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PRINCIPLE OF SUBSIDIARITY AND ‘EMBEDDEDNESS’ OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS IN THE FIELD OF THE REASONABLE-TIME REQUIREMENT: THE ITALIAN CASE

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Abstract. *The right to ‘domestic remedies’, which ideally connects ‘subsidiarity’ and ‘embeddedness’ of the ECHR in the legal systems of member States, is deemed to play a crucial role for the Strasbourg machinery survival as well as for an effective protection of human rights, especially in the field of the ‘reasonable-time’ requirement. In this respect the Italian case seems an excellent test. Once a compensatory remedy was introduced in the Italian legal system by Law No. 89 of 2001 (the ‘Pinto Act’), it soon appeared that such a remedy could be considered ‘effective’ in so far as it was implemented in accordance with the ECtHR’s jurisprudence. Therefore a legal tool for the interaction between ECtHR and Italian courts had to be found. Nevertheless, the results of this interaction might suggest that the domestic remedy has neither increased the protection of the reasonable-time requirement in Italy nor is it the final solution to the ECtHR’s overload.*

Keywords: *reasonable time, domestic remedies, principle of subsidiarity, interaction of jurisdictions, European Convention on Human Rights.*

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Introduction

'Subsidiarity' and 'embeddedness', connected by the 'right to domestic remedies', are probably among the most appropriate key-words to summarize the recent debate about the present and the future of the European Convention and Court of Human Rights (hereinafter, respectively: 'the ECHR' or 'the Convention' and 'the ECtHR' or 'the Court').

As concerns the first concept, even the inexperienced scholar will soon discover that the principle of subsidiarity is generally considered to be one of the core features of the international system for the protection of human rights set down by the Convention.¹

The principle of subsidiarity has deep roots in Western thought² and has played a crucial role in the building of the European Union.³ In the field of international human rights law it requires, on the one hand, 'that local communities be left to protect and respect the human dignity and freedom represented by the idea of human rights whenever they are able to achieve those ends on their own; in many cases, the aspect of subsidiarity will result in a degree of discretion over the interpretation and implementation of rights ...'⁴ On the other hand, 'to the extent that local bodies cannot accomplish the ends of human right without assistance, the larger communities of international societies have responsibility to intervene.'⁵

Within the legal order of the Convention 'subsidiarity' mainly assumes two aspects.

[A]s a procedural or functional concept it means that before appealing to the Convention institutions, any applicant must have referred his or her complaints to all those domestic institutions which can be considered to offer an effective and adequate remedy in the circumstances of the case; as a material or substantive concept it means that when applying the Convention provisions, the Convention institutions have to make, wherever appropriate, due allowance for those legal and factual features which characterize the life of the society in the State concerned.⁶

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- 1 Limiting the references to the most widely known textbooks, see Harris, D.; O'Boyle, M.; Bates, E.; Buckley, C. (eds.) *Harris, O'Boyle & Warbrick: Law of the European Convention on Human Rights*. 2nd ed. Oxford University Press, 2009, p. 13; Ovey, C.; White, R. *Jacobs & White: The European Convention on Human Rights*. 4th ed. Oxford University Press, 2006, p. 18; Shelton, D. *Remedies in International Human Rights Law*. 2nd ed. Oxford University Press, 2006, p. 124; Leach, P. *Taking a Case to the European Court of Human Rights*. 2nd ed. Oxford University Press, 2005, p. 161; Sudre, F. *Droit européen et international des droits de l'homme*. 8th ed. Paris: PUF, 2006, p. 200; De Salvia, M. *La Convenzione europea dei diritti dell'uomo*. 3rd ed. Napoli: Editoriale Scientifica, 2001, p. 73.
 - 2 Carozza, P. G. Subsidiarity as a Structural Principle of International Human Rights Law. *American Journal Int'l Law*. 2003, 97: 40–49.
 - 3 *Ibid.*, p. 49–53.
 - 4 *Ibid.*, p. 57–58.
 - 5 *Ibid.*, p. 58.
 - 6 Petzold, H. The Convention and the Principle of Subsidiarity. In Macdonald, R.; Matscher, F.; Petzold, H. (eds.) *The European System for the Protection of Human Rights*. Dordrecht, Boston, London: Martinus Nijhoff Publishers, 1993, p. 60.

In the light of these explanations one can, for instance, understand why in the same judgment of the ECtHR⁷ the principle of subsidiarity: a) is invoked both as a limit to the Court review of the assessment made by the national competent authority⁸ and as the reason for the Court supervision on such an assessment⁹; b) it is indicated as the rationale of the rule of prior exhaustion of domestic remedies¹⁰; c) it is considered as reflecting the need for an effective protection at national level of the human rights enshrined in the Convention.¹¹

In this last meaning, the principle of subsidiarity is not far from the ‘embeddedness perspective’ (the second key-word mentioned above), which has been recently suggested with regard to the relation between the Convention and the legal systems of the member States. Indeed, this approach ‘seeks first and foremost to augment the mechanisms available to remedy human rights violations in national law, obviating the need for individuals to seek relief at the regional level.’¹² The more seriously Convention standards are taken by national bodies, the more available are domestic procedures for challenging violations of fundamental rights, the lower is the rate of Convention violations found by the ECtHR.¹³ In case the national mechanisms are inadequate, the Court ‘should increase its supervision of domestic courts and political bodies and provide incentives for government actors faithfully to follow the Court’s case law and to remedy Convention violations at home.’¹⁴

So a common core can be detected in such remarks, which, finally, constitutes a widely-held opinion among scholars¹⁵ and is strongly supported at the institutional level¹⁶: to ensure that each member State effectively secures Convention rights in its own

7 ECtHR (Grand Chamber), *Mc Farlane v. Ireland*, Application No. 31333/06, Judgment of 10 September 2010.

8 *Ibid.*, para 88–92.

9 *Ibid.*, para 112–113.

10 *Ibid.*, para 112; see also the joint dissenting opinion of judges Gyulumyan, Ziemeles, Bianku and Power, para 5.

11 *Ibid.*, para 12; see also the dissenting opinion of judge Lòpez Guerra.

12 Helfer, L. R. Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime. *European Journal Int’l Law*. 2008, 19(1): 139.

13 Greer, S. *The European Convention on Human Rights: Achievements, Problems and Prospects*. Cambridge University Press, 2006, p. 132.

14 Helfer, L. R., *supra* note 12, p. 139.

15 See Cartabia, M. La CEDU e l’ordinamento italiano: rapporti tra fonti, rapporti tra giurisdizioni. In Bin, R.; Brunelli, G.; Pugiottio A.; Veronesi, P. (eds.) *All’incrocio tra Costituzione e CEDU. Il rango delle norme della Convenzione e l’efficacia delle sentenze di Strasburgo*. Torino: Giappichelli, 2007, p. 20; Greer, S., *supra* note 13, p. 41 and authors therein quoted; Cohen-Jonathan, G. Réponse aux propos introductifs. In Cohen-Jonathan, G.; Flauss, J.-F.; Lambert Abdelgawad, E. (eds.) *De l’effectivité des recours internes dans l’application de la Convention européenne des droits de l’homme*. Bruxelles: Nemesis – Bruylant, 2006, p. 21–22; Gaja, G. Art. 1. Obbligo di rispettare i diritti dell’uomo. In Bartole, S.; Conforti, B.; Raimondi, G. (eds.) *Commentario alla Convenzione europea per la tutela dei diritti dell’uomo e delle libertà fondamentali*. Padova: Cedam, 2001, p. 23–24; Wildhaber, L. A constitutional future for the European Court of Human Rights? *Human Rights Law Journal*. 2002, 23(5-7): 161–163; Pisillo Mazzeschi, R. *Esaurimento dei ricorsi interni e diritti umani*. Torino: Giappichelli, 2004, p. 197–200; Loucaides, L. G. Il ruolo del giudice interno nel processo e l’applicazione della convenzione europea dei diritti dell’uomo. *Rivista internazionale dei diritti dell’uomo*. 1993, p. 599–607.

16 See, for instance, the Interlaken Declaration adopted on 19 February 2010 by the High Level Conference

legal processes is one of the primary objectives for the Convention system at the beginning of the twenty-first century. The right to an effective domestic remedy set forth by article 13 of the Convention is, clearly, an unmovable pillar of this restored building.¹⁷

Domestic remedies are deemed to offer an essential contribution in solving the overload crisis of the ECtHR as well as to restore member States to their role of both decision makers and defenders of human rights.¹⁸ Article 13 should be the tool to guarantee a stronger implementation of the Convention, a higher level of protection for the human rights guaranteed therein.

