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THE PROTECTION OF HUMAN RIGHTS IN THE DECISIONS OF THE ITALIAN SUPREME COURT OF CASSATION

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INTRODUCTION

Over the last few decades, countries of common law and civil law traditions have undergone a process which has brought them closer together. This process can be traced back to the common conviction that law does not consist merely of complex, abstract norms, but rather of decisions made in applying these norms. In other words, it is the decisions of the courts which constitute the law in force. Thus, any understanding of the protection of human rights requires reference to the decisions of judges who are called upon to decide cases in which this protection is challenged at both the international and national levels.

At the national level, the decisions of supreme courts take on particular importance. I would like to refer briefly to the decisions of the Italian Supreme Court of Cassation concerning the fundamental question of the direct effect of international sources on the protection of human rights in my country.

It should perhaps be mentioned that the decisions of the Italian Court of Cassation¹ are not binding as precedent when

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¹ See generally ANGELO GRISOLI, GUIDE TO FOREIGN LEGAL MATERIALS-ITALIAN (C. Szladits ed., 1965). The Italian court system is divided into courts of ordinary jurisdiction, which deal with civil and criminal matters, and courts of special jurisdiction, which primarily deal with constitutional questions. The Court of Cassation is the highest court in the hierarchy of ordinary courts in the Italian legal system. *Id.* at 32-35. The primary task of the Court of Cassation is to assure the uniform interpretation of the law. *Id.* at 34. The Court of Cassation hears cases after they have been appealed and determines whether the lower courts properly applied the law. If the law has been properly applied, the Court of Cassation will not grant recourse. If the challenged decision does not comply with the law, however, the Court quashes the decision below and remands the case to a lower court to render a decision that complies with its ruling on the law. *Id.* at 35.

the question decided comes before other courts or is brought up again before the Court itself.² The authority of such decisions, however, is such that it will undoubtedly have a guiding effect on future decisions.³ This is a sufficient justification for limiting my remarks to these decisions.

I. INTERNATIONAL SOURCES FOR THE PROTECTION OF HUMAN RIGHTS

The international sources for the protection of human rights, referred to in the decisions of the Court of Cassation, are the Convention for the Protection of Human Rights and Fundamental Freedoms ["Convention"],⁴ signed in Rome on November 4, 1950, and entered into force in Italy in 1955;⁵ and the International Covenant on Civil and Political Rights ["Covenant"],⁶ adopted in New York on December 16, 1966, and given effect in

² See MAURO CAPPELLETTI ET AL., *THE ITALIAN LEGAL SYSTEM* 149-54, 270-73 (1967). Traditionally, judicial decisions are not binding precedents in subsequent Italian cases. *Id.* at 150, 270. This stems from the strict historical distinction in the civil law where the legislature makes the law and the judiciary applies it. *Id.* Therefore, if the decisions of the court had effect beyond the limits of the case, the courts would engage in functions reserved to the legislature. *Id.*

³ See CAPPELLETTI ET AL., *supra* note 2, at 152. The Court of Cassation explicitly recognizes the need for uniformity in judicial interpretation of the law. *Id.* The court creates "massime," or headnotes that express the rules of law on which the court bases its decisions. *Id.* Lawyers and judges utilize these massime to help them understand the law. *See id.* In a practical sense, the rulings of the court take on the force of law. *Id.* at 153.

⁴ *Convention for the Protection of Human Rights and Fundamental Freedoms*, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter *Convention*]. The Convention's goal was to enforce the fundamental human freedoms. *Id.* § I. Members of the Council of Europe sought to secure for everyone within the jurisdiction of the council the same fundamental rights which were enumerated in the articles of the Convention. *Id.* The rights enumerated include: life, freedom from torturous punishment, freedom from servitude, liberty, a fair hearing and trial, family life, freedom of thought, religion, peaceful assembly, and freedom from discrimination. *Id.* § I, art. 2-9, 11. The Convention also sets up the European Commission of Human Rights as well as the European Court of Human Rights to ensure enforcement of these freedoms. *Id.* § II, art. 19.

