

THE MULTILEVEL SYSTEM OF FUNDAMENTAL RIGHTS PROTECTION

The protection of fundamental rights involves the justice systems of three courts: the Constitutional Court at the national level, the Court of Justice (*i.e.* the Luxembourg Court) at the level of the European Union and the European Court of Human Rights (*i.e.* the EDU Court, or Strasbourg Court) at the level of the Council of Europe.

The subject is broad and complex and much has already been dealt with in the preceding reports. The necessary conciseness of my speech allows me now to make only a few short remarks.

Briefly, these are the three areas of jurisdiction from the angle of the Italian legal system.

The Constitutional Court judges on the possible contrast between the primary national legislation and the Constitution and declares the unconstitutionality of the censured provision when it finds out that such contrast exists. However, the violation of European Union law and the European Convention on Human Rights (and its Protocols) also is considered as a violation of the Constitution, which the Constitutional Court may ascertain.

The Court of Justice establishes the interpretation of Union law and assesses the conformity of national laws with it. National judges must not apply domestic law that is not in conformity with EU law and, in case of conflict, they have apply the latter if self-executing. Otherwise, they can raise an incidental question of constitutionality (preliminary ruling).

The European Court of Human Rights (ECHR), in case of a direct appeal by the person who claims the violation of his fundamental rights, ascertains the violation of the European Convention on Human Rights in the individual case. Consequently, in a similar dispute, the national judges may consider the possible unconstitutionality of the domestic legislation in conflict with the ECHR.

However, the Strasbourg Court may now also find that there is a "structural or systemic problem", which implies, beyond the case before the Court, a more general problem of conformity of the domestic legislation with the ECHR. In such a case, the Court issues a 'leading judgment' in which it can identify the corrective measures to be taken at the national level by the Member State in order to comply with the Court's

judgment. With this type of decision (leading judgment), the Strasbourg Court - which in any case has made limited use of this instrument, essentially to settle serial litigation - highlights its role as a super national Court specialized in the protection of fundamental rights and places itself in a position to review the conformity with the Convention of the domestic legislation.

The Italian Constitutional Court has also often referred to this sort of judgment, extended from the specific case to the general normative case, while emphasising that it is up to the European Court to decide on individual cases and individual fundamental rights.

For example, the Italian Constitutional Court has referred to the rulings of the Strasbourg Court, which has censured the Italian legislation with reference to the national discipline of the criminal trial in absentia. It has pointed out the excessive difficulty of proving the lack of knowledge of the proceeding and the extreme brevity of the time for challenging the judgment in absentia. Therefore, it has ascertained the existence of a "structural problem connected with a dysfunction of the Italian legislation".

The decisions of the Constitutional Court, issued in the wake of the judgments of the European Court of Human Rights, led the Italian legislator to introduce new rules for criminal proceedings in the absence of the defendant.

Thus, fundamental rights may have different sources (the Constitution, the Charter of Fundamental Rights of the European Union, and the European Convention on Human Rights) and in symmetry they have different 'reference' Courts, each empowered to adopt decisions characterised by different effects, which require mutual coordination.

In particular, the Charter of Fundamental Rights of the European Union (CFREU) - relevant to the scope of Union law - is broad and detailed and in many provisions it overlaps with the European Convention on Human Rights. According to the Charter's equivalence clause, the meaning and scope of those rights are the same as those conferred by the Convention as far as the Charter contains rights corresponding to those guaranteed by the ECHR.

A textual link that connects Charter and Convention can be found in Article 6 of the Treaty on European Union, which set a possible overlap in the recognition of fundamental rights. After providing that the Union shall accede to the European Convention - according to a procedure that is still in progress, but which seems close to

being concluded - Article 6 reaffirms that the fundamental rights guaranteed by the Convention (in addition to those resulting from the constitutional traditions common to the Member States) are part of Union law as 'general principles'.

Moreover, Article 52(3) of the Charter lays down the equivalence clause whereby, in the event of overlapping, the Charter may not have a lower content of protection than the ECHR, but Union law may, if anything, grant protection that is more extensive.

The Court of Justice, on the other hand, has at times ascertained the infringement of rights in EU matters with reference to the higher level of guarantee recognised by the Convention.

However, the Court of Justice itself has reaffirmed that fundamental rights are an integral part of the general principles of Union law. The Court has reiterated that the reference made by Article 6(3) TEU to the ECHR does not allow national judges, in the event of a conflict between a rule of domestic law and the convention, to apply directly the provisions of the latter and not the rules of a national law in conflict with it.

Similarly, the Italian Constitutional Court has ruled out that the enforcement of the Lisbon Treaty (on 1st December 2009) has changed the position of the ECHR provisions in the source system. The applicability of the ECHR, as such, to European Union law and domestic legislation can be inferred and, therefore, national judges cannot ignore domestic rules that are in conflict with the Convention.

In practice, it may occur the case that the level of protection of fundamental rights is different, higher in one, lower in another. The correlation of the three levels of protection in the national Constitution, in the European Treaties and in the European Convention leads to an alignment towards a higher standard of guarantee.

For example, at a European level it is applicable the principle of “*ne bis in idem*”, which is not literally provided in the Italian Constitution. Nevertheless, this principle integrates a parameter of constitutionality that ordinary laws must respect.

Another example: at a European level there is the presumption of innocence of the defendant in a criminal trial; in the Italian Constitution there is the presumption of 'not guilty', which now is interpreted as equivalent to the presumption of innocence in order to align it with European protection.

In conclusion, there is overall an integrated system of fundamental rights protection articulated on three levels: national, European Union, Council of Europe. The

dialogue between the Courts is necessary for the integration of these protections and their alignment to the highest level, which creates a common legal space of fundamental rights protection.

A common space governed by the rule of law and inspired by ideals of peace, unity and goodwill.

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