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The ECrtHR Case Law as a Tool for Harmonization of Domestic Administrative Laws in Europe

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Abstract

The article deals with the European Court of Human Rights case law as an important source for improving the harmonization of the administrative law principles in Europe.

The European Court has developed new rules derived from the Conventional provisions, which represent important guarantees for the creation of a common core of principles in national administrative law. The article aims to analyse the vertical and horizontal relationship between domestic administrative law and the ECHR. Besides referring directly to the European Court case law, national courts are starting to refer to the case law of other national administrative courts which implement ECHR principles.

The outcome could result in a mutual exchange not only between the ECrtHR and the administrative courts, but also between domestic courts themselves. Such a mutual exchange could increase a new form of harmonization and cooperation for a common standard of principles for administrative law in Europe.

1 Introductory Remarks

This paper will focus on the European Convention on Human Rights (ECHR) as an important source for improving a horizontal harmonization of the principles of administrative law in Europe.

Perhaps the title of this paper should be written in the form of a question rather than a statement,

the question being: can the European Court of Human Rights (ECrtHR) case law be considered a tool for the harmonization of domestic administrative law in Europe?

The aim of this paper is to suggest some reflections in order to try to answer that question.

First, it is necessary to underline some aspects of the vertical relationship between the ECrtHR and the domestic administrative courts in the ECHR system.

Second, it will be interesting to analyse whether there are some cases where the horizontal relationship among national courts reveals the tendency to apply ECrtHR case law. This would imply the need to refer to it as a sort of common European standard for the protection of human rights in the field of administrative law. It will be pointed out that, besides referring directly to European

Court case law, national courts (such as the French Council of State) are starting to refer to case law of other national administrative courts which implement the principles developed in Strasbourg.

The issue also involves the problem of the future accession of the European Union (EU) to the ECHR. This is strictly linked with the need of focusing on the role played by the European Union and the Member States in the implementation of the Convention rights.

Thus, it must be underlined that the implementation of Convention rights in the EU reveals the existence of a sort of 'trialogue' among the Convention institutions (i.e. the Council of Europe, the Ministers Committee and the Court of Strasbourg), the EU institutions (i.e. the European Council, the Commission and the Court of Justice) and the Member States (i.e. the Parliaments, the governments and the domestic courts).[1] In such a 'trialogue', each subject develops relationships with others, while at the same time keeping its own autonomy and individuality. The outcome could result in a mutual exchange not only between the ECrtHR and the national administrative courts, but also between domestic courts themselves. Analysing such a new form of mutual exchange, the paper could be considered as an incentive for further research about the increasing horizontal harmonization and cooperation for a common standard of principles for administrative law in Europe.

2 Principles for Administrative Law in the ECrtHR Case Law

As is well known, in its judgments the European Court applies the ECHR provisions, creating 'autonomous meanings' which allow for a modern approach to the traditional Convention rights. Fundamental rights and freedoms written in the Convention are consequently interpreted in accordance with the present reality of the relationship between individuals and public powers.[2] The outcome of the creative interpretation given by the Court is the development of new rules derived from the text of the Convention provisions. This is particularly relevant in the administrative law field, where originally the impact of the traditional ECHR provisions was not as wide and deep as in the civil or criminal law fields.

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1 With reference to that expression in the European contest R. Toniatti, *The European Judicial Trialogue: Premises and Promises for the Protection of Fundamental Rights*, Paper at the Conference 'La adhesión de la Unión Europea al Convenio Europeo de Derechos Humanos' – Universitat Pompeu Fabra, Barcelona, 3-4 February 2011.

2 About the 'autonomous meanings' created by the Court F. Sudre, 'Le recours aux "notions autonomes"', in: F. Sudre (dir.), *L'interpretation de la Convention européenne des droits de l'homme*, Bruxelles, 1998, 93.

An example of this is Article 6 ECHR (right to a fair trial). The provision, limited in the Convention text to the determination either of a 'civil rights and obligations' or of a 'criminal charge', is also interpreted by the Court as a right to a 'fair administrative proceeding', not only with reference to the jurisdictional administrative proceedings but also to the administrative proceedings, which are not 'judicial' under national law.[3] Therefore the principle of fair trial has been applied to several proceedings, which are administrative in domestic law, concerning, for instance, customs offences, disciplinary sanctions imposed to prisoners[4], traffic offences[5] and fiscal penalties[6]. Moreover, the wide interpretation of the concept of 'criminal charge' in the perspective of the Convention led the Court to consider the administrative proceedings concerning sanctions imposed by Independent Administrative Authorities as also valid for the application of Article 6.[7]

