*, in D. Anagnostou, E. Psychogiopoulou (eds.), Leiden, Martinus Nijhoff/Brill (2009); Id., *Italy's treatment of immigrants toward the European Convention on Human Rights: some recent developments*, in *Journal of Immigration, Asylum & Nationality Law*, 24 (2010).

[76] Order of the Ministry of the Interior *Linee guida per la gestione dei centri di permanenza temporanea e assistenza (CPT) e dei centri di identificazione (CID)*, 27/11/2002; establishment of the Committee for the protection of foreign minors *ex* Art. 33, legislative decree no. 286/1998; establishment of the UNAR (National office against racial discrimination) under the Presidency of the Council of Ministers, *ex* legislative decree no. 215/03.

[77] CAT/C/SR/777 and CAT/C/SR/778.

78 For a complete overview of the issue see *FIDH*, *Rapporto sull'Immigrazione*, cit, 8.

One of the violations of fundamental rights that international institutions, NGOs and some politicians denounced in the CPT came before the ECtHR. Several immigrants who landed in Lampedusa were detained in the CPTA and then were expelled to Lybia, in compliance with confidential agreements between the Italian and Libyan governments and without any guarantee for the individuals affected. A confidential report of the European Commission obtained by an Italian journalist, Fabrizio Gatti[79], stressed that, between August 2003 and December 2004, the Italian government sent back to Lybia 5,688 Lybian immigrants. After the inspection by the UN delegate appointed to migrant affairs in June 2004 of the Lampedusa CPTA, in October two Italian MEPs submitted a question in Parliament on expulsions from Lampedusa. The Parliamentary Assembly of the Council of Europe approved a declaration on June 2005 where it expressed a strong concerned about the respect for asylum proceedings in Lampedusa. While the European Parliament passed a resolution against the mass expulsions from Lampedusa[80], the Court of Strasbourg on May 10, 2005 passed an interim resolution to stop the expulsions of 11 out of 79 plaintiffs, represented by the lawyer Anton Giulio Lana, from the *Unione forense per la tutela dei diritti dell'uomo* and three days later it demanded that the expulsion of the other 79 immigrants be stopped.

One year later, with a decision emitted on May 11, 2006, the Court declared as partially admissible four applications by a group of aliens who arrived in Lampedusa in March 2005, detained for some weeks in the island's CPTA and finally expelled to Libya[81]. The Court examined these applications on the merits claims under Arts. 2, 3[82] ECHR, Art. 4 of Protocol 4 (prohibition of

[79] The news was done in the review *Espresso* on 7 October 2005, *Io clandestino a Lampedusa*.

[80] Resolution n. P6_TA (2005)0138.

[81] *Hussun and others v. Italy,* no. 10171/05, *Mohamed v. Italy*, no. 10601/05, *Salem and Others v. Italy*, no. 11593/05, *Midawi v. Italy* no. 17165/05. Decision of 11 May 2006.

[82] For having been expelled to Lybia, a country not member to the Geneva Convention on refugees and which does not offer sufficient guarantees for the protection of fundamental freedoms.

collective expulsions of aliens)[83], Art. 13 (right to an effective remedy)[84], Art. 34 (right to individual recourse to the Court)[85].

Among the applicants, 57 were unknown, while 14 had been expelled to Libya.

The ECtHR rejected the claims and their referral, due in part to the impossibility to get in contact with almost all the applicants concerned[86].

While the applications must still discussed before the Court, the Italian government inaugurated in May 2009 a new strategy of expulsions, stopping the immigrant's boat before their arriving in the Italian territory, on high seas.

In view of the seriousness of these allegations, UNHCR emitted a press release requesting to the Italian government information on the treatment of people returned to Libya and asking that international norms be respected[87].

In fact, according to the Human Rights Watch report, on 6 May 2009 for the first time after the Second World War Italy gave the order to its Navy to intercept and refoul boats of immigrants on high seas, without any identification nor evaluation if some of them needed humanitarian intervention[88], in accordance to a treaty signed by the Libyan and the Italian government on August 2008[89]. Such a treaty was highly controversial. For the Italian government, the State is faced with a serious problem of illegal immigration from North Africa and need to fight it[90]; on the other

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[83] The Italian authorities have undertaken the expulsion without considering personal conditions of the applicants.

[84] The applicants have been denied to enter in contact with lawyers and to seek asylum; Furthermore, they had no remedy at their disposal to stay the order of expulsion.

[85] The applicants have been expelled pending at the Court the request for temporary suspension of the expulsion.

[86] The Court struck down the application with a decision of 19 January 2010.

[87] Press release of 7 May 2009.

[88] See the Human Rights Watch report *Scacciati e schiacciati, l'Italia e I respoingimento di migranti e richiedenti asilo, la Libia e il maltrattamento di migranti e richiedenti asilo*, 4 (2009).

[89] *Trattato di amicizia, partenariato e cooperazione tra la Repubblica Italiana e la Grande Giamahiria Araba Libica Popolare Socialista*, signed on 30 August 2008.

