

THE EFFECTS OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS IN NATIONAL CRIMINAL LAW: THE HARMONIZING PROCESS

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Abstract

The paper discusses the developing relationship between the system of the European Convention on Human Rights and the national criminal law systems of the member states. In particular, there are three kinds of influence that "European law" can have on criminal law: the reduction of the criminal arena or the expansion of the guarantees with regard to criminal matters, enlargement of the criminal arena and by establishing cooperation in the field of justice. By concentrating on the experience of Italy, the paper discusses the way these phenomena can involve criminal law, considering that when the obligations that arise from harmonization enlarge the criminal area in continental Europe, the formal rule of law and the extrema ratio principle are obstacles to their effectiveness.

Özet

Bu makale, Avrupa İnsan Hakları Sözleşmesi sistemi ile üye devletlerin ulusal ceza hukuku sistemleri arasındaki ilişkinin gelişimini tartışmaktadır. "Avrupa hukuku" ceza hukuku üzerinde özellikle üç etkiye sahiptir: cezaya

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ilişkin alanın daraltılması veya cezai hususlara ilişkin güvencelerin artırılması, cezaya ilişkin alanın genişlemesi ve adalet alanında işbirliği yapılması. İtalya deneyimine odaklanmak suretiyle makale, uyumlaşmadan kaynaklanan yükümlülüklerin Kara Avrupası'nda cezaya ilişkin alanı genişlettiği, şekli hukukun üstünlüğü ilkesi ve extrema ratio ilkesinin belirtilen hususların etkinlikleri açısından engel teşkil ettiğini göz önüne alarak belirtilen etkilerin ceza hukukunu da kapsamasını sağlayan yolu tartışmaktadır.

Keywords: *European Convention on Human Rights system; national criminal law, EU harmonization.*

Anahtar Kelimeler: *Avrupa İnsan Hakları Sözleşmesi sistemi, ulusal ceza hukuku, Avrupa Birliği uyumlaştırması.*

INTRODUCTION

I shall discuss the developing relationship between the system of the European Convention on Human Rights and national criminal law in the EU member states. "European law" can influence criminal law in three ways: firstly by reducing the criminal arena or by expanding guarantees with regard to criminal matters (i.e. in order to protect human rights with respect to government); secondly by enlarging the criminal arena (to protect new interests emerging at European level or to prevent human rights violations¹); and thirdly by establishing cooperation in the field of justice (creating instruments such as the "European arrest warrant").² For the most part, the European Convention on Human Rights and the decisions handed down by the European Court of Human Rights (ECHR) affect national systems in the first of the three ways indicated. This constitutes the "negative obligation" or "mandates of abstention." In other words, the ECHR acts to repress violations or restrictions of human rights

¹ See Francesco Bestagno, DIRITTI UMANI E IMPUNITÀ. OBBLIGHI POSITIVI DEGLI STATI IN MATERIA PENALE [HUMAN RIGHTS AND IMPUNITY. POSITIVE OBLIGATIONS OF THE STATES IN THE CRIMINAL FIELD] 25 et seq. (Milan, 2003).

² For discussion on this direction of European law, see Gabriele Mazzini, *Allargamento dell'UE e questione penale [Enlargement of the EU and the Criminal Issue]*, unpublished presentation at the Comparative Criminal Law Course Seminar, Bologna, May 16, 2005; Francesco Viganò, *Diritto penale sostanziale e Convenzione Europea dei Diritti dell'Uomo* [Substantive Criminal Law and the European Convention on Human Rights], 2007 RIVISTA ITALIANA DI DIRITTO E PROCEDURA PENALE [ITALIAN JOURNAL OF LAW AND CRIMINAL PROCEDURE] 56; Emanuele Nicosia, *CONVENZIONE EUROPEA DEI DIRITTI DELL'UOMO E DIRITTO PENALE* [THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND CRIMINAL LAW] 255 (Turin, 2006); see Bestagno, *supra* note 1.

protected by the Convention arising from the actions and decisions of public authorities or arising from the national systems of law.