⁵ BASIS DOCUMENTS ON HUMAN RIGHTS 326 (Ian Brownlie ed., 3d ed. 1992).

⁶ *International Covenant on Civil and Political Rights*, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966). The provisions of the Covenant create rights and duties to help protect human freedom and dignity. *Id.* at pmbl. The Covenant is binding international law on the member states to help protect the peoples of the world. *Id.* at pt. 2, art. 2. The Covenant affirms the right to have violations redressed. *See generally* LOUIS HENKIN, *THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS* 32-71 (Louis Henkin ed. 1981) (discussing the development and impact of the Covenant).

Italy in 1977.⁷ Additionally, reference is frequently made to the Universal Declaration of Human Rights,⁸ adopted and proclaimed by the General Assembly of the United Nations in New York on December 10, 1948.⁹ The question of the direct effect of this particular document within our legal system, however, has not yet arisen. All questions of this nature are encompassed within the issue of the direct internal effect of the Convention and the Covenant.

As far as the Convention is concerned, the Court of Cassation has been criticized for not addressing this question until many years after the implementing legislation. Two reasons have been articulated to account for this delay. First, it is due to the slight and superficial knowledge of the Convention possessed by lawyers and judges. Lawyers either did not invoke the application of the Convention, or they sought to invoke the principles of the Convention in such a vague manner that judges were hesitant to apply them.

The second reason is the widely-held belief that Italian domestic sources, the Italian Constitution and ordinary laws, substantially exhaust the protection of human rights covered by the Convention. This apprehension of domestic law preemption by international laws is not unique to Italian jurisprudence. A similar delay can be seen in the behavior of judges in other countries. In France, for example, the Convention only began to be applied in the second half of the 1970's.¹⁰ The question of the direct application of the Covenant does not have the same history as the Convention. Thus, what will be said about the latter is equally valid for the former.

II. APPLICATION OF THE CONVENTION AND THE COVENANT

The question of the application of the Convention and the

⁷ *International Covenant on Civil and Political Rights*, *supra* note 6.

⁸ *Universal Declaration of Human Rights*, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., Supp. No. 16, U.N. Doc. A/810 (1948). The Declaration enumerates generally accepted principles concerning human freedoms. *Id.* at pmb. These principles were approved by the unanimous vote of the General Assembly of the United Nations and were later codified by the Convention and Covenant. See Edward D. Re, *Judicial Enforcement of International Human Rights*, 27 AKRON L. REV. 281, 283-85 (1994).

⁹ *Universal Declaration of Human Rights*, *supra* note 8.

¹⁰ See generally ANDREW Z. DRZEMCZEWSKI, EUROPEAN HUMAN RIGHTS CONVENTION IN DOMESTIC LAW 70-81, 145-54 (1983) (analyzing adoption of international law by Italy and France).

Covenant has been dealt with primarily in decisions concerning criminal cases. Therefore, it is on these cases that I will concentrate. The Court's first reaction after becoming aware of the existence of this question was to deny the direct effect of the Convention within our legal system. Thus, the decisions of the Court of Cassation affirmed that the provisions of the Convention bind states only in their relationships with other states and do not affect a state's relationship with individuals. These provisions were held to be of a programmatic nature and therefore could not modify domestic law.¹¹

This theory was justified using two arguments. First, it was assumed that the Convention anticipates an exhaustive system of protection for a violation of human rights through recourse to two international bodies—the Commission¹² and the European