In this respect, since the human rights enshrined in the Convention mostly have to be protected at national level, there is a need to spread the knowledge of the ECtHR's case-law in the member States with special regard to the judgments of principle, that is to say those cases in which the Court specifies content and limits of the Convention rights, as well as to ensure an effective implementation of the judgments of the ECtHR, namely when they underline a problem in the legal system of the concerned State rather than a contingent violation of the Convention.¹⁹ Indeed, national remedies related to the rights set forth by the Convention involve a domestic interpretation and implementation of the Convention, whose provisions and ECtHR's jurisprudence cannot be easily separated.²⁰ Furthermore, when local remedies are applied in a manner which is consistent with the ECtHR's jurisprudence, they avoid or, at least, effectively redress the violations and, consequently, they stem the flow of applications directed to Strasbourg. In other words, 'subsidiarity' and 'embeddedness,' through the 'domestic remedies,' entail a closer interaction between national courts and the ECtHR.²¹

This article aims to investigate the practical functioning of the approach briefly described hitherto in the field of the protection of the reasonable-time requirement, enshrined in article 6, para 1, of the Convention, with special regard to the Italian case. Several reasons can be suggested to justify this choice.

on the Future of the European Court of Human Rights, at 2: the Conference "[r]eiterates the obligation of the States Parties to ensure that the rights and freedoms set forth in the Convention are fully secured at the national level and calls for a strengthening of the principle of subsidiarity.'

- 17 See Interlaken Declaration, at 3, Item B, para 4, c); Committee of Ministers of Council of Europe, Recommendation Rec(2004)6 to member states on the improvement of domestic remedies; Frowein, J. Art. 13 as a growing pillar of Convention law. In Mahoney, P.; Matscher, F.; Petzold, H.; Wildhaber, L. (eds.) *Protection des droits de l'homme: la perspective européenne/Protecting human rights: the European perspective: mélanges à la mémoire de/studies in memory of Rolv Ryssdal*. Köln: Heymanns, 2000, p. 545, 549; Helfer, L. R., *supra* note 12, p. 142.
- 18 In this respect it has been observed that 'there are grounds for believing that judicial remedies which permit Convention standards to be effectively litigated in national legal processes provide the best means by which such standards can be effectively integrated into national public decision-making' (see Greer, S., *supra* note 13, p. 87).
- 19 See the Interlaken Declaration, at 3, Item B, para 4, a), b). c); Committee of Ministers of Council of Europe, Recommendation Rec(2002)13 to member states on the publication and dissemination in the member states of the text of the European Convention on Human Rights and of the case-law of the European Court of Human Rights; Recommendation Rec(2004)6 to member states on the improvement of domestic remedies.
- 20 This view is frankly promoted by the COE institutions: see, for instance, Parliamentary Assembly of the Council of Europe, *Execution of Judgments of the European Court of Human Rights*, Resolution 1226 (2000) adopted on 28 September 2000, para 3.
- 21 Helfer, L. R., *supra* note 12, p. 134; Carozza, P. G., *supra* note 2, p. 74.

Firstly, excessive delays in dispute settlement can weaken the confidence in the justice system and, consequently undermine the Rule of Law.²² For this reason the accumulation of breaches of the reasonable-time requirement ‘constitutes a practice that is incompatible with the Convention.’²³ Therefore, though occurring in otherwise stable and well-functioning democracies, such structural problems in the administration of justice are extremely serious, so moving the diligent scholar to canvass any possible remedy.

Secondly, it is generally recognized that delays in resolution of legal disputes ‘have been the single most litigated issue before the ECtHR’²⁴ and that complaints about the unreasonable length of domestic proceedings continue to represent a great burden for the Strasbourg machinery.²⁵ The awareness of this situation was the cause of a spectacular overruling in *Kudla v. Poland*, where the Court held for the first time that the principle of subsidiarity (articulated in articles 1, 13 and 35, para 1, of the Convention) requires the introduction of domestic remedies for the victims of violations of the reasonable-time requirement.²⁶ Well, Italy has significantly contributed both to the aforesaid Court’s docket crisis and reaction.²⁷

- 22 See ECtHR, *H. v. France*, Application No. 10073/82, Judgment of 24 October 1989, para 58; Committee of Ministers of Council of Europe, *Execution of the judgments of the European Court of Human Rights concerning the excessive length of judicial proceedings in Italy*, Interim Resolution CM/ResDH. 2009, 42, adopted on 19 March 2009; Parliamentary Assembly of Council of Europe, *Implementation of judgments of the European Court of Human Rights*, Resolution (1516) 2006, adopted on 2 October 2006, 10; Tulkens, F. The right to a trial within a reasonable time: problems and solutions. In Venice Commission, *Can excessive length of proceedings be remedied?* Strasbourg: Council of Europe Publishing, 2007, p. 335, 342; Sudre, F., *supra* note 1, p. 391.
- 23 In these terms see the four judgments of the ECtHR delivered by the Grand Chamber on 28 July 1999 in the cases of *Bottazzi v. Italy* (Application No. 34884/97), *Ferrari c. Italia* (Application No. 33440/96), *A.P. c. Italia* (Application No. 35265/97 and *Di Mauro v. Italy* (Application No. 34256/96).
- 24 Janis, M. W.; Kay, R.; Bradley, A. *European Human Right Law. Text and Materials*. 2nd ed. Oxford University Press, 2000, p. 454; in similar terms see Jacot-Guillarmod, O. Rights Related to Good Administration of Justice (Article 6). In Macdonald, R.; Matscher, F.; Petzold, H. (eds.), *supra* note 6, p. 381, 394–395; Greer, S., *supra* note 13, p. 39, 76.
- 25 See, also for other references, Mowbray, A. Beyond Protocol 14. *Human Rights Law Review*. 2006, 6(3): 582; Greer, S., *supra* note 13, p. 39–40, 282.
- 26 ECtHR (Grand Chamber), *Kudla v. Poland*, Application No. 30210/96, Judgment of 26 October 2000, paragraphs 146–156. In quite open words, the Court affirm that ‘[i]f Article 13 is ... to be interpreted as having no application to the right to a hearing within a reasonable time as safeguarded by Article 6 paragraph 1, individuals will systematically be forced to refer to the Court in Strasbourg complaints that would otherwise, and in the Court’s opinion more appropriately, have to be addressed in the first place within the national legal system. In the long term the effective functioning, on both the national and international level, of the scheme of human rights protection set up by the Convention is liable to be weakened.’ On this point see also the partially dissenting opinion of Judge Casadevall: ‘To state, as the Court does ... that the time has now come, on account of the number of applications relating to length of proceedings, to examine the complaint under Article 13 taken setely smacks, in my view, more of expediency than of law’. Furthermore, the practical reasons behind *Kudla v. Poland* are underlined by several scholars: see, for instance, Helfer, L. R. *supra* note 12, p. 146; Frumer, Ph. Le recours effectif devant une instance nationale pour dépassement du délai raisonnable: un revirement dans la jurisprudence de la Cour européenne des droits de l’homme. *Journal des Tribunaux—Droit européen*. 2001, 77: 53; Flauss, J.-F. Le droit à un recours effectif au secours de la règle du délai raisonnable: un revirement de jurisprudence historique. *Revue trimestrielle des droits de l’homme*. 2002: 179, 183; Beernaert, M.-A. De l’épuisement des voies de recours internes en cas de dépassement du délai raisonnable. *Revue trimestrielle des droits de l’homme*. 2004: 905–906.
- 27 Wolf, S. Trial within a reasonable time: the recent reforms of the Italian justice system in response to conflict with Article 6(1) of the ECHR. *European public law*. 2003, 9: 194; Caflish, L. The reform of the Euro-

Thirdly, but no less important, almost ten years ago Italy introduced by Law No. 89 of 24 March 2001 (the so-called 'Pinto Act') a domestic compensatory remedy in order to redress the victims of unduly lengthy proceedings.²⁸ The time has come to evaluate achievements and problems of this remedy.

With regard to the former, The Pinto Act has involved quite an unproven interaction between the Italian Supreme Court (hereinafter '*Corte di Cassazione*') and the ECtHR, whence a relatively new debate about the effects of the ECtHR's jurisprudence in the Italian legal system. The main results are resumed in the second paragraph.

With regard to the latter, some cases are reported in the third and fourth paragraph in order to verify whether the Pinto remedy practically ensures an effective protection to the reasonable-time requirement.

Some final remarks are expressed in the fifth paragraph.