The application of the principle of the fair trial in disciplinary and sanctionary proceedings before administrative authorities shows the need of the Court to provide important guarantees, for instance the impartiality and the independence

3 Interpreting the notion of 'civil rights and obligations', the Court held that the mere fact that the right or obligation at issue is governed by public law in national legislation does not exclude the applicability of the first paragraph of Article 6. The leading case is the judgment of 16 July 1971, *Michael Ringeisen v. Autriche*, A, No. 13. See also the judgment of 28 June 1978, *König v. Germany*, A, No. 27 and judgment 23 October 1985, *Benthem v. Netherlands*, A, No. 97. It is through the concept of 'criminal charge' that the Court comes to apply the principle of Article 6 to administrative proceedings which are not of a judicial nature under national law. In the Judgment of 8 June 1976, *Engel v. Netherlands*, A, No. 22, concerning a disciplinary proceeding under military law, the Court underlined that the character of a procedure under domestic law cannot be decisive in the question of whether Article 6 is applicable. In particular the case dealt with the violation of Article 6 ECHR under the aspect of reasonable time.

4 See the judgment of 28 June 1984, *Campbell and Fell v. United Kingdom*, A, No. 80. See also the judgment of 9 October 2003, *Ezeh and Connors v. United Kingdom*, relating to a disciplinary sanction of two additional days of prison imposed to the two applicant prisoners.

5 See for example the leading judgment of 21 February 1984, *Oztürk v. Germany*, A, No. 73; and also the next judgments of 23 October 1995, *Schmautzer v. Austria*; *Umlauft v. Austria*; *Grandinger v. Austria*, A, No. 328; judgment of 23 September 1998, *Malige v. France*, in www.echr.coe.int and in *JCP-La Semaine juridique*, 1999, G, II, 10086, note F. Sudre, *Le retrait de points du permis de conduire au regard de l'Article 6, § 1, de la Convention EDH*.

6 In this field the European Court has adopted the position that those penalties which are not compensatory in nature, but are of a punitive character give the proceedings a criminal character for the purpose of Article 6. See, for example, judgment of 7 October 1988, *Salabiaku*, A, No. 141-A; the mentioned judgment of 24 February 1994, *Bendenoun v. France*, and recently judgment of 11 gennaio 2000, *Meignen v. France*, in www.echr.coe.int.

7 In the judgment of 27 August 2002, *Didier v. France*, in www.echr.coe.int and in *Revue de droit public*, 2003, 3, note G. Gonzales, the Court has found that the *Conseil des marchés financiers* has the nature of 'tribunal' falling under the scope of Article 6. The *Conseil* is a French administrative authority holding disciplinary powers, which has taken the place of *Conseil des bourses de valeurs* and of *Conseil des marché à terme* and now is transformed, by the Law of 1st August 2003, No. 706, in *Autorité des marché financiers*. When the Authority imposes administrative sanctions of a punitive nature it should be considered, according to the opinion of the Court, a tribunal which must guarantee fairness of treatment.

of the Authority's decision[8] or the respect of equality of arms, the guarantee of a reasonable time and the right to a hearing.[9]

Important guarantees and fundamental principles of administrative law are enshrined by the Court, not only through the reference to a wide interpretation of the right to a fair trial in Article 6, but also by applying other Convention rights, which are relevant in the case concerned.

A reference to the principle of fairness, proportionality and good administration in the decision-making process can be found, for instance, in the case law concerning Article 1 Protocol No. 1 ECHR.On several occasions, the European Court held that an interference with the right to the peaceful enjoyment of possession – as laid down in the first sentence of the first paragraph of Article 1 of Protocol No. 1 – must be lawful andmust strike a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights.[10] In particular, there must be a reasonable relationship of proportionality between the means employed and the aim to be realised by any measure applied by the State, including measures depriving a person of their possessions, such as in the case of an expropriation proceeding. In several judgments (many of them concerning Italian law)[11] the Strasbourg Court considered the expropriation proceedings, which did not provide for the payment of an amount reasonably related to the market

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8 See the judgment of 27 October 1987, *Pudas v. Sweden*, *A*, No. 125-A; and judgment of 22 October 1984, *Sramek v. Austria*, *A*, No. 84

9 See the judgment of 23 June 1981, *Le Compte, Van Leuven and De Meyere v. Belgium*, A, No. 43; Judgment of 29 May 1986, *Deumeland v. Germany*, *A*, No. 100. A more complete analysis about this case law could be found in S. Mirate, 'Protection of ECHR rights in administrative proceedings', in: R. Caranta (Ed.), *Interest representation in administrative proceedings*, Napoli 2007, 235 ff.

