https://doi.org/10.18778/8331-399-3.25

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Reflections on the Italian Tax Judiciary System from the Perspective of the European Convention on Human Rights[2]

1. Introduction

The aim of this paper is to examine the current Italian tax judiciary system under the lens of Art. 6(1) of the European Convention on Human Rights (ECHR),[3] and specifically in accordance with the principle contained therein that everyone is entitled to be judged by an independent and impartial tribunal established by law. The aim of this investigation is to help clarify the ongoing discussion on the future reform of the Italian tax judiciary system[4] and, in particular, the nature, status, and role of Tax Commissions and tax judges, and it will therefore focus only on those aspects of the current order that are in conflict with Art. 6(1).

Given its aim and delimitation, this paper will methodologically proceed using both an inner and outer perspective,[5] the latter used to

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[2] This paper was made possible by the financial assistance of the Torsten Söderbergs Stiftelse. The author is grateful to the foundation for their support.

[3] Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols No. 11 and 14, 4 November 1950.

[4] IT, The Senate of the Republic (Senato della Repubblica), *XVIII Legislatura Fascicolo Iter DDL S. 1243 Riforma della giustizia tributaria*, 6 December 2020.

[5] G. Samuel, *An Introduction to Comparative Law Theory and Method*, Vol. 11, Hart Publishing, Oxford 2014, p. 60 et seq.

reveal aspects of the Italian judicial tax system that the former might miss,[6] and to identify national sources and those incongruences or conflicts that are relevant for the analysis.[7]

2. Monistic versus dualistic approach

Italy presents an interesting case study in respect to the national application of the ECHR and tax law. The country signed the ECHR in 1950 and ratified it in 1955. With ratification, Italy should have ensured that its national legislation is in compliance with the obligations deriving from the ECHR. This conflicts with the considerable, and increasing, number of judgments for breaching human rights obligations deriving from the ECHR Italy has received through the years.[8]

Broadly speaking, international law doctrine distinguishes between two different approaches when it comes to the relationship between domestic law and international law: monism, and dualism.[9] In a monistic approach,[10] international and domestic law constitute one single legal system: if applied to our case, it would imply immediate application of the Convention's normative content, it being hierarchically superior to what national legislation mandates. A dualistic approach considers instead international law and domestic law as two different legal bodies[11] whose hierarchical position in respect to one another has to be determined independently in each national legal system: in our case, it would mean that the application of the ECHR within a state's legal system would be left to that state's own judgement.

Italy adopts a dualist approach,[12] and, because of this, the ECHR does not have preconstituted primacy over national legislation.[13]

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[6] *Ibidem*.

[7] J. Husa, *A New Introduction to Comparative Law*, Hart Publishing, Oxford 2015, p. 64, quoting M. Bogdan, *Komparativ rättskunskap*, Norstedts Juridik AB, Stockholm 2003, p. 28.

[8] Council of Europe, *Annual Report 2020 of the European Court of Human Rights*, 2020, p. 164.

[9] J.G. Starke, *Monism and dualism in the theory of international law*, "British Year Book of International Law" 1936, No. 17, pp. 66–81.

[10] A. Caligiuri, N. Napoletano, *The Application of the ECHR in the Domestic Systems*, "The Italian Yearbook of International Law Online" 2010, No. 20(1), pp. 125–159.

[11] *Ibidem*.

[12] C. Jonas, M. Rask Madsen (eds), *The European Court of Human Rights between Law and Politics*, Oxford University Press, Oxford 2011, p. v.

[13] O. Pollicino, *The European Court of Human Rights and the Italian Constitutional Court: No 'Groovy Kind of Love'*, [in:] K.S. Ziegler, E. Wicks, L. Hodson (eds), *The UK and European Human Rights: A Strained Relationship?*, Hart Publishing, Oxford 2015, pp. 361–377.

3. Tax Commissions and the judicial tax system in Italy

In Italy, tax law disputes fall currently under the competences of special judges and courts: the Tax Commissions (*Commissioni Tributarie*).[14] Tax Commissions have exclusive jurisdiction over tax matters. In 1992, Legislative Decrees No. 545 and No. 546 reformed tax litigation.[15] The reform entered into force in 1996. Legislative Decree No. 156,[16] approved in 2015 and containing measures concerning the legal framework for advance rulings and tax litigation,[17] introduces minor non-structural changes to Legislative Decree No. 545.

3.1. Issues concerning independence

If one considers the principle of independence and its case-law elaboration by the European Court of Human Rights (ECtHR), the organization of Tax Commissions can be deemed to be in breach of Art. 6(1) of the ECHR, since independence as such also encompasses the criterion that a court ought to show an appearance of independence.[18]

A brief historical note is necessary to understand how the current situation came into being. The Tax Commissions were first established in the late 19th century with Law 1830 of 14 July 1864,[19] but they were reformed under the fascist regime with Royal Decree-law No. 1639 of 7 August 1936 and Royal Decree No. 1516 of 8 July 1937.[20] The foundations

[14] The Revenue Agency, *Glossary of tax terminology*, "Commissioni tributarie", https://www.agenziaentrate.gov.it/portale/web/english/nse/glossary#C (accessed: 22.03.2021).

