
GUIDE TO READING OF EDITION No. 2: 2014-2015

The Editorial Staff

1. For the second edition of the *Survey* (2014-2015), the editors followed the same approach of the first. The database therefore contains a further reasoned selection of legal documents relevant to advance knowledge and understanding on the application of international law in the domestic legal order of Italy. Leaving out some addition to the [Subject Index](#) and the [Index by treaty](#), the organization of the documentation has not changed.

The editors present a wide selection, although not exhaustive, of acts and documents covering approximately 300 legislative acts, court cases and documents related to monitoring procedures on the implementation of multilateral treaties, all emerging from Italian practice in the relevant two year period. With regard to the content, we refer the reading to a consultation of the relevant documents. The aim of this guide is just pointing out some examples of the most significant and interesting cases.

2. The relevant legislation consist, for a great part, of laws authorizing the ratification and implementation of international treaties. Among the latter, there are two important UN conventions, which Italy had not ratified, yet. One is the Convention for the Protection of All Persons from Enforced Disappearance of 2006 (law No. 131/2015) and the other, the 1961 Convention on the Reduction of Statelessness (law No. 162/2015). The Parliament also authorized the ratification of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, through law No. 152/2014. Entered into force in 2013, the Optional Protocol has enhanced the monitoring mechanism of the ICESCR, through introducing an individual complaint procedure and an inquiry procedure. This is also the case of the (third) Optional Protocol to the Convention on the Rights of the Child (law No. 199/2015). Further, law No. 101/2015 authorized the ratification and implementation of the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-Operation in Respect of Parental Responsibility and Measures for the Protection of Children.

Italy also concluded a conspicuous number of bilateral agreements. Many are on judicial cooperation on criminal matters, in further application of the UN Convention against Transnational Organized Crime. Besides dealing with extradition (as is the case for the Agreement with China, law No. 161/2015) or exchange of convicted persons, these agreements also contain provisions aimed at reinforcing cooperation and mutual assistance in the fight against international terrorism and transnational organized crime. Other agreements set out norms on cooperation on financial matters, not only to avoid double taxation, but also to establish obligations on the exchange of information between parties and other kind of mutual assistance in the fight against fraud and tax evasion. See, among others, the agreements concluded by Italy with San Marino (law No. 160/2014), Gibraltar (law No. 187/2014), the Isle of Man (law No. 12/2015), and Cayman Island (law No. 100/2015). See also law No. 95 of 18 June 2015, on the ratification and implementation of the Agreement between the Government of the Italian Republic and the Government of the United States of America aimed at improving international tax compliance and applying F.A.T.C.A. (Foreign Account Tax Compliance) legislation.

Social security is another field of bilateral cooperation where there were developments, following authorization by the Parliament to ratification and implementation of a number of agreements. We can mention law No. 35/2015, concerning a social security agreement with Turkey; law No. n. 93/2015 (on a similar agreement with Canada), law No. n. 97/2015 (Japan), law No. 98/2015 (Israel). Moreover, Italy broadened its participation in international space activity. Through law No. 197 of 16 November 2015, the Parliament authorized the ratification of the Framework Agreement with the United States for cooperation in the exploration and use of outer space for peaceful purposes (Washington, 2013). Similarly, law No. 180/2014 concerns the Cooperation Agreement on Satellite Navigation between the EU and its Member States and Norway (Bruxelles, 2010).

Worth of note is also the reform of the Italian legislation on international cooperation to development, resulting from law No. 125/2014. With regard to criminal law, modifications were introduced on the penalty regime and for enhancing the protection of detainees' rights, in further application of the Judgment of the European Court of Human Rights on the *Torreggiani* case. In this vein, law No. 117 of 2014 set out new provisions aimed at better realizing the right to compensation of those

persons who were subjected to ill treatment in the meaning of Article 3 of the ECHR, in consequence of prison overcrowding.