10 See for instance ECrtHR, 21 February 1986, *James and others v. the United Kingdom*, A, No. 98, in particular § 37, which refers to the previous judgment 23 September 1982, *Sporrong e Lönroth v. Sweden*, A, No. 52; ECrtHR, 9 December 1994, *The Holy Monasteries v. Greece*, A, No. 301-A, in particular § 56; ECrtHR, 23 November 2000, *The former King of Greece and others v. Greece*, *Reports*, 2000-XII.

11 See about the value for the compensation in the Italian expropriation proceedings ECrtHR, Great Chamber, 29 March 2006, *Scordino v. Italy*, in www.echr.coe.int, in particular §§ 93-104; and about the Italian practise of the 'constructive expropriation' or 'indirect expropriation', see in particular the judgment ECrtHR, 17 May 2005, *Scordino v. Italy* and the following judgment for the application of Article 41 ECHR, 6 March 2007, *Scordino v. Italy*; ECrtHR 12 January 2006, *Sciarrotta v. Italy*; ECrtHR 20 April 2006, *Sciscio v. Italy*; ECrtHR, 19 October 2006, *Gautieri v. Italy*; ECrtHR, 16 November 2006, *Ippoliti v. Italy*; ECrtHR 18 march 2008, *Velocci v. Italy*, all in www.echr.coe.int (all documents are in French only). In these judgments the European Court criticized the application of the Italian rule on constructive expropriations that resulted in arbitrary outcomes depriving litigants of effective protection of their rights. The occupation of private land in order to carry out building work, which took place without an expropriation order and without compensation, infringed Article 1 of the Protocol No. 1 ECHR.

value of the private property, as a disproportionate interferencewith the Convention right safeguarded by Article 1 of Protocol No. 1 ECHR.[12]

The Strasbourg Court often stresses that the Convention aims to guarantee rights which are not abstract or theoretical but rights which are practical and effective.[13]Providing measures of legal protection against arbitrary interference by public authorities is essential for the protection of ECHR rights. Whilst ECHR provisions contain no explicit procedural requirements, it is important for the effective enjoyment of the rights guaranteed by these provisions that the decision-making process is fair and such as to afford due respect to the interests safeguarded by it.

It is, in particular, with respect to Article 8 ECHR (right to respect for private and family life) that the European Court has undertaken the task to scrutinise the decision-making process to ensure that due weight has been accorded to the Convention rights in the administrative proceedings. In several judgments concerning the field of health protection particularly, the Strasbourg Court has pointed out the need to determine whether, having regard to the peculiar circumstances of the case and notably the nature of the decisions to be taken, an individual has been involved in the decision-making process seen as a whole, to a degree sufficient to provide him or her with the requisite protection of their interests.[14] Actually Article 8 ECHR does not contain any reference to procedural guarantees to ensure the right to respect for private and family life, home and correspondence.

The second paragraph provides a fair balance between the fundamental right and the possible interference by a public authority with the exercise of this right, whether in accordance with the law, and if it is necessary, 'in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others' (Art. 8 ECHR, Subsection. 2). But there is no reference to

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12 The rule according to which only full compensation can be regarded as reasonably related to the value of the property, is not without exceptions in Strasbourg case law. In some cases the Court found that legitimate objectives in the 'public interest', such as those pursued in measures of economic reform or measures designed to achieve greater social justice, could call for less than reimbursement of the full market value. See for example the judgment 23 November 2000, *The former King of Greece and others v. Greece*, already quoted, with reference to the change of the country's constitutional system from monarchy to republic; the judgment *Kopecky v. Slovakia*, 28 September 2004, § 35, in *Reports*, 2004-IX, referring to a context of a change of political and economic regime; or the judgment *James and others v. the United Kingdom*, already mentioned, in the context of a leasehold-reform legislation.

13 See for all the judgment of 9 October 1979, *Airey v. Ireland*, *A*, No. 32, § 24.

14 Judgment of 20 March 2007, *Tysiac v. Poland*, in www.echr.coe.int. See, in the same sense, the next judgments 1st December 2008, *X v. Croatia*; 7 April 2009, *Brânduse v. Romania*, both in www.echr.coe.int. See also the judgment of 8 July 2003, *Hatton and others v. United Kingdom*, in www.echr.coe.int, § 99 ff.

the participatory rights of individuals, such as the right to be heard in proceedings concerning their private and family life.