[90] In the opinion of the UNHCR, the number of illegal immigrants arriving in Italy from North Africa has arisen from 19.900 in 2007 to 36.000 in 2008 (plus 89,4%); the number of asylum demands was grow up from 14.053 in 2007 to

side, there is a strong criticism due to the lack of any guarantees from the Libyan authority about the treatment of immigrants.

On 14 July 2009, the UNHCR spokesperson intervened at the press briefing at the Palais des Nations in Geneva, denouncing that UNHCR staff in Libya have been carrying out interviews with 82 people who were intercepted by the Italian Navy on high seas on July 1 about 30 nautical miles from the Italian island of Lampedusa. They were transferred to a Lybian ship and later transported to Libya. Based on subsequent interviews, it does not appear that the Italian Navy made an attempt to establish nationalities or reasons for fleeing their countries. From interviews conducted by the UNHCR in Libya, it emerged that 76 persons came from Eritrea. Based on UNHCR's assessment of the situation in Eritrea, it was clear that a significant number of these persons was in need of international protection.

Some days later, from 27 to 31 July, a delegation from the European Committe for the prevention of torture of the Council of Europe visited Italy questioning the practice of intercepetion and refoulement of irregular immigrants.

From their side, NGOs were mobilised: Human Rights Watch published a report denouncing this practice[91] and Amnesty International did a mission in Libya in order to investigate on the fate of refouled immigrants.

In the meantime, the *Unione forense per i diritti dell'uomo* submitted a new application[92] for violation of Arts. 3 (prohibition of torture), art. 4, Prot. 4 and Art. 1 (the fair proceedings and the prohibition of collective expulsion), and Art. 13, on behalf of 24 immigrants stopped on the sea before the Sicilian isle.

The UNHCR submitted a third party intervention in order to address the practice and justification of the "push-back" operations by the Italian government, the conditions for reception and seeking asylum in Libya and the extraterritorial scope of the principle of no-refoulement and pursuant legal obligations concerning the rescue and interception of people at sea.

31.164 in 2008 (plus 122%) (see www.unhcr/org/pages/412d406060.html and www.unhcr.org/49c796572.html.

[91] HRW, *Repoussés, malmenés: L'Italie renvoie par la force les migrants et demandeurs d'asile arrivés par bateau, la Libye les maltraite*, 21 September 2009.

[92] Application no. 27765/09, *Hirsi et autres c. Italie*.

This new application, deposited at Strasbourg by the same lawyer of the previous *Lampedusa* case, demonstrates that the use of the Convention in order to protect vulnerable groups challenging the national institutions and policies is no more isolated, but, from the *Saadi* case and the case of expulsions from Lampedusa, it has been inaugurated a new era in the protection of fundamental rights in Italy, where NGOs, legal associations, political parties and also individuals use international instruments to promote them.

The claim of immigrants returned to Libya will likely based on the violation of the due process clause, in its widest concept, and on the violation of the principle of non-refoulement.

Regarding the first principle *ex* Art. 4, Prot. 4, in the cases under scrutiny there likely was any guarantee of identification of immigrants. As the Italian Supreme Court stated, "the guideline of the European Court on the concept of prohibition of collective expulsion of aliens *ex* Art. 4 Prot. IV of the ECHR, is aimed to comprehend the expulsion adopted against a group of aliens when there is not for everyone a reasonable and objective examination of their cases and claims before the competent authority [… Art. 4] intends to avoid that the reasons of expulsion of a "group" absorb the examination of single positions, with regard to the objectivity and legitimacy of the motivation of the expulsion".[93]

Regarding the prohibition of non-refoulment, as already said, Art. 3 ECHR bans extradition to States where there is a real risk of torture, in its widest concept. But this principle is also a cornerstone of international law. It is part of the international law on refugees, and in this sense it is provided for by the Refugees Convention of 1951[94]. It is also part of the EU law, as it is provided for by the directive 2004/83/CE, whom Art. 21.1 establishes that member States respect the principle of non-refoulment in accordance to international obligations[95]. But the principle of non-refoulment is also part of the broader international law on human

[93] Cass. Civ., Sez. I, no. 16571/2005.

[94] Convention relating to the Status of Refugees, 189, U.N.T.S. 150, entered in force on 22 April 1954, ratified by the Italian State on 15 November 1954. See art. 33.

[95] Such a provision has been introduced in the Italian system by the legislative decree no. 251/2007.

rights, in the wider mean that no one can be send in countries where he will likely suffer tortures or inhuman and cruel treatments. Such a perspective of the principle is foreseen by Art. 3 of the Convention against torture[96] and by Art. 7.1 of the International Covenant on Civil and Political rights.[97]

The practice to intercept immigrants' boats on high seas is a sort of *escamotage* attempted by the Italian government. It likely derives from the opinion of the Italian government that the non-refoulment obligation must not be applied outside the sovereign territory, but this is a quite isolated interpretation[98]. The opposite opinion is expressed by many other institutions. Firstly, by the UN ones, who are confirmed in several cases the opposite interpretation[99]. Secondly, even the ECtHR has already stated that

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[96] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted on 10 December 1984, G.A. res. 39/46, annex, 39 U.N. GAOR Supp. (no. 51) at 197, U.N. Doc. A/39/51(1984), entered in force on 26 June 1987, ratified by the Italian State on 12 January 1989.

