

# THE INFLUENCE OF THE ECHR JURISPRUDENCE ON THE NATIONAL CRIMINAL PROCEDURE SYSTEM. THE ITALIAN PERSPECTIVE: FROM DIVERGENCE TO REALIGNMENT

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## Abstract

*The paper will offer a survey of the most important and recent ECHR decisions that sentenced Italy on varied criminal procedure aspects. In particular, the essay will analyze how those decisions influenced both legislative choices and judicial decisions: as a matter of fact, the Italian Parliament approved specific laws in order to adapt the criminal procedure code to the ECHR decisions that sentenced Italy; the Constitutional Court, as well as the Trial Courts, also changed its perspective and followed the principles carried out by the ECHR. The overview will focus on: in absentia trials, defendant rights, revision of the final conviction and right to a renewal of the trial.*

**Keywords:** *ECHR jurisprudence; national Courts decisions; in absentia trial; renewal of the trial; draft-bills.*

## Introduction

One of the most important and up-to-date matters that involve lawyers is to understand at which level the European Convention of Human Rights should be placed among the Italian sources of law. The matter intersects several fields, including International law, European law, Constitutional law, Criminal and Criminal Procedure law. After many years of debate and after changing its perspective several times, in the last two years four decisions passed by the Constitutional Court seemed to acknowledge a new position for the rules of the Convention and, at the same time, paved the way for a forthcoming constitutionalization of the Convention as a Constitutional charter of fundamental rights. Aim of the essay is to point out which are the rules of the Constitution through which the Convention enters in the Italian legal system and, according to Constitutional Court decisions, which is the role of the Trial Courts in case a national law violates a rule of the Convention.

Once this matter will be solved, the research will focus on other topics in the field of criminal procedure which are related especially on the effects of ECHR decisions which sentenced Italy because of the unlawfulness of a trial. The core question is: if a trial whose decision is final didn't respect an article of the Convention, how and through which legal instruments should that trial be renewed? After pointing out the rules in force both at European Council and national law level, the essay will offer a case study on recent and relevant decisions, offering a perspective for a new law that Italy cannot put off any longer.

Afterwards, the survey will analyze the legislative reforms that have been approved and entered into force after ECHR sentenced Italy on *in absentia* trials, pointing out which are the problems still pending.

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The essay will show a law case in which the Courts play a relevant role in avoiding the violations of the Convention interpreting the Italian laws according to the principles carried out by ECHR decisions.

Offering an overview of the above mentioned issues and formulating hypothesis for matters that have not been solved yet, the aim of the study is to put on the floor the core matters in order to provoke a debate with Scholars from other Countries, in light of the harmonization pursued by the ECHR jurisprudence.

**1. The position of the European Convention of Human Rights in the hierarchy of the Italian sources of law.** - Since Italy implemented the European Convention of Human Rights<sup>1</sup>, judges and Scholars had to face the problem of the relationship between the rules of the Convention and those of the national sources of law. In particular, the core question is where to place the European Convention among the Italian sources of law<sup>2</sup>.

In analogy with all other European Council member States, Italy was entitled to choose among four options: first, to either be bounded by the European Convention at the international level only, or, second, to recognize a constitutional significance to the Convention's rules, or, third, to regard them at an intermediate level between the Constitution and the statutory laws approved by Parliament or, finally, to consider them *au par* with statutory law<sup>3</sup>.

To better understand the current Italian approach to the rules of the Convention, it is useful to offer a short overview on the previous ways, that can be summarized as follows:

1) At a first stage, in light of the theory that states that the national and the Convention systems are separated, the Convention, as any other international treaty that Italy has signed, has been considered as a law issued by the Italian Parliament. The main reason is that the legal instrument through which an international treaty enters into force in Italy is in fact a law of the Parliament.

2) At a second stage, all levels of Courts' jurisprudence set forth several solutions in order to assure to the rules of the Convention an acknowledgment by the rules of the Constitution as well as the respect of the national statutory laws. However, the varied solutions brought to very different decisions, which cannot be accepted inside a unique and coherent legal system.

3) Finally, further to the constitutional reform approved in 2001 together with the interpretation proposed by the Constitutional Court on the new articles in 2007, the relationship between the Italian system and the Convention changed: in the sources of law hierarchy, the

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<sup>1</sup> The European Convention on Human Rights has been implemented in Italy by means of the law 4<sup>th</sup> August 1955, n. 848.

<sup>2</sup> See Antonio Ruggeri, "Carte internazionali dei diritti, Costituzione europea, Costituzione nazionale: prospettive di ricomposizione delle fonti in sistema", in *"Itinerari" di una ricerca sul sistema delle fonti*, vol. 11, ed. Antonio Ruggeri (Torino: Giappichelli, 2008).

<sup>3</sup> As for the first choice, it is possible to mention the UK before the implementation of the Convention through the approval of the Human Rights Act in 1998; as for the second, several States (i.e. Austria and The Netherlands) acknowledged a constitutional significance to the Convention; as for the third, we can consider France, Spain and Portugal; as for the fourth, even Italy could be mentioned in this group until 2007. For a comparative overview on the approach of the European Council member States on points of hierarchy of the sources of law, see, above all, Andrew Drezemczewski, *European Human Rights Convention in Domestic Law* (Oxford: Oxford University Press, 1983); Laura Montanari, *I diritti dell'uomo nell'area europea tra fonti internazionali e fonti interne* (Torino: Giappichelli, 2002), 45-195; Laura Montanari, "Le tecniche di adattamento alla Cedu come strumento di garanzia dei diritti: un'analisi comparata delle soluzioni adottate negli ordinamenti nazionali", in Antonio Gambaro, Gaetano Silvestri, Mario Chiavario et al., *I diritti fondamentali in Europa*, (Milano: Giuffrè, 2002), 522-557.

Convention took a higher placement with respect to the law of the Parliament, but still lower than the Constitution<sup>4</sup>.

The articles of the Constitution by means of which the Convention could receive acknowledgement in our legal system are four: art. 10, paragraph 1, which states that «The legal system of Italy conforms to the generally recognized principles of international law»; art. 11, on the basis of which «Italy [...] 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»; art. 2, which states that «The republic recognizes and guarantees the inviolable human rights, be it as an individual or in social groups expressing their personality, and it ensures the performance of the unalterable duty to political, economic, and social solidarity»; art. 117, paragraph 1 on the Legislative power, which has been modified in the year 2001 and whose wording is: «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».