It is the Court in its judgments which arises from a general principle of a democratic society, such as the rule of law, the right to participate in the decision-making process concerning interests safeguarded by Article 8 ECHR. Thus the aim to guarantee participatory rights in the administrative proceedings is achieved by the Strasbourg Court without referring to only one 'procedural' provision in the European Convention (i.e. Article 6 ECHR). The aim is also achieved through an interpretative creation of the contents of Article 8, which includes an instrumental right to a fair proceeding as a relevant part of the substantive right to the respect for private and family life. Therefore the Convention rights, which have a substantive nature, receive protection in European case law through procedural guarantees, which are not formally provided in the text of the European Convention on Human Rights.

3 The Vertical Relationship between the ECrtHR and Domestic Administrative Courts

The European Court develops new rules derived from Conventional provisions, which represent important guarantees for the creation of a common core of administrative law principles. The outcome is given by Strasbourg through a wide application of the principle of the rule of law. The Court underlines that this fundamental principle of the democratic society is inherent in all the ECHR Articles[15] and in compliance with it, domestic laws must provide measures of legal protection of the Convention rights against arbitrary interference by public authorities.[16]

A pivotal role in such a creation of a common core of administrative laws principles is played by the relationship between the ECHR and the national legal systems, and in particular the 'dialogue' between the ECrtHR and domestic administrative courts.[17]

Nevertheless, it must be said that the impact of the European Convention and of its case law in providing a common system of administrative law principles is not uniform in the different Member States. It depends on the legal authority of the Convention and the European Court's decisions in national

15 See the judgment of 25 March 1999, *Iatridis v. Greece*, in www.echr.coe.int, § 58; the judgment of 24 November 2005, *Capital Bank AD v. Bulgaria*, in www.echr.coe.int, § 133.

16 See in particular the judgment of 2 August 1984, *Malone v. United Kingdom*, A, No. 82, § 67.

17 French scholars often refer to the expression 'Dialogue des juges' to describe the growing attention paid by the Conseil d'Etat in relation to the European and Community case law. On this regard see in particular F. Sudre (dir.), 'Le dialogue des juges', *Cahiers de l'Institut de Droit Européen des Droits de l'homme*, n° 11, Faculté de droit de Montpellier 2007.

law. As it has been noted, 'the place and the role of the European Convention on Human Rights and the European Court of Human Rights is different in different jurisdictions'.[18] How the national legal systems and the courts are influenced by the ECrtHR case law depends, to a large extent, on the place and the role that each domestic law gives the Convention.

Many times the Strasbourg Court has underlined that the Convention does not impose on Contracting States 'any given manner for ensuring within domestic law the effective implementation of any of its provisions'.[19]Contrary to European Union Law, the law of the Convention does not require a strictly uniform application throughout Europe. The ECHR remains a 'minimum standard' which allows for 'margin of appreciations' binding the national judge to have regard to the peculiar considerations of law and policy in the domestic legal order.[20]

It must be considered furthermore that the relationship between the domestic courts and the ECrtHR is not as prompt and direct as the relationship between the domestic courts and the European Court of Justice. The judgments in Strasbourg have direct effect only between the parties, they do not imply any cassation effect, nor do they annul any laws, judgments or any other acts taken by Member State's authorities.[21] Moreover, in the Convention system there is not a mechanism such as the preliminary rulings provided by Article 35 EU Treaty for the jurisdiction of the Court of Justice, which represents an important

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18 E. Örücü, *Whether Comparativism in Human Rights Cases?*, in: E. Örücü (Ed.), *Judicial Comparativism in Human Rights Cases*, London 2003, 229.

19 ECrtHR, 26 November 1991, *Observer and Guardian v. United Kingdom*, *A*, n. 216, § 76; ECrtHR, 25 March 1983, *Silver and Others*, *A*, n. 61, § 113; ECrtHR, 6 February 1976, *Swedish Engine Drivers' Union*, *A*, n. 20, § 50.