1. The Role of the ECtHR's Jurisprudence in the Implementation of the Pinto Remedy and the 'Visa' to the Italian Legal System

The effects of the ECtHR's jurisprudence in the Italian legal system soon became a crucial issue in the implementation of the Pinto remedy following the decision of the ECtHR in *Scordino v. Italy (No. 1)*.²⁹

A few months after its introduction, in *Brusco v. Italy*³⁰, the Court welcomed the Pinto remedy as 'available' and 'effective', since the parties of proceedings falling within the ambit of article 6, para 1, of the Convention could lodge an application before the Court of appeal, as judge of first instance, with a view of obtaining a finding of an infringement of the reasonable-time requirement and, where appropriate, just satisfaction for any pecuniary and non-pecuniary damage sustained. Thus the Pinto remedy was supposed to fulfil the requirements of articles 13 and 35, para 1, of the Convention; in other words, it was deemed to offer an adequate relief to the victims and, therefore, to prevent them from lodging with the ECtHR further complaints related to the unduly lengthy Italian proceedings. But less than two years later, this optimistic assessment was reviewed.

In *Scordino v. Italy (No. 1)* the Court underlined several critical aspects in the *Corte di Cassazione*'s jurisprudence related to the Pinto remedy.

pean Court of Human Rights: Protocol No. 14 and Beyond. *Human Rights Law Review*. 2006, 6(2): 405; Greer, S., *supra* note 13, p. 78, 80, 103.

28 For an overlook of the various remedies in the COE's member State see *Study on the Effectiveness of National Remedies in respect of Excessive Length of Proceedings*, adopted by the Venice Commission at its 69th Plenary Session (Venice, 15-16 December 2006), p. 15-21; Flauss, J.-F. Les recours internes destinés à garantir le respect ou la sanction de la règle du délai raisonnable consacrée par l'article 6(1) de la Convention européenne des droits de l'homme. In Cohen-Jonathan, G.; Flauss, J.-F.; Lambert Abdelgawad, E. (eds.), *supra* note 15, p. 94-104.

29 ECtHR, *Scordino v. Italy (No. 1)*, Application No. 36813/97, Decision of 27 March 2003.

30 ECtHR, *Brusco v. Italy*, Application No. 69789/01, Decision of 6 September 2001.

Firstly, the applicants were not automatically considered to have sustained damage where there had been a finding of a violation of the right to a trial within a reasonable time. Indeed, this was quite the contrary of the ECtHR's practice in length-of-proceedings cases, where just satisfaction for non-pecuniary damage is generally awarded once the violation of article 6, para 1, of the Convention is found.

Secondly, in the case at stake the amount awarded to the applicants for non-pecuniary damage by the court of first instance at the issue of the Pinto proceedings was more than ten times lower than the amounts awarded by the ECtHR in similar cases. Although the margin of appreciation enjoyed by the national courts in the assessment of just satisfaction should be observed, said the ECtHR, 'those courts must also comply with the Court's case-law by awarding corresponding amounts'. Since the sum awarded to Scordinos was not regarded as adequate and hence capable of making good the alleged violation, the applicants could still claim to be victims within the meaning of Article 34 of the Convention.³¹

Thirdly, and directly connected to the issue considered in the present paragraph, in *Scordino* the ECtHR noted that the *Corte di Cassazione* had never entertained a complaint to the effect that the amount awarded by the court of first instance was insufficient in relation to the alleged damage or inadequate in the light of the ECtHR's case-law. Such complaints, stressed the ECtHR, have always been dismissed by the *Corte di Cassazione*, 'being treated either as factual issues outside its jurisdiction or as issues arising on the basis of provisions that are not directly applicable'.

Indeed, according to a settled case-law of the ECtHR about the rule of the prior exhaustion of domestic remedies, the applicant must have used the remedies provided for up to the highest level, only if and insofar as the appeal to a higher tribunal can still substantially affect the decision on the merits.³² As regards the Pinto remedy, even though the decision of first instance can be appealed before the *Corte di Cassazione*³³, such an appeal would be inadmissible if it concerned the amount of just satisfaction for non-pecuniary damage. Indeed, by virtue of article 2, para 3, of the Pinto Act the assessment of the just satisfaction for non-pecuniary damage is done, by the judge of first instance, on equitable basis. In the Italian legal system the assessment of damages 'on equitable basis' is related to the proof of the alleged damages and, consequently, is considered as a factual issue, while the *Corte di Cassazione* can only deal with appeal on point of law.³⁴

The only way to extend the supervision of the *Corte di Cassazione* on the amount awarded by the judge of first instance was to invoke the jurisprudence of the ECtHR, re-

31 For this aspect see the following paragraph.

32 Zwaak, L. The procedure before the European Court of Human Rights. In van Dijk, P.; van Hoof, F.; Rijn, A.; Zwaak, L. (eds.) *Theory and Practice of the European Convention on Human Rights*. 4th ed. Antwerpen–Oxford: Intersentia, 2006, p. 138.

33 See article 3, para 6, of the Pinto Act: 'The court shall deliver a decision within four months after the application is lodged. An appeal shall lie to the Court of Cassation. The decision shall be enforceable immediately.'

34 As an example of the limits of the Italian Supreme Court's competence regarding the supervision of the assessment of damages done 'on equitable basis' see *Corte di Cassazione*, Judgment No. 12318 of 19 May 2010; Judgment No. 1529 of 26 January 2010; Judgment No. 10111 of 17 April 2008.

lated to the assessment of just satisfaction in length-of-proceedings cases, as being part of the 'law' that the judge of first instance had to observe in Pinto proceedings. But the *Corte di Cassazione* used to dismiss any complaint based on article 41 of the Convention and the related ECtHR's case-law, to which neither direct nor binding effect was recognized.

Nevertheless, the aforesaid principles, namely the non-binding effect of the ECtHR's jurisprudence in the implementation of the Pinto remedy, would have defeated the aim pursued through the introduction of the domestic remedy and would have entailed a violation of the principle of subsidiarity since, once having obtained an inadequate redress at national level, the parties would have continued to be 'victims,' within the meaning of article 34 of the Convention, and so to complain for the violation of the reasonable-time requirement with the ECtHR. Therefore, after the *Scordino* warning, the *Corte di Cassazione*, sitting as a full court (*Sezioni Unite*), departed from its previous jurisprudence in four judgements of January 2004.³⁵

Namely, in its judgement No. 1339 (*Lepore v. Ministero della Giustizia*) the *Corte di Cassazione* held:

As stipulated in [article 2, para 1, of the Pinto Act], the legal fact which gives rise to the right to the just satisfaction that it provides for is constituted by the 'violation of the [Convention] for failure to comply with the reasonable time referred to in Article 6, para 1' In other words, [the Pinto Act] identifies the fact constituting the right to compensation by reference to a specific provision of the European Convention on Human Rights. This Convention instituted a Court (the European Court of Human Rights ...) to ensure compliance with the provisions contained therein (Article 19). Accordingly, the competence of the said court to determine, and therefore to interpret, the significance of the said provisions must be recognised.

As the fact constituting the right conferred by [the Pinto Act] consists of a violation of the [ECHR], it is for the Court of the [ECHR] to determine all the elements of such a legal fact, which thus ends by being 'brought into conformity' by the Strasbourg Court, whose case-law is binding on the Italian courts in so far as the application of [the Pinto Act] is concerned.

Hence, in its judgment No. 1340 (*Corbo v. Ministero della Giustizia*) the *Corte di Cassazione* affirmed, with special regard to the assessment of the just satisfaction, the principle that 'the court of appeal's determination of non-pecuniary damage in accordance with article 2 of [the Pinto Act], although inherently based on equitable principles, must be done in a legally defined framework since reference has to be made to the amounts awarded, in similar cases, by the Strasbourg Court. Some divergence is permissible, within reason'.

Through the 2004 overruling the *Corte di Cassazione* tried to overcome a hard difficulty:—to affirm, in a civil law system, that the ECtHR's jurisprudence has to be regarded, at least to a certain extent, as a 'law' whose violation by the judge of first instance can be complained with the *Corte di Cassazione*. The legal tool to this achievement is

35 *Corte di Cassazione (Sezioni Unite)*, Judgments No. 1338, 1339, 1340, 1341 of 26th January 2004, reported in *Italian Yearbook Int'l Law*. 2003, 13: 245.

intended to be the reference made by article 2, para 1, of the Pinto Act, to article 6 of the Convention.³⁶

Still, some doubts can be cast on this doctrine. On the one hand, article 6 of the Convention, which article 2, para 1, makes reference to, does not concern the assessment of just satisfaction but the right to a fair trial within a reasonable time. On the other hand, it is the article 2, para 3, of the Pinto Act which rules the assessment of the pecuniary redress and indicates the criteria the national judge shall use, without making any reference to the Convention.³⁷ Therefore one could still claim that the criteria followed by the ECtHR in the assessment of just satisfaction are not binding for the national judge since they concern the interpretation of article 41 (Just satisfaction) of the Convention, which has no direct effect in the implementation of the Pinto remedy.³⁸

Another ‘visa’ for the ECtHR’s case-law, in the view of the implementation of the Pinto remedy, may be found at a higher level of the Italian legal system.