[97] International Covenant on Civil and Political Rights (ICCPR), adopted on 16 December 1966, G.A. Res. 2200A(XXI), 21 U.N. GAOR Supp. (no. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered in force on 23 March 1976, ratified by the Italian State on 15 September 1978. The Human Rights Committee, i.e. the Office responsible on the ICCPR execution, clarified that States must respect and guarantee the rights provided in the Covenant to any person subjected to their jurisdiction, also when he is outside the national territory (General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant, 29 March 2004). See also the European Convention on Extradition, the European Convention on Terrorism. Some doctrine says that this principle can be considered as international customary law (see IHF, *Anti-terrorism Measures, Security and Human Rights – Developments in Europe, Central Asia and North America in the Aftermath of September 11* (2003).

[98] See on that respect the US Supreme Court opinion in Sale v. Haitian Centres Council, 509 US 155, 156 (USSC 1993).

[99] Unhcr, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol*, 26 January 2007, para. 24; Id., *Unhcr Background Note on the Protection of Asylum-Seekers and Refugees Rescued at Sea*, 18 March 2002, par. 18; Id., *The Principle of Non-Refoulement as a Norm of Customary International Law, Response to the Questions Posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in Cases 2 BvR 1938/93, 2 BvR 1953/93, 2 BvR 1954/93*, 31 January 1944, par. 33; Id., *UN High Commissioner for Refugees responds to U.S. Supreme Court Decision in Sale v Haitian Centers Council*, International Legal Materials, 32, 1215 (1993); Id., *Comments on the Communication from the Commission to the Council and the European Parliament on the Common Policy on Illegal Immigration COM (2001) 672 Final*, 15 November 2001, par. 12; UNHCR

the ECHR can be applied also to governmental actions taken on high seas[100].

6.3 The immunity of parliamentarians

The immunities of Italian parliamentarians are named as "prerogatives", is said as instruments that protect the free exercise of legislative functions putting a difference on the parliamentarian's *status* and this of common people.

One of these prerogatives is the absolute immunity from being persecuted and processed for opinions given during the parliamentary activity (Art. 68.1 Const). The border between an adequate tool for the independence and the liberty of any parliamentarian on one side, and the unequal treatment in respect of common people is quite evident: in theory, a member of the Parliament can not persecuted for defamations even when he acts and speaks during the exercise of his functions, but the enforcement of this rule has largely protected parliamentarians even when they were acting more as politicians than as member of the Parliament. In fact, is the Parliament that can oppose the immunity as a preliminary question, preventing the judicial proceedings[101].

Since the years '70, the doctrinal debate has enriched an impressive number of conflicts before the Constitutional court between the judiciary and Parliament, where, in substance, the guarantees for parliamentarians not to be persecuted and judged were normally confirmed in the name of the absolute immunity[102].

Amicus Curiae Brief in Sale, 21 December 1992. See also: Executive Committee of the High Commissioner's Programme, 18th Meeting of the Standing Committee *Interception of Asylum Seekers and Refugees: The International Framework and recommendations for a Comprehensive Approach*, EC/50/SC/CRP.17, 9 June 2000, par. 23; EXCOM Conclusion no. 82 (XLVIII) (1997); EXCOM Conclusion no. 85 (XLIX) (1988), EXCOM Conclusion no. 53 (XXXIX) (1981); EXCOM Conclusion no. 22 (XXXII), (1981).

[100] *Women on Waves and Other v. Portugal*, no. 31276/05, 3 February 2009.

[101] See the law no. 140/2003 for the execution of Art. 68 Const.

[102] C.P. Guarini, *L'ordine delle competenze di Camere e autorità giudiziaria in materia di insindacabilità parlamentare* (1998); M. Midiri, *Autonomia costituzionale delle Camere e potere giudiziario* (1999); S. Panunzio, *Interrogativi sulla insindacabilità dei parlamentari per le opinioni da essi espresse e il nesso funzionale*, in AA.VV., *Immunità e giurisdizione nei conflitti costituzionali*, 285-297 (2001); G. Azzariti,

Only the intervene of the ECtHR could challenge what is perceived by the common people as an abuse of this prerogative[103].

The ECtHR had found in various cases a violation of the Art. 6 of the ECHR, relating to the impossibility to condemn a parliamentarian for his/her offensive statements[104].

But two recent similar cases, brought before the Court by the general secretary of one of the major Italian trade-union federation, mark in a more significant manner a challenge to the rules on absolute immunity.