20 J. Polakiewicz, 'The Status of the Convention in National Law', in: R. Blackburn & J. Polakiewicz, *Fundamental rights in Europe*, Oxford 2001, 52-53, who underlines also that even the right to an effective remedy, provided by Article 13 ECHR, cannot be considered as a remedy whereby the laws of a Contracting State may be impugned before a national authority as being in themselves contrary to the Convention. 'Instead of imposing an obligation to give direct effect to the substantive provisions of the Convention, article 13 of the ECHR only guarantees the availability at the national level of an effective remedy to enforce the substance of the Convention rights and freedoms in whatever form they may happen to be secured'. See also the judgments of the ECrtHR *Ergi v. Turkey*, 28 July 1998, *Reports of Judgments and Decisions*, 1998, IV, 1781, § 96; 9 December 1994, *The Holy Monasteries v. Greece*, *A*, n. 301-A; *James and Others*, 21 February 1986, *A*, n. 98, § 84; *Lithgow and Others*, 8 July 1986, *A*, n. 102, § 205. About the doctrine of the Margin of Appreciation see P. van Dijk & G.J.H. van Hoof, *Theory and practice of the European Convention on Human Rights*, The Hague 1998, 82 e ss.; 'The doctrine of the Margin of Appreciation under the European Convention on Human Rights: Its Legitimacy in Theory and Application in Practice', *HRLJ* 1998, 1-36; R.St.J. Macdonald, 'The Margin of Appreciation in the Jurisprudence of the European Court of Human Rights, International Law at the time of its Codification', *Essays in honour of Judge Robert Ago*, Milano 1987, 187.

21 G. Ress, 'The Effects of Judgments and Decisions in Domestic Law', in: R. Macdonald, F. Matscher & H. Petzold, *European System for the protection of human rights*, already quoted, 802. On the topic see recently G. Martinico & O. Pollicino (Eds), *The National Judicial Treatment of the ECHR and EU Laws. A Comparative Constitutional Perspective*, Groningen 2010.

link between national judges and the Luxembourg Court.The distinction existing between the ECHR and EU law has been well pointed out by Lord Hoffman in his Judicial Studies Board Annual Lecture:[22] 'The European institutions, including the Court of Justice in Luxembourg, were given a mandate to unify the laws of Europe. The Strasbourg court, on the other hand, has no mandate to unify the laws of Europe on the many subjects which may arguably touch upon human rights...The proposition that the Convention is a 'living instrument' is the banner under which the Strasbourg court has assumed power to legislate what they consider to be required by 'European public order'.

This is the reason for the growing attitude shown by the Strasbourg Court to concentrate its efforts on decisions of 'principle', decisions which create jurisprudence. The place of individual relief, while important and particularly so regarding the most serious violations, seems to have become secondary to the aim of raising the general standard of human rights protection and extending human rights jurisprudence throughout the community of Convention States.[23] In this way, the ECrtHR case law has indirect effects on domestic laws insofar as it is able to influence the national case law, and to create a common core of principles with reference to the implementation of the fundamental rights and freedoms enshrined in the Convention. It is possible only to refer to 'indirect effects' because the European Court case law has no real binding force towards the domestic courts. Nevertheless, it must be borne in mind that, according to the principle of subsidiarity, the ECHR system requires national judges to undertake the role of 'first guardians' in protecting fundamental rights, as enshrined in the Convention and as interpreted by the European Court. As a consequence, domestic courts have to give a consistent interpretation of internal laws in accordance with the ECrtHR case law. In default of binding effects, to what extent they undertake that role first of all depends on the place given the Convention in the national legal order and on the attention paid by the domestic law to this international source.

It is a judicial as well as a cultural matter. By way of example it is worth recalling a datum.

In 2007 the French Council of State handed down 102 decisions (judgments and advice) which referred to the ECHR as a legal source capable of forming the solution of the case.[24] This is a typical case of the effective cooperation of the French supreme administrative court as a principal actor in the already mentioned 'dialogue des juges', showing an existing and effectual relationship

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22 Lord Hoffman, *Judicial Studies Board Annual Lecture*, London, 19 March 2009.

23 L. Wildhaber, 'A constitutional future for the European Court of Human Rights?', *HRLJ* 2002, 163, who suggests that 'This would also be the best means of ensuring that the common minimum standards are maintained across Europe'.

24 See on this J. Andriantsimbazovina & L. Sermet, 'Jurisprudence administrative et Convention européenne des droits de l'homme', *RFDA* 2008, 743.

between national courts and the international jurisdiction of the Court of Strasbourg. Such a 'dialogue' is one of the most important tools for the realisation of a common minimum standard of protection of human rights in Europe.[25]

In the same year, the Italian Council of State handed down just 39 decisions that, directly or indirectly, concerned the ECHR. Research, carried out using the search engine of the official web site of the Italian Council of State,[26] shows that in the majority of its judgments, the Italian administrative supreme court referred to the Convention only in order to exclude the relevance of the Conventional provisions submitted by the complainants, without giving a well-reasoned opinion on the actual application of these provisions in the case.