According to article 117, para 1, of the Italian Constitution, as amended by Constitutional Law No. 3 of 2001, ‘[i]n performing their legislative powers, the State and the Regions shall respect the Constitution and the obligations arising both from European Union law and international law.’

In two fundamental judgments of October 2007³⁹ the Italian Constitutional Court said that, by virtue of the above mentioned article 117, para 1, of the Constitution, statute law enacted by Parliament and other legislative bodies has to comply with the Convention, so that the Convention is a parameter through which the constitutionality of a statute law is reviewed. Above all, the Constitutional Court held that, taking into account articles 19 and 32 of the Convention, it is for the ECtHR to interpret the provisions of the Convention; hence the provisions of the Convention have to be considered by the Italian judge and also by the Constitutional Court itself as they are interpreted by the ECtHR.

In this regard, more recently the Constitutional Court added that it ‘cannot substitute its interpretation of the Convention with that given by the [ECtHR], since it would interfere with the competence of the [ECtHR] as recognized by Italy through the unconditioned ratification of the Convention.’⁴⁰

36 Article 2, para 1, of the Pinto Act: ‘Anyone sustaining pecuniary or non-pecuniary damage as a result of a violation of the Convention for the Protection of Human Rights and Fundamental Freedoms, ratified by Law No. 848 of 4 August 1955, on account of a failure to comply with the “reasonable-time” requirement in Article 6, 1, of the Convention, shall be entitled to just satisfaction.’

37 Article 2, para 3, of the Pinto Act: ‘The court shall assess the quantum of damage in accordance with Article 2056 of the Civil Code and shall apply the following rules: (a) only damage attributable to the period beyond the reasonable time referred to in subsection 1 may be taken into account; (b) in addition to the payment of a sum of money, reparation for non-pecuniary damage shall be made by giving suitable publicity to the finding of a violation’.

38 A similar reasoning can be found in Corte di Cassazione, *Zullo*, Judgment No. 14 of 3 January 2008, reported in *Italian Yearbook Int’l Law*. 2007, 17: 284.

39 Constitutional Court, Judgments No. 348 and 349 of 24 October 2007. For an overlook of the various issues examined by these judgments see Mirate, S. A New Status for the ECHR in Italy: the Italian Constitutional Court and the New ‘Conventional Review’ on National Laws. *European Public Law*. 2009, 15(1): 89.

40 Constitutional Court, Judgment No. 317 of 30 November 2009.

It is true that the Constitutional Court qualified its new doctrine on the rank of the Convention and the ECtHR's case-law, noting that it must always aim to establish a reasonable balance between the duties flowing from international law obligations and the protection of other constitutionally protected interests; in other words the 'Conventional review,' carried out in the light of the ECtHR's jurisprudence, might be 'counter-limited' by other provision of the Italian Constitution. Moreover, it is understood by some scholars that the Constitutional Court did not affirm the binding character of the ECtHR's jurisprudence, but the duty, for the Italian judge, to take into account this jurisprudence in the interpretation of the Convention.⁴¹

Nevertheless, it is generally agreed that in its recent case-law the Italian Constitutional Court has recognized an obligation upon the Italian courts to interpret domestic rules in the light of the Convention and that, in this task, the Italian courts have to give to the Convention's provision a meaning that is, somehow, consistent with the ECtHR's jurisprudence.⁴²

Coming to the conclusion, since the Pinto Act has introduced in Italy a domestic remedy in respect of excessive length of proceedings, following up *Kudla v. Poland*, the Italian courts have to interpret and apply the Pinto Act in the light of article 13 of the Convention, as interpreted by the ECtHR.⁴³

As outlined by a well settled case-law of the ECtHR, an adequate relief is among the requirements for the effectiveness of the domestic remedy.⁴⁴ This aspect leads to the second part of the analysis, which is carried out below.

2. The Interaction of ECtHR and National Courts in the Implementation of the Pinto Remedy: Threshold of Compensation of Non-Pecuniary Damage

In the view of verifying if, thanks to the interaction of ECtHR and Italian courts, the Pinto remedy ensure an effective compensatory protection to the reasonable-time requirement, some judgments of the *Corte di Cassazione* are reported in the present and in the following paragraph.

41 See, for instance, Palombino, F. M. *Gli effetti della sentenza internazionale nei giudizi interni*. Napoli: Editoriale Scientifica, 2008, p. 138–140; Cannizzaro, E. Sentenze della Corte europea dei diritti dell'uomo e ordinamento italiano in due recenti decisioni della Corte costituzionale. *Rivista di diritto internazionale*. 2008, 91(1): 140–141. In this perspective it is thought that the Italian Constitutional Court has adopted a similar approach to the Section 2 of the UK Human Rights Act -1998 and to the German Constitutional Court in *Görgülü-Beschluß*, Judgment No. 1481 of 14 October 2004.

42 For a recent summary of the position of the Italian Constitutional Court on the subject see Lamarque, E. Gli effetti delle sentenze della Corte di Strasburgo secondo la Corte Costituzionale italiana. *Corriere giuridico*. 2010, 7: 955.

43 For a wider reasoning to this conclusion see De Santis di Nicola, F. L'interazione tra "livelli" di tutela (riparatoria) del diritto alla durata ragionevole del processo: fondamento e linee di tendenza. *Studi in onore di Modestino Acone*. Napoli: Jovene, 2010, 1: 630–646.

44 See, for instance, *Scordino v. Italy (No.1)* and *Mc Farlane v. Ireland*, both quoted above, as well as the Grand Chamber judgments of 26 March 2006 reported in the following paragraph. Furthermore apparently there is a general consensus among scholars on this point.

*Rossi and Others*⁴⁵, *M.M.C.*⁴⁶ and *Illiano*⁴⁷ concern the threshold of compensation for non-pecuniary damage as a condition for effective redress of violation of the reasonable-time requirement. A short background must be offered for a better understanding of these cases.

As said above, under pressure from the ECtHR and in order to keep the Pinto remedy ‘effective’ within the meaning of articles 13 and 35 of the Convention, the *Corte di Cassazione* (*Corbo*) held that non-pecuniary damage had to be determined by national judges within a legally defined framework, since reference had to be made to the amounts awarded in similar cases by the ECtHR.

Few months later, aiming to set guidelines for the implementation of the Pinto remedy⁴⁸, the ECtHR indicated the criteria followed in the assessment of just satisfaction (article 41 of the Convention) in length-of-proceedings cases.⁴⁹

As regards non-pecuniary damage the ECtHR considered that:

A sum varying between EUR 1,000 and 1,500 per year’s duration of the proceedings (and not per year’s delay) is a base figure for the relevant calculation The aggregate amount will be increased by EUR 2,000 if the stakes involved in the dispute are considerable, such as in cases concerning labour law, civil status and capacity, pensions, or particularly serious proceedings relating to a person’s health or life.

The cases decided in November 2004 were then referred, with *Scordino (No. 1) v. Italy*⁵⁰ to the Grand Chamber, which ruled on them on 29 March 2006.⁵¹

Coming back to the cases here reported, in *Rossi and Others* the court of first instance, ruling on the Pinto application, held that the length of the considered proceedings exceeded by three years the reasonable time enshrined in article 6 of the ECHR; consequently it awarded 2,500 euro to each of the applicants, that is to say 750 euro for each year beyond the reasonable time.

45 *Corte di Cassazione, Rossi and Others v. Ministero della Giustizia*, Judgment No. 10415 of 6 May 2009.

46 *Corte di Cassazione, M.M.C. v. Presidenza del Consiglio dei Ministri*, Judgment No. 16086 of 8 July 2009.

47 *Corte di Cassazione, Illiano v. Presidenza del Consiglio dei Ministri*, Judgment No. 21840 of 14 October 2009.

48 As concerns the assessment of non-pecuniary damages, it has been observed that ‘fundamental fairness requires that similarly situated parties be treated in a similar fashion’; therefore there is the risk that ‘[t]he inability to achieve consistency in awards ... erode general confidence in justice and the integrity of the human rights system’ (see Shelton, *supra* note 1, at 353). Hence it should be welcome that, as regards the award of compensation for non-pecuniary damage in length-of-proceedings cases, the ECtHR has followed some scales to bring about equivalent results in similar cases (see Tulkens, F., *supra* note 22, p. 342) and that, finally, it outlines these criteria to the national courts.