¹¹ See CAPPELLETTI ET AL., *supra* note 2, at 58 (stating that some provisions of Italian Constitution are enforceable and others are programmatic, thus imposing duty on Parliament but not creating legal right in individuals); Antonio La Pergola & Patrick Del Duca, *New International Law in National Systems: Community Law, International Law and the Italian Constitution*, 79 AM. J. INT'L L. 598, 600 (1985) (finding that Italy's Constitutional Court has decided to consider laws of Convention and Covenant as external, autonomous legal system and therefore laws are "not modifiable by ordinary legislative action and ... [are] ... immediately applicable by all judges rather than only through centralized constitutional review."). Article 10 of the Italian Constitution concerns "conforming the national legal order to customary international law." *Id.* at 601. The practical effect of article 10 is that customary international law takes precedence over subsequent domestic statutory law. *Id.* at 603. *But see* MAURO CAPPELLETTI, *THE JUDICIAL PROCESS IN COMPARATIVE PERSPECTIVE* 166-67 (Mauro Cappelletti et al. eds. 1989) (stating in Italy "Convention is directly applicable but with a status equal to ordinary national law and thus susceptible to supersession by subsequent national law").

¹² European Commission of Human Rights. See *Convention*, *supra* note 4, § II, Art. 19 (establishing commission). Section III and IV of the Convention, Articles 20-31, 33-37, and 48 discuss the composition and activity of the Commission. *Id.* § III, art. 20-31, 33-37, § IV, art. 48. Under the Convention, any case submitted to the European Court of Human Rights originates through application to the Commission. *Id.* § IV, art. 47. The Commission determines the admissibility of the application by ensuring that all domestic remedies have been exhausted and that the application has been submitted less than six months from the date of a final decision by the state courts involved. *Id.* § III, art. 25-28. Once the application has been deemed admissible, the Commission investigates the case and encourages the parties to reach an amicable settlement. *Id.* § III, art. 28-31. If a settlement cannot be reached, the Commission writes a report containing an opinion as to whether a State has violated the norms of the Convention. *Convention*, *supra* note 4, § III, art. 31. This report is submitted to the Committee of Ministers at the Council of Europe. *Id.* Within three months, the Commission may then refer the case to the European Court of Human Rights. See VINCENT BERGER, *1 CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS* 2-3 (1989); LAWS, RIGHTS AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS 17-18 (Jacob Sundberg ed., 1986).

Court of Human Rights.¹³ These fully enforceable rights cannot directly benefit the individual before the courts of his own country due to the particular conditions of this system.

Secondly, reference was made to Article 57 of the Convention, which obliges every high contracting party, at the request of the Secretary General of the Council of Europe, to explain how its internal law ensures the effective implementation of all the provisions contained in the Convention.¹⁴ It was also assumed that Article 57 excluded a provision stating that the protections promulgated at the Convention were a direct part of domestic law.

The opposite view was taken by the trial judges and certain administrative judges who affirmed the norms of the Convention not only as domestic law, but also as constitutional law. This approach, however, was consistently rejected by the Court of Cassation's decisions and by the Constitutional Court.¹⁵ This view will therefore not be further addressed but mention was made of it to provide a brief glimpse into the extent of this debate.

At the beginning of the 1980's, after a rather extended period of resistance to new ideas, some of the Court of Cassation's decisions acknowledged that the norms of the Convention were immediately and directly applicable to domestic cases. The exception is those provisions whose contents are considered so vague in their terms as to not indicate sufficiently clear situations.

¹³ European Court of Human Rights. *See Convention, supra* note 4, § 4, art. 38-56 (regulating and organizing European Court of Human Rights). The Court was established to "ensure the observance of the engagements undertaken by the High Contracting Parties in the present Convention." *Id.* § 2, art. 19(b). The European Court of Human Rights is located in Strasbourg, France and consists of judges from the countries who are members of the Council of Europe. *Convention, supra* note 4, § IV, art. 38. Its purpose is to enforce the obligations of the parties under the Convention. *Id.* § IV, art. 45. The vast majority of applications to the court are made by individuals claiming human rights violations by their own countries. *See* Daniel S. Sullivan, *Effective International Dispute Settlement Mechanisms and the Necessary Condition of Liberal Democracy*, 81 GEO. L.J. 2369, 2374-75 (1993).