This is interesting when considering the true role played by the ECHR in Italian administrative case law as an international legal source to which the courts habitually refer when giving judgments regarding the protection of fundamental rights. The lack of attention paid by the Italian Council of State to the ECHR provisions and to the Strasbourg case law came primarily from the 'ancient dilemma' which affected the status of the ECHR in the Italian legal sources system. The legal authority of an international treaty in the Italian system normally derives from the nature of the source through which the treaty itself has been ratified. Thus the European Convention, incorporated into the Italian system through an ordinary law (law No. 848 dated 4 August 1955), formally took the authority of an ordinary statute adopted by Parliament. In principle, the Convention's provisions could have been derogated by posterior conflicting legislation and it was not considered a supranational source which domestic courts considered in interpreting national law. With the two judgments dated 24 October 2007[27] the Italian Constitutional Court held that the provision of Article 117, par. 1, must be considered a constitutional rule granting superior legal authority to the European Convention, over and above ordinary domestic statute law. The judgments overruled the precedent solution. Nowadays a domestic law in contrast with the provisions of the Convention, as interpreted by the European Court, violates Article 117, par. 1, of the Italian Constitution and must be declared unconstitutional by the Constitutional Court.[28] The 'revolu-

25 See on this S. Mirate, 'The Role of the ECHR in the Italian Administrative Case Law. An Analysis after the two Judgments of the Constitutional Court No. 348 and No. 349 of 2007', *Italian Journal of Public Law* (www.ijpl.eu) 2010, 260-297.

26 The official website of the Italian Council of State is www.giustizia-amministrativa.it.

27 See the judgments Italian Constitutional Court, 24 October 2007, n. 348 and n. 349, in www.cortecostituzionale.it. See for a comment S. Mirate, 'A new status for the European Convention on Human Rights in Italy. The Italian Constitutional Court and the new "Conventional review" on national laws', *European Public Law* 2009, 89-110.

28 Under Italian law the Constitutional Court can pass judgment on the constitutionality of national laws, regional laws and government acts having the force of law (such as the 'law-decree', or 'decreto legge', and the 'legislative decree', or 'decreto legislativo'). The most common way to bring cases before the Constitutional Court is the 'ricorso in via incidentale' (interlocutory appeal). When a case is discussed in a Court, the parties or the judge can raise the question of the constitutionality of a law that must be applied in the case. If the judge decides the question is relevant to the case, he or she must refer the question to the Constitutional Court and at the

tionary' decisions have the effect of according a new consideration to the ECHR and to European case law in Italian courts. In recent years, administrative courts, and first of all the Council of State, have progressively shown a new attitude: that of taking the Strasbourg case law into account when making their decisions interpreting the domestic law in the light of Convention guarantees.

4 The Horizontal Relationship between Administrative Courts and their Reference to ECrtHR Case Law

There is a wider knowledge of the ECHR provisions and larger implementation of Convention rights in national law arising from the growing attention paid by domestic courts to ECrtHR case law. As a result, the ECHR is increasingly circulating in domestic courts; such a circulation has become not only 'vertical' (from the European Court to the courts of each Contracting State) but also 'horizontal'. The circulation in this case is given by the mutual exchange between national courts, which have started taking ECrtHR case law into account in their decision-making.

Such a mutual exchange can work in many different ways and in various directions, depending on different tendencies that, as previously mentioned, national judges could have when referring to the ECrtHR case law.

First of all, one must consider that the attention paid to the Strasbourg case law is also attention paid to the law of others countries. In its judgments, the European Court takes a decision about the potential violation of a Convention right by a Contracting State by first considering the national law frame. Also from a cultural point of view, reading the ECrtHR judgments is an opportunity for national judges to have a comparative view about legal systems of different countries.

On the other hand, it is worth recalling the use of the 'autonomous meanings' created by the European Court, in order to interpret the Convention in accordance with the present reality of the relationship between individuals and public powers.[29] In this way the Court develops new rules and new principles of law, which are not formally written in the text of the Convention. The meanings are 'autonomous' expressly because they are *ex novo* created by the

same time suspend the proceedings until the Court has decided the preliminary question. The Constitutional Court can reject or sustain the question. In the latter case, such as in the two judgment No. 348 and No. 349 dated 2007, the law is declared unconstitutional and can no longer be applied. See on this J.S. Lena & U. Mattei, *Introduction to Italian law*, The Hague: Kluwer 2002, 54.

