

THE EFFECT OF THE ECHR ON THE ITALIAN LEGAL ORDER: DIRECT EFFECT AND SUPREMACY

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This paper is devoted to a study of the effect of the European Convention on Human Rights (ECHR) on the Italian legal order, according to the most recent national case law. This rather complex topic will be divided into three sub-issues, to which three sections of the paper are devoted. The first is the question of the direct effect and supremacy of the substantive obligations imposed by the Convention. The second concerns the effect of decisions of the European Court of Human Rights (ECtHR). The third concerns the binding value of the case law of the European Court for national judges. Before entering into the topic, I will entertain a brief discussion of the changing paradigms in the relationship between international obligations and municipal legal orders.

1. THE THEORETICAL FRAMEWORK: DIRECT EFFECT AND SELF-EXECUTION

Although the present paper is not directed at reconsidering theoretical options on the effect of treaties in internal law, a word of premise is nonetheless opportune. Indeed, the conceptual landscape of the relationship between international law and municipal law is rapidly changing. Appraising, albeit in passing, the reasons and the effect of this conceptual development might help to grasp some of the uncertainties surrounding the main issues addressed by the current paper and shaping some possible solutions.

For the limited purpose of this paper, I will assume, in a certain sense only assertively, that there is a difference between two notions which are frequently used interchangeably in case law and literature; namely, self-execution and direct effect. These two notions refer broadly to the same issue: the effect produced by international rules within municipal legal orders. However, this effect is determined through a variety of standards which can be grouped into two different conceptual frameworks. According to the classical doctrine of self-execution, the effect of international rules are determined on the basis of standards developed by domestic legal orders¹. According to the emerging doctrine of direct effect, the effect of international law is determined by international law, which ultimately establishes if a

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¹ This was probably what the US Supreme Court had in mind when it stated, in *Foster v. Neilson*, 2 Pet. 253, 315 (1829), that treaties are "equivalent to an act of the legislature".

certain rule is aimed at creating domestically enforceable rights and obligations for individuals or rather if it is aimed at establishing merely interstate obligations.

Determining whether a treaty provision is self-executing entails, of course, the interpretation of that provision. This operation is, however, logically distinct from the activities commonly referred to as treaty interpretation, designed to determine the content and the scope of the international obligations of a treaty. The identification of the self-executing character of a treaty provision is not aimed at determining the international obligations flowing from it, but rather the effect which this provision is likely to produce in the municipal legal order, in the absence of implementing legislation. This, in turn, depends on a number of factors which can vary considerably in the municipal legal order of different States. Some might pre-eminently consider the intent of the constitutional organs involved in the process of treaty conclusion; others might give weight to how the provision is phrased and, henceforth the clarity and completeness of the treaty provision; still others might consider the suitability of the provision to sustain a private right of action, and so on. The fact that a certain treaty provision is considered self-executing in one legal order does not necessarily entail that the same provision must be equally considered self-executing in the municipal legal order of other States parties to the same treaty.²

The idea that each State freely sets the criteria for determining the condition under which a treaty is self-executing has been recurrently called into question. Recent trends of case law tend to see direct applicability as a quality of a particular category of external law rules, which are aimed at governing rights and duties within the domestic legal order.

A quite complex doctrine of direct effect has been developed by the European Court of Justice (ECJ) with regard to the issue of the application of European Community (EC)/European Union (EU) law within the municipal order of the Member States. Notoriously, this case law is based on the idea that the direct effect of EC/EU law is a uniform notion, determined by the EC/EU treaties and which does not depend on specific criteria autonomously developed by each of the Member States.