3. With regard to case law, which form the greatest part of the overall documentation of the *Survey*, there are no doubts that the most important case concerns Judgment No. 238 of 2014 of the Constitutional Court. Through this Judgment, the Court declared the non-enforceability in Italy of the ICJ's Judgment of 2012 on the case *Jurisdictional Immunities of the State (Germany v. Italy)*. Further cases followed in 2015, where the Italian courts applied the principles affirmed by the Constitutional Court and, thus, did not recognize the immunity from jurisdiction to Germany, and other foreign States in respect of civil actions brought against them for acts that, though done in the performance of sovereign functions, qualify as war crimes or crimes against humanity. This, in application of the so-called "counter-limits" doctrine, from which Judgment No. 238 was inspired, leading to assert that there may be limits on the entering of international law in the domestic legal order, to preserve supreme principles of the Italian Constitution. This case is discussed in the *Focus* section.

Looking at judicial decisions at large, a great majority deals with the application in Italy of the convention on human rights' protection, *in primis* the ECHR provisions as interpreted by the ECHR Court. This is true for a number of decisions applying the principles enshrined in the Judgment of the ECHR Court on the case *Grande Stevens v. Italy*, highlighting that certain administrative sanctions provided under Italian legislations amount, as for their substance, to criminal sanctions. It derives that imposing these sanctions, in addition to criminal ones, upon the same person and for the same fact violates the fair trial principles (Article 6 of the ECHR) and, most in particular, the *ne bis in idem* principle (Article 4 of the Protocol No. 7 to the ECHR). The relevant Italian case law showed uncertainty. Assessing whether a given sanction falls, by its characters, within the category of those that amount, for their substance, to criminal sanctions according to the ruling of the ECHR Court, is not always easy. We can mention, among these interesting decisions: Judgments No. 19915/2013, No. 4880/2014 and No. 19334/2015 of the Supreme Court of Cassation; Judgment No. 7566/2014 of the Council of State; Judgment of 17 October 2014 of the Court of Brindisi; Judgment of 27 October 2014 of the Court of Torino, V Criminal Section; Judgment of 21 April 2015 of the Court of Bologna, I Criminal Sections. All the relevant case are found in the *Survey* under the subject "Human Rights", sub-subject "*ne bis in idem*".

Another issue is protection of the rights of same-sex couples. Until the adoption of law No. 76 of 2016, there were no applicable norms in Italy. Many judicial decisions anticipated, however, the application of appropriate legal principles, also in follow-up of the decision of 2015 of the ECHR Court on the case *Oliari v. Italy*. A number of cases concerned the transcription in Italy of same-sex marriages celebrated abroad. These therefore involved not only the application of the relevant ECHR provisions (non-discrimination, respect for private and family life), but further legal issues to be decided in accordance with private international law (see, among others, Judgment No. 4889/2015 of the Council of State). Italian legislation does not allow one of the same-sex partners to adopt the child of the other (there was no sufficient consensus on this particular point, when the Parliament passed law No. 76 of 2016). However, Italian courts upheld, in some cases, the arguments of the applicants, through assessing the compatibility of the same with general legal principles and in light of the existing legislation on “adoption under particular circumstances” (Appeal Court of Rome, 20 October 2015; Juvenile Court of Rome, 23 December 2015).

Other cases relate, more generally speaking, to prohibition of gender-based discrimination and discrimination against LGBTI persons. We can mention Judgment No. 221/2015 of the Constitutional Court, recognizing the right of the individuals to self-determination with regard to their own gender identity. Moreover, the Court of Cassation established the principle that the persons who suffered damages in consequence of homophobic behavior must receive proportionate compensation as compared with the gravity of such offense (Judgment No. 1126/2014).