49 ECtHR, Judgments of 10 Nov. 2004 in cases *Riccardi Pizzati v. Italy* (Application No. 62361/00), *Musci v. Italy* (Application No. 64699/01), *Giuseppe Mostacciuolo v. Italy (n° 1)* (Application No. 64705/01), *Cocchiarella v. Italy* (Application No. 64886/01), *Apicella v. Italy* (Application No. 64890/01), *Procaccini Giuseppina e Orestina v. Italy* (Application No. 65075/01), *Giuseppe Mostacciuolo v. Italy (n° 2)* (Application No. 65102/01), *Ernestina Zullo v. Italy* (Application No. 64897/01).

50 In this case, after the decision on the admissibility delivered on 27 March 2003 and reported in the previous paragraph, the ECtHR, sitting as a Chamber, delivered a Judgment on 29 July 2004.

51 See Granata, S. Review of Judgments and Decisions Delivered in 2005 and 2006 by the ECHR on Subjects Relevant to International Law. *Italian Yearbook Int’l Law*. 2006, 16: 303–308.

Rossi and Others appealed against this judgment to the *Corte di Cassazione*, claiming that in the assessment of compensation, the judge of first instance had violated the parameters applied by the ECtHR, which usually considers 1,000/1,500 euro as a base figure for the relevant calculation.

Furthermore, the applicants questioned the compatibility of article 2, para 3(a), of the Pinto Act, which states that 'only damage attributable to the period beyond the reasonable time ... may be taken into account', with article 117, para 1, of the Italian Constitution, which, as said above, provides for compliance with international obligations. They invoked precisely articles 13 and 41 of the ECHR as the 'intermediate law' allegedly violated by article 2, para 3(a), of the Pinto Act in breach of article 117, para 1, of the Constitution. So the *Corte di Cassazione* has been forced to assess if the conflict between national criteria and Strasbourg ones in the determination of just satisfaction, as regards the duration to be taken into account, undermined the effectiveness of the Pinto remedy.⁵²

The *Corte di Cassazione* notes that, ruling on 29 March 2006 on the aforesaid Italian cases, the Grand Chamber of the ECtHR did not confirm any general criteria, such as those outlined in November 2004, as binding on national judges in determining compensation for non-pecuniary damages. In evaluating the effectiveness of the Pinto remedy within the meaning of articles 13 and 35 of the Convention, the *Corte di Cassazione* goes on to say, one should not merely consider whether, according to national legislation, the judge is to take into account either the entire duration of proceedings or only the period beyond the reasonable time. One should rather consider whether such a discrepancy affects the global attitude of the Pinto Act to ensure adequate redress for the violation of the right to reasonable length of proceedings.

In the *Corte di Cassazione*'s view, taking into account the Grand Chamber judgments of March 2006, the ECtHR does not consider adequate only the sums which are manifestly unreasonable when compared with the minimum threshold of compensation which would result from the application of its criteria. More specifically 'compensation which is not less than 45% of the amount usually awarded by the European Court is considered to be adequate.'

Accordingly, the *Corte di Cassazione* concludes that:

Since the criteria for calculation stated by the national law does not lead to the award of sums which are lower than 45% of the sums awarded in similar cases by the Strasbourg Court, the aforesaid criteria does not violate the right to an effective remedy as interpreted by the Court of Human Rights, on the condition that the EUR 1,000 base figure is respected.

52 Also in *Zullo* (quoted above) the applicant alleged that according to the ECtHR compensation should be determined taking into account the entire length of proceedings, not only the year of delay. But, unlike *Rossi and Others*, on this basis he claimed that the aforesaid Article 2, 3(a), of the Pinto Act, did not comply with Article 6 of the ECHR and, consequently, violated Article 117, para 1, of the Constitution. As recalled in the previous para (text and note 38), the *Corte di Cassazione* rejected this complaint, stressing that Article 6 (*Right to a fair trial*) does not concern the determination of adequate compensation for breaches of reasonable-time requirement, while compensation matters are covered by Articles 13 and 41 of the ECHR.

The preliminary objection on the compatibility of article 2, para 3(a), of the Pinto Act with article 117, para 1, of the Constitution is consequently rejected, as it already ruled in *M.M.C.* and *Illiano*, just to give two more examples among a well established case-law.

Nevertheless, in *Rossi and Others* the *Corte di Cassazione* quashes the appealed decision, since in determining compensation the judge of first instance awarded 750 euro per year, so violating the parameter of 1,000-1,500 euro followed by the ECtHR.

Indeed, in the *Corte di Cassazione*'s view a certain discrepancy compared with the last Strasbourg parameter may be accepted, namely taking into account the stakes involved in the dispute, the number of courts dealing with the case throughout the duration of the proceedings and the conduct of the applicant. But consideration of these circumstances, says the *Corte di Cassazione*, must clearly appear in the reasoning of the decision, while it was totally lacking in the appealed one.

In the *M.M.C* case the *Corte di Cassazione* makes another step towards the reduction of compensation for non-pecuniary damage. Widely referring, as in *Rossi and Others*, to Grand Chamber judgments of March 2006, the *Corte di Cassazione* notes that according to the ECtHR:

Where a State has made a significant move by introducing a compensatory remedy, the [Strasbourg] Court must leave a wider margin of appreciation to the State to allow it to organise the remedy in a manner consistent with its own legal system and traditions and consonant with the standard of living in the country concerned. It will, in particular, be easier for the domestic courts to refer to the amounts awarded at domestic level for other types of damage—personal injury, damage relating to a relative's death or damage in defamation cases for example—and rely on their innermost conviction, even if that results in awards of amounts that are lower than those fixed by the [Strasbourg] Court in similar cases.

Above all, even if in the judgments of March 2006 the compensation awarded by the Italian court as the result of the Pinto proceedings was considered insufficient, leading the Strasbourg Court to award supplementary sums as just satisfaction, in the end total compensation was about 45% of what the ECtHR would have awarded in the absence of a local remedy.

On this basis the *Corte di Cassazione* holds that

[a]ccording to the most recent case-law of the [ECtHR], if in the case under consideration there are no concrete elements to appreciate the significant relevance of non-pecuniary damage (such as, among others, what is at stake, also taking into account the standard of living of the applicant, the period beyond the reasonable time and the legitimate expectation that the judge will rule in favour of the applicant), ... the Italian judge *shall not award less than 750 euro for each year's delay*.⁵³

This new threshold, concludes the *Corte di Cassazione*, aims to prevent just satisfaction for lengths of proceedings from being 'unduly lucrative' for Pinto applicants and is consistent with the amounts awarded in Italy for other types of non-pecuniary damage. Moreover, also considering the different criteria about the period to be taken into

53 Italics added.

account in the assessment of compensation, the 750 euro base figure is not too far from the ECtHR standards and so maintains the effectiveness of the Pinto remedy.

The *M.M.C.* case—which concerned the right of the applicant to a periodic increase of a specific allowance relating to his duties as a registry staff member—has lasted eleven years for only one level of jurisdiction, *i.e.* eight years beyond the reasonable time. So the *Corte di Cassazione* awards the applicant 6,000 euro (750 euro per year's delay), while it underlines that the violation of reasonable time in labour cases does not necessarily require higher compensation since the stakes involved in such cases are not considerable in themselves.

In the early autumn of 2009 the *Corte di Cassazione* ruled on the *Illiano* case, which arises from the proceeding concerning the acknowledgment of an attendance allowance sought by the applicant for assisting his invalid relative. This judgment both confirms and partially amends the principles stated in *M.M.C.*

As regards the former aspect, the *Corte di Cassazione* underlines that compensation for non-pecuniary damage does not have to be increased by EUR 2,000 in all cases concerning labour law, social allowances or the right to a pension. In the *Corte di Cassazione*'s opinion, the ECtHR, although stating that higher sums must be awarded if the stakes involved in the dispute are considerable, has simply listed some examples, quoting cases concerning labour law, social allowances and the right to a pension. This means that:

stakes involved in these cases *may be regarded*⁵⁴ as considerable; so the judge of first instance, ruling on the merit [of the Pinto application], can award a higher sum if he is persuaded that the stake involved in the specific case is considerable for the applicant, but there is no duty either to indicate the reasons for the dismissal of the applicant's plea for higher compensation or to rule on such a plea.

As regards the latter aspect, the *Corte di Cassazione* reiterates that compensation for non-pecuniary damage must not be lower than 750 euro per year's delay. Nevertheless, this threshold, indicated in *M.M.C.*, has to be confirmed 'only for the first three years of delay, while for the following years the base figure for calculation is EUR 1,000 for each year's delay, as further delay clearly aggravates the damage sustained by the applicants.'

The parameter so indicated in *Illiano* was not implemented in that case, since the length of the proceedings at stake exceeded the reasonable time by only eight months. Thus one can easily conclude that the *Corte di Cassazione* has aimed to outline a new general guideline for the assessment of non-pecuniary damage, which the judges of first instance and the *Corte di Cassazione* itself will have to follow in order to award adequate compensation, bearing in mind ECtHR's practice. As a matter of fact at Strasbourg the assessment of just satisfaction per year's duration does not follow a linear progression.