[15] Legislative Decree No. 545 of 31 December 1992 [*Decreto Legislativo*] and Legislative Decree No. 546 of 31 December 1992 [*Decreto Legislativo*], Official Gazette No. 9 of 13.01.1993, replacing Presidential Decree No. 636 of 16 October 1972 [*Decreto del Presidente della Repubblica*], Official Gazette No. 292 of 11 November 1972.

[16] Legislative Decree No. 156 of 24 September 2015 [*Decreto Legislativo*], Official Gazette No. 233, 7 October 2015.

[17] M. Leo, *La Riforma del Contenzioso Tributario: Cose Fatte e Cose da Fare*, "il fisco" 2015, No. 42, p. 4016 et seq.

[18] Council of Europe, Department for the Execution of Judgments of the European Court of Human Rights, DG1, *Thematic Factsheet, Independence and Impartiality of the Judicial System*, December 2020, p. 3.

[19] The Senate of the Republic (Senato della Repubblica), *XVIII Legislatura No. 759, Disegno di Legge*, 7 August 2018.

[20] V. Mastroiacovo, *Il Diritto Tributario alla Prova del Regime tra Urgenze di Guerra e Ambizioni di Sistema*, [in:] I. Birocchi, G. Chiodi, M. Grondona (eds), *La Costruzione della "Legalità" Fascista negli Anni Trenta*, Romatre Press, Roma 2020, p. 162.

of the Italian judiciary system were laid out in the years after World War II and enshrined in the Constitution of the Italian Republic.[21] The Constitution was enacted by the Constituent Assembly on 22 December 1947, and entered into force on 1 January 1948.[22] The Constitution establishes one of the fundamental characteristics of the Italian judiciary, that of the independence of judges.[23]

In line with this principle, Art. 102(1) of the Constitution states that the judicial proceedings are exercised by ordinary magistrates, and Art. 102(2) introduces a general prohibition of establishing extraordinary or special judges. The reason for this explicit interdiction resides in the routine appointment of special judges, called to decide on specific cases under the close audit of the executive,[24] by the Italian fascist regime during the war and pre-war years.[25] The newly constituted Italian Republic unsurprisingly laid out a judicial system based on civil, criminal, and administrative judges bound by the law and nothing more:[26] all other existing special roles, judges, and courts were to be terminated. But not the Tax Commissions.[27]

Their compliance with the Italian Constitution has been recognized in a number of judgments by the Italian Constitutional Court (ICC) on the grounds that Tax Commissions are indeed a special body of jurisdiction that predates the Constitution and is therefore fully compatible with it.[28] Recognitions of constitutionality by the ICC notwithstanding, the special nature of Tax Commissions places them in conflict with the standards of Art. 6(1) of the ECHR and its further elaborations by the ECtHR, both in terms of their mere existence, and in terms of their "appearance". In the *Ergin* v. *Turkey* case,[29] the ECtHR reaffirmed the United Nations' Human Rights Committee warning to Member States, in their General

[21] M. Greggi, N.Ž. Kovacevic, *Lights and Shadows on the Implementation of the Alternative Dispute Resolution (ADR) System in the Italian and Croatian Tax Trial*, "Zbornik Pravnog Fakulteta Sveucilista Rijeci" 2017, No. 1, pp. 377–396.

[22] M. Einaudi, *The Constitution of the Italian Republic*, "The American Political Science Review" 1948, No. 4, pp. 661–676.

[23] M. Greggi, N.Ž. Kovacevic, *Lights and Shadows*…

[24] G. Scarselli, *Ordinamento giudiziario e forense*, Giuffrè Editore, Milan 2010, p. 303.

[25] A. Kallis, *The Third Rome, 1922–43: The Making of the Fascist Capital*, Palgrave Macmillan, London 2014.

[26] Constitution of the Italian Republic of 27 December 1947 [*Costituzione della Repubblica Italiana*], Official Gazette No. 298 of 27 December 1947, Art. 108.

[27] M. Greggi, N.Ž. Kovacevic, *Lights and Shadows*…, pp. 377–396.

[28] See i.a. IT, Constitutional Court, judgment, 8 February 2010, No. 39, 2010; G. Gilardi, *La riforma della Giustizia Tributaria e l'"Unitarietà" della Giurisdizione*, "Questione Giustizia" 2016, No. 3, p. 74 et seq.

[29] ECtHR, judgement, 4 May 2006, *Ergin* v. *Turkey*, Application No. 47533/99.

Comment on Art. 14[30] of the International Covenant on Civil and Political Rights, that they should adopt care in creating and using special courts.[31] That same case, together with the *Zolotas* v. *Greece* case,[32] also sees the ECtHR cast doubts on the fact that, in consideration of their special status, Italian Tax Commissions can be upheld to the standard of appearance of independence for courts established in the ECHR.