The turning point for Italy is represented by two “twin” decisions that the Constitutional Court handed down in 2007: the Court passed the interpretation that, due to the new art. 117, paragraph 1 of the Constitution, the Convention can be used as a criteria to check the respect of the Constitution by a law of the Parliament<sup>5</sup>. In other words, as art. 117, paragraph 1 mentions «European union law and international obligations» and as the Convention is, as a matter of fact, an international obligation, a law of the Parliament or a law of a local Parliament (which exist in each Italian region) must respect, apart of course from the Constitution, even the rules of the European Convention of Human Rights. This means that a law of the Parliament can’t change the

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<sup>4</sup> See Constitutional Court, 22<sup>nd</sup> December 1980, n. 188; Constitutional Court 22<sup>nd</sup> October 1998, n. 388 and Cassazione penale, sez. I, 23<sup>rd</sup> March 1984, n. 2770; Cassazione penale, sezioni unite, 8<sup>th</sup> May 1989, n. 1191. For an overview of the above-mentioned theories, see Marta Cartabia, “La Cedu e l’ordinamento italiano: rapporti tra fonti, rapporti tra giurisdizioni”, in *All’incrocio tra Costituzione e Cedu*, ed. Roberto Bin, Giuditta Brunelli, Andrea Pugiotto, Paolo Veronesi (Torino: Giappichelli, 2007), 1-20; Marta Cartabia, “La Convenzione europea dei diritti dell’uomo e l’ordinamento italiano”, in *Giurisprudenza europea e processo penale italiano*, ed. Antonio Balsamo and Roberto E. Kostoris (Torino: Giappichelli, 2008), 33-66; Laura Montanari, “*Giudici comuni e Corti sovranazionali: rapporti tra sistemi*”, in Luigi Cozzolino, Gianmario Depuro et al., *La Corte costituzionale e le Corti d’Europa* (Torino: Giappichelli, 2003), 119-163; Oreste Pollicino and Vincenzo Sciarabba, “La Corte europea dei diritti dell’uomo e la Corte di giustizia nella prospettiva della giustizia costituzionale”, paper presented at the Conference “I<sup>o</sup> Workshop in diritto dell’Unione europea e internazionale”, held by Magistratura Democratica and MEDEL in Venice, 26<sup>th</sup>-27<sup>th</sup> March 2010, now available in *Forum di Quaderni costituzionali* (2010), <http://www.forumcostituzionale.it>; Margherita Salvadori, “L’applicazione della Convenzione europea e l’integrazione dei processi interpretativi”, in *Convenzione europea sui diritti dell’uomo: processo penale e garanzie*, ed. Rosanna Gambini and Margherita Salvadori (Napoli: ESI, 2009), 1-47.

<sup>5</sup> See Constitutional Court decisions nn. 348 and 349, handed down on 24<sup>th</sup> October 2007. For comments on the two decisions, see Rosanna Gambini, “Corte costituzionale «europeista»: una svolta non priva di rischi per la tavola delle garanzie”, in *Convenzione europea sui diritti dell’uomo: processo penale e garanzie*, ed. Rosanna Gambini and Margherita Salvadori (Napoli: ESI, 2009), 67-78; Laura Montanari, “Il sistema integrato delle fonti: analisi e prospettive in relazione all’ordinamento italiano dopo l’intervento della Corte costituzionale con le sentenze 348 e 349 del 2007”, paper of the presentation at the Conference “Il sistema integrato delle fonti e la giurisprudenza della Corte europea dei diritti dell’uomo”, held by the High Council of the Judiciary in Rome, 23<sup>rd</sup> September 2009; Diletta Tega, “Le sentenze della Corte costituzionale nn. 348 e 349 del 2007: la Cedu da fonte ordinaria a fonte “sub-costituzionale” del diritto”, *Quaderni Costituzionali* (2008): 133-136. For comments in English on the 2007 Constitutional Court decisions, see Francesca Biondi Dal Monte and Filippo Fontanelli, “The Decisions No. 348 and 349/2007 of the Italian Constitutional Court: The Efficacy of the European Convention in the Italian Legal System”, *German Law Journal* (2008), 889-931; Oreste Pollicino, “Constitutional Court at cross road between constitutional parochialism and cooperative constitutionalism”, *European Constitutional Law Review* (2008): 363-382.

law which implemented the Convention and can't breach its rules without being declared unconstitutional.

From the point of view of the Italian Courts, the decision means that, as the control of the respect of the Constitution belongs only to the Constitutional Court, a judge who has to apply in a trial a law which seems to violate the European Convention of Human Rights' rules must ask to the Constitutional Court to check its constitutionality and eventually declare the annulment of the law.

The only thing that a judge can do by itself in order to avoid an appeal for the intervention of the Constitutional Court is, while interpreting the national law, to do the utmost to save the constitutionality of the law, which means to find an interpretation which could be coherent with the European Convention of Human Rights. If this is not possible unless causing a breach in the system, the judge should ask to the Constitutional Court the annulment of the statutory law.

The Constitutional Court itself, prior to declare the unconstitutionality of the law, should try to offer an interpretation coherent with the Convention.

The outcome of this decisions is that the Constitutional Court will check the Convention respect of the rules of the Constitution. On the other hand, the rules of the Convention itself should be applied in light of the interpretation given by ECHR decisions.

As stressed by the Court itself, this is pretty different from what happens when a national rule breaks the European union law: after many years of debate between the Constitutional Court and the European Court of Justice, the outcome is that, in case a law violates the European Union law, a judge (both at Trial Courts level and at the Supreme Court level) can decide not to apply that law in the concrete case in order to save the respect of the European union law, which deserves a special position in the hierarchy of the sources of law and is able to produce direct effects on our legal system<sup>6</sup>.

Recently, the Constitutional Court passed two new decision in which it is stated that, depending on their content, the rules of the Convention find their acknowledgement not only in art. 117, paragraph 1, but also in art. 10, paragraph 1, of the Constitution: as a matter of fact, art. 117, paragraph 1, will be the basis of the acknowledgment in our legal order when referring to rules of the Convention which are new in the international landscape, while art. 10, paragraph 1, will be the basis when the rules of the Convention are only reproducing through their wordings a generally recognized principle of international law (i.e. prohibition of torture)<sup>7</sup>.

The framework resulting from the above mentioned decisions shows that the Convention rules cannot breach any of the rules of the Constitution. On the other hand, as the Convention still keeps its nature of international treaty, its rules cannot be forced or changed in their meaning in light of the Constitution.

Nevertheless, for sure the Constitutional Court decisions seem to pave the way for the acknowledgment of the Convention as a Constitutional charter of fundamental rights, pursuing eventually the aim to place the Convention and the Constitution altogether at the top of the hierarchy.

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<sup>6</sup> See Michele de Salvia and Vladimiro Zagrebelsky, eds., *Diritti dell'uomo e libertà fondamentali: la giurisprudenza della Corte europea dei diritti dell'uomo e della Corte di giustizia delle Comunità europee* (Milano: Giuffrè, 2006).

<sup>7</sup> See decisions nn. 311 and 317 respectively passed on 16<sup>th</sup> and 30<sup>th</sup> November 2009. For first comments on these decisions, see Oreste Pollicino, "Margine di apprezzamento, art. 10, c.1 Cost. e bilanciamento "bidirezionale": evoluzione o svolta nei rapporti tra diritto convenzionale nelle due decisioni nn. 311 e 317 della Corte costituzionale?", *Forum di Quaderni costituzionali* (2009), <http://www.forumcostituzionale.it>; Antonio Ruggeri, "Conferme e novità di fine anno in tema di rapporti tra diritto interno e CEDU (a prima lettura di Corte cost. nn. 311 e 317 del 2009)", *Forum di Quaderni costituzionali* (2009), <http://www.forumcostituzionale.it>.

As a final remark, in view of future developments of the role of the Convention in the Italian legal system, it is interesting to point out a recent debate, which follows a controversial ECHR decision. In *Lautsi v. Italy* case, issued in November 2009, the ECHR stated that the crucifix, which is present in public School classrooms, should be banned, as it discriminates those who observe other religions or those who are atheists. The topic is discussed deeply in Italy and has caused a bitter debate, involving politicians, Vatican representatives and the civil society as a whole. The decision has been appealed and the ECHR *Grand Chambre* is about to decide. It's not unlikely to foresee that, if the first-instance decision will be confirmed, the Italian Courts' enthusiasm in applying principles and rights provided by the Convention could diminish, maybe causing a step backward in the way to a complete constitutionalization of the Convention<sup>8</sup>.