The Convention does not cover either the many principles in criminal matters (unlike trial matters, Article 6, and with the exception of Article 7 and Article 3)³ or the competence of the ECHR to verify the compliance of the national criminal system with the Convention.⁴ However, judicial review of individual and concrete national violations of human rights may involve rulings concerning criminal law, which by its very nature touches on fundamental human rights and freedoms. In other words, the Court, in checking on a single case, more often than not also checks whether the national law causing the limitation of human rights is in accordance with the Convention: this is termed “indirect incidence.”⁵ In other words, the rulings of the Court are pertinent only to a specific and concrete case of law; hence they do not have effect *erga omnes* but have consequences only for the specific case. The Court does not need to verify the abstract conformity of the national law with the Convention or with the ECHR’s jurisprudence. The only duty incumbent on the country against which the judgment is delivered is to remedy the individual injustice through appropriate compensation or retrial, as suggested by the Court. However, the Court’s sentences have recently acquired a more general import. The Court lets it be understood that a case entails a general incompatibility between the national criminal law and the European human rights system. This trend began

³ The ECHR system’s influence is mainly focused on the criminal trial system, although some influence for reform is also to be found in criminal law. A major influence of the Convention is on the general part of the criminal law, mainly in categories such as “criminal subject” or “legality” as defined by Article 7 of the Convention. The Court’s decisions consider “criminal” not only the conduct or the sanctions as defined by national law, but also conduct with general application and whose sanctions have a punitive and deterrent purpose that are very strict as well. The Court goes beyond the guidelines laid down in national law to focus on what the criminal subject is. Since *Engel v. The Netherlands* (Application No. 5100/71, 1976), the Court has enlarged the concept of “criminal matter” by linking it to substantial rather than formal criteria. In this way, it has extended the boundaries of the guarantees derived from Article 6 of the Convention (fair trial principle) and from Article 7 (legality) applied in criminal law. Also the legality principle is established by the Court using substantive standards such as accessibility of the norms and of the jurisprudence, prediction of the conduct and conviction, rather than formal criteria such as the rule of law. On this subject, see Viganò, *supra* note 2, at 52; Alessandro Bernardi, *Articolo 7 [Article 7]*, in *COMMENTARIO ALLA CONVENZIONE EUROPEA PER LA TUTELA DEI DIRITTI DELL’UOMO E DELLE LIBERTÀ FONDAMENTALI [COMMENTARY ON THE EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS]* 249-306 (S. Bartole, B. Conforti and G. Raimondi, Cedam ed., Padua, 2001); Nicosia, *supra* note 2, at 56.

⁴ Article 45 of the Convention states “The jurisdiction of the Court shall extend to all cases concerning the interpretation and application of the present Convention which the High Contracting Parties or the Commission shall refer to it in accordance with Article 48.” Provisions of the Convention are available at <http://www.hri.org/docs/ECHR50.html>.

⁵ Viganò, *supra* note 2, at 68; Nicosia, *supra* note 2, at 22.

with *Broniowski v. Poland*⁶ and, from the Italian point of view, *Sejdovic v. Italy*,⁷ in which the Court called for reform of Italian legislation. These suggestions were taken up by the Italian State with Law No. 94 enacted on 22 April 2005, which modified Article 175 of the Code of Criminal Procedure regarding trial *in absentia*, as requested by the ECHR.⁸ In detail, in *Sejdovic*, the ECHR criticized the old version of Article 175 of the Italian Code of Criminal Procedure in comparison to the standard of Article 6 of the Convention,⁹ because it did not grant the accused who (by failing to appearing before the court) had implicitly forgone the right to be present, an automatic and unconditional right to retrial. In this case, the Court referred explicitly to a “structural defect” in the Italian trial system and so went beyond the single concrete situation. After this decision, Article 175 of the Italian Code of Criminal Procedure was revised and now provides that if a sentence is passed *in absentia* or a decree of conviction is passed, the accused is given another term, at his request, to propose a challenge or opposition, unless he had effective knowledge of the proceeding or measure and has voluntarily renounced being present or proposing challenge or opposition. For this purpose the Judicial Authority must carry out all necessary inquiries.¹⁰

From another angle, the Committee of Ministers and the Court have begun to request each country to modify its national law so as to avoid multiple

⁶ App. No. 31443/96, Eur. Ct. H.R. (2004). Decisions of the ECHR are available at <http://www.echr.coe.int>.