The general secretary, Mr Sergio Cofferati, was indicate in two interviews released by two parliamentarians as connected with the murder of a Government consultant, committed by Italian terrorists.

Cofferati, who considered that the interview damaged its reputation, brought two different proceedings in the tribunal of first instance, but the Chamber of Deputies decided that the statements in question had been uttered in the course of a parliamentary debate and that, consequently, the interviewed

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Cronaca di una svolta: l'insindacabilità dei parlamentari dinanzi alla Corte costituzionale, in Id., *Le Camere dei conflitti*, 199-251 (2001); C. Martinelli, *L'insindacabilità parlamentare: teoria e prassi di una prerogativa costituzionale* (2002); M. Midiri, *Recenti tendenze in materia di conflitti di attribuzione tra poteri: i conflitti di attribuzione relativi all'insindacabilità parlamentare*, in E. Bindi, M. Perini (eds.), *Recenti tendenze in materia di conflitti di attribuzione tra poteri dello Stato*, 89-130 (2003).

[103] The infringement of the ECHR was foreseen by A. Pace, *L'insindacabilità parlamentare e la sentenza n. 1150 del 1988: un modello di risoluzione dei conflitti da ripensare perché viola la Costituzione e la C.E.D.U.*, in *Poteri, garanzie e diritti a sessant'anni dalla Costituzione: scritti per Giovanni Grottanelli De' Santi*, cit., 521-536.

[104] First of all, *Cordova v. Italy(1) and (2)*, nos. 40877/98 and 45649/99, 30 January 2003, *De Jorio v. Italy*, no. 73936/01, 3 June 2004, *Ielo v. Italy*, no. 23053/02, 6 December 2005. Especially the *Ielo* case had a strong political impact, also because it followed a decision of the Constitutional court (no. 417/1999), diverging from the opinion of such a Court. T.F. Giupponi stresses the importance of the *Ielo* case in respect to the other one: *Il "caso Ielo" in Europa: Strasburgo "condanna la Corte italiana in material di insindacabilità?*, in www.forumocostituzionale.it. See also N. Purificati, *L'insindacabilità dei parlamentari tra Roma e Strasburgo*, in *Quaderni costituzionali*, 2 (2007); B. Randazzo, *Prerogative parlamentari: il giudice di Strasburgo "bacchetta" la Camera dei deputati e sembra smentire anche la Corte costituzionale*, in forumcostituzionale.it.

were covered by parliamentary immunity. Both the tribunals raised two different conflicts against Parliament before the Constitutional Court, which declared the conflicts inadmissible[105].

Consequently, Cofferati toke two legal actions before the ECtHR[106], relying on Art. 6.1 (right to a fair hearing) and complaining his inability to sue the two parliamentarians for defamation in the national courts.

The Court found in its judgments that the applicants had been deprived of the possibility of obtaining any form of compensation, which had resulted in an interference with their right of access to a court. Although this interference had pursued a legitimate aims because it was designed to protect members of Parliament from partisan complaints, ensuring a full freedom of expression during their mandate, not every statement is covered by the immunity, and those under the scrutiny of the Court could be appreciated as statements made outside the context of the parliamentary debate, and therefore without a clear connection with the parliamentary activity.

In sum, in a highly sensitive fact which involved famous political representatives (one of the parliamentarian was also Minister) and which has been widely followed by the public opinion, the ECtHR confirmed which has to be the approach on the balance between the legitimate aim of the interference and the fundamental rights of person damaged by declarations made by a parliamentarian, included the right to a fair hearing. Only this approach belonging from an international court seems able to challenge, more effectively than any other effort done in the national context, the parliamentarians' prerogative. This is a democratic result that is relevant not only in the legal context, but also in the political arena[107].

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[105] Constitutional Court 2007, nos. 305 and 368/2007.

[106] *CGIL and Cofferati v. Italy*, no. 46967/07, 24 February 2009, *CGIL and Cofferati (2) v. Italy*, no. 2/08, 6 April 2010.

[107] Another ECtHR's judgment brought into question Parliament as self-governed body: is the decision emitted on 28 Avril 2009, on applications nos. 17214/07, 20329/05, 42113/04 *Savino and others v. Italy*, concerning the issue of whether the judicial committee and judicial section of the Italian Chamber of Deputies can be classified as a "tribunal".

6.4 The "Genoa" case

In July 2001, Genoa hosted the G8 summit.

During the days of the summit, some authorised demonstrations degenerated in extremely clashes between anti-globalisation militants and police. These event occupied for months the Italian and foreigner newspapers and provoke deep consequences at political level, like the dimissions of the Minister of Interior.

The extreme positions went from charging some militants to have seriously undermined the public order to accusing the police for having violate fundamental rights by the abuse of their powers.

A number of criminal investigations was initiated by the Italian judicial authorities[108], while a parliamentary committee of inquiry was established[109] and the European Parliament passed a report demanding the respect of fundamental rights and freedoms during public demonstrations[110].