At the international law level, however, a fully-fledged doctrine of direct effect is still lacking. Yet, a consistent pattern of case law is moving towards the idea that only those treaty provisions which intend to create private rights of action enforce-

² This conception was clearly expressed by the ECJ in the *Kupferberg* judgment of 26 October 1982 (Case 104/81, *Hauptzollamt Mainz v. C.A. Kupferberg & Cie KG a.A.*, ECR, 1982, p. 3641 ff.): "although each contracting party is responsible for executing fully the commitments which it has undertaken, it is nevertheless free to determine the legal means appropriate for attaining that end in its legal system unless the agreement, interpreted in the light of its subject-matter and purpose, itself specifies those means. Subject to that reservation the fact that the Courts of one of the parties consider that certain of the stipulations in the agreement are of direct application whereas the Courts of the other party do not recognize such direct application is not in itself such as to constitute a lack of reciprocity in the implementation of the agreement".

able in the domestic legal order of the States parties can be regarded as having direct effect. Just to mention a few examples, this idea has inspired the ECJ in its well known case law concerning the internal effect of WTO agreements.³

Among the criteria for determining if a certain rule intends to create individual rights enforceable in the domestic legal order, a considerable role is assigned to the presence in the treaty of a mechanism of dispute settlement. In this line of reasoning, the United States Supreme Court in *Medellin* stated that judgements of the International Court of Justice (ICJ) do not have direct effect in the US legal order, and do not bind domestic courts, as the United Nations Charter envisages a mechanism of enforcement at the international level.⁴

More recently, the ECJ seems to assume that only treaty provisions which create rights and freedoms for individuals within the international legal order can be considered as provisions having direct effect within the EU legal order.⁵

The classical doctrine of self-execution and the various doctrines, which refer to an international standard for determining if a treaty can be applied internally, are based on philosophically different, almost antithetical conceptions of the relationship between international law and municipal law. In the present paper, I will look at these two theoretical options only to the extent that they shed light on the internal implementation of the ECHR.

2. THE SUBSTANTIVE PROVISIONS OF THE ECHR AS SELF-EXECUTING RULES

Traditionally, Italian judges are inclined to assume that substantive provisions of the ECHR are self-executing and can be relied upon by individuals in order to sustain their claims. This conclusion is based on the classical definition of self-executing provisions as provisions capable of producing rights and duties for individuals in the municipal legal order without any need for implementing legislation. The substantive provisions of the ECHR are typically self-executing, as they are mostly worded in the same way as internal provisions.

The rules of the ECHR were recognised as self-executing by the Italian Supreme Court (*Corte di Cassazione*) in 1988:

³ The most clear in a consistent pattern of cases is Case C-149/96, *Portugal v. Council*, ECR, 1999, p. I-8395, para. 47.

⁴ See *Medellin v. Texas*, 552 US 491 (2008), where the Court stated: "The remainder of Article 94 confirms that the UN Charter does not contemplate the automatic enforceability of ICJ decisions in domestic courts. Article 94(2) – the enforcement provision – provides the sole remedy for non-compliance: referral to the United Nations Security Council by an aggrieved State".

⁵ Case C-308/06, *Intertanko and others*, ECR, 2008, p. I-4057. The Court held that the UNCLOS has not direct effect within the EU legal order because "[i]ndividuals are in principle not granted independent rights and freedoms by virtue of UNCLOS".

“The provisions of the ECHR, with the only exception of those worded in a very imprecise and generic way as to sustain an individual claim, are immediately applicable within the domestic legal order. Their normative content must be determined in the light of the interplay between these provisions and the other legal rules of the domestic legal order”.⁶

The peak of this trend was probably reached in 2005,⁷ when the Court found that rules of the ECHR must be applied unconditionally, even at the cost of disregarding inconsistent legislation. From the reasoning of the Supreme Court it is unclear whether this is a consequence of the self-executing nature of the ECHR or rather of the supremacy recognized to the ECHR *vis-à-vis* national law.

A different course was taken by the Italian Constitutional Court in two well-known decisions delivered in 2007, Nos. 348 and 349 (the so called “twin judgments”). In decision No. 348/2007, the Constitutional Court said:

“[The rules of the ECHR] albeit occupying a role of great significance in that they protect and foster the rights and fundamental freedoms of people, are still ultimately international treaty norms that are binding on the State, they do however not produce effects on the internal legal order which can found the jurisdiction of the national courts to apply those provisions in disputes before them, at the same time not applying any conflicting internal provisions” (official translation).