⁷ *Sejdovic v. Italy*, App. No. 56581/00, 10 November 2004; referred to Grand Chamber, with judgment on 1 March 2006.

⁸ On this case see Andrea Tamietti, *Processo contumaciale e Convenzione europea dei Diritti dell’Uomo: la Corte di Strasburgo sollecita l’Italia ad adottare riforme legislative [Trial in Absentia and European Convention of Human Rights: The Court of Strasburg Urges Italy to Adopt Legislative Reforms]*, 2005 CASSAZIONE PENALE [CRIMINAL APPEALS] 418 (2005); Roberto Conti, *Efficacia delle sentenze all’interno dell’ordinamento: sempre più importante il ruolo del giudice sopranazionale [Effectiveness of the Sentences inside the Legal Order: The Increasingly Important Role of the Supranational Judge]*, at <http://www.dirittoegiustizia.it> (last visited Jul. 1, 2009); Alberto Cuccuru, *Profili storici della contumacia nel diritto processuale penale: dal diritto romano al caso Sejdovic [Historical Profiles of Trials in Absentia in Criminal Trial Law: From Roman Law to the Sejdovic Case]*, 2005 DIRITTO E PROCESSO PENALE [CRIMINAL LAW AND PROCEDURE] 646 (2005); Leonardo Fillippi, *Rito contumaciale: quale “equo processo?” [Trial in Absentia: What is a “Fair Trial”?]*, 2005 CASSAZIONE PENALE [CRIMINAL APPEALS] 2193 (2005).

⁹ Anyone charged with a criminal offence has the following minimum rights: . . . to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require . . .

¹⁰ Italian text is as follows: “Se è stata pronunciata sentenza contumaciale o decreto di condanna, l'imputato è restituito, a sua richiesta, nel termine per proporre impugnazione od opposizione, salvo che lo stesso abbia avuto effettiva conoscenza del procedimento o del provvedimento e abbia volontariamente rinunciato a comparire ovvero a proporre impugnazione od opposizione. A tale fine l'autorità giudiziaria compie ogni necessaria verifica.”

judgements under the same provision. An example is Italian Constitutional Law No. 2, enacted on 23 November 1999, which reformed Article 111 of the Constitution stipulating the right to a fair trial, including reasonable duration.

I. THE DEVELOPING RELATIONSHIP BETWEEN THE EUROPEAN CONVENTION ON HUMAN RIGHTS SYSTEM AND MEMBER STATE CRIMINAL LAW

This trend has involved criminal law and may affect it more seriously in the future, both negatively and positively. From the negative point of view, the Convention lays down the standard that criminal sanctions may not involve deprivation of life (Protocol VI and XIII), torture, or inhuman or degrading treatment or punishment (Article 3).

With regard to freedom of expression, the Court has underlined the uncertain compatibility of the crime of “political vilification” or “apology and propaganda” (if interpreted as a dangerous and abstract illicit act) with Article 10 of the Convention. In other words, the Court has established that member states cannot punish freedom of expression unless it involves instigation to violence or the commission of terrorist actions.¹¹

Moreover, the notions of “criminal matter” developed by the ECHR (and based on the nature of the illicit and the severity of the sanction)¹² means that the guarantees applied in the criminal arena go beyond the “name” assigned to the individual illicit act in national law and instead refer to a “substantive” criterion. With reference to Italian criminal law, this may imply that the prohibition against retroactivity (under Article 7 of the Convention for criminal sanctions) also applies to security measures, even if the Italian Constitution does not envisage this, and Article 200 of the Italian criminal code states that security measures must be applied according to the law in force at the moment of their application. Likewise, the constitutional guarantees in criminal matters could also be applied to corporations, even if Legislative Decree 231/2001,