¹⁴ *Convention, supra* note 4, § 5, art. 57.

¹⁵ *See* GRISOLI, *supra* note 1, at 35-36. The Constitutional Court is considered the highest court of the country. Its function is to oversee the application of the Constitution of the Republic. *Id.* at 35. It has jurisdiction to decide cases concerning the constitutionality of federal and regional law, the conflicts between state and regional courts, the admissibility of requests for referenda, and the impeachment of the highest government officials. *Id.* at 35-36.

Since other decisions continued to uphold the previous and opposing view, a conflict came about which required the intervention of the United Criminal Divisions of the Court (*Sezioni Unite Penali*). This is the extended panel of the supreme court which adjudicates the most important cases, or cases in which there have been contrasting precedents of the individual divisions of the court.¹⁶ In 1988, the United Divisions passed judgment on the appeal of Paolo Castro, accepting the immediate applicability of the norms of the Convention in Italy.¹⁷

In this respect, the court made three observations. First, it observed that from a reading of Articles 1 and 13 of the Convention¹⁸ it is apparent that the high contracting parties must secure a direct recognition of the rights and freedoms defined in the Convention itself. Therefore, it is responsible for more than only to "undertake to respect" these rights and freedoms, as was stated in the first version of the draft Convention.¹⁹ Second, protection at the international level does not exclude protection by national judges, but serves to reinforce this protection by controlling the way in which national judicial authorities ensure respect for these rights. The opposing argument, drawn from the protections afforded through recourse to the Commission of Human Rights, has no foundation.²⁰ Third, the domestic applicability of the Convention flows from the principle that Italian law is to be adapted to international treaty law. The writers agree that, where the international legal instrument contains a model legal procedure or action, complete in all the essential elements and which may be directly adopted by the domestic system, the internal implementation of the international model is automatic. When the international instrument does not contain such a model, however, it cannot be self-executing. To become effective,

¹⁶ See GRISOLI, *supra* note 1, at 35. The Court of Cassation at times renders judgment by united divisions (*sezione unite*) which consists of a panel of fifteen judges.

¹⁷ Case of Paolo Castro, decision of the "united division" of the Italian Supreme Court of Cassation, November 23, 1988 [hereinafter *Castro*].

¹⁸ See *Convention*, *supra* note 4, § 1, art. 1 ("The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention."); *Id.* § 1, Art. 13 ("Everyone whose rights and freedoms as set forth in this convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity").

¹⁹ *Castro*, *supra* note 17.

²⁰ *Id.*

the domestic legal implications imposed by the instrument require state legislative action.²¹

The Constitutional Court has agreed with the approach taken by the United Divisions of the Court of Cassation.²² Subsequent decisions in both criminal and civil matters have uniformly proceeded in this same direction.²³

Recently, the Court of Cassation has had to face the question of whether domestic laws enacted subsequent to the Convention can have the effect of repealing the Convention's provisions, or whether the norms of the Convention are more "resistant" than the subsequent domestic norms. The Court's answer has been in favor of the greater "resistance" of the provisions of the Convention over subsequent domestic norms.

In 1993, the Court of Cassation held this to be so in the case of Juan Carlos Medrano.²⁴ It is worth referring to this case in greater detail for the distinctive way it applied the norms of the Convention in its decision. Juan Carlos Medrano, an Argentinian citizen, was found guilty by the Tribunal of Rome of a serious drug-related offense.²⁵ The Tribunal decided that upon completion of his sentence Medrano should be deported from Italian territory. This latter provision was adopted on the basis of Section 86 T.U. of the law on narcotic drugs no. 162 of 1990.²⁶ That provision expressly states that a foreigner found guilty of a seri-

²¹ *Id.*

²² See generally CAPPELLETTI ET AL., *supra* note 2, at 76-77 (discussing interaction of Court of Cassation and Constitutional Court).