More radically, in decision No. 349/2007, the Court said:

“At present no aspect of the structure and objectives of the ECHR, or character of particular provisions of it, makes it possible to conclude that the legal position of individuals could be directly and unconditionally dependent on it, irrespective of the traditional normative framework of the individual signatory states, to the point of enabling the courts to set aside conflicting national legislation” (official translation).

This issue was restated recently by the Constitutional Court in its decision of 26 November 2009, No. 311. Initially, the Court appeared to have accepted the idea that national judges can apply provisions of the ECHR and decide, on that basis, cases duly presented for their determination. However, just a few lines later, the Court added that “‘ordinary’ (i.e. non-constitutional) judges cannot apply the

⁶ *Corte di Cassazione (Sez. Unite)*, 23 November 1988, No. 15.

⁷ *Corte di Cassazione (Sez. Unite civili)*, 23 December 2005, No. 28507.

ECHR norm (as such, and thus differently from a directly effective EU norm) in stead of a conflicting domestic norm" (unofficial translation).

In spite of the spirited debate prompted by these decisions, and in particular by those parts in which the Constitutional Court seems to contend that the substantive rules of the ECHR do not have direct effect, there is a strong case for a more moderate conclusion. The Court has not denied the possibility for domestic judges to apply directly the ECHR to domestic claims. In principle, substantive provisions of the ECHR are self-executing. Rather, by saying that the ECHR does not have direct effect, the Court seems to rule out a particular effect, specifically the setting aside of inconsistent national law. This is precisely the meaning of the term "direct effect" within the conceptual framework of EU law, where, indeed, the ECJ seems to conceive of direct effect as the particular quality of certain EU rules which must be applied unconditionally by national judges, even at the cost of disregarding (or "disapplying") inconsistent national law.

Thus, by mentioning direct effect as a quality pertaining to EU law, and by highlighting the difference in treatment between EU rules, which have direct effect, and international rules, which do not, the Constitutional Court seems to allude (inadvertently) to the very thin conceptual line which separates the notion of direct effect from that of self-execution. It also seems to uphold the idea that the effect of self-executing rules is an effect entirely determined and governed by municipal law, whereas direct effect is an effect determined and governed by an external legal order, such as that of the EU.

3. SUPREMACY

3.1. *The Constitutional Reform of 2001*

Before the constitutional reform of 2001, the ECHR, not unlike other international treaties, was deemed to have the rank of its law of incorporation. Incorporated through ordinary law (*Anwendungsbefehl*), the ECHR ranked, in principle, as ordinary law. Its relationship with other laws was therefore governed by the last-in-time rule. Substantive rules of the ECHR superseded prior statutes and were trumped by supervening laws.

The situation changed with the constitutional reform of 2001, which introduced a new Article 117, paragraph 1, according to which international legislation must conform to international obligations. The opinion prevailing in the relevant literature holds that, under Article 117, paragraph 1, domestic laws inconsistent with international obligations are unconstitutional and must be judicially reviewed by the Constitutional Court. However, Article 117, paragraph 1, did not change the formal rank of treaties. Treaties implemented by ordinary laws, therefore, must conform to constitutional requirements. To date, this mechanism of indirect supremacy of international law has only been tested in relation to the ECHR. The regime adopted

by Article 117, paragraph 1, is particularly troublesome where the ECHR is concerned. Indeed, there is a certain coincidence between substantive provisions of the ECHR and provisions of the Constitution protecting the same fundamental rights. This circumstance makes it extremely difficult to establish a coherent and balanced relationship between these two sets of rules.

3.2. The Relationship between the ECHR and the Italian Constitution

As said above, supremacy of the ECHR with respect to ordinary laws does not entail that domestic courts are empowered to disregard the latter in order to apply the former. The setting aside of ordinary laws inconsistent with the ECHR can be ordered only by the Constitutional Court. It is therefore for the Constitutional Court to determine whether an actual conflict does exist and, in the positive, to settle it on the basis of the rule of conflict provided for by Article 117, paragraph 1, of the Constitution. This means that, in most cases, ordinary laws found to be inconsistent with the ECHR should be declared null and void.