**2. ECHR decisions effects in light of recent Italian jurisprudence.** – As stated in art 46, paragraph 1, of the European Convention, «if the Court finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party». The Committee of Ministers is competent in identifying the public administration of the sentenced Country in charge of the payment of the «just satisfaction».

A second effect is the obligation to conform to the sentence purview: the State has the duty to reproduce the situation existent before the breach of the Convention and to adopt any needed measure to stop the violation, delete its consequences or prevent other similar violations.

The practice of the Committee of Ministers in supervising the execution of the Court's judgements shows that in exceptional circumstances the re-examination of a case or a reopening of the proceedings has proved the most efficient, if not the only, means of achieving *restitutio in integrum*. As a matter of fact, in the year 2000 the Committee of Ministers approved a Recommendation inviting the member States to adopt measures in order to assure the injured person's *restitutio in integrum*, also by means of a re-examination of the case, including reopening of the proceeding<sup>9</sup>. In particular, when the violation consists in the breach of the defendant's right

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<sup>8</sup> See ECHR, *Lautsi v. Italy*, 3<sup>rd</sup> November 2009. The ECHR *Chambre de la Cour*, composed by seven judges, stated that «the presence of the crucifix – which it was impossible not to notice in the classrooms – could easily be interpreted by pupils of all ages as a religious sign and they would feel that they were being educated in a school environment bearing the stamp of a given religion. This could be encouraging for religious pupils, but also disturbing for pupils who practised other religions or were atheists, particularly if they belonged to religious minorities. The freedom not to believe in any religion (inherent in the freedom of religion guaranteed by the Convention) was not limited to the absence of religious services or religious education: it extended to practices and symbols which expressed a belief, a religion or atheism. This freedom deserved particular protection if it was the State which expressed a belief and the individual was placed in a situation which he or she could not avoid, or could do so only through a disproportionate effort and sacrifice. The State was to refrain from imposing beliefs in premises where individuals were dependent on it. In particular, it was required to observe confessional neutrality in the context of public education, where attending classes was compulsory irrespective of religion, and where the aim should be to foster critical thinking in pupils». For first comments on the decision, see Ilaria Anrò, “Il crocifisso e la libertà di non credere”, *Forum di Quaderni costituzionali* (2009), <http://www.forumcostituzionale.it>; Giuseppe di Genio, “Laicità europea e struttura pluralista dell'ordinamento”, *Forum di Quaderni costituzionali*, <http://www.forumcostituzionale.it>; Ilenia Ruggiu, “Perché neanche “l'argomento culturale” giustifica la presenza del crocifisso negli spazi pubblici”, *Forum di Quaderni costituzionali* (2010), <http://www.forumcostituzionale.it>.

<sup>9</sup> See Recommendation R (2000) 2 of the Committee of Ministers. Among several Scholars, see Silvia Allegrezza, “Violazione della Cedu e giudicato penale. Quali contaminazioni? Quali rimedi?”, in *All'incrocio tra Costituzione e Cedu*, ed. Roberto Bin, Giuditta Brunelli, Andrea Pugiotta, Paolo Veronesi (Torino: Giappichelli, 2007), 21-26; Filippo Giunchedi, “Linee evolutive del giusto processo europeo”, in *Procedura penale e garanzie europee*, ed. Alfredo Gaito and Filippo Giunchedi (Torino: UTET, 2006), 15-27; Barbara Lavarini, “Giudicato penale ed esecuzione delle sentenze della Corte europea dei diritti dell'uomo”, in *Convenzione europea sui diritti dell'uomo: processo penale e garanzie*, ed. Rosanna Gambini and Margherita Salvadori (Napoli: ESI, 2009), 129-

to take part at the trial, ECHR jurisprudence states that «a retrial or the reopening of the case, if requested, represents in principle the appropriate way of redressing the violation», all the same confirming that it's not her duty «to indicate how any new trial (or re-examination of the applicant's appeal) is to proceed and what form it is to take»<sup>10</sup>.

Recently, on January, 15<sup>th</sup> 2010, the State Duma of the Russian Federation has voted in favour of the draft law ratifying Protocol No. 14 to the European Convention on Human Rights. On February, 19<sup>th</sup> 2010, the President of the Court has received the depositing by the Russian Federation of its instrument of ratification. Protocol no. 14 will be effective three months after its deposit. As for what matters to the present study, it is relevant that art. 46 of the Convention will be amended: the new provisions are more strict in introducing an infringement procedure towards the State which does not respect its obligation to adopt measures requested by the ECHR decision.

A large number of States adopted special legislation providing for the possibility of re-examination of the case or reopening of the proceedings. In other States this possibility has been developed by the Courts and national authorities under existing law. The two missing States are Spain and Italy<sup>11</sup>. From the Italian perspective, the question becomes ticklish when it comes into consideration that the Italian criminal procedure law doesn't provide any remedy against the execution of a decision adopted in breach of the ECHR principles nor the Italian criminal procedure code gives the opportunity to replace the trial with a new one that respects the Convention rules. The revision of the final decision is an extraordinary remedy on an otherwise final judgment conviction. Such an attack is allowed only when there is a new evidence which alone, or in connection with other evidences, shows that the defendant must be acquitted, or that the conviction was based on false or fabricated evidence. This remedy is not available to a condemned person who seeks for a more favorable disposition or for a mild punishment<sup>12</sup>.

Up till now, only the Courts tried to solve the problem interpreting the rules of the Italian criminal procedure code provided for different kind of situations: in these decisions, judges acted as substitutes of the Parliament in lack of a specific law for the case<sup>13</sup>.

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149; Daniele Negri, "Rimedi al giudicato penale e legalità processuale: un connubio che gli obblighi internazionali non possono dissolvere", in *All'incrocio tra Costituzione e Cedu*, ed. Roberto Bin, Giuditta Brunelli, Andrea Pugiotta, Paolo Veronesi (Torino: Giappichelli, 2007), 169-176; Barbara Randazzo, "Le pronunce della Corte europea dei diritti dell'uomo: effetti ed esecuzione nell'ordinamento italiano", in *Le Corti dell'integrazione europea*, ed. Nicolò Zanon (Napoli: ESI, 2006), 295-352; Michele de Salvia, "L'obbligo degli Stati di conformarsi alle decisioni della Corte europea e del Comitato dei Ministri del Consiglio d'Europa", in *Giurisprudenza europea e processo penale italiano*, ed. Antonio Balsamo and Roberto E. Kostoris (Torino: Giappichelli, 2008), 67-79.

<sup>10</sup> See the following ECHR decisions: Pitiitto v. Italy, 12<sup>th</sup> November 2007; Kollcaku v. Italy, 8<sup>th</sup> February 2007; Zunic v. Italy, 21<sup>st</sup> December 2006; Ali Ay v. Italy, 14<sup>th</sup> December 2006; Sejdovic v. Italy, 1<sup>st</sup> March 2006; Somogyi v. Italy, 18<sup>th</sup> May 2004.