The application of Article 8 of the ECHR, which guarantees respect for private and family life, is involved, together with the right to health, in a number of cases concerning medically assisted procreation. In 2015, the Italian Constitutional Court declared the illegitimacy of certain provisions of law No. 40 of 2004, also in follow-up of the ECHR Court’s decision on the case *Costa and Pavan*. The Constitutional Court held that the selection of embryos could not qualify as a criminal offense, if made only to prevent the implantation of embryos affected by communicable diseases of such gravity as to allow medically assisted termination of pregnancy under law No. 194/1978. Another interesting case is the complaint brought before the Italian courts and, then, the ECHR Court by the genetic parents of twins born because of an exchange of embryos that took place at the hospital Pertini in Rome (Order of 8 August 2014

of the Court of Rome, I Civil Section; ECHR Court's Judgment of 2014, *X and Y v. Italy*).

Jurisprudence on immigration is conspicuous. We refer most in particular, to the decisions of the administrative courts concerning residence permit, expulsion, family reunification, regularization of irregular immigrants, and so on. On other hand, the Court of Cassation (I Criminal Section) issued an important decision concerning migrant smuggling in 2015. Accordingly, the Italian courts have the competence for prosecuting those responsible for the smuggling of migrants even if such illicit activity took place beyond Italy's territorial sea, and the entry in Italy of irregular migrants resulted from maritime search and rescue activity carried out in conformity with the SAR Convention and the UNCLOS (Judgment No. 3345/2015).

4. The protection of human rights, including the rights of migrants is of great relevance also in the framework of international procedures on monitoring treaty implementation. Between the relevant documents, we point out those concerning the Universal Periodic Review from the UN Human Rights Council: the National Report submitted by Italy in July 2014 and the Report of the Working Group of 10 December 2014 on the outcome of the review. In their remarks, over 90 States has repeatedly expressed strong appreciation for the efforts made by Italy in matters related to the management and protection of migrants. Among the critical issues, emerge the establishment of an independent national body for the protection and promotion of human rights in accordance with the Paris Principles, the non-ratification of some international conventions (starting with the UN on the rights of migrants and their families) or the additional protocols, the implementation of the plan for the fight against gender violence, and of strategies concerning the rights of the Roma, Sinti and Caminanti, and of LGBTI persons.

Worth of note are also documents from the UNHCR, which include recommendations concerning the rights of stateless persons resident in Italy (October 2014), and a document on the critical issues emerging by the EU policy and legislation with regard to asylum seekers (UN High Commissioner for Refugees (UNHCR), Consolidating the CEAS: innovative approaches after the Stockholm Programme? UNHCR's recommendations to Italy for the EU Presidency July - December 2014).

With regard to multilateral treaties, Italy submitted its first Report to the Committee on the Rights of Persons with Disabilities in 2015 (see also the considerations on the report, adopted by the Committee in its session

25 March-17 April 2015). In the field of the environment and cultural heritage, there was the submission of a number of Italy's reports to the competent monitoring bodies (UNESCO Convention on World Heritage, Biodiversity Convention and CITES, submitted in 2014; Ramsar Convention on Wetlands, in 2015).

Looking at documents produced in the framework of the Council of Europe, there were many decisions of the Committee of Ministers concerning the implementation by Italy of some Judgments of the ECHR Court, including on the cases *Hirsi Jamaa* and *Torreggiani*. Moreover, Italy submitted a national report on the implementation of the European Framework Convention on National Minorities, and another report under the European Convention against Trafficking in Human Beings.

Further 'cases' at the European level relate to decisions issued *vis-à-vis* Italy by the European Committee on Social Rights. One is the decision on the complaint brought by the *Planned Parenthood Federation-European Network*, adopted in September 2013 and published in March 2014. The Committee declared that Article 9 of law No. 194/1978 – on the right of conscientious objection of medical staff in cases of voluntary interruption of pregnancy – violates the articles on the right to protection of health (Article 11) and non-discrimination (Part V - Article E) of the European Social Charter (Revised). The Committee also examined a complaint from the Association for the Protection of All Children (APPROACH), concerning the compatibility of Italian legislation and jurisprudence with the European Social Charter prohibition of all corporal punishment of children. In the view of the Committee, although in the Italian legislation there is no clear prohibition on such matter, the interpretation given to the existing norm by the Supreme Court of Cassation was sufficient to avoid the violation of the relevant provisions of the European Social Charter.