29 About the 'autonomous meanings' created by the Court see the already quoted F. Sudre, 'Le recours aux "notions autonomes", in: F. Sudre (dir.), *L'interpretation de la Convention européenne des droits de l'homme*, 93.

Court. They are not derived from any particular domestic rule or national law; they are interpreted and then applied generally towards all the different legal systems of the Contracting States. Many such examples could be found in the administrative law field, thinking for instance of the wide application of the principle of fair trial (originally provided by the ECHR only with reference to 'civil rights and obligations' and to 'criminal charges') or the implementation of new fundamental principles, such as the principle of proportionality in the administrative decision-making process[30]. Autonomous meanings and the linked creation of general principles are the main instruments through which ECrtHR case law can contribute to the horizontal approach in the harmonization of administrative law in Europe. The European Convention, as interpreted by the Court of Strasbourg, thus becomes a tool for the creation of a 'common language' for protecting human rights in Europe. An interesting example is the due process clause in the administrative proceedings. Even if not expressly mentioned in the text of the Convention, the clause, thanks to the creative interpretation of the European Court, plays a role as a general principle, through which participatory rights are safeguarded as an important element of the substantive fundamental rights enshrined in the Convention.

Reference has already been made to the interpretation of Article 8 (right to respect for family and private life) by the Strasbourg Court. According to its case law, consultations, debates, information and participation of citizens in the decision-making process are, in both the 'adjudication' and 'rule-making' proceedings, crucial factors in striking a fair balance between individual rights with respect to private and family life and the common interests undertaken by the public authorities of the Contracting States, according to the doctrine of margin of appreciation. The above-mentioned judgments of the European Court are relevant in so far as they consider the participation of citizens in administrative proceeding as a key element in the protection of the fundamental rights enshrined in the ECRH[31]. Participative democracy becomes a condition in implementing the principle of the rule of law and in guaranteeing the lawfulness of administrative action. In the national background, therefore, a reference to Strasbourg case law about the protection of participatory rights could represent a useful occasion to improve this important guarantee, which contributes to

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30 According to the principle of proportionality, an administrative decision is proportionate only if it meets an important goal in the public interest, and in doing so violates the individual right as little as possible. The ECrtHR derived the principle, which is also known and well developed in EU law by the European Court of Justice, from Article 6 ECHR in the famous judgment 27 September 1999, *Smith and Grady v. United Kingdom, Reports of Judgments and Decisions*, 1999, VI, or in www.echr.coe.int. See on the topic J. Rivers, 'Proportionality and Variable Intensity of Review', *Cambridge Law Journal* 2006,174-207; I. Leigh, 'Taking Rights proportionately: Judicial Review, the Human Rights Act and Strasbourg', *Public Law* 2002, 583.

31 See the already mentioned judgments: 20 March 2007, *Tysiac v. Poland*, in www.echr.coe.int.; 1st December 2008, *X v. Croatia*; 7 April 2009, *Brânduse v. Romania*; 8 July 2003, *Hatton and others v. United Kingdom*, in www.echr.coe.int.

realizing a deeper democratic relationship between citizens and public authority. Improving such a guarantee is, first of all, a legislative matter. Nevertheless, the administrative courts, already involved in a new approach to the ECHR, could also cooperate in this direction by taking into account the solutions adopted by the European Court.

Another example in the harmonization of administrative law principles through the creative interpretation by the Strasbourg court could be found in the implementation of the principle of reasonableness of the duration of administrative proceedings. The principle is interpreted by the Court not only with reference to Article 6 ECHR[32] (extending the provision originally written in the text of the Convention only in regard to the reasonable length of the judicial proceedings), but also with reference to other Convention articles providing substantive (and not procedural) guarantees for the protected rights. For instance, the excessive length of expropriation proceedings is considered by the European Court as an infringement of the right to the private property safeguarded by Article 1 Protocol No. 1 ECHR.[33] In another case, where the public administration was twenty-eight months late in granting a marriage certificate, the Court found a violation of Article 8 ECHR providing the right to the respect for family and private life.[34]

The procedural aspect of the respect for a reasonable time in administrative proceedings is considered in that case law as the condition for the protection of substantive fundamental rights enshrined by the Convention. The European Court refers to an obligation of 'due diligence' by the public authority, which is a pivotal expression of the more general principle of good administration.