<sup>11</sup> For a comparative overview on this topic, see Mitja Gialuz, "Il riesame del processo a seguito di condanna della Corte di Strasburgo: modelli europei e prospettive italiane", *Rivista italiana di diritto e procedura penale* (2009): 1864-1877; Annalisa Mangiaracina, "La revisione del giudicato penale a seguito di una pronuncia della Corte europea dei diritti dell'uomo. (I) La progettualità italiana e l'esperienza del Regno Unito", *Rivista italiana di diritto e procedura penale* (2006): 982-1009; Lucia Parlato, "La revisione del giudicato penale a seguito di una pronuncia della Corte europea dei diritti dell'uomo. (II) L'esperienza della Repubblica federale tedesca e di altri Paesi dell'Europa continentale", *Rivista italiana di diritto e procedura penale* (2006): 1010-1042; Vincenzo Sciarabba, "La riapertura del giudicato in seguito a sentenze della Corte di Strasburgo: profili di comparazione", *Diritto Pubblico Comparato ed Europeo* (2009): 917-947.

<sup>12</sup> See art. 630 of the Italian criminal procedure code.

<sup>13</sup> Among Scholars, see Ercole Aprile, *Diritto processuale penale europeo e internazionale* (Padova: CEDAM, 2007), 147-153; Mitja Gialuz, "Il riesame del processo a seguito di condanna della Corte di Strasburgo: modelli europei e prospettive italiane", *Rivista italiana di diritto e procedura penale* (2009): 1844-1895; Andrea Saccucci, "Obblighi di riparazione e revisione dei processi nella Convenzione europea dei diritti umani", *Rivista di diritto internazionale* (2002): 618-681; Andrea Saccucci, "La riapertura del processo penale quale misura

The first decision passed by the Supreme Court (*Corte di Cassazione*) is related to the “Cat Berro case”. ECHR sentenced Italy because the trial at the end of which the accused was sentenced was unfair. Therefore, the defendant’s counsel of the defense asked to the competent Court of Appeal the annulment of the execution. The Court of Appeal rejected the request and the defendant seek review by the Supreme Court, which stated that the matter of the effects of ECHR decisions on a final conviction issued at the end of an unfair trial cannot be decided by the Court of Appeal pending the execution, but should be analyzed in a cross-examination procedure. Accordingly, the Supreme Court annulled the Court of Appeal decision, which had to decide again on the point, but rejected the defendant’s request a second time<sup>14</sup>.

More insightful has been the decision handed down in the “Somogyi case”. An Hungarian citizen sentenced in Italy for trafficking in weapons at the end of an *in absentia* trial appealed to the ECHR, which sentenced Italy for violating the defendant’s right to be present at trial because there was no evidence of the fact that the defendant was aware of the ongoing trial. After that, the Supreme Court stated that the defendant could appeal the first instance decision in accordance with art. 175 of the code of procedure, which entitles a person who, without his fault, was not aware of the trial to appeal the decision even if the time period to apply has expired<sup>15</sup>.

The third one is known as “Dorigo case”: Mr Dorigo was final sentenced in 1996 to thirteen years in prison. After Mr Dorigo appeal, the ECHR sentenced Italy because the conviction was based on statements made during the investigations by three witnesses who, once the trial came to the Court, took the right to refuse to answer<sup>16</sup>. This caused a breach of the defendant’s right to confront and question the witness against him provided by art. 6 of the Convention.

After the ECHR decision, Mr Dorigo asked to the competent judge (Court of Appeal in Bologna) to stop the execution of the final decision condemning him, taking advantage of ECHR decision. However, the Court of Appeal, refused to accept the request and asked the Constitutional Court to decide whether the Italian rule which provides the review only in the abovementioned hypothesis was respectful of the principles of the Constitution.

The Constitutional Court stated that only the Parliament is competent to decide whether a trial can be reviewed: according to the Italian *principio di tassatività delle impugnazioni*, the hypothesis in which it is possible to apply for appeal are limited by the statutory law. Therefore, it’s a duty of the Parliament to find a remedy in case a final decisions is passed at the end of trials that the ECHR considers unlawful accordingly to the European Convention rules.

At the same time, the Public prosecutor in Udine, competent for the execution of the sentence condemning Mr Dorigo and aware of the critical situation, asked to the execution judge

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individuale per ottemperare alle sentenze della Corte europea”, in *Giurisprudenza europea e processo penale italiano*, ed. Antonio Balsamo and Roberto Kostoris (Torino: Giappichelli, 2008): 81-97; Vincenzo Sciarabba, *Tra fonti e corti: diritti e principi fondamentali in Europa* (Milan: Giuffrè, 2008), 332-350; Eugenio Selvaggi, “Linee di evoluzione dell’ordinamento integrato. I limiti della protezione dei diritti da parte della Cedu. Appunti e spunti per una riflessione”, paper presented at the Conference “La tutela dei diritti e delle libertà fondamentali nella giurisprudenza della Corte europea dei diritti dell’uomo in materia civile e penale”, held by the High Council of the Judiciary in Rome, 21<sup>st</sup>-23<sup>rd</sup> January 2008; Giulio Ubertis, “L’adeguamento italiano alle condanne europee per violazione dell’equità processuale”, in *Giurisprudenza europea e processo penale italiano*, ed. Antonio Balsamo and Roberto E. Kostoris (Torino: Giappichelli, 2008), 99-121.

<sup>14</sup> See ECHR, *Cat Berro v. Italy*, 28<sup>th</sup> August 1991; ECHR, *Cat Berro v. Italy*, 25<sup>th</sup> November 2008; Cassazione penale, sez. I, September, 22<sup>nd</sup> 2005, n. 35616; Corte d’assise d’appello di Milano, 30<sup>th</sup> January 2006, *Cat Berro*.

<sup>15</sup> See ECHR, *Somogyi v. Italy*, 18<sup>th</sup> May 2004; Cassazione penale, sez. I, 18<sup>th</sup> May 2006, n. 56581. For a comment, see Pierpaolo Rivello, “La vicenda Somogyi di fronte alla Corte di Cassazione: un’importante occasione di riflessione”, *Rivista italiana di diritto e procedura penale* (2007): 1071-1115.

<sup>16</sup> This was possible according to the version of art. 513 of the criminal procedure code in force before the amendment introduced in 1997.

to declare that Mr Dorigo's detention was not lawful because based on a final decision which was the outcome of an unlawful trial. However, the execution judge rejected its request stating that: a) the execution judge should only control the existence of a final decision, no matter what happened on merit points during the trial; b) there's no instrument to renew a trial in this case, and a decision stopping the execution would create the strange situation in which a final decision is suspended without an end and the subsequent possibility to be executed.

The Public prosecutor seek review of the Supreme Court, which admitted the Public prosecutor's claim stating that, whenever ECHR sentences Italy for unlawfulness of a trial, the defendant has the right to ask for a review of the decision and Italy should respect the decision, according to art. 46 of the Convention. Even if the Italian code of criminal procedure doesn't allow a review for this particular case, the judge in charge of the execution should declare that he cannot execute the decision condemning the defendant, because doing so he would breach the Convention rules for two times in the same case (in particular, a breach of art. 5 of the Convention)<sup>17</sup>.

According to art. 670 of the criminal code of procedure, should the judge stop the execution, the defendant will have again the time to apply for the appeal. However, in the Dorigo case, the Supreme Court only blocked the execution, stating nothing about the renewal of the trial. Doing this, the Supreme Court avoided a breach of art. 5 of the Convention but still didn't solve the problem of the right of a review of the final decision.