The Italian public opinion was highly impressed by the facts of those days, especially because of the death of a demonstrator, Carlo Giuliani, shouted by a law enforcement officer during one of the violent conflict.

The echo of his dead is still vibrating in the media and in the public discourse. For several months the debate around this

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[108] These include inquiries relating to the fatal shooting of Carlo Giuliani on 20 July; instances of alleged use of excessive force on the streets; alleged ill-treatment and excessive force by law enforcement officers during the raid on the Genoa Social Forum premises (Scuola Pertini-ex Diaz premises) in the early hours of 22 July, and alleged ill-treatment and cruel, inhuman and degrading treatment by law enforcement and prison personnel in detention facilities, including Bolzaneto. Criminal investigations were also opened both by the Public Prosecutor's office in Ancona and by the Public Prosecutor's office in Patras, Greece, concerning the alleged ill-treatment of Greek citizens en route to Genoa on 19 July.

[109] On 1 August 2001 the Italian Parliament decided to open a fact-finding investigation (*indagine conoscitiva*), with no judicial powers, rather than a full ad-hoc parliamentary commission of inquiry (*commissione d'inchiesta*), possessing full judicial powers. See the final document of the Senate *sull'indagine conoscitiva svolta dalla 1a Commissione permanente "sui fatti accaduti in occasione del vertice G8 tenutosi a Genova*, Doc. XVII, no. 1.

[110] Committe on Citizens' Freedoms and Rights, Justice and Home Affairs, *Report on the human rights situation in the European Union (2001)*, (2001/2014(INI)), 12 December 2002.

fatal accident, as a symbol of the violent and tragic Genoa days, has been heated, and it is still now so. The parliamentary group of *Rifondazione comunista* dedicated its office at the Senate to the young boy, his mother began a political career, while not only newspapers, but also movies, documentaries and songs talk about this episode. An association created under the name of Carlo Giuliani enlarged its initial aim in a broader purpose to fight for the right to life and free expression[111].

The Giuliani's death, in sum, arises as a symbol used by activist and some political groups belonging from the left against the abuse of the force by public agents and policemen[112], and in that way it arrived at the ECtHR.

The family of the boy alleged that Carlo Giuliani's death had been caused by excessive use of force and that the organisation of the operations to maintain and restore public order had been inadequate. They also argued that the failure to provide immediate assistance amounted to a violation of Arts. 2 and 3 of the ECHR. They complained as well that there had not been an effective investigation into the boy's death, in violation of Arts. 2, 6, and 13.

The Court found the Italian government not responsible for violation of the Convention on grounds of excessive use of force and for violation of the obligation to protect life, but condemned the Government for violation of Art. 2 only in its procedural aspect, because the investigation was not adequate in that it did not seek to determine who had been responsible for the situation.

Aspects on the legal ground apart, the *Giuliani* case has been object of an intense debate in Italy. An immense quantity of articles and reports in newspapers, books and every kind of media followed the case, using the Court's arguments both in the sense of denounced the abuse of violence by the State and in the sense of delegitimize the no-global activism.

The cultural and political fight is not ceased, as both the Government and the applicants take recourse against the judgment. The referral is now under scrutiny of the Grand Chamber.

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[111] See the activity of the Comitato Piazza Carlo Giuliani O.N.L.U.S.

[112] See in that sense the document of Amnesty International, *Italy: G8 Genoa policing operation of July 2001*, 1 November 2001.

6.5 Freedom of religion

Since the pre-republican era, there is a rule in Italy requiring that public place (public hospitals, schools, tribunals) display the catholic crucifix in each room.

Regarding the schools, the royal decrees nos. 965/1924 and 1297/1928 survive to the entry into force of the Italian Constitution in 1948 and the constitutionalisation of the principle of separation of Church and State.

Such an exposition of a religious symbol in public places did not provoke any sense of offence until the Italian society was generally supporting the catholic faith.

A pluralistic evolution of the Italian people due both to the general secularization of the contemporary societies and the phenomenon of immigration, that is quiet new for Italy, brought a vivid and troubled debate on this matter that across the entire society and institutions at every level.

One of the first cases brought to the national courts concerned the display of the crucifix in the public place during the electoral vote[113].

Yet, it is from a case concerning the display of the crucifix in a kindergarten that the public debate became very heated.

The founder of the Union of Muslim, Abel Smith, objected to the symbol of a particular religious faith being featured in his child's classroom, but he referred also to crucifix as "small cadaver [... whom] morphology is nothing but a corpse that could scare children". The judge of first instance found in Smith's favour stating in a temporary order that Italy is living a cultural transformation and calling the display of the crucifix an offense to the freedom of religion[114].

Apart the reaction of the Catholic clergy, also the major institutions disagreed with the judge: even the President of the Republic argued that "the crucifix has always been considered [...] a symbol of the values that are at the base of our Italian identity"[115].

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[113] Cass. Pen., sez. IV, no. 4273, 1 March 2000. For a comment see G. Di Cosimo, *Simboli religiosi nei locali pubblici:* le mobile frontier *dell'obiezione di coscienza*, in *Giur. cost*., 1130 (2010).