Despite the *Illiano* adjustment, the *Corte di Cassazione* case law reported hereto is not entirely convincing. Nobody denies that, in the Grand Chamber's words, just satisfaction at national level can be lower than that fixed by the ECtHR in similar cases, so

54 Italics added.

that a certain margin of appreciation is granted to the Italian judge in determination of non-pecuniary damage.

But, since the domestic margin of appreciation goes hand in hand with the European supervision, the Grand Chamber pointed out some conditions which should be met at national level for a legitimate reduction of compensation.⁵⁵ More specifically, in the ECtHR's view⁵⁶:

The level of compensation depends on the characteristics and effectiveness of the domestic remedy. The Court can ... perfectly well accept that a State which has introduced a number of remedies, one of which is designed to expedite proceedings and one to afford compensation, will award amounts which—while being lower than those awarded by the Court—are not unreasonable, on condition that the relevant decisions, which must be consonant with the legal tradition⁵⁷ and the standard of living in the country concerned, are speedy, reasoned and executed very quickly.

In effect, none of these requirements is met by the Pinto remedy. For instance, as for the possibility that the compensation for such non-pecuniary damage is lower if finally it is 'consonant with the legal tradition' of the concerned State, the Court has noted that 'there is no disproportion in Italy between the amounts awarded to heirs for non-pecuniary damage in the event of a relative's death or those awarded for physical injury or in defamation cases and those generally awarded by the Court under Article 41 in length-of-proceedings cases. Accordingly, the level of compensation generally awarded by the courts of appeal in Pinto applications cannot be justified by this type of consideration.'

Above all, although the Pinto decisions are immediately enforceable, the Italian State does not pay the sums awarded and consequently obliges the victims to bring enforcement proceedings.⁵⁸ Consequently the ECtHR has recently held that the delay of the Italian State in paying the just satisfaction awarded at the issue of the Pinto proceedings have to be considered a systemic problem.⁵⁹

Nonetheless, one has to admit that the absence of the aforesaid requirements is not a grave omission, since the 45% threshold is considered by the ECtHR as not affec-

55 Flauss, J.-F., *supra* note 28, p. 111–113; Bernaert, M.-A., *supra* note 26, p. 915; Venice Commission, *supra* note 28, p. 22.

56 ECtHR (Grand Chamber), *Cocchiarella v. Italy*, Application No. 64886/01, Judgment of 29 March 2006, para 96–97. In the following analysis reference will be made to the text of this judgment, but the same principles have been affirmed by the same wording in the other eight Grand Chamber judgments, also delivered on 29 March 2006 in the other cases quoted in note 49.

57 See also *Cocchiarella*, para 80: 'It will, in particular, be easier for the domestic courts to refer to the amounts awarded at domestic level for other types of damage—personal injury, damage relating to a relative's death or damage in defamation cases for example—and rely on their innermost conviction, even if that results in awards of amounts that are lower than those fixed by the Court in similar cases.'

58 For the acknowledgment of this situation as a potential risk to the effectiveness of the Pinto remedy see *Cocchiarella*, at para 127; add also *Simaldone v. Italy*, Application No. 22644/03, Judgment of 31 March 2009, para 78–85.

59 See *Gaglione and others*, Application No. 45867/07 and others, Judgment of 21 December 2010, para 51–60.

ting the effectiveness of the Pinto remedy.⁶⁰ The rationale of such a conclusion, which objectively offers some basis to the *Corte di Cassazione* ruling in the cases reported above, is understood to be the acknowledgment of the effort made by the contracting State introducing the domestic remedy⁶¹ as well as the assumption that such remedy 'is closer and more accessible than an application to the Court, is faster and is processed in the applicant's own language; it thus offers advantages that need to be taken into consideration.'⁶²

Nevertheless, one may observe that the Court has found the Pinto remedy to be affected by serious problems (for instance the aforesaid State delay in paying the sums awarded). In addition to this, even after the 2004 overruling of the *Corte di Cassazione*, the ECtHR has found several violations in Italian length-of-proceedings cases, brought after the applicants have sought for non-pecuniary damages through the Pinto proceedings and have obtained a sum which does not constitute an adequate redress.⁶³ In light of these observations⁶⁴, is it possible to claim that the Italian remedy is 'faster' and 'more accessible' than the application to the Court, so that the compensation awarded can be 45% of which the Court would have awarded in the absence of a domestic remedy?⁶⁵ On the contrary, 'where the domestic remedy has not met all the foregoing requirements, it is possible that the threshold in respect of which the amount will still allow a litigant to claim to be a "victim" will be higher.'⁶⁶

Moreover, as indicated by the *Corte di Cassazione* in *M.M.C.*, this new '45% standard' has even been adopted by the ECtHR itself in the March 2006 Grand Chamber judgments and in its subsequent case law about Italian length-of-proceedings cases.⁶⁷ This result has been described as 'disconcerting' (*déconcertante*) by a prominent expert on the subject⁶⁸ since it seems to have a weak connection with the 'guide' for the assessment of non-pecuniary damages outlined by the Court in the aforesaid judgments of principle.

In sum, one might notice a certain inconsistency in the jurisprudence of the ECtHR on the subject. But its practical result is clear: taking into account the new '45% standard', the applicants have less chances to obtain by the ECtHR a ruling on the merit and

60 See, for example, ECtHR, *Cagnoni v. Italy*, Application No. 48156/99, Decision of 11 December 2007; *Garino c. Italy*, Applications No. 16605/03, 16644/03 and 16641/03, Decision of 18 May 2006.

61 *Cocchiarella*, para 67.

62 *Ibid.*, para 139.

63 See, among dozens of cases, *Carbè and others v. Italy*, Application No. 13697/04, Judgment of 23 June 2009; *Maria Vicari v. Italy*, Application No. 13606/04, Judgment of 26 May 2009; *Ambrosino v. Italy*, Application No. 32745/02, Judgment of 23 September 2008.

64 For other critical remarks on this issue see De Santis di Nicola, F., *supra* note 43, p. 656–660.

65 In this critical perspective see also Andriantsimbazovina, J. Délai raisonnable du procès, recours effectif ou déni de justice. *Revue française de droit administratif*. 2003, 1: 86, 94.

66 *Cocchiarella*, para 97.

67 In addition to *Carbè and others*, *Maria Vicari* and *Ambrosino* (quoted *supra* note 65), see *Stornaiuolo c. Italia*, Application No. 52980/99, Judgment of 8 August 2006, para 94; *Delle Cave e Corrado c. Italia*, Application No. 14626/03, Judgment of 5 June 2007, para 50.

68 Flauss, J.-F., *supra* note 28, p. 122.

a finding of violation of article 6, para 1, and 13 of the Convention.⁶⁹ In other words, as in Kudla, one can better understand the ECtHR's position bearing in mind a practical reason. But what if the Italian courts take other steps in the opposite direction of Strasbourg jurisprudence? *Guarino* and *Guarano* offer an example of such a trend.

3. The Interaction of ECtHR and National Courts in the Implementation of the Pinto Remedy: 'Ending Point' of Proceedings

Both *Guarino* and *Guarano* cases arise from first instance decisions which declared the Pinto applications inadmissible as being time-barred on the basis of six-months rule enshrined in article 4 of the Pinto Act.⁷⁰ In *Guarino* the application was lodged with the Court of Appeal some years after the enforceable decision was delivered, ascertaining the right to an increase of a social allowance, but only one month after the end of the enforcement proceeding which the applicant brought to obtain the sum already acknowledged. In *Guarano*, the application was lodged during the enforcement proceeding (*giudizio di ottemperanza*) brought before the administrative court in order to obtain the payment of the sums already awarded some years before as the result of a declaratory proceeding.

So in both cases the applicants underlined that their Pinto application had been lodged within six months departing from the issue of the enforcement proceedings. In their view, since they had to bring the enforcement proceedings in order to enjoy their specific right, there was no 'final decision,' within the meaning of article 4 of the Pinto Act, before the end of the enforcement proceedings. On this point, the applicants made reference to the relevant ECtHR's case law concerning article 6 (*Right to a fair trial*) and 35 (*Admissibility criteria*).

The reported judgments⁷¹ uphold the appealed decisions by means of a common reasoning, which can be summarized as follows.

First of all, according to the *Sezioni Unite* of the *Corte di Cassazione*, ECtHR's case-law does not confirm the applicant's allegation that declaratory and enforcement proceedings must be considered as a whole.