In the "Drassich case", Mr Drassich was sentenced to eight years and three months in prison for corruption. Seeking review by the Supreme Court, he said that the crime has lapsed, but the Court rejected his claim giving a different qualification of the fact committed: instead of "simple" corruption, the conduct was considered corruption of the judiciary, which deserves a harder punishment. The effect was a longer prescription time and the final conviction of Mr Drassich. Therefore, Mr Drassich presented his appeal to the ECHR, that sentenced Italy because the changing in the description of the fact was not respectful of art. 6 of the European Convention, because nor the defendant or the Public prosecutor had the possibility to discuss the new qualification. Taking advantage of the ECHR decision, Mr Drassich asked to the competent judge to stop the execution on the basis of art. 670 of the Italian criminal procedure code, as the Supreme Court stated in the "Dorigo case". Nevertheless, in this case the Supreme Court, though stating that the final decision couldn't be executed, didn't apply art. 670 of the criminal procedure code. As a matter of fact, its decision was based on art. 625-bis: however, art. 625-bis provides an extraordinary remedy useful only in case of mistake on fact<sup>18</sup>.

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<sup>17</sup> See ECHR, *Dorigo v. Italy*, 16<sup>th</sup> November 2000; Cassazione penale, sez. I, 1<sup>st</sup> December 2006, n. 2800; Corte costituzionale, 30<sup>th</sup> April 2008, n. 129. Among Scholars, see Mario Chiavario, "Giudicato e processo «iniquo»: la Corte si pronuncia (ma non è la parola definitiva)", *Giurisprudenza costituzionale* (2008): 1522-1524; Luca De Matteis, "Tra Convenzione europea dei diritti dell'uomo e Costituzione: la Corte costituzionale in tema di revisione a seguito di condanna da parte della Corte di Strasburgo", *Cassazione penale* (2009): 3994-4003; Mitja Gialuz, "Il caso Dorigo: questione mal posta, ma con qualche (tenue) speranza di essere accolta", in *All'incrocio tra Costituzione e Cedu*, ed. Roberto Bin, Giuditta Brunelli, Andrea Pugiotto, Paolo Veronesi (Torino: Giappichelli, 2007), 123-128; Simone Lonati, "Il «caso Dorigo»: un altro tentativo della giurisprudenza di dare esecuzione alle sentenze della Corte europea dei diritti dell'uomo in attesa di un (auspicato) intervento legislativo", *Rivista italiana di diritto e procedura penale* (2007): 1538-1551; Vincenzo Sciarabba, "La riapertura del giudicato in seguito a sentenze della Corte di Strasburgo: questioni generali e profili interni", *Giurisprudenza costituzionale* (2009): 513-543; Vincenzo Sciarabba, "Il problema dell'intangibilità del giudicato tra Corte di Strasburgo, Corte costituzionale e... legislatore? (osservazioni a margine della sentenza della Corte costituzionale n. 129 del 2008)", *Europeanrights.eu* (May, 30, 2008), <http://www.europeanrights.eu/index.php?funzione=S&op=5&id=130>.

<sup>18</sup> See ECHR, *Drassich v. Italy*, 11<sup>th</sup> December 2007; Cassazione penale, sez. VI, 12<sup>th</sup> November 2008, n. 45807. The Supreme Court, however, not only solved the single case suggesting art. 625-bis of the code of criminal procedure as a special remedy, but also gave a general solution if the breach of the right to confrontation happens during the second-instance trial: in this case, the defendant has the opportunity to apply a claim to the Supreme



Finally, on February 2010 the Supreme Court decided the “Scoppola case”. Mr Scoppola was finally sentenced to life-imprisonment because he murdered his wife and tried to kill one of his sons. During the first-instance trial, Mr Scoppola asked to apply for a special proceeding (*giudizio abbreviato*) that grants the defendant to obtain: a) reduction of the punishment by 1/3 if he is found guilty; b) a change from life imprisonment to thirty years imprisonment; c) no daytime isolation during life imprisonment<sup>19</sup>.

The first-instance Court admitted Mr Scoppola request and sentenced him to thirty years in prison. However, on the day of the decision, a law entered into force providing an interpretation of the said special proceeding: according to that law, Mr Scoppola should have been sentenced to life imprisonment because the punishment for murder together with other crimes he committed is punishable with life imprisonment and daytime isolation. Then, thanks to *giudizio abbreviato*, it would have turned into life imprisonment.

On this basis, the Public prosecutor applied to the Court of Appeal, which admitted the claim and sentenced Mr Scoppola to life imprisonment, stating that, in respect of the *tempus regit actum* principle, the judge should apply the new law to the pending case.

The core question is: if that law is considered as a procedural law, then the judge should respect *tempus regit actum* principle. If, instead, is considered as a substantive criminal law, the judge should apply the rules which provide the lesser punishment, in respect of art. 2 of the criminal code, art. 25 of the Constitution and, last but not least, art. 7 of the European Convention.

Firstly, the Court explained that «Article 7, paragraph 1, of the Convention guarantees not only the principle of non-retrospectiveness of more stringent criminal laws but also, and implicitly, the principle of retrospectiveness of the more lenient criminal law. That principle is embodied in the rule that where there are differences between the criminal law in force at the time of the commission of the offence and subsequent criminal laws enacted before a final judgment is rendered, the Courts must apply the law whose provisions are most favourable to the defendant».

Secondly, the Court considers that Article 442, paragraph 2, of the criminal procedure code is a «provision of substantive criminal law concerning the length of the sentence to be imposed in the event of conviction following trial under the summary procedure. It therefore falls within the scope of the last sentence of Article 7 § 1 of the Convention». In respect of this reasoning, the ECHR sentenced Italy because of violation of art. 7 of the Convention<sup>20</sup>.

Therefore, taking advantage of the “Drassich case”, Mr Scoppola asked for the special remedy provided by art. art. 625-*bis*. The Supreme Court accepted its request in February, but the decision has not been published yet.

From the above mentioned examples, we can say that Italian jurisprudence found a solution utilizing a technique that, from the point of view of the victim’s rights, deserves approval. However, even Scholars agree that, following the Constitutional Court decision, the Parliament

Court by using the general remedy of art. 606, lett. c of the criminal code of procedure, which entitles the defendant to seek review whenever a criminal procedure rule has been violated during the proceedings. Among Scholars, see Michele Caianiello, “La riapertura del processo ex art. 625-bis c.p.p. a seguito di condanna della Corte europea dei diritti dell’uomo”, *Cassazione penale* (2009): 1465-1473; Luca De Matteis, “Condanna da parte della Corte europea dei diritti dell’uomo e revoca del giudicato”, *Cassazione penale* (2009): 1474-1483; Chiara Gabrielli, “*Decisum* del giudice europeo e parziale rimozione del giudicato”, *Giurisprudenza italiana* (2009): 2295-2296; Roberto E. Kostoris, “Diversa qualificazione del fatto in Cassazione e obbligo di conformarsi alle decisioni della Corte europea dei diritti dell’uomo: considerazioni sul caso Drassich”, *Giurisprudenza italiana* (2009): 2514-2525; Fulvio Maria Palombino, “Esecuzione delle sentenze della Corte europea dei diritti dell’uomo e integrazione analogica dell’art. 625 *bis* c.p.p. (in margine al caso Drassich)”, *Giurisprudenza italiana* (2009): 2296-2299; Francesco Zacché, “Cassazione e *iura novit curia* nel caso Drassich”, *Diritto penale e processo* (2009): 781-788.

<sup>19</sup> See art. 438-443 of the criminal procedure code.

<sup>20</sup> See ECHR, Scoppola v. Italy, 19<sup>th</sup> September 2009.

should approve a specific law in order to avoid uncertainty and discrimination among defendants. As an evidence of the fact that the solution is not completely welcomed by the judges of the Supreme Court itself, at the end of April all the sections of the Supreme Court will take part to a meeting in order to decide whether to submit the question to the plenary session, so to find a shared solution in lack of a law on the point.