Comparative experience, however, proves that domestic courts are reluctant to accept the principle of unconditional supremacy of international law over municipal legislation. Without dwelling on it any longer, suffice it to say that national courts have developed a wide range of devices aiming to moderate the principle of supremacy and to make it possible, in exceptional circumstances, to disregard international law so that conflicting national law may be applied.

The same tendency can be observed under the Italian Constitution. As mentioned above, the ECHR formally has the rank of the incorporating law. Although it enjoys supremacy over conflicting statutes, it must nonetheless, like any other treaty, conform to constitutional requirements. Consequently, the Constitutional Court, with much emphasis, pointed out expressly that provisions of the ECHR could be judicially reviewed in light of the Italian Constitution and, if found inconsistent with the Italian Constitution, they could be declared null and void. In quite clear-cut terms, the Constitutional Court, in its decision No. 349/2007, found that it has the competence to verify "the compatibility of the ECHR provisions, as interpreted by the court specifically charged with this task by the member states, with the relevant constitutional provisions (official translation)".

The consequences of these findings are quite clear. Although the conflict between ordinary laws and the ECHR normally produces the nullity of the former, in exceptional cases it can unveil the existence of a different conflict: between the ECHR and Italian constitutional law. Since the ECHR has been incorporated through ordinary law, provisions of the Convention conflicting with Italian constitutional law must be declared as null and void by the Constitutional Court.

The idea of an inconsistency between the ECHR and the Constitution might seem to be an oddity. Indeed, the Constitutional Court appears to refer to such an inconsistency as a very remote possibility. However, this possibility cannot be altogether dis-

missed. Since both the Constitution and the ECHR are complex systems of value-balancing, one cannot exclude that, as a consequence of the development of the case law of the ECtHR, the balancing of values on which certain rules of the ECHR rest may prove to be sensibly different than that underlying the rules of the Italian Constitution. Yet even in this case, rather than speaking in terms of a radical antinomy, one should more properly speak of different interpretation and balancing activities in the context of the two sets of rules. This issue should therefore be dealt with more thoroughly in the next section of this paper devoted to consistent interpretation.

3.3. *Consistent Interpretation*

When speaking of consistent interpretation, it is not always clear which rules must be interpreted in accordance with others. Indeed, from the case law of the Constitutional Court one can infer three different situations: (a) ordinary laws must be interpreted consistently with the ECHR; (b) the ECHR must be interpreted in accordance with the Constitution; (c) the Constitution must be interpreted in accordance with the ECHR. Each of these three options is, by itself logically tenable. However, each of them appears hardly consistent with, and vies to prevail over, the others.

The issue also has a philosophical implication, inasmuch as it contributes to determine the nature of the troubled relationship (competition or cooperation) between the Constitution and the ECHR: two sets of provisions broadly overlapping, aimed at protecting human rights respectively in the internal and in the international arena. Not surprisingly, each of these tends to influence the interpretation of the other. If one assumes that the constitutional provisions protecting fundamental rights must be interpreted in accordance with the ECHR, as most authors would concede, it would follow that human rights law develops mainly at the international level. If one assumes that provisions of the ECHR must be interpreted in accordance with domestic constitutions, then the interpretation of the ECHR by national judges would be made on the basis of a domestic constitutional standard.

In a number of cases, the Constitutional Court has held that ordinary laws must be interpreted in accordance with the ECHR. The Court has gone on to say that judges are even prevented from referring a conflict to the Constitutional Court if this conflict can be settled on the basis of the principle of consistent interpretation, i.e. by interpreting laws in accordance with the ECHR.

