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The Interaction between European Law and National Law in the Case Law of Constitutional Courts

Italy

The Interaction between EU and National Law in Italy. The Theory of "limits" and "counter-limits"

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The theory of "limits" and "counter-limits"

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In the Italian Constitution, the interaction between European and national law is founded on the general norms on the interaction between the international and the national legal systems.

Art. 11 Const. affirms that:

Italy repudiates war as an instrument offending the liberty of the peoples and as a means for settling international disputes; it agrees to limitations of sovereignty where they are necessary to allow for a legal system of peace and justice between nations, provided the principle of reciprocity is guaranteed; it promotes and encourages international organizations furthering such ends.

Until 2001, no reference there was to the European Union and the interaction between the national and the European legal system.
In 2001, art. 117 Cons. was amended and par. 1 was added:

Legislative power belongs to the state and the regions in accordance with the Constitution and within the limits set by European Union law and international obligations.

On January, the 23rd 2002, it was proposed to amend art. 11 Const. as follows:

Italy participates, in parity with the other states and respecting the supreme principle of the legal system and the fundamental rights of the human being, to the European integration process; it promotes and supports the development of European Union, based on the democratic principle and the subsidiarity principle.

But this amendment was not approved.

On those constitutional basis, the implementation of the European Community treaties in the Italian legal system has been made through laws of the Parliament. The literature and the jurisprudence of Constitutional Court found in art. 11 Const. – which admits the limitations of sovereignty – the basis on which Italy could join to the EU and elaborated a theory of counter-limits.

The first case where the Court faced with the problem of the role of EU treaties in the Italian legal system was ***Sentenza* n. 183, 18th December 1973 (Frontini case)**.

This case arose from the challenge of art. 2 of law 14th October 1957, n. 1203, the law by which Italy took in its legal system the Institutional Economic European Community Treaty.

Through the art. 2 of the law n. 1203/1957, it was challenged art. 189 of the Treaty. In the opinion of the judge who applied the Court, by introducing art. 189 CEE Treaty, the Italian legislator recognised that the European regulations have the same rank as the primary legislation. In fact this article establishes that the European regulations have general scope, are compulsory in all their parts and are directly applicable in all member states. This was, for the judge, an inadmissible renounce to the sovereignty and a modification of the fundamental constitutional structure of the state, not allowed by art. 11 Const.

The Constitutional Court decided that the challenged article did not violate the sovereignty of the State, because the limitation of the legislative power of Italian institutions was not unilateral: indeed, joining the CEE, Italy gained powers in the new institution, such as the right to appoint its representatives in the European institutions and the right to participate at the European Commission and the European Court of Justice.

In order to declare that the European regulations are not in conflict with the sovereignty of the State, the Constitutional Court affirmed that art. 11 Constitution does not allow limitations to the sovereignty in every case, but only in order to achieve the peace and the fairness among the Nations. Therefore, such limitations are not allowed when they are able to breach the *fundamental principles of the constitutional order or the fundamental rights of the individuals*. This was, in the opinion of the Constitutional Court, the correct interpretation of art. 189 of the Treaty. And, in case of the contrary "aberrant" interpretation, the Constitutional Court declares to have the power to exercise

the constitutional review of the norms of the Treaty inconsistent with the principles of the Constitution.

The theory of counter-limits has been confirmed in the ***Granital case*** (**Sentenza n. 170, 5th june 1984).**

This case is mainly important because the Constitutional court conformed its ruling to the ECJ case n. 70/77, 28th June 1978, *Simmenthal.*

Interpreting art. 11 Const., the Constitutional Court decided that when national law is in contrast with European law, the judge should apply European law, because in the fields reserved to it the European law is prevalent on antecedent or successive national law.

The case is mainly important because the Constitutional Court overruled its jurisprudence. Indeed, since 1984, if Italian laws were in contrast to the European law, they were considered unconstitutional for violation of art. 11 Const. This solution was founded on the idea that, to not reduce the sovereignty of Parliament, the European law was not directly applicable. Therefore, the application of incompatible European law was possible only in cases of declaration of unconstitutionality of national law.

In this decision, by overruling the interpretation of article 11, the Court argued that the European law prevails on the Italian law, not in terms of hierarchy of norms, which implies a problem of sovereignty, but in terms of attribution of competences: in the fields reserved to the European law, this is the exclusive rule. Therefore, in case of incompatibility between national and European law, the judge is not obliged to appeal the Constitutional Court, but can decide to apply the European law instead of the national law.

Therefore, in the opinion of the Court, the question of unconstitutionality of national law, by contrast with art. 11 Const., was not admissible.

But the protection of the fundamental principles and the fundamental rights against the limitation of sovereignty by the European legal system was an *extrema ratio* which could not work easily, either for political or juridical reasons.

In fact, the Court was asked to exercise such a control only one time and, in this case, all the political obstacles appeared: in fact, with ***Sentenza*** **n. 232, 13th, 21th april 1989**, the Constitutional Court was faced with the challenge of art. 1-2 of law n. 1203, 14th October 1957, which implemented the Treaty of Rome.