The only relevant reform has been introduced on the 28<sup>th</sup> November 2005 with the decree of the President of the Italian Republic n. 289, which provides a new ruling for the criminal records, stating that the ECHR decisions must be added to the defendant's criminal record below the Italian final decision to which they are referred. Even if this is not practically useful, it has the implicit meaning of a first step towards a modification of the effects of the Italian decision.

**3. Draft bills on the renewal of the trial.** – The above mentioned Recommendation R (2000) 2, encourages «the Contracting Parties to examine their national legal systems with a view to ensuring that there exist adequate possibilities of re-examination of the case, including reopening of proceedings, in instances where the Court has found a violation of the Convention, especially where (i) the injured party continues to suffer very serious negative consequences because of the outcome of the domestic decision at issue, which are not adequately remedied by the just satisfaction and cannot be rectified except by re-examination or reopening, and (ii) the judgment of the Court leads to the conclusion that: (a) the impugned domestic decision is on the merits contrary to the Convention, or (b) the violation found is based on procedural errors or shortcomings of such gravity that a serious doubt is cast on the outcome of the domestic proceedings complained of».

Bearing in mind these wordings, from 1998 on, several draft bills have been presented to the Parliament in order to introduce an instrument that allows a renewal of the trial or a revision of the decision passed at the end of a trial considered unlawful by the ECHR, but none of them has been approved nor even discussed by the two Chambers of the Parliament yet<sup>21</sup>.

The drafts choose among two options: modify art. 630 of the criminal procedure code, which provides four cases in which it is possible to ask for a revision of the decision condemning the defendant, or introduce a specific rule for the case.

Analyzing the drafts, it's possible to notice that they entitle the sentenced defendant to apply for a renewal of the trial only if criminal procedure rules have been violated during the trial. Nothing is provided in case the breach is related to substantial rules. Some of them are even more strict, limiting the possibility to seek review only when a breach of art. 6 of the Convention is committed. Of course this is not in line with the Committee of the Ministers Recommendation R (2000) 2 and would exclude from the remedy a large number of cases. From the above mentioned cases, we can mention the last one (Scoppola), as an example in which ECHR sentenced Italy for violation of art. 7 of the Convention.

Secondly, some of the drafts provide the special remedy only if the defendant has been sentenced in prison, or to any other no-pecuniary punishment, thus excluding all the unlawful trials at the end of which the defendants are obliged to pay a fine.

The competent judge will be the Court of Appeal, and the judge should renew only the part of the trial in which ECHR ascertained a violation of the Convention.

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<sup>21</sup> For comments on the draft bills, see Mitja Gialuz, "Il riesame del processo a seguito di condanna della Corte di Strasburgo: modelli europei e prospettive italiane", *Rivista italiana di diritto e procedura penale* (2009): 1881-1895; Annalisa Mangiaracina, "La revisione del giudicato penale a seguito di una pronuncia della Corte europea dei diritti dell'uomo. (I) La progettualità italiana e l'esperienza del Regno Unito", *Rivista italiana di diritto e procedura penale* (2006): 985-991; Barbara Randazzo, "Nuovi sviluppi in tema di esecuzione delle sentenze della Corte europea dei diritti dell'uomo", *Diritti dell'uomo, cronache e battaglie* 2 (2006): 11-18.

The revision of the final decision is admitted in the Italian system only if it could be held to the defendant's acquittal. However, this is not always useful for the situation we are analyzing, because not necessarily a new trial, held in respect of the Convention, must lead to the defendant's acquittal. The draft-bills suggest that at the end of the new trial which respects the rules of the Convention, there are two options for the competent judge: a) confirm the first decision, b) annul it.

Moreover, as suggested by Scholars, three more questions arise: 1) in case the trial was held against two or more defendants and only one of them applied to the ECHR, what should happen to the co-accused who didn't apply to the ECHR?; 2) what is it going to happen to the victim who already had her compensation for the damages suffered?; 3) how is the new law going to solve the matter that both judge and participants to the trial should face in terms of possible loss of evidence due to the period elapsed<sup>22</sup>.

These questions are still unanswered and should be taken into consideration by the draft-bills before the approval of a new law.

**4. ECHR decisions about Italian *in absentia* trials.** – As a general rule, the criminal trial must guarantee that the accused will be present during the hearing and will be able to follow and understand any part of the proceedings<sup>23</sup>.

Interpreting art. 6 of the Convention, the ECHR stated that, although not expressly mentioned, «the object and purpose of Art. 6 taken as a whole show that a person “charged with criminal offence” is entitled to take part in the hearing»<sup>24</sup>.

However, proceedings held in the absence of the accused are not necessarily incompatible with the Convention, particularly when the accused can obtain a new determination of the charge, in respect of both law and fact. Furthermore, even in those cases where there is no possibility of a re-trial, the *in absentia* trial may be compatible with art. 6 of the Convention, namely when the accused was aware of the summons: States can consider the failure of the accused to appear as implicit waiver, and thus carry out a trial *in absentia*.

In 1975, the Committee of the Ministers approved a Resolution in which the States were recommended to apply the following minimum rules: «no one may be tried without having first been effectively served with a summons in time to enable him to appear and to prepare his defence, unless it is established that he has deliberately sought to evade justice». Moreover, «6. A judgement passed in the absence of the accused must be notified to him according to the rules governing the service of the summons to appear and the time-limit for lodging an appeal must not begin to run until the convicted person has had effective knowledge of the judgement so notified, unless it is established that he has deliberately sought to evade justice. 7. Any person tried in his absence must be able to appeal against the judgement by whatever means of recourse would have been open to him, had he been present. 8. A person tried in his absence on whom a summons has not been served in due and proper form shall have a remedy enabling him to have the judgement annulled. 9. A person tried in his absence, but on whom a summons has been properly served is entitled to a retrial, in the ordinary way, if that person can prove that his absence and the fact that he could not inform the judge thereof were due to reasons beyond his control»<sup>25</sup>.

<sup>22</sup> As noticed by Elisabeth Lambert-Abdelgawad, *The execution of judgements of the European Court of Human Rights* (Strasbourg: Council of Europe Publishing, 2008), 72.

<sup>23</sup> See Ercole Aprile, “La tutela dei diritti fondamentali e le nuove garanzie del processo penale”, in *Cooperazione giudiziaria penale nell’Unione europea prima e dopo il Trattato di Lisbona*, ed. Ercole Aprile and Filippo Spiezia (Milano: Ipsoa, 2009), 157-161; Sarah J. Summers, *Fair Trials. The European Criminal Procedure Tradition and the European Court of Human Rights* (Oxford and Portland: Hart Publishing, 2007), 113-120.

<sup>24</sup> See ECHR, *Colozza v. Italy*, 12<sup>nd</sup> February 1985.

<sup>25</sup> See Council of Europe Committee of Ministers Resolution (1975) 2, adopted on 21<sup>st</sup> May 1975. See Ercole Aprile, *Diritto processuale penale europeo e internazionale* (Padova: CEDAM, 2007), 195-198.