On other occasions, the Court has stated that the ECHR exerts a great influence on the interpretation of the Constitution. In its decision No. 349/2007, the Court referred to the "special relevance of the Convention provisions in the light of their content, which translates into an intention to guarantee, above all through interpretation, the tendency to harmonise the Constitution with the ECHR" (official translation). Even more clearly, the Court said, in decision No. 317/2009:

“Art. 117, para. 1, of the Italian Constitution, refers to the obligations contained in the ECHR. The constitutional provision has thus the effect of bestowing constitutional rank upon the Convention. This has consequences for what concerns the interpretation and the balancing of fundamental rights one with another” (unofficial translation).

However, in decision No. 348/2007, the Court seemed to refer to the possibility of disregarding the interpretation of the Convention given by the ECHR in order to conform to constitutional requirements. The Court said:

“The judgments of the Strasbourg Court are not unconditionally binding for the purposes of the verification of the constitutionality of national laws. Such controls must always aim to establish a reasonable balance between the duties flowing from international law obligations, as imposed by Article 117(1) of the Constitution, and the safeguarding of the constitutionally protected interests contained in other articles of the Constitution” (official translation).

Perhaps in an attempt to reconcile these rather incoherent statements, the Court stated, in its decision No. 317/2009, that “the comparison between the ECHR and the Constitution in matters of fundamental rights’ protection must be undertaken with a view to the maximum expansion of human rights guarantees, also by developing the potentialities inherent in the constitutional norms relating to the same rights” (unofficial translation). From this perspective, the criterion of the maximum standard of protection should be the basic principle guiding judicial interpretation. I will return on this issue when examining the impact of the case law of the ECtHR on national judges.

4. THE EFFECT OF DECISIONS OF THE ECtHR

Article 36 of the ECHR states: “the High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties”. The recent case law of the Italian Supreme Court referred to this provision, in order to determine the internal legal effect of decisions of the ECtHR.

In *Somogyi*⁸ the Supreme Court declared that the need to give full effect to a decision of the ECtHR entails that criminal proceedings conducted in breach of the right to a fair trial secured by Article 6 of the Convention must be reviewed and

⁸ *Corte di Cassazione (Sez. I penale), Somogyi*, 3 October 2006, No. 32678, IYIL, Vol. XVI, 2006, p. 317 ff.

reconsidered, even in the presence of judicial decisions endowed with the effect of *res judicata*.

In an analogous line of reasoning, the same Court in *Dorigo*⁹ found that decisions of the ECtHR declaring that a violation of the Convention occurred are directly applicable within the domestic legal order of the State concerned. In that legal order, decisions of the ECtHR entail obligations for that State, in particular the obligation to sweep out the effect of the violation, and rights for the individuals, which are entitled to *restitutio in integrum* and, in case of material impossibility, to full compensation of the damages suffered in consequence of the violation. The right to restitution also includes, in case of violation of the right to a fair trial, review and reconsideration of the judicial proceedings.

However, a different approach was taken by the Constitutional Court. In a passage of decision No. 349/2007, read by commentators as a response to the findings of the Supreme Court in *Dorigo* and *Somogy*, the Court said: “the very judgments of the Strasbourg Court are directed to the legislating member State and call for specific action to be taken by it, even where it is an individual who initiates court proceedings against his own state” (official translation).

In all evidence, the two most authoritative courts of Italy expressed divergent opinions on the same issue, namely the possibility for individuals to directly rely on a decision of the ECtHR in order to claim a review of judicial proceedings carried out in breach of the right to a fair trial. More generally, the different patterns of case law are based on different conceptions on the effect of decisions of the ECtHR. According to the Supreme Courts, decisions of the ECtHR entail a right to restitution which can be exercised by the individuals within their own national legal order. In other words, decisions of the ECtHR must be applied directly by judges in order to restore the situation which would have existed if no breach of human rights had been committed. In order to attain this goal, national procedural rules of fundamental importance, such as the *res judicata* rule, must be set aside if they unduly prevent the right to restitution of the individuals to be brought into effect.

A different stance is that adopted by the Constitutional Court. In this Court’s opinion, decisions of the ECtHR are not directly applicable within the national legal order and, therefore, do not create enforceable rights for individuals. They address the State, considered as an international legal person, which can give full effect to these decisions through legislation.