On the opinion of the appellant, the law was in contrast with art. 23, 24 and 41 of the Constitution, because, by implementing in the Italian legal system art. 177 of the Treaty

of Rome, it assigned to the European Court of Justice the power to limit the temporal validity of the decision on preliminary question.

The Court affirmed to have the power to judge if any rule of the European Community Treaty is consistent with the Constitution, as it is interpreted and applied by the European bodies, by means of the review of constitutionality of the Italian law for the implementation of the European Treaty.

In the exercise of this competence, the Court evaluates the question of constitutionality, and on the basis of its reasoning, declares that: «on the basis of these arguments, the question should be admitted … *but before to evaluate if the question is founded, the Court should verify two other aspects*». Therefore, the Court evaluated if the decision of the ECJ was really applicable to the judgment where the question of constitutionality was submitted to the Court. Affirming that, in that case, the ECJ decision was not applicable for chronological reasons, the Court finally declared the question non admissible.

After the 2001 reform, a reference to the European Union law was introduced in art. 117 Const.

Art. 117 par. 1 was applied for the fist time by the Constitutional Court four years later.

With ***Sentenza* n. 406, October, 10th 2005**, the Constitutional Court declared that art. 1-2 of the Law of Regione Abruzzo where not consistent with art. 117 par. 1 of the Constitution.

An year later, the Constitutional Court gave an interpretation of the same article.

With ***Sentenza* n. 129, march 23rd 2006**, the Constitutional court declared that the European directives are *norme interposte*, which are part of the parameter for the evaluation of the conformity of regional laws to art. 117 par. 1 Const. This disposition, on the opinion of the Court, is linked to the fundamental principle laid down in art. 11 Const. and supposes the respect of the rights and the fundamental principles guaranteed by the Italian Constitution.

Both the cases were submitted to the Court by the President of the Council of Ministers, in the direct procedure for the declaration of unconstitutionality of regional laws.

Keeping in mind the decisions of the Constitutional Court, we have to consider if new art. 117 is a new step in the evolution of the model of interaction between European and Italian legal system.

The recent Constitutional Court cases have been commented by the doctrine. Some commentators argue that they express a new position of the Constitutional Court on the topic of the interaction between the European and the national legal system: from a dualistic system (where the national norms in contrast with the European laws should not be applied but not annulled because they belong to different legal systems) we moved to a monistic system (where the national norms which are not compatible with the European laws are struck down). On the contrary, other commentators affirmed that new article 117 and the Constitutional Court cases did not change the existent model of the interaction of the European and the Italian legal systems: in fact, as decision n. 129/2006 shows, the national legislation was annulled because it was not consistent with a directive, which was not immediately applicable. If the national law was not consistent with a disposition of the European legal system which is immediately applicable, such as a bylaw, in that case, the solution of the non application of the national law by the ordinary judge should be adopted.

Two recent Constitutional Court cases can contribute to solve the doctrinaire dispute on the meaning of new article 117 Const.

In fact, the Italian Constitutional Court, with ***sentenze*** **n. 348 and 349, 24th October 2007**, has evaluated the compatibility of *decreto legge* n. 333/1992 with article 117.

In the reasoning of the Court, article 117 has been indirectly violated, because of the breach of the European Convention on Human Rights. This convention, in fact, has to be considered "*norma interposta*" between the law and the Constitution, because art. 117 affirms that the Italian legal system should respect the international obligations.

In solving those cases, the Court gives an interpretation on the meaning of new art. 117 and solve (or try to) the problem of the role of European and international law in the italian legal system after the constitutional reform. According to the Court, in the article we have to distinguish two different cases: the case of European law and the case of international obligations. In fact, by signing the European treaties, Italy joined a supranational legal order, to which gave part of its sovereignty, concerning also the legislative power, with the only counter-limit of the fundamental principles of the Italian constitutional order. Therefore, in case of contrast between national law and European law which can

have direct application, the latter should be directly applied by the ordinary judges. In the contrary, as the Court has always judged, the rule of the non-application of domestic law in favour of supranational law cannot be applied with reference to international law and new article 117 does not give to the Court the opportunity to change its jurisprudence. In fact, the Court states that the European Convention of Human Rights, which has to be considered a multilateral international treaty, does not produces norms which can have direct application in the signatory States. International treaties, in fact, create obligations that the States must respect but do not build a new legal order. Therefore, the ordinary judge cannot decide not to apply national laws in contrast with them, but have the only option to submit a question of constitutionality to the Court because of the indirect violation of art. 117 Const.

In conclusion, considering the recent evolution of constitutional case-law, art. 117 Const. does not change the rules concerning the relations between national law and European law. But there is something new concerning the relations between international and national laws. In fact, before the 2001 constitutional reform, the Constitutional Court and the doctrine stated that international treaties, which are introduced in the Italian legal system by ordinary laws, assumes the same rank of primary legislation. After decisions n. 348 and 349/2007, the Court, affirming that the European Convention, as an international treaty is "*norma interposta*" between the law and the Constitution, implicitly admits the prevalent position of international law on the domestic legislation.