Indeed, for the *Corte di Cassazione*, the ECtHR affirmed this principle ruling on the issue of the effectiveness of compensatory remedies related to the unreasonable length

69 In this respect it seems interesting that in 2010 the ECtHR has never ruled on the merit of Italian length-of-proceedings cases brought after the applicants have obtained a compensation through Pinto remedy: see *Baccini and others v. Italy*, Application No. 26423/03, Decision of 1 June 2010; *Vallerotonda and others v. Italy*, Applications No. 52039/09 and 66483/09, Decision of 18 May 2010; *Vagnola S.p.A. and Madat S.r.l. v. Italy*, Application No. 7653/04, Decision of 12 January 2010.

70 According to article 4 of the Pinto Act, any claim for just satisfaction may be lodged, at latest, 'within six months from the date when the decision ending the proceedings becomes final.'

71 *Corte di Cassazione (Sezioni Unite)*, *Guarino v. Ministero della Giustizia*, Judgment No. 27348 of 24 December 2009; *Corte di Cassazione (Sezioni Unite)*, *Guarano v. Presidenza del Consiglio dei Ministri*, Judgment No. 27365 of 24 December 2009.

of proceedings. Referring again to the Grand Chamber cases of March 2006 as well as *Simaldone v. Italia* (all quoted above), the *Corte di Cassazione* consequently concludes that in those judgments execution is regarded as an integral part of the ‘trial,’ within the meaning of article 6 of the Convention, with the sole purpose of indicating a condition which a compensatory remedy must meet to be effective.

Insofar as, according to the *Corte di Cassazione*, the ECtHR’s case-law does not outline any binding general principle on this subject, ‘it is for domestic jurisdictions to verify if the Convention lays down a specific notion of ‘trial’ which is binding also on the national legal systems and which obliges to take declaratory and enforcement proceedings as a whole.

The *Corte di Cassazione* offers, then, a broad overview of the Italian system of judicial protection of rights. As a result, the structural autonomy of enforcement proceedings and declaratory ones is considered clear regarding the enforcement proceedings ruled by the Code of Civil Procedure, under review in *Guarino*.

This autonomy—admits the *Corte di Cassazione*—is more questionable regarding the execution of judgments delivered by the administrative court, at least when it takes place in judicial proceedings also under the jurisdiction of the administrative court (*giudizio di ottemperanza*). In these cases, given that the effective protection of the applicant’s right acknowledged in the declaratory proceedings requires the conduct due from public powers to be specified, some previous judgments of the *Corte di Cassazione* have considered that such enforcement proceedings concur in the final determination of the applicant’s right, within the meaning of article 4 of the Pinto Act. But in *Guarano* the *Corte di Cassazione* rejects this reasoning and, in accordance with its prevailing case-law, reaffirms the autonomy of declaratory proceedings and the *giudizio di ottemperanza*.

In fact, in the *Corte di Cassazione* view, declaratory and enforcement proceedings do not concern the same right: the former concern the substantial right asserted by the applicant, the latter concern the right to the execution.

As a consequence of the autonomy of declaratory and enforcement proceedings, their duration cannot be summed in order to obtain a whole, global duration. Furthermore, the time limit for the application, set by article 4 of the Pinto Act, has to be calculated departing from the final decisions respectively delivered in each kind of proceedings.

The *Guarino* and *Guarano* reasoning calls for critical remarks from the point of view of the national legal system. For instance, it is disputable that declaratory and enforcement proceedings do not concern the same right. In fact, even if these proceedings are surely autonomous from the structural point of view, their common purpose is to ensure that the applicant can effectively enjoy the right at stake.

Above all, one cannot conceal that the *Corte di Cassazione* has not made reference to the most pertinent precedents of the ECtHR, while it has misunderstood those it has cited.

As regards the latter remark, nobody contests that the enforcement of the Pinto decision was considered as a condition for the effectiveness of the domestic remedy in

Grand Chamber cases of March 2006 and in *Simaldone*. Yet, in these cases the ECtHR restates for the Pinto proceedings in question a well-established principle under article 6 of the Convention which governs all sorts of proceedings concerning civil rights and obligations:

[t]he Court reiterates its case-law to the effect that the right of access to a tribunal guaranteed by article 6, para 1, of the Convention would be illusory if a Contracting State's domestic legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party. Execution of a judgment given by any court must therefore be regarded as an integral part of the 'trial' for the purposes of Article 6.⁷²

As for the former remark, it is sufficient to examine briefly one of the precedents invoked by the applicants in *Guarino* and *Guarano*, bearing in mind that also the application to the ECtHR has to be lodged within 'six months from the date on which the final decision was taken.'⁷³

In *Di Pede v. Italy* the applicant complained about the length of declaratory proceedings which he had brought in order to force his neighbour to demolish a building, followed by enforcement proceedings which he had to lodge since his neighbour had not yet executed the due demolition.

The Court considers that it does not have to express a view on the difference of opinion among legal writers as to whether under Italian law enforcement proceedings are autonomous; it is with reference to the Convention and not on the basis of national law that the Court must decide whether, and if so when, the right asserted by Mr Di Pede ... actually became effective. It is that moment which constitutes determination of a civil right, and therefore a final decision within the meaning of article 26 [then article 35 of the Convention].⁷⁴

The ECtHR finally stated that the enforcement proceedings had to be regarded as the second stage of declaratory proceedings, so till the end of the enforcement proceedings no 'final decision,' within the purpose of the six-months rule, had been taken. The application concerning the length of the proceedings on the merits was consequently declared admissible and, in the assessment of the reasonable time, both declaratory and enforcement proceedings were considered as a whole⁷⁵.

The *Corte di Cassazione* has ignored this precedent, so it has not investigated whether the ECtHR case-law offers another basis for its ruling. As a result of the affirmed principles, many Pinto applications, lodged during enforcement proceedings but considering also the length of previous declaratory ones, can be declared inadmissible as time barred.

72 In these terms see, for example, *Cocchiarella*, para 87, quoting *Hornsby v. Greece*, Grand Chamber, Application No. 18357/91, Judgment of 1 April 1998, para 40.

73 Article 35, once article 26, of the Convention.

74 ECtHR, *Di Pede v. Italy*, Application No. 15797/89, Judgment of 26 Sept. 1996, para 22.

75 These terms see, most recently, ECtHR, *Belperio et Ciarmoli v. Italy*, Application No. 7932/04, Judgement of 21 Dec. 2010, para 39, 45.

Conclusions

After an overall consideration of the judgments reported, it seems that a common policy inspires the case-law of the *Corte di Cassazione* relating to the Pinto remedy, namely that of discouraging applicants from seeking just satisfaction for excessive length of proceedings at domestic level. Sooner or later, this approach may involve a violation of article 13 and force the victims to proceed again before the ECtHR. In other words, a sort of undesired boomerang would get back to the ECtHR, which could either stop this trend, as it did with the *Scordino* decision in March 2003, or resign under the burden of its growing backlog. The practical reason, which has been indicated above as the possible explanation of a certain inconsistency in the ECtHR's jurisprudence about the amount of the just satisfaction, might steer towards the latter option.

On the one hand, 'the workload of the Court is directly dependant upon States' commitments (financial as well as legal) to effectively implement Convention rights in their domestic legal systems.'⁷⁶ On the other hand, the risk that The Pinto Act, instead of nationalising the litigation arising from the excessive length of proceedings, does not prevent victims of unduly lengthy proceedings from complaining with the Court and even adds to the Court's workload a litigation arising from the inadequacy of the domestic remedy is utterly concrete.⁷⁷ Thus, as the State is not completely playing its role of first line defender of the reasonable-time requirement, the ECtHR has to find a compromise between the coherence of its case-law and the practical limits arising from the scarce resources at the Strasbourg system's disposal.

On the whole, according to a certain perspective, even an apparently endless series of Strasbourg Court's judgments concerning delays of judicial process in Italy is not an effective way of improving Convention compliance in this field.⁷⁸ Finally, it relies on national political and legal forces to take notice of what the Strasbourg Court says and finding the proper remedies.⁷⁹ So the national level has to do more, but what?

One could dispute that in the Italian case the introduction of a compensatory remedy in respect of excessive length of proceedings, which proceeds from article 13 of the Convention since *Kudla* overruling, has really increased the protection of the right to trial within reasonable time, entrusted in article 6, para 1, of the ECHR. As a matter of fact in 2009 the Pinto Act has been the third most disputed subject in the activity of the *Corte di Cassazione*; comparing to judicial year 2008, in 2009 30% more applications have been lodged to the Courts of Appeal; the State debt for payment of just satisfactions amount to EUR 267 million.⁸⁰ Therefore the compensatory protection of the reaso-

⁷⁶ Mowbray, A., *supra* note 25, p. 584.