²³ See Stephen P. Freccero, *An Introduction to the New Italian Criminal Procedure*, 21 AM. J. CRIM. L. 345, 354-55 (1994) (discussing constitutional court as final interpretive authority of any constitutional provision whose decisions are retroactively and dispositively applied in criminal cases).

²⁴ Case of Juan Carlos Medrano, Italian Supreme Court of Cassation, 1993 [hereinafter *Medrano*].

²⁵ *Id.* There are three principal criminal courts in Italy which together constituted the equivalent of the American trial courts. Freccero, *supra* note 23, at 350. The first, the *Pretura*, is the lowest of the three and consists of one judge. *Id.* The judge decides on all crimes punishable by a maximum penalty of four years imprisonment. *Id.* The second court is the *Corte d'assise* which is composed of eight judges and has jurisdiction over felonies. *Id.* at 350-352. Finally, the *Tribunale*, which is divided into judicial circuits ("*circondari*") that roughly correspond to the Italian provinces, is composed of three judges and has jurisdiction over all matters not assigned to the *Pretura* or the *Corte d'assise*. *Id.* at 352. Within its jurisdiction are cases involving financial crimes, crimes committed by the press, and unlawful participation in secret associations. Freccero, *supra* note 23, at 350; See generally GRISOLI, *supra* note 1, at 33-47 (discussing hierarchy of Italian courts).

²⁶ Law on Narcotic Drugs, no. 162, Legis. Ital. I. § 86 (1990).

ous drug-related crime should be deported from the state upon completion of his sentence.

Upon completion of his sentence, the *Majistrato di sorveglianza* (the judge responsible for overseeing the carrying out of the sentence) in Trieste ordered the expulsion of Medrano from Italy.²⁷ The decision was upheld by the *Tribunale di sorveglianza*.²⁸ Medrano appealed to the Court of Cassati, arguing that the expulsion order was illegal because it went against the fundamental and inalienable rights relating to the protection of the family and the education of children, recognized by both the Italian Constitution and international treaties on human rights ratified by the Italian government.²⁹

The Court of Cassation posed two questions. The first issue concerned the link between Section 86 of the 1990 law³⁰ and Article 8 of the Convention,³¹ from which it might be concluded that the obligation to deport is not automatic, but instead must be

²⁷ *Medrano*, *supra* note 24. Magistrates are career judges in Italy. Freccero, *supra* note 23, at 355. In the Italian criminal justice system, magistrates determine the guilt or innocence of the defendant and the appropriate punishment. *Id.* at 356.

²⁸ *Medrano*, *supra* note 24. The *Tribunale di sorveglianza* is the *tribunale* responsible for supervising the carrying out of sentences.

²⁹ *Medrano*, *supra* note 24; *see also* *Convention*, *supra* note 4, § 1, art. 8 (declaring right to respect for private and family life); First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, Mar. 20, 1952, art. 2, 213 U.N.T.S. 262 (requiring that states shall respect right of parents to educate children).

³⁰ No. 162 Legisl. Ital. I. § 86.

³¹ *Convention*, *supra* note 4, § 1, art. 8. Article 8 of the Convention states:

(1) Everyone has the right to respect for his private and family life, his home and his correspondence.

(2) There shall be no interference by a public authority with the exercise of this right such as is in accordance with the law and is necessary in a democratic society in the interests of national security, the economic well-being of the country, for the prevention of disorder and crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Id.

Respect for one's private and family life must be protected against any unlawful interference by the State. G. Cohen-Jonathan, *Respect for Private and Family Life*, in *THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS* 405 (R. St. J. Macdonald *et. al.* eds., 1993). *See also* *Marckx v. Belgium*, 2 Eur. H.R. Rep. 330, 331 (1979) ("Article 8 did not merely compel a state to abstain from interference in family life, but might also impose positive obligations."); *X and Y v. The Netherlands*, 6 Eur. H.R. Rep. 311, 315 (1983) (discussing Government's obligation to secure respect for private lives). In determining whether a positive obligation exists, a balance must be struck between the general interests of the community and the interests of the individual. *Rees v. United Kingdom*, 9 Eur. H.R. Rep. 56, 64 (1986).

reconciled with the family interests of the person to be deported. The second issue questioned the legitimacy of this proposed link. Since Article 86 is a domestic legal provision enacted subsequent to the Convention, the Court had to determine whether the provisions of the Convention had greater weight and thus could not be repealed by successive domestic laws. The Court answered both questions in the affirmative.