From the Italian perspective, we can notice that there are three different cases related to the defendant's absence during the trial, ruled by artt. 420ter, 420quater, 420quinquies (as far as regards the preliminary hearing) and art. 484, paragraph 2bis (as far as regards the trial at Court) of the code of criminal procedure:

a) *contumacia / absentia*, which means that the person is not available at the trial even if he has been summoned in person or otherwise informed of the date and place of the hearing of the trial going on against him. More precisely, the code distinguishes between: 1) summon in person, which means that the person has received the writ of summon directly and is aware that a process is going on against him; 2) presumption of knowledge of the trial, which is obtained after sending services of writ of summon to persons (i.e. relatives, employers, etc.) or institutions (i.e. local authorities) that have a relation with the defendant<sup>26</sup>;

b) *assenza al processo / absence at the trial* depends on the defendant's will. It means that the defendant has been correctly summoned but he declares that he doesn't want to attend the trial and in fact asks that the trial is continued even if he will not attend it. If the defendant is in jail, and he refuses to attend the trial, still the trial is continued without him. The attorney-at-law will act on behalf of the defendant and will ensure a proper defense at the trial;

c) *legittimo impedimento / legitimate impediment*, which is related to the fact that the defendant, even if imprisoned in jail, cannot stand to the hearings for a reason that doesn't depend on his will (i.e. fortuitous events, necessities or other lawful impediments). The process is held over till the end of the impediment.

As far as regards *contumacia / in absentia* trials, Italy has been sentenced several times under the principles stated by two important ECHR decisions<sup>27</sup>.

Before the new criminal code of procedure entered into force, the ECHR sentenced Italy in the "Colozza case". Mr Colozza was sentenced in *absentia* even if he was not aware of the trial. He applied for an appeal and then seek review to the Corte di Cassazione because he didn't receive any summon even if his address was known by the office of the Prosecutor, as it was testified by summons that Mr Colozza received and that were related to different proceedings in which he was involved as defendant. However, the decision became final and he applied to the ECHR, which sentenced Italy<sup>28</sup>.

After the new criminal code of procedure entered into force, Italy has been sentenced because, according to our criminal procedure code, a defendant convicted *in absentia* doesn't have an immediate right to appeal against the decision convicting him if he is not aware of the trial going on against him (except the case of his negligence). To be more precise, the former wordings of art. 175 of the criminal code of procedure stated that the defendant convicted *in absentia* had to prove that he was not aware of the trial and that this lack of awareness was not related to his fault or negligence. If he would have successfully carried out that proof, then he would have been given the time to apply for an appeal against the decision convicting him.

Thus, the ECHR sentenced Italy in the cases Sejdovic and Somogyi because the two defendants were convicted even if there was no evidence that they were aware of the trial: in the first case the Court presumed that the defendant gave up his right to be present at the trial, but

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<sup>26</sup> For the presumption of awareness, see art. 157, 159, 160 of the criminal procedure code.

<sup>27</sup> See Mario Deganello, "Procedimento in absentia: sulla 'tratta' Strasburgo-Roma una 'perenne incompiuta'", in *Convenzione europea sui diritti dell'uomo: processo penale e garanzie*, ed. Rosanna Gambini and Margherita Salvadori (Napoli: ESI, 2009), 79-114; Barbara Milani, "Il processo contumaciale tra garanzie europee e prospettive di riforma", *Cassazione penale* (2009), 2180-2193; Giulio Ubertis, "Corte europea dei diritti dell'uomo e «processo equo»: riflessi sul processo penale italiano", *Rivista di diritto processuale* (2009): 33-45.

<sup>28</sup> See ECHR, *Colozza v. Italy*, 12<sup>th</sup> February 1985. See also ECHR, *Rubinat v. Italy*, 12<sup>th</sup> February 1985; *Brozicek v. Italy*, 19<sup>th</sup> December 1989.

there was no evidence about the voluntary waiver to this right; in the second case, the Court stated that the defendant had received and signed the writ of summon, so he was aware of the trial: however, the defendant claimed that the writ had been signed by a different person and there was no evidence that he had signed in person the writ. Moreover, in this two decisions the ECHR criticized the Italian rulings on *in absentia* trial: first of all, the terms to prove the lack of awareness when applying for a new term to appeal were too short; secondly, the defendant's duty to prove his blameless lack of awareness about the trial instead of the Prosecutor's burden of proof about the awareness of the trial was not in line with the principles of the Convention<sup>29</sup>.

Following the ECHR decisions, in the year 2005 the Italian Parliament approved a law that modified art. 175 of the criminal code of procedure. The new wording reads that the defendant who has been convicted without being aware of the trial is given the time to apply for the appeal: he must ask for the appeal within thirty days after he gets to know about the decision. Furthermore, it's not a defendant's burden to carry the proof that he has received no information about the trial.

But still some matters have not been solved. First of all, even if the person is given the time to present an appeal, this is only a review of the first decision, and not a retrial, which means that the person has the right to attend only one stage related to the merit of the fact. However, *in absentia* trials are in line with the principles of the Constitution, namely art. 24, which provides the right of defense, and art. 112, which introduces the mandatory prosecution principle. Furthermore, the Italian Constitution states that the defendant has only the right for a petition to the *Corte di Cassazione* (art. 111, paragraph 7 of the Italian Constitution), which decides only on points of law. This means that there is no defendant's right protected by Constitution to two merit trials (first and second instance judgments). Actually, there is the right to one only merit trial and to a reviewing of the decisions of an inferior Court on points of law. This means that art. 175 of the criminal code of procedure is in line with the Italian Constitution provisions stating that: 1) the defendant who has been convicted without being aware of the trial against him is automatically given the time to present appeal (excepts for the hypotheses in which the lack of awareness depends on the defendant's fault or negligence); 2) it is no more a defendant's duty to provide the proof that he was unaware of the trial against him.

A second matter is related to a lack of coordination between new art. 175 and art. 603 of the criminal procedure code, which deals with renewal of the proceedings, by means, for example, of the possibility to confront and question the witnesses. Renewal of the proceedings in appeal can take place only in four hypothesis. One of these regards *in absentia* decisions given at the end of the first instance trial. Art. 603, paragraph 4, states that a renewal of the proceeding is possible only if the defendant carries the proof that he was not able to attend the trial due to fortuitous events, necessities, other lawful impediments, or that he was not informed of the ongoing trial against him. So, if the defendant isn't anymore obliged to provide the proof of his unawareness in order to be allowed to present appeal, that proof is still on him in case he wants to obtain a renewal of the proceeding.

Furthermore, the defendant misses the opportunity to ask for an alternative proceeding (such as *applicazione della pena su richiesta delle parti* and *giudizio abbreviato*) that grant a reduction of the punishment, because the deadline for this proceedings is, in general, the preliminary hearing during the first-instance trial.

This causes a breach in the system and Italian Scholars assert that a decisions of the Constitutional Court is needed on the subject.

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<sup>29</sup> ECHR, *Sejdovic v. Italy*, 18<sup>th</sup> May 2004 and ECHR, *Somogyi v. Italy*, 10<sup>th</sup> November 2004. See also ECHR, *Osu v. Italy*, 11<sup>th</sup> July 2002; ECHR, *Hu v. Italy*, 28<sup>th</sup> September 2006; ECHR, *Ay Ali v. Italy*, 14<sup>th</sup> December 2006; ECHR, *Zunic v. Italy*, 21<sup>st</sup> December 2006.

The Constitutional Court decided several times upon the constitutionality of the articles of the criminal procedure code dealing with the summons' procedure. In each decision, the Court stated that there is no breach with the Constitution if the criminal procedure code doesn't provide a postponement of the proceedings whereas it is impossible to find the defendant or there's no evidence that he is aware of the trial. In fact, as confirmed by the ECHR jurisprudence, *in absentia* trials are not incompatible with the Convention once the State provides the defendant with the opportunity to ask for a renewal of the trial.