¹¹ Viganò, *supra* note 2, at 58; Nicosia, *supra* note 2, at 209. Regarding Article 10 of the Convention, see Paolo Caretti, *Articolo 10. Libertà di espressione [Article 10: Freedom of Expression]*, in COMMENTARIO ALLA CONVENZIONE EUROPEA PER LA TUTELA DEI DIRITTI DELL'UOMO E DELLE LIBERTÀ FONDAMENTALI [COMMENTARY ON THE EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS] 340 (S. Bartole, B. Conforti and G. Raimondi, Cedam ed., Padua, 2001).

¹² Bernardi, *supra* note 3, at 257-258.

which introduced the liability of corporations, expressly establishes that it is administrative, not criminal, liability.¹³

Moreover, since the 1970s, the ECHR has developed a new theory on the most important human rights, the “Theory of Positive Obligations.” Some judgments concerning the rights to life, physical integrity, personal freedom and sexual freedom have imposed upon national authorities the positive obligation to actively protect fundamental rights in a positive, and not just a negative, way. In other words, the Court has required countries to take positive action to prevent the violation of human rights, not just formally but proactively,¹⁴ by introducing all the legislative, judicial, administrative, and practical preventive measures necessary to ensure the effective protection of human rights.

Starting from the assumption that private individuals (and not just public authorities) can violate human rights,¹⁵ the Court has obliged countries to introduce adequate criminal law systems to protect fundamental rights.¹⁶ In other words, the Court has asked member states to introduce criminal norms in order to prevent violations of human rights, and it has criticized those whose legal systems comprise too many exceptions regarding the punishment of certain offences.

An example of the Court’s creation of a new violation is the judgment in *Siliadin v. France*.¹⁷ The Court criticized France for the lack of a criminal law repressing domestic slavery in accordance with Article 4 of the Convention.¹⁸ The case concerned a young girl who had immigrated from Togo and was held as a slave; she was illegally employed at a very low wage and deprived of her freedom. The Court condemned France because the accused were acquitted owing to the lack of a relevant criminal statute. In *M.C. v. Bulgaria*, the Court condemned the defendant state because under Bulgarian law a conviction for

¹³ Enrico Amati, *LA RESPONSABILITÀ DA REATO DEGLI ENTI: CASI E MATERIALI* [CORPORATE LIABILITY FOR CRIMINAL OFFENCES: CASES AND MATERIALS] (Utet ed., Turin, 2007); Viganò, *supra* note 2, at 47; Nicosia, *supra* note 2, at 39.

¹⁴ The leading case on the positive-preventive obligations regarding Article 2 of the Convention is *McCann v. U.K.*, Sep.27, 1995. See Bestagno, *supra* note 1; Carlo Russo and Andrea Blasi, *Articolo 2*, in *COMMENTARIO ALLA CONVENZIONE EUROPEA PER LA TUTELA DEI DIRITTI DELL’UOMO E DELLE LIBERTÀ FONDAMENTALI* [COMMENTARY ON THE EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS] 40 (S. Bartole, B. Conforti and G. Raimondi, ed. Padua, 2001).

¹⁵ *Yasa v. Turkey*, App. No. 22495/93, Eur. Ct H.R. (1998).

¹⁶ *Osman v. U.K.*, App. No. 23452/94, Eur. Ct. H.R. (1998).

¹⁷ App. No. 73316/01, Eur. Ct, H. R. (2005).

¹⁸ “No one shall be held in slavery or servitude.”

rape required proof of the victim's resistance.¹⁹ In Italy, an analogous problem may arise from the lack of a statute explicitly forbidding torture.²⁰

The case of *A. v. United Kingdom*²¹ is an example of the Court's effort to reduce exceptions to the general applicability of criminal liability. The Court ruled against the UK because the justification under *ius corrigendi* (in brief, the right to use means of correction/discipline) was too broad and violated the minor's right not to be subjected to inhuman treatment as stated in Article 3 of the EHR Convention.²² The United Kingdom was criticized because the judges acquitted a man for violence inflicted on his nine-year-old stepchild.