The potential impact of these European judgments on domestic administrative case law has been underlined by some French scholars, who expressly suggest that their administrative judges follow the wide Strasbourg interpretation of the concept of 'bonne gouvernance de l'administration'.[35]

4.1 The Horizontal Relationship between Administrative Courts and the Reference to 'Other' National Case Law Referring to the ECHR

As we have already seen, the horizontal relationship between administrative courts can deal with a circulation of the rules and principles

32 See, for example, 15 September 2009, *Moskal v. Poland*, in www.echr.coe.int.

33 See the judgments *Di Belmonte v. Italy*, 16 March 2010; *Plalam sp.a. v. Italy*, 18 March 2010, both in www.echr.coe.int.

34 ECrtHR, *Dadouch v Malta*, 20 July 2010, in www.echr.coe.int.

35 See in particular P. Waschsmann, 'Les normes régissant le comportement de l'administration selon la jurisprudence de la Cour européenne des droits de l'homme', *AJDA* 2010, 2138.

developed in Strasbourg as a common standard for the protection of fundamental rights towards public authorities.

Nevertheless, a further development of the horizontal relationship regarding the ECHR is apparent, although it is more unusual.That is the way in which national courts are starting to refer both to the European Court's case law and also to the case law of other national administrative courts which implement the principles developed in Strasbourg.

An example worth mentioning is the case decided by the French Council of State in 2008, *Conseil national des barreaux et autres*.[36] The case dealt with the obligation on lawyers to inform the competent authorities of any fact which could be an indication of money laundering and involved the respect by national authorities of the EU Directive 91/308/EEC about the prevention of the use of the financial system for the purpose of money laundering. The applicants alleged a violation of professional secrecy and of the independence of lawyers, referring to a breach of Article 6 (right to a fair trial) and Article 8 (right to the respect for the private life) ECHR and asked to annul the administrative decisions implementing the national law which transposed the EU Directive. There was, therefore, an issue of the compatibility of the EU law, as transposed by the domestic legislation, with respect to Convention rights. The Council of State decided not to refer a question for a preliminary ruling before the European Court of Justice, for the following reasons: with reference to Article 6 ECHR there had already been another decision taken by the EU Court in 2007 in a reference for a preliminary ruling from the Constitutional Court of Belgium about the same topic and about the same contrast with the right to a fair trial safeguarded by Article 6 ECHR,[37] with reference to Article 8 ECHR, the French Council of State held that the same issue was already settled by the Belgian Constitutional Court in the decision subsequent to the preliminary ruling judgment of the EU Court. This illustrates a settlement which directly involves the mutual exchange between national courts in interpreting and applying Convention rights inside the European Union. From the above case, one may infer that:

– there is a 'dialogue' between the national courts in the EU referring to the interpretation and implementation of Convention rights. The 'dialogue' is the opportunity for creating a system to protect fundamental rights in Europe, where the main actors are the EU Court, the European Convention Court and the national judges (constitutional as well as common courts);
– the cooperation for the protection of fundamental rights in Europe can be not only the result of a vertical harmonization (top-down and bottom-up effect) between the supranational courts (the EU Court of Justice and the

36 Council of State, 10 April 2008, *Conseil national des barreaux et autres*, in www.legifrance.fr.
37 EU Court of Justice, 26 June 2007, C-305/05, *Ordre des barreaux francophones and germanophone and Others*, in www.curia.europa.eu.

ECrtHR), but also the outcome of a developing 'horizontal' relationship between national courts;
– in the 'horizontal' relationship common judges are involved, such as administrative courts (i.e. French Council of State), as well as constitutional courts, undertaking the same role as 'first guardians' for the protection of fundamental rights towards the supranational jurisdictions in Europe.

5 Final Remarks

At the beginning of this paper we observed that the title should be written in the form of a question rather than a statement. The reason is that a horizontal harmonization of administrative law in Europe through the instrument of the ECHR is still a developing reality. Cases such as the above-mentioned decision of the French Council of State are nowadays still unusual. Nevertheless they are a sign of the increasing 'pluralism' in the protection of fundamental rights, even in the administrative law field.

That could be still more relevant following the future accession of the EU to the ECHR. Despite all the current problems concerning the negotiations about the modalities of the accession, it must be considered that, even after accession the European Convention on Human Rights will be an external source which will have the power to bind the EU as well as the Member States. Having a part in the Convention system, EU law will be a further instrument for implementing the ECHR in national laws of the its Member States, but at the same time the EU States must keep their own role as Contracting States towards the European Convention.

In this sense, it could be said that the relationship between ECHR, EU law and national law takes the form of a sort of 'trialogue', in which a mutual exchange between national courts in referring to the ECJ and the ECrtHR case law will be ever more significant, also in relation to the opportunity of further research in the topic, for the harmonization of rules and principles in European administrative law .