[114] Trib. L'Aquila, 23 october 2003.

[115] C.A. Ciampi, *Il crocifisso simbolo di valori condivisi*, reported by the newspapers "Repubblica" and "Il Corriere della Sera" on 28 October 2003.

The final judgment of the first instance void the temporary order arguing that it is incompetent on such a matter[116].

Two years later, a first instance judge, Mr Luigi Tosti, refused to act in his courtroom until the crucifix, appealed the administrative tribunal, was displayed and was suspended from the bench and convicted of refusing to perform his duties[117]. While the dispute arose in a nationwide debate, the Constitutional court was involved by Mr Tosti, but the claim was rejected as he was not entitled to raise in court the issue[118].

Meanwhile, a Finnish woman filed a suit demanding the removal of the crucifix in the her children's school. The woman, Ms Soile Lautsi, since 2002 pressed the school to remove the crucifixes in the classrooms. In May 2022, the school's governing body decided to leave them and the Ministry of State education adopted a directive recommending such an approach[119].

The case of the Finnish woman arrived to the Administrative Tribunal, that threw out the case, arguing that the crucifix is not a religious symbol, but – as anticipated by the President of the Republic – a symbol of the values which underlie and inspire the Constitution and the Italian way of life[120]. Also the Constitutional court was requested to examine the constitutionality of the royal decree, but it held that it did not have jurisdiction, because the royal decree was not a law[121].

From another side, the Council of State on 2006 emitted an advice[122] that, in conformity with another advice of 1988[123], insists on the nature of the crucifix as symbol of the values of freedom, equality, human dignity and religious tolerance that do not undermine the principle of *laicité* of the State.

After having tried all the domestic remedies, Ms Lautsi claimed the ECtHR on behalf of her children, alleging that the display of the crucifix in the State school was contrary to her right

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116 Trib. L'Aquila, 19 November 2003.
117 TAR Marche, sez. I, 22 March 2006.
118 Constitutional court, no. 127/2006.
119 Ministero dell'istruzione, *Direttiva* 3 ottobre 2002 and *Nota* 3 ottobre 2002.
120 TAR Veneto, sez. III, 17-22 marzo 2005.
121 Const. Court, no. 389/2004.
122 Council of the State, 15 February 2006: *Esposizione del crocifisso nelle aule scolastiche*.
123 Council of the State, 27 Avril 1988: *Insegnamento della religione cattolica ed esposizione dell'immagine del Crocifisso nelle sue aule scolastiche*.

to ensure their education and teaching in conformity with her religious and philosophical convictions, within the meaning of Art. 2, Prot. 1, and was contrary also to her freedom of conviction and religion, *ex* Art. 9 ECHR. The Greek Helsinki Monitor intervened as third party in support of the Lautsi's arguments.

According to the Court, the crucifix could easily be interpreted by pupils as a religious sign and they would feel that they were being educated in a school environment bearing the stamp o a given religion. Disagreeing from the Italian position, the Court hardly could imagine that the crucifix, as more than a religious symbol, could serve the educational pluralism. Unanimously, it found that there had been a violation of Arts. 2, Prot. 1 and Art. 9 of the ECHR.

The proceedings was alertly followed by the people, the Vatican, the other Churches and the institutions, in a great mobilisation of the public opinion that putted in charge of the opinion of the Court both the preservation of the religious and cultural tradition and, from the opposite side, the challenge to the strong link between the Catholic Church and the State.

Such a rely upon the Court's decision can explain how deep was the impact of the judgment in the public opinion, testified by the impressive attention dedicated to this case by the media, also foreigners, that call for a flare-up between Italy and the Court[124]: the decision provoked "a real thunderstorm", among "the reaction of the national media and the counter-reactions to the judgment by local authorities" [125]. In fact, a large number of them approved municipal decrees in order to avoid the enforcement of the judgment. Politics reacted submitting to Parliament three bill regulating the exposition of the crucifix and recognising its value as a universal symbol of the Italian culture, aside from its religious meaning[126].

In march 2010, the Grand Chamber accepted the referral request submitted by an Italian Government which is firmly defending the crucifix's display. The Grand Chamber has already

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[124] So the article *Will Crucifixes Be Banned in Italian Schools*, in "Time.com", 5 November 2009.

[125] P. Annicchino, *Is the glass half empty or half full? Lautsi* v *Italy before the European Court of Human Rights*, in "Stato, Chiese e pluralismo confessionale", 8 (2010).

[126] Bills nos. S1900, C2905, S1856, deposited on November 2009.

authorised the Governments of Armenia, Bulgaria, Cyprus, Greece, Lithuania, Malta, Monaco, Romania, the Russian Federation and San Marino, 33 members of the European Parliament, the Greek Helsinki Monitor, the *Associazione nazionale del libero pensiero*, the European Centre for Law and Justice, Eurojuris, the International Commission of Jurists joint with Interrights and Human Rights Watch, the *Zentralkomitee des deutschen Katholiken* joint with the *Semaines socials de France* and the *Associazioni cristiane lavoratori italiani* to present written observations[127].