In this regard there are also the cases *Makaratzis v. Greece*²³ and *Nachova v. Bulgaria*, where the states were condemned because the limitations on the "legitimate use of weapons by the public forces" were too ambiguous.²⁴

In Italy, the same problem may arise regarding the recent reform of the law on the right to self-defense. In 2006, a second part to Article 52 of the Criminal Code was introduced, providing that when certain conditions are met, proportionality between defense and assault within the domicile is presumed. If this presumption is interpreted as absolute, it conflicts first with the necessity to ascertain the "proportionality" between the aggressor's conduct and the self-defense of the person assaulted,²⁵ and secondly with the requirement for a complete and effective investigation. These two conditions have been read into Article 2 of the Convention by the ECHR.²⁶

¹⁹ App. No. 39272/98, Eur. Ct. H.R., (2003), quoted in Viganò, *supra* note 2, at 62.

²⁰ *Id.* at 63.

²¹ App. No. 25599/94, Eur. Ct. H.R. (1998). For discussion on this case, see Francesco Viganò, *Spunti per "un progetto alternativo" di riforma della legittima difesa*, [Ideas for an "Alternative Project" for the Reform of Self-Defense Law] in *STUDI IN ONORE DI GIORGIO MARINUCCI* [STUDIES IN HONOR OF GIORGIO MARINUCCI] 2040 (E Giuffrè ed., Milan, 2006).

²² "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

²³ App. No. 50385/99, Eur. Ct. H.R. (2004).

²⁴ App. No. 43577/98, Eur. Ct. H.R., Grand Chamber (2005).

²⁵ See Article 2(2). "Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary in defense of any person from unlawful violence . . .".

²⁶ On this point, see Francesca Consorte, *La presunzione di proporzione in una prospettiva internazionale: spunti interpretativi* [The Presumption of Proportion in an International Perspective: Points for Interpretation], 2006 CASSAZIONE PENALE [CRIMINAL APPEALS] 2657-2659 (2006).

II. THE ITALIAN SITUATION

From the standpoint of harmonization, it is evident that the ECHR and its judgments have decisive influence. Two very important issues require analysis. One bears on Court judgments that enlarge the criminal area (either directly or by diminishing exceptions, such as the excessively broad definition of self-defense). From this point of view, European law and the European human rights system share a problem: when the obligations that arise from harmonization enlarge the criminal area in continental Europe, the formal rule of law and the *extrema ratio* principle are obstacles to their effectiveness.²⁷ Although this is a national problem, it is worth noting that the Italian Constitutional Court has recently declared the pre-eminence of the rule of law²⁸ over any imposition of criminal protection deriving from the Constitution (or, consequently, from the European Union Treaty or the Convention).²⁹

The second point concerns the type of influence that can be exerted on national law by the ECHR judgments and by the Convention, as interpreted by the Court. In fact, the harmonizing effect joins together the European human rights system and the European Community system, but its effects differ between these two systems.³⁰ The European Convention of Human Rights and the judgments of the European Court of Human Rights do not directly affect national law, although they may influence national legal systems in two ways. Since they form a single system, I shall discuss the ECHR judgments and the Convention jointly. The reflections that follow are important because, as we have seen above, the Court is increasingly issuing judgments with general content.

From the international point of view, the ECHR judgments require the country involved to remedy the violation that the Court has determined, and in

²⁷ Nicosia, *supra* note 2, at 258.

²⁸ In other words only statutes passed by parliament can amend criminal matters in accordance with Article 25 of the Constitution, which stipulates down that no one can be punished if there is no law in force before the offence was committed, i.e. no *ex post facto declaration* of criminality.