5. THE EFFECT OF THE ECtHR CASE LAW

Paradoxically enough, the Constitutional Court, while excluding that domestic courts might be addressed by individual decisions of the ECtHR, expressed un-

⁹ *Corte di Cassazione (Sez. I penale), Dorigo*, 1 December 2006, No. 2800, *ibid*.

equivocal statements in favour of the binding value of the case law of the ECtHR. In the Constitutional Court's view, national judges retain no discretion as to the interpretation of a provision of the ECHR but must rely on the interpretation given to it by the ECtHR. This conclusion rests on a variety of arguments, none of which, however, seems to be fully persuasive.

In decision No. 348/2007, the Court seems to ground this conclusion on Article 32, paragraph 1, of the ECHR, which reads: "the jurisdiction of the Court shall extend to all cases concerning the interpretation and application of the Convention and its Protocols which are referred to it". In the Court's view, this provision assigns the ECtHR a "pre-eminent role" in interpreting the Convention's provisions.

The idea that Article 32, paragraph 1, assigns the ECtHR the exclusive competence to interpret the Convention appears misplaced. Indeed, Article 32, paragraph 1, confers jurisdiction to the ECtHR without going so far as to say that the jurisdiction is also exclusive.

In more moderate terms, the issue is labelled, in decision No. 349/2007, as one of uniformity in the interpretation of the Convention. The Court said:

"The [Convention has] created a system for the uniform protection of fundamental rights. The application and interpretation of the system of rules is naturally a matter in the first instance for the courts of the member states, which are the ordinary courts in relation to Convention law. Definitive uniformity in application is on the other hand guaranteed by the centralised interpretation of the ECHR attributed to the European Court of Human Rights in Strasbourg, which has the last word [...]" (official translation).

In the same decision, the Constitutional Court seems to link the binding value of the case law of the ECtHR with the need to apply the Convention as a living instrument, whose goal is to establish a uniform body of rules designed to protect human rights across Europe. Whereas this assumption seems fully acceptable, it does not necessarily entail the exclusive competence of the ECtHR in interpreting the provisions of the Convention. Nonetheless, this latter stance was reiterated again, and with the greatest emphasis, in the most recent decision No. 317/2009:

"This Court cannot substitute its own interpretation of an ECHR provision to that of the Strasbourg Court, thereby stepping out of the limits of its jurisdictional competence and violating a precise obligation assumed by Italy when signing and ratifying, with no reservations, the ECHR" (unofficial translation).

In spite of its intuitiveness, this conclusion appears to be debatable. The idea of the exclusive competence of the ECtHR to interpret the Convention has no legal

anchoring in the Convention, and is countered by a number of other arguments, such as, first and foremost, the lack of the effect of precedent of the decisions of the ECtHR. There is no reason for denying the autonomous power of national judges to interpret provisions of the ECtHR at variance with the interpretation given to them by preceding decisions of the ECHR.

Quite on the contrary, national judges can bring to the attention of the ECtHR arguments which can contribute to a change of the ECtHR's position. Politically, too, the idea of a monopoly reserved to the ECtHR seems unwise. Precisely the idea of the Convention as a living instrument should plead in favour of the possibility for national judges to exert influence over the development of the system of protection of human rights enshrined in the Convention. As noted above, the impact between national and international systems of protection of human rights is bidirectional, thus feeding the international system of protection with emerging needs coming from the States' legal order.

The most that can be said in this regard is that the power of national judges to interpret the ECHR is a flexible one. National judges can make an attempt to influence the formation of jurisprudential strands in their first stage of development. Such a power diminishes in accordance with the process of progressive definition of the case law, and it tends to disappear in cases of well-settled case law. Even in these cases, it might not be fully excluded that national judges will interpret the ECHR differently from the way in which it is interpreted by the ECtHR, with a view to prompting a change in its case law. In this way, national judges may consider emerging values and interests which assert themselves in a distinct national context and which have not, or not sufficiently, been considered by the ECtHR.