In its judgment released on 18 March 2011, the Grand Chamber overruled the first one, stating that there has been no violation of the right to education. In fact, even if the crucifix is a clear symbol of the Christianity, there is no evidence that the display of such a symbol on classroom walls could influence pupils. The subjective perception of the applicant on that is not sufficient to conclude for a lack of respect on the State's part for her right to ensure education to her children in conformity with her personal philosophical convictions.

It is also worth to note that the Grand Chamber include on the margin of appreciation the States' decision whether or not to perpetuate what the Italian Government shows as a tradition, i.e. the display of the crucifix in the State-school classrooms. The argument of the lack of an European consensus allow the Grand Chamber to avoid to take a position regarding the domestic debate among the courts (especially, the Council of the State and the Court of Cassation) on that, since the presence of the crucifix in the classes' walls is not an evidence a process of indoctrination of a State's religion, but it is only a passive and not offensive symbol.

Ironically, for now the findings of the case have been, in some way, a conservative reactions, which are exacerbated a dispute that seems far from being settled.

Besides the reactions outside national boundaries[128], the cultural élite, all the Churches and all the political parties are

[127] See the press release issued by the Registrar on the hearing hold on 30 June 2010.

[128] Above all, the written declaration of some members of the EP *On the freedom to display religious symbols representative of a people's culture and identity on public premises*, no. 64/2009, 23 November 2009.

participating, sometimes in a fierce manner, to the debate[129]. The claim of Ms Lautsi is so evolving in the apical and crucial point of a very sensitive question which is animating a debate that is overtaking the individual interest of Ms Lautsi. Or, more realistically, Ms Lautsi decided to take upon herself one of the major challenge to the Italian cultural traditions since its foundation[130].

7. Conclusion: Toward a strategic litigation in Italy?

Major conflicts between the ECHR and the Italian system regard chronic deficiencies in certain fields, especially the administration of justice.

Until the middle of first decade of 2000, no relevant judgments relating issues crucial in the political and cultural debate were emitted. But the *Saadi* case, the case of mass expulsions to Lybia and the other ones here examined probably marked a starting point for a strategic litigation aimed at challenging policies and legislation which contrasts in areas were the political discourse is controversial.

The delay of the Italian State in accounting for such issues is due to several factors.

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[129] For an account of the large and deep debate see, apart P. Annicchino, cit., L.P. Vanoni, *I simboli religiosi e la libertà di educare in Europa: uniti nella diversità o uniti dalla neutralità?*, in *Rivista dell'Associazione Italiana dei Costituzionalisti* (2010).

[130] Another case concerning the freedom of religion is *Lombardi Vallauri*, no. 39128/05, 20 October 2009: Mr Lombardi Vallauri is a professor at the Catholic University of Milan. The University decided to not renew his contract because of his views clearly opposite to catholic doctrine. Relying on Art. 10, 6.1, 9, 13 and 14 of the ECHR, Mr Lombardi Vallauri complained, in brief, that the decision of the University had breached his right to freedom of expression, for which no reasons had been given and which had been taken without any genuine adversarial debate. The Court stated that the procedural guarantees have been not guaranteed and that the interference with Mr Lombardi Vallauri's freedom of expression had not been "necessary in a democratic society". Although this case was quite followed by the Italian public opinion and it has a concrete impact in the secularization of the Italian society, it does not appear has included in a strategic litigation more than in a right approach. For a first comment, see M. Massa, *Lombardi Vallauri c. Italia: due sfere di libertà ed un confine evanescente*, in www.forumcostituzionale.it.

From a legal point of view, Italy had to solve the problematic role of the ECHR in the internal system. After decades of ambiguity, only in November 2007 the Constitutional Court called a halt and clarified the relationship between the ECHR and national norms. Moreover, an already stable system of protection of human rights, added to a subsidiarity role of the EctHR, gives another legal reason for the lack of judgments regarding vulnerable groups.

In any case, as we have seen, a sort of evolution in ECHR rights' culture has been growing in recent years, also thanks to the most recent judgments by the Constitutional Court and the Court of Cassation, that have focused their attention on the ECHR.

It seems that an emerging strategic litigation is growing, where NGOs, politicians and further international organisations have become main players in challenging state legislation and practice, when an infringment of fundamental rights is alleged.

The attitude of some politicians and of the highest courts, research projects and academic monographs as well as some legislative initiatives (like that culminating in the *Azzolini* law) emphasize an improved knowledge and consideration of the ECHR, not only in traditional issues such as length of proceedings, fair trial, expropriations and so on, but also in the general system of the Convention.

The cases here summarised, although they are different on the merit, they are in common the fact that the proceedings before the ECtHR is inscribed in a broader national debate, as one of the instrument to challenge the law and also the legal culture of the country.