3.2. Issues concerning impartiality

The principle of impartiality, descending from both Art. 111 of the Italian Constitution and Art. 6(1) of the ECHR, requires the absence of any prejudice or bias. According to ECtHR case law, the existence of impartiality must be evaluated not only according to a subjective test, involving the personal convictions and behaviour of a judge, but also according to an objective test, meant to assess whether a court and its composition display satisfactory guarantees to eliminate any legitimate doubt of partiality.[33] The principle also applies to Tax Commissions.

Article 111(2) of the Italian Constitution states that "the parties are entitled to equal conditions before an impartial judge in third party position". Italian doctrine clarifies "third party position" to mean a position of "absolute indifference and real equidistance from the convening parties" that also includes "having no interest in the case".[34] In the specific case of tax trials impartiality, this "third party position" implies that the judges should not belong to the tax administration,[35] since the tax administration is one of the two parties of any tax controversy.

As such, the management and organization of the tax judiciary system, including tax judges and Tax Commissions, should be outside of the sphere of influence of the tax administration and ideally directly handled by the Ministry of Justice or, alternatively, by the Presidency of the Council of Ministers. Nevertheless, in accordance with Art. 9 of Legislative Decree No. 545 of 1992, tax judges in Italy are appointed

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[30] United Nations, Human Rights Committee (HRC), *General Comment no. 32, Article 14, Right to Equality Before Courts and Tribunals and to Fair Trial*, CCPR/C/GC/32, 23 August 2007.

[31] UN General Assembly, International Covenant on Civil and Political Rights of 16 December 1966, United Nations, Treaty Series, Vol. 999, p. 171.

[32] ECtHR, judgement, 2 June 2005, *Zolotas* v. *Greece*, Application No. 38240/02, Para. 24.

[33] Council of Europe, Department for the Execution of Judgments of the European Court of Human Rights, DG1, *Thematic*…, p. 9.

[34] Treccani, "Terzietà", https://www.treccani.it/enciclopedia/terzieta/ (accessed: 25.03.2021). Translation from the Italian by the author.

[35] M. Villani, *I Compensi dei Giudici Tributari*, "Tribuna Finanziaria" 2008, No. 1, pp. 23–24.

by the President of the Republic upon a proposal of the Minister of Finance, who is not a third, independent party in the context of tax justice, but, rather, the top controller for the tax administration. The fact that consultation of, and deliberation by, the Board of Presidency of Tax Justice is required does not change the status of the Minister in the process.

The tax judiciary system ought to be independently managed and organized under its own administrative profile, and any and all administrative connections to the Ministry of Finance rescinded. The system will remain defective, and be subject to reasonable scepticism, if the independence of tax judges is considered to be relevant only at the moment of passing judgment, and not as an organizational value.[36]

On this specific point, it is worth noting that the ECtHR, in the *Miroshnik* v. *Ukraine* case,[37] maintains that a military tribunal financially dependent on the Ministry of Defence and whose judges were also appointed by same ministry, was not in compliance with the principle of independence.[38]

It is clear that a number of factors hinder a complete implementation of the principle of impartiality in the current Italian judicial tax system, which would require amendments in the way it handles both the management and organization of Tax Commissions and tax judges if it were to achieve the standards set by the ECHR: the existing process conflicts with both Art. 111 of the Italian Constitution and Art. 6(1) of the ECHR.

3.3. Issues concerning remuneration

In Italy, the appointment of tax judges is honorary in nature and does not constitute a formal relationship of public employment.[39] They receive a fixed monthly remuneration for the service they provide, plus an additional per-case handling fee.[40] This is problematic for at least two different reasons. On one hand, criteria for determining a reasonable decent pay are in fact lacking as the service is deprofessionalized for the

[36] A. Poddighe, *Giusto Processo e Processo Tributario*, Giuffrè Editore, Milan 2010, p. 23; S. Cantelli, *Cittadini-Contribuenti e Avvocati Tributaristi: Figli di un Processo Minore?*, "il fisco" 2014, No. 37, p. 3651 et seq.

[37] ECtHR, judgement, 7 November 2008, *Miroshnik* v. *Ukraine*, Application No. 75804/01, Para. 64.

[38] C. Buccico, *Verso la Riforma della Giustizia Tributaria nella Prospettiva della Terzietà e Imparzialità del Giudice*, "Giurisprudenza delle Imposte" 2019, No. 4, pp. 264–316.

[39] IT, Legislative Decree No. 545 of 31 December 1992…, Art. 11.

[40] IT, Legislative Decree No. 545 of 31 December 1992…, Art. 13.

reasons articulated earlier. On the other, compensation is also partially dependent on performance,[41] measured quantitatively in the number of cases. The professionalization of the role would also help ensure that tax judges have access to specialized training.[42]

According to Art. 6(1) of the ECHR, independence is connected to an appropriate remuneration. The Recommendation CM/Rec(2010)12 of the Committee of Ministers to Member States on Judges: Independence, Efficiency and Responsibilities[43] states that "judges' remuneration should be commensurate with their