6. CONCLUDING REMARKS

The analysis undertaken thus far allows one to put forward some remarks on the role and effect of the ECHR, including its secondary normative level, namely decisions of the ECtHR, within domestic law. These remarks might also be relevant from a more general perspective, as they call into question the traditional and the emerging theoretical frameworks concerning the relationship between international law and national legal orders.

First, from the analysis a wide agreement seems to emerge on the self-executing nature of the substantive provisions of the ECHR. Doctrines aimed at limiting or even at excluding the domestic application of HRs treaties, on the basis of an alleged inter-State nature of their provisions, have not aligned with the Italian jurisprudence.¹⁰

¹⁰ A different stance was adopted in *Corte di Cassazione (Sez. Unite civili), Presidency of the Council of Ministers v. Marković et al.*, 5 June 2002, No. 8157, IYIL, Vol. XII, 2002, p. 292 ff. The Supreme Court ruled out the possibility for domestic judges to apply the provi-

However, diverging conclusions have been reached by the Supreme Court and the Constitutional Court, respectively, with regard to the problem of the binding effect of decisions of the ECtHR within the domestic legal order. According to the Constitutional Court, decisions of the ECtHR are not self-executing. In order to be given effect, they require implementing legislation. According to the Supreme Court, decisions of the ECtHR can be implemented by the judiciary even at the cost of disregarding inconsistent national laws and, in particular, a fundamental rule of the municipal legal order such as the *res iudicata* rule.

This difference can be legally explained by the different conceptual frameworks adopted by the two Courts. The Constitutional Court seems to apply the classical doctrine of self-execution according to which the effect of international rules are autonomously determined by national legal orders. In this framework, decisions of the ECtHR are conceived as an instrument for the enforcement of substantive provisions of the ECHR within the international legal order. Therefore, they must be applied internally in the context of the national system of remedies.

The Supreme Court seems to have applied a different conceptual framework, one which considers decisions of the ECtHR as international decisions, whose implementation is assisted by the system of remedies provided for by international law. This conception, often used in order to limit the effect of substantive international rules within domestic law, turns out to be a valuable conceptual framework in order to explain the expansive effect of international decisions in the internal legal order of States.

In this context, the idea emerges that violations of substantive provisions of the ECHR, once assessed by the ECtHR, entail a duty of reparation and, in particular, a duty to sweep off the consequences of the breach, to compensate the damages and to secure guarantees of non repetition. If one accepted the idea that decisions of the ECtHR entail legal consequences for the States found in breach of the Convention, and that some of these consequences might be directly applicable within the domestic legal order, one could be inclined to accept also the idea that national judges are empowered to set aside national procedural rules which prevent decisions of the ECtHR from being brought into effect.

One is tempted to say, conclusively, that the most recent Italian case law highlights the diverse legal nature of substantive provisions of the ECHR and, respectively, decisions of the ECtHR. Their implementation within domestic legal orders requires, therefore, a different scheme. Substantive provisions of the ECHR can

sions of Protocol I Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts of 8 June 1977. The Court stated two reasons: first, the Protocol establishes international procedures for determining violations of its rules and international remedies thereto; second, the law which ordered the implementation of the Protocol within the Italian legal order did not specify that individuals damaged by breaches to the Protocol are entitled to claim damages from the States which violated the treaty provisions before domestic courts.

appropriately be implemented in domestic legal orders on the basis of the classical scheme of self-execution, which considers that international rules are assisted, within the domestic legal order of States, by the system of remedies which assist, in that legal order, the implementation of national rules. The scheme of incorporation is well described by the classical assumption that "international law is part of our law".¹¹

In order to be fully implemented, the decisions of the ECtHR do require a different scheme: one which considers them as part of the complex system of remedies set up by the Convention. In this system, the obligation to provide reparation in kind entails that a State might be under an obligation to review and reconsider judicial decisions, which have been adopted in proceedings that fail to conform with principles of international human rights law.

¹¹ US Supreme Court, *The Paquete Habana* case (175 US 677, 686 (1900)): "International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of rights depending upon it are duly presented for their determination".