²⁹ Corte Costituzionale, No. 394, 2006; see Gaetano Insolera, *Ancora qualche riflessione sulla irragionevolezza sulle norme di favore* [*Some More Reflections on the Unreasonableness of Norms in Favor*], STUDI E MATERIALI DI DIRITTO PENALE [STUDIES AND MATERIAL IN CRIMINAL LAW] 415-17 (2008); Vittorio Manes, *Norme penali di favore, no della Consulta* [*Penal Norms in Favor: The Court Says No*], 46 DIR. GIUST. [LAW AND JUSTICE] 28 (2006).

³⁰ Notwithstanding the fact that the Convention is an integral part of the European system of law incorporated by reference under Article 6 of the European Union Treaty.

the manner that the Court determines. This follows from Article 1 of the Convention,³¹ Article 46 of the Convention³² and from Protocol No. 14.³³

From the point of view of the individual member states, the influence of the European human rights system depends on national legislation, because the Convention establishes the rules but does not say how they are to be implemented in any given legal system. For Italy, the influence is wholly dependent on the decisions of the national authorities to implement the rulings of the ECHR, whose decisions are not immediately applicable to the system of law.

In other words, the European human rights convention system establishes a “minimum standard of protection” for fundamental human rights but grants member states freedom to determine the way in which they will make their national systems conform. The Italian system has followed the route of incorporation through Law No. 848/1955.³⁴ That is, in Italy the Convention is not transposed explicitly into the Constitution, and trials judged unfair by the ECHR cannot be reopened.³⁵ However, national judges³⁶ and legislative doctrine³⁷ have increasingly accorded the European human rights system greater force than ordinary law by combining the provisions of the Convention with those of the Italian Constitution. The European human rights system has thus

³¹ “The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.”

³² “The High Contracting Parties undertake to abide by the final judgment of the Court in any case in which they are parties.”

³³ The Protocol gives particular power in controlling the execution of the Court’s convictions to the Committee of Ministers.

³⁴ Law No. 848/1955 is the act of ratification and execution of the Convention signed in Rome on 4 November 1950 and of the Additional Protocol to the Convention, signed in Paris on 20 March 1952.

³⁵ For the recent suspension of a sentence of imprisonment declared unjust by the European Court, see Corte Cassazione, I, 01 Dec. 2006 – 25 Jan. 2007, n. 2800, Dorigo; GUIDA AL DIRITTO [LEGAL GUIDE] 2007, 9, 74.

³⁶ Corte Costituzionale, 19 Jan. 1993, n. 10; Corte Costituzionale, 22 Oct. 1999, n. 399.

³⁷ See Tommaso Basile, *Adeguamento dell’ordinamento giuridico nazionale alla Convenzione europea dei diritti dell’uomo* [Adaptation of the National Legal Order to the European Convention of Human Rights], 2002 DIR. PEN. PROC. [LAW AND CRIMINAL PROCEDURE] 907 (2002); Andrea Pertici and Roberto Romboli, *Commentario alla convenzione delle libertà fondamentali* [Commentary on the European Convention for the Protection of Human Rights and Fundamental freedoms] in in COMMENTARIO ALLA CONVENZIONE EUROPEA PER LA TUTELA DEI DIRITTI DELL’UOMO E DELLE LIBERTÀ FONDAMENTALI [COMMENTARY ON THE EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS] 389, 391 (S. Bartole, B. Conforti and G. Raimondi, Cedam ed., Padua, 2001); Franco Bricola, *Prospettive e limiti della tutela penale della riservatezza* [Perspectives and Limits of Penal Protection of Privacy], 1967 RIVISTA ITALIANA DI DIRITTO E PROCEDURA PENALE [ITALIAN JOURNAL OF LAW AND CRIMINAL PROCEDURE] 1094, 1094-95 (1967).

been used as a legitimate parameter with which to interpret, remove or modify national laws if Parliament does not enact the corrections specified in the ECHR judgments.

The relationship between the Italian system and the Convention system has been clarified by two important rulings of the Italian Constitutional Court, decisions 348/2007 and 349/2007.³⁸ The Court separated the powers of the ECHR from those of the Italian Constitutional Court, ruling that the former should harmonize the interpretation of the Convention and the latter should verify the conformity of the provisions of the Convention with the Italian Constitution.