Secondly, the Constitutional Court explained that the choice between the postponement or the renewal of a trial that involves a person who is impossible to find must be demanded to law. Thus, the Court cannot interfere with the current choice of the Parliament, which consists, as already mentioned, in the possibility to apply for an appeal as stated in art. 175 of the code of criminal procedure<sup>30</sup>.

Therefore, two different ways can be suggested to solve the matter: the first assumes that art. 159 of the criminal procedure code should be interpreted in light of the Convention, as suggested by the Constitutional Court decisions n. 348 and 349 passed in 2007. However, the wordings of art. 159 are clear in providing a situation in which the summon served only to the defendant's attorney-at-law is valid and lawful even if the defendant's himself was not aware of the trial. Thus, this way is not practicable.

A second possibility is related to the interpretation of art. 648 of the criminal procedure code where the definition of a sentence which is final is provided. The question is: is it logical to consider as final a decision passed at the end of a trial held in the defendant's absence and whereas the defendant was not aware of the trial? The problem is that this final decision can be executed. However, thanks to art. 175 of the code of criminal procedure, the defendant can ask a renewal of the trial. So, the suggestion is to ask to the Constitutional Court to declare the unlawfulness of art. 648 of the criminal procedure code whereas it considers that a decision is final even if the defendant is provided with the opportunity to ask for a renewal of the trial, due to the fact that the trial was held *in absentia* and without the evidence of the fact that the defendant was aware of it<sup>31</sup>.

## Conclusions

The matters presented in this essay show that main topics are still on the socks and have not been totally solved yet<sup>32</sup>.

First of all, the question about where the Convention should be placed among the sources of law is still pending. In fact, two decisions handed down by the Constitutional Court in November

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<sup>30</sup> See Constitutional Court decisions n. 399 passed on 12<sup>th</sup> December 1998; Constitutional Court decision n. 117 passed on 5<sup>th</sup> April 2007; Constitutional Court ordinance n. 89 passed on 4<sup>th</sup> April 2008. Among Scholars who suggested that the right to be present at trial is not only a defendant's right, but also a condition for an objective validity of the trial, see Francesco Caprioli, "“Giusto processo” e rito degli irreperibili”, *Legislazione penale* (2004), 586-595; Francesco Caprioli, "Cooperazione giudiziaria e processo in absentia", in Alfio Gabriele Fragalà, Tommaso Rafaraci et al., *L'area di libertà sicurezza e giustizia: alla ricerca di un equilibrio fra priorità repressive ed esigenze di garanzia*, Catania, 9-11 giugno 2005 (Milano: Giuffrè, 2007), 391-402. See also Carlo Dell'Agli, "Il fuggibile interesse della Corte costituzionale al principio *ne absens damnetur*", *Diritto penale e processo* (2010): 244-248.

<sup>31</sup> See Pasquale Profiti, "La Corte italiana e il processo in contumacia: i riflessi della giurisprudenza di Strasburgo", *Europeanrights.eu* (March, 12, 2010), <http://www.europeanrights.eu/index.php?funzione=S&op=5&id=381>.

<sup>32</sup> See Mario Chiavario, "Giustizia europea e processo penale: nuovi scenari e nuovi problemi", *Legislazione penale* (2009): 461-470; Mario Pisani, "Il «processo penale europeo»: problemi e prospettive", *Rivista di diritto processuale* (2004): 653-678.

2009 seem, from one hand, to confirm the decisions passed in 2007, and, on the other hand, that a different interpretation is possible, as they state that the rules of the Convention receive acknowledgment in our system through art. 117 and art. 10 of the Constitution. Moreover, things seem to be on the way of a deep change, as the Council of European Union received on 17<sup>th</sup> March 2010 the mandate to sign the European Convention of Human Rights on behalf of the European Union. This means that, from the point of view of the national judges, the Convention, the Treaty and the other rules approved by the European Union could be applied and interpreted through a unique approach, instead of the two current approaches explained in paragraph 1. Since the Lisbon Treaty entered into force in December 2009 and the European Union is supposed to sign the European Convention of Human Rights in June 2010, this field of discussion will probably be one of the most interesting, as it involves both the European top-level Courts (ECHR, ECJ) and the national judges (Constitutional Court, Corte di Cassazione and merit Courts).

As regards the matter related to the duty for the State to abide the final ECHR judgment, the subject is really tricky and both Scholars and judges are waiting for the approval of a new law that should introduce an instrument through which a final sentence passed at the end of a trial which the ECHR considers not fair could be reviewed. Unfortunately, we must remark that the draft bills awaiting for discussion at the Parliament are not at all satisfactory, as they limit the possibility to obtain a new trial only in case of violations of art. 6 of the Convention. However, as the Italian Courts have tried different solutions through interpretation in order to grant a remedy for the defendant who has been sentenced at the end of an unfair trial, the only way to obtain a unique solution is the approval of a statutory law, which shouldn't be put off any longer.

Finally, as explained in paragraph 4, *in absentia* trials represent a matter which has not been solved yet, even if the Parliament approved a law in 2005 that introduces a new wording inside art. 175 of the criminal procedure code, in order to adapt it to the Convention principles and the ECHR decisions.

The matter becomes even tougher if we consider that a sentence passed at the end of a trial in which the defendant was not present could be considered final and then able to produce the *ne bis in idem* effect. From one point of view, it is important to grant the defendant's right to ask for a renewal of the trial previously held in the defendant's absence. From another point of view, to exclude that a sentence passed at the end of a trial in *absentia* could be considered as final and then able to stop a second trial against the same person charged of the same facts, would be against art. 54 of the Convention implementing the Schengen Agreement.

What is certain is that up till now there is no harmonization among member States as far as regards *in absentia* trials. The European Union, being aware that the mutual trust itself is not enough to grant a shared position on *in absentia* trials, is trying to offer a common definition of *in absentia* decisions: as a matter of fact, on 26<sup>th</sup> February 2009 the European Union Council approved a framework decision «enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial». One of the main reasons that led the Council to approve the framework decision is due to the fact that the various framework decisions «implementing the principle of mutual recognition of final judicial decisions do not deal consistently with the issue of decisions rendered following a trial at which the person concerned did not appear in person. This diversity could complicate the work of the practitioner and hamper judicial cooperation»<sup>33</sup>.

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<sup>33</sup> See framework decision 2009/299/JHA published in the Official Journal of the European Union on 27<sup>th</sup> March 2009. For a comment of the Framework decision from the Italian perspective, see Andrea Chelo, "Nuove regole per l'esecuzione delle sentenze emesse *in absentia*", *Diritto penale e processo* (2009): 111-120.

This topic could be discussed also through a dialogue between the ECHR and the European Union Court of Justice, as the Lisbon Treaty explicitly mentions that the European Union joins the European Convention of Human Rights (as well as the 2000 Charter of Fundamental Rights signed in Nice, which reproduces several principles carried out by the Convention), including the provisions related to the defendant's presence at the trial as interpreted by the ECHR (see paragraph 4). Another way to deal with the subject could be to issue an EU regulation stating when a final *in absentia* decision must be subjected to the *ne bis in idem* principle or instead must be reviewed because the defendant was not aware of the trial going on against him: the main thing is to avoid impunity spots or, even worse, to cause a detriment in the defendant's rights to a fair trial<sup>34</sup>.

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<sup>34</sup> See Annalisa Mangiaracina, "Sentenze contumaciali e cooperazione giudiziaria", *Diritto penale e processo* (2009): 120-127.