As for the first question, the position taken by the judicial bodies in Strasbourg, where Article 8 of the Convention was drafted, was strictly followed. The Court held that in cases where deportation might cause the breakdown in family unity and life, it is necessary to look into the specific circumstances of the case with a view to forming a decision which balances the various interests concerned.³² Factors which are relevant when considering deportation are the seriousness of the crime, the ability of the family members to follow the person deported, and the age and personal situations of the children and family members in general.³³

Turning to the second question, the court noted that special weight is attached to the provisions of the Convention with respect to successive domestic provisions because, following their insertion into the Italian legal system, the provisions of the Convention must be recognized as general principles.³⁴ This conclusion was approved by the Court of Justice of the European Communities and was formally and incontestably recognized in Article F of the Treaty of Maastricht.³⁵ Since it had erroneously

³² *Medrano*, *supra* note 24. The Convention must always be interpreted in light of current circumstances. See generally Cohen-Jonathan, *supra* note 31, at 412. The interference by a public authority may be justified in order to protect human health and morals, and the rights of others. See *Convention*, *supra* note 4, § 1, art. 8. If, however, an individual's offense is not serious, such punishments as deportation wrongly interfere with the family unit and are not justified. See *Moustagium v. Belgium*, 13 Eur. H.R. Rep. 802 (1991); see also Cohen-Jonathan, *supra*, note 31 at 412-13 (discussing *B. v. France*, App. No. 13343/87, 16 Eur. H.R. Rep. 1 (Eur. Ct. of H.R. 1992) (noting where consequences for applicant were disproportionate to general societal interests).

³³ *Medrano*, *supra* note 24.

³⁴ See *supra* note 11 (comparing Convention's status with subsequent national domestic law).

³⁵ Treaty on European Union, Feb. 7, 1992, art. F, O.J. c224/1 (1992). The Treaty on European Union, signed in Maastricht, went into effect upon ratification by Germany. See Heinrich Kirschner, *The Framework of the European Union Under the Treaty of Maastricht*, 13 J.L. & COM. 233 (1994). The treaty is part of the European Union's constitution and precludes Member State action in fields where it has

considered the deportation order to be automatic without considering the interests protected by Article 8, paragraph 1 of the Convention, the application of this conclusion to the Medrano case led to the annulment of the appealed decision.³⁶

CONCLUSION

With the decisions in Paolo Castro³⁷ and Juan Carlos Medrano,³⁸ the Court of Cassation has adapted to the trend promoted by international judicial bodies, giving the widest possible scope to the effect of the Convention within the interested States. This goal was reached in an international spirit, a spirit which should be emphasized because it represents an important cultural and political victory. Atavistic parochial reluctance was overcome. Even at the institutional level, the work was faced with a spirit open to understanding and willingness, a spirit which has always been a characteristic of the best Italian people.

legislated. Stephen Weatherill, *Beyond Preemption? Shared Competence and Constitutional Change in the European Community*, in *LEGAL ISSUES OF THE MAASTRICHT THEORY* 13, 16 (David O'Keefe & Patrick M. Twomey eds., 1994).

Article F of the Treaty states "[t]he Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from constitutional traditions common to the member states, as general principles of community law." Treaty on European Union, *supra* at art. F.

³⁶ *Medrano*, *supra* note 24.

³⁷ *Castro*, *supra* note 17.

³⁸ *Medrano*, *supra* note 24.