These are the principles that have been established by the Italian Constitutional Court. When possible, that is, the Convention is a parameter for the interpretation of national law. Where this is not possible, the Convention, as interpreted by the ECHR in its judgments, can be interjected as a parameter that, when combined with Article 117 of the Italian Constitution mandating fulfillment of the country's international obligations, can be applied to rule that an Italian provision violates the Convention and therefore abrogates it. The Italian Constitutional Court must determine whether the rules established by the European human rights system are in accordance with the Italian Constitution. The Constitutional Court may also rule that, even where Italian law is not in accordance with the Convention, the duty to respect international obligations under Article 117 of the Italian Constitution can be outweighed by other constitutional values deemed more important by the Court.

³⁸ Corte Costituzionale, sent. no. 348 and 349, 2007; see Laura Cappuccio, *La Corte Costituzionale interviene sui rapporti tra Convenzione europea dei diritti dell'uomo e Costituzione [The Constitutional Court Intervenes in the Relationships between the European Convention on Human Rights and the Constitution]*, 2008 FORO IT. [ITALIAN FORUM] 47, 47-50 (2008); Fabrizio Gandini, *Il giudice ordinario e la Convenzione europea per la salvaguardia dei diritti dell'uomo e delle libertà fondamentali: il tramonto della "judicial review" [The ordinary courts and the European Convention for the protection of human rights and fundamental freedoms: the demise of judicial review]*, 2008 FORO IT. [ITALIAN FORUM] 57, 61 (2008); Barbara Piattoli, *Diritto giurisprudenziale Cedu, garanzie europee e prospettive costituzionali [ECHR case law, European guarantees and constitutional perspectives]*, 2008 DIRITTO PENALE E PROCESSO [CRIMINAL LAW AND PROCESS] 262 (2008); Roberto Romboli, *In tema di violazione da parte di leggi statali o regionali di norme della Cedu [On violations of EHRC laws by national or regional laws]*, 2008 FORO IT. [ITALIAN FORUM] 39, 39 – 41 (2008); Federico Ghera, *Una svolta storica nei rapporti del diritto interno con il diritto internazionale pattizio (ma non in quelli con il diritto comunitario) [A historical watershed in the relationships between national law and international treaty law (but not in that with Community law)]*, 2008 FORO IT. [ITALIAN FORUM] 50 – 54 (2008).

Italian laws in force can never be simply disregarded or not applied by an Italian court, even where they clash with the Convention, because the European human rights system is not comparable with the legal system of the European Union. The impossibility of direct non-application of Italian laws has now been reconfirmed by the Italian Court of Cassation, with Decision No. 14/2008 on the reasonable duration of trials.³⁹

CONCLUSION

To conclude, the growing influence of the Convention system on the Italian legal order is also evident in some Italian decisions that establish the non-applicability of the Italian final judgment if the ECHR has judged the Italian trial to be a violation of the Convention⁴⁰ and in some recent legislative measures, such as DPR No. 289 of 28 November 2005, which requires that the summary of convictions of Italy by the ECHR be annotated in the national court records.⁴¹

In light of the foregoing, the judgments of the European Court of Human Rights can be seen to exert a political, cultural and juridical influence on national authorities. This may be the first step towards harmonization and the creation of a “European criminal law system.”

³⁹ This decision is about the ECHR parameters of the reasonable length for a trial and of the amount of compensation for excessive length of the trial.

⁴⁰ See Cass., I, 25 Jan. 2008, n. 2800, Dorigo. See Ernesto Lupo, *La vincolatività delle sentenze della Corte Europea dei Diritti dell’Uomo per il giudice interno e la svolta recente della Cassazione civile e penale [The Binding Nature of the Judgments of the European Court of Human Rights with Respect to National Courts and the Recent Turnaround by the Civil and Penal Court of Cassation]*, 2007 CASSIONE PENALE [CRIMINAL APPEALS] 2251 (2007).

⁴¹ This is an example of the advancing indirect incidence of the sentences of the European Court: Consorte, *supra* note 26, at 2661-2663.

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