The same applicants sometimes seem to file the suit before the ECHR not only in their individual interests, but also with the aim to challenge a law, an administrative practice or even a legal culture. This is so for the *Lautsi* case, the case of mass expulsions and also the *Giuliani* case.

A confirmation of that conclusion belongs from two other cases, one of them still under scrutiny, the other declared inadmissible by the Court.

The first case moves from 17 applications against the Italian electoral law[131].

The applicants act in quality of voters against the electoral law no. 270/2005, that provides for the elections at Parliament. Such a law impedes to voters to express their preference on single candidates: they vote only for a political party or coalition, but they do not decide on the name of the candidates, that are chosen by the political parties. This system has been far and wide contested by citizens, besides almost all the political actors. While there were approuved three referendum for the abrogation of the law, some individuals filed a suit before the court and tried to involved the Constitutional court[132].

With a very naïve initiative, a voter appealed the Constitutional court for conflict among State powers, qualifying himself as state power because of "member of electoral body". This legal action was obviously attempted in a provocative way, as it is a clear and undoubted principle that "in any case […] a single citizen can […] consider himself invested with a task that is constitutionally relevant so much that he can raise a conflict among state powers"[133].

After the Constitutional court's declaration of inadmissibility, the applicants alleged the violation of the freedom of thought, conscience, expression and association and the right to an effective remedy *ex* Art. 6, 13, 1, 5, 9, 10, 11, 14, 16 and 3, Prot. 1 of the ECHR. It appears clear that such applications imply general interests directly related to the democratic structure of the society, and not individual interests of the applicants. They are brought to the ECtHR, in sum, as an instrument of a collective political challenge that regard every Italian citizens.

The other case concerns the right to die.

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[131] Applications nos. 11583/08, *Saccomanno et autres*, 11929/08, *Anetrini et Alessio*, 15726/08, *Arato et autres*, 16155/08, *Malena*, 20223/08, *Zurzolo*, 20225/08, *Deleo*, 20598/08, *Dova*, 20671/08, *Versolato*, 35953/08, *Bozzi et autres*, 39854/08, *Zampa*, 49434/08, *Dell'Acqua et autres*, 49512/08, *Critelli et autres*, 49519/08, *Pullano et autres*, 49538/08, *Raffaelli et autres*, 49545/08, *Arcuri et autres*, 49548/08, *Cosco et autres*, 29218/09, *Marrari*.

[132] See TAR Lazio, 27 February 2008, and Council of the State, 11 March 2008.

[133] So the Court rejected the claim on the basis of its constant jurisprudence, decision no. 284/2008.

The bioethical debate on the right to die is one of the most high and pitched in Italy at the moment. Despite herself, Eluana Englaro becomed the paladin of the libertarian positions[134].

Ms Englaro was a comatose woman at the centre of a euthanasia debate that has divided Italy, even sparking a constitutional crisis. She died after a long fight of his father and guardian to remove her life support after 16 years of vegetative state, in accordance with what she have wished when she was in full possession of her faculties.

Her father began to have got the authorisation to discontinue his daughter's artificial nutrition and hydration in 1999. After a very troubled judicial events, in 2008 the Milan Court of Appeal granted the requested authorisation on the bases of the criteria laid down by the Court of Cassation for this case. The case was so crucial from a political point of view that Parliament raised a conflict of powers against the judiciary before the Constitutional Court, but the Court rejected it[135]. Finally, the Court of Cassation dismissed an appeal on points of law by the Milan public prosecutor's office against the decision of the Court of Appeal.

The case has shocked the public opinion and divided Italians in prolife activists and people claiming the right to freely choice on own life.

Also in this case, the European Convention has been used in this political and ethical discourse.

Some individual applicants, represented by their guardians, and some associations whose membership consists of the relatives and friends of disabled persons and of doctors and lawyers who assist the persons concerned and a human rights association complained of the adverse effects that execution of the decision of the Milan Court of Appeal in the Englaro case was liable to have on them, alleging the violation of Arts. 2 and 3[136]. The ECtHR declared inadmissible the claims, because of the lack of direct interest. Reading the declaration of inadmissibility from the opposite perspective, one can conclude that in these case the

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134 As the «Times» remembers, Ms Englaro was called "Italy's Terri Schiavo" ("*Right to die" coma woman Eluana Englaro dies*, 10 February 2009.

135 Constitutional Court, no. 334/2008.

136 For a comment of this ethical and legal problem see A. Simoncini, O. Carter Snead, *Persone incapaci e decisioni di fine vita (con uno sguardo oltreoceano)*, in *Quaderni Costituzionali*, 7-34 (2010).

applicants, both individuals and associations, addressed the Court not for their individual interests, but in order to push the political debate toward the prolife arguments. In other words, they did not demand justice for themselves, but they sought to introduce a prolife argument belonging from the ECHR in a very sensitive issue.

These cases may be the most evident proof of an incoming strategic, and in some way suffered, approach toward the ECHR in Italy.