⁷⁷ Such worries have been expressed by Flauss, J.-F., *supra* note 26, p. 185, 195; Andriantzimbazovina, J., *supra* note 67, p. 95; Beernaert, M.-A., *supra* note 26, p. 914–916; Greer, S., *supra* note 13, p. 161.

⁷⁸ Greer, S., *ibid.*, p. 174.

⁷⁹ *Ibid.*, p. 182.

⁸⁰ For these data see the *Report on the State of Justice in Judicial Year 2009*, presented by the First President of the *Corte di Cassazione* on the occasion of the inauguration of Judicial Year 2010 [interactive]. [accessed 10-01-2011]. <<http://www.cortedicassazione.it/Documenti/Relazione%20anno%20giudiziario%202009.pdf>>.

nable-time requirement is weighing heavily on the Italian justice, that is to say on the very machinery which should guarantee a trial within a reasonable time. Quite on the contrary, as outlined in paragraph 1, one of the purposes of ‘subsidiarity’ and ‘embeddedness’ should be that of improving the Convention compliance.

In this respect, an authoritative expert of the Italian civil justice has recently observed that, in a legal system affected by endemic problems with length of proceedings, all the efforts should be concentrated on planning and implementing serious reforms in order to ensure dispute settlement within a reasonable time, rather than to manage the litigation arising from unduly lengthy proceedings. A global reduction or even the temporary exclusion of the domestic compensation for victims of violations of the reasonable time requirement is, consequently, suggested as the way for a smooth reform of justice.⁸¹

Nevertheless, some doubts can be cast on such a solution: to reduce or, thoroughly, to exclude the redress cannot be regarded as the necessary price for the reform of justice. In general terms, ‘rectification and compensation in the framework of basic rights serve to restore to individuals to the extent possible their capacity to achieve the ends that they personally value. As such, compensation may have an important rehabilitative effect, alleviate suffering and provide for material needs. A climate of impunity, in contrast, can leave serious negative consequences on individual survivors and ultimately on society as a whole.’⁸²

Of course a pecuniary compensation does not constitute a genuine protection of the reasonable-time requirement guaranteed by article 6, para 1, of the Convention. But denying even an adequate compensation for the violation of this fundamental right, at national or international level, resembles a *summa iniuria*. Without neglecting that, at least in general terms, compensation for human rights violations also constitutes a deterrence for the State, it is the importance of the right considered, strongly connected to the Rule of Law, that calls for a double effort: to carry out reforms and, in the meantime, to afford an adequate pecuniary redress.

Finally, in the light of the report and the related remark carried out in the present article, one may conclude that ‘subsidiarity’, ‘embeddedness’ and ‘domestic remedies’ are an interesting subject for research and legal reasoning. Yet, without adequate financial means both at national and international level, they might be regarded as the fig leaf of a weak protection of the right to a trial within a reasonable time.

81 Consolo, C. La improcrastinabile radicale riforma della legge-Pinto, la nuova mediazione ex d.lgs. 28 del 2010 e l’esigenza del dialogo con il Consiglio d’Europa sul rapporto fra Repubblica italiana e art. 6 CEDU. *Corriere giuridico*. 2010, 4: 432–433.

82 Shelton, D., *supra* note 1, p. 11.

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EUROPOS ŽMOGAUS TEISIŲ KONVENCIJOS SUBSIDIARUMO IR ĮSILIEJIMO PRINCIPAI, SUSIJĘ SU PROTINGO LAIKO REIKALAVIMU: ITALIJOS ATVEJIS

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Santrauka. Manoma, kad teisė į „vidines priemones“, kurios jungia Europos Žmogaus Teisių Konvencijos (EŽTK) subsidiarumo ir įsiliejimo (angl. – embeddedness) principus šalių narių teisėse sistemose, turės esminę reikšmę Strasbūro mechanizmui išlikti bei efektyviai žmogaus teisių apsaugai. Kalbama apie priemones, susijusias su protingo laiko reikalavimu. Taigi Italijos atvejis gali būti puikus išbandymas.

Kai 2001 m. Įstatymu Nr. 80 (Pinto aktu) į Italijos teisinę sistemą buvo įvesta kompensavimo priemonė, greitai tapo aišku, jog ji galėtų būti laikoma „efektyvia“ 13 ir 35 EŽTK straipsnių prasme tiek, kiek ji būtų įgyvendinta, remiantis Europos Žmogaus Teisių Teismo (EŽTT) praktika. Dėl to reikėjo nustatyti teisinę EŽTT ir Italijos teismų bendravimo priemonę.

Šiuo atžvilgiu Italijos Aukščiausiasis Teismas (Corte di Cassazione) šios valstybės civilinės teisės sistemoje bandė tvirtinti, kad EŽTT praktika turi būti laikoma, bent jau iki tam tikro lygio, įstatymu, įpareigojančiu nacionalinį teisėją. Teisine priemone šiam tikslui pasiekti turėtų tapti Pinto akto 2 straipsnio 1 dalyje esanti nuoroda į 6 EŽTK straipsnį ir pripažinimas EŽTT vaidmens, interpretuojant šią nuostatą.

Kadangi ši doktrina abejotina, įmanoma rasti kitą galimybę EŽTT praktikai įgyvendinti Pinto priemonę. Pirma, galima prisiminti, jog pagal dabartinę Italijos konstitucinio teismo praktiką, atsižvelgiant į 18 bei 32 EŽTK straipsnius, visas šios Konvencijos nuostatas turėtų interpretuoti EŽTT, o Italijos teismai turėtų remtis šiomis interpretacijomis. Antra, svarbu pabrėžti, jog Pinto aktu, vykdamas įsipareigojimą pagal 13 EŽTK straipsnį, Italijoje buvo įvesta vietinė priemonė. Taigi galima daryti išvadą, jog Italijos teismai turi interpretuoti bei taikyti Pinto aktą, atsižvelgdami į 13 EŽTK straipsnį, kaip interpretuoja EŽTT.

Netgi sukūrus teisinę anksčiau minėtos jurisdikcijų sąveikos priemonę, tokios sąveikos rezultatai rodo, jog vietinė priemonė nei pagerino protingo laiko reikalavimo Italijoje apsaugą, nei sumažino EŽTT darbo krūvį. Ši teiginį galima pagrįsti dviem pavyzdžiais: pirmasis susijęs su neturtinės žalos, atsiradusios dėl per ilgą proceso trukmės, kompensacijos pradžios tašku, o kitas – su proceso pabaigos nustatymu.

Kalbant apie pirmąjį, labiausiai susijusios teismų praktikos ataskaita rodo, jog 45 proc. teisingos satisfakcijos, paskirtos EŽTT nesant vietinės priemonės, laikoma adekvačiu ir efektyviu kompensavimu. Vis dėlto nors ir pripažįstant, kad nacionaliniu lygiu teisinga satisfakcija gali būti mažesnė nei panašiais atvejais nustatyta EŽTT, negalima pamiršti, jog Didžioji kolegija nustatė keletą sąlygų, kurios nacionaliniu lygiu turi būti patenkintos, teisėtai sumažinus kompensaciją. Iš tiesų net EŽTT požiūriu Pinto priemonė neatitinka nė vieno iš šių reikalavimų.

Kalbant apie antrąjį pavyzdį, Corte di Cassazione nusprendė, jog aiškinamuoju ir vykdymo procesu neturėtų būti siekiama Pinto pareiškimo, kuris turi būti paduotas per šešis mėnesius nuo to momento, kai proceso pabaigos sprendimas tampa galutinis, ar proceso trukmės vertinimo. Vis dėlto atsižvelgiant į EŽTT praktiką, ypač bylą Di Pedė prieš Italiją, gali būti kitokia išvada.

*Apibendrinant galima pasakyti, jog Italijos Aukščiausiasis Teismas trukdo pareiškėjams vietiniu lygiu siekti teisingos satisfakcijos už per ilgą proceso trukmę. Tačiau EŽTT turėtų atsargiai reaguoti į tokias nuostatas, kadangi nustačius, jog, įgyvendinant Pinto priemonę bus pažeistas 13 straipsnis, Strasbūrą gali užplūsti tūkstančiai Italijos bylų dėl proceso trukmės. Galiausiai galima daryti išvadą, jog tokia vietinė kompensacijos priemonė nėra pati geriausia išeitis sistemoje, kuriai būdingos proceso trukmės problemos. Arba galbūt pastangos reformuoti teisingumo sistemą turi būti padvigubintos, nesumažinant arba nepa-
naikinant adekvačios kompensacijos aukoms.*

Reikšminiai žodžiai: *protingas laikas, vietinės priemonės, subsidiarumo principas, jurisdikcijų sąveika, Europos Žmogaus Teisių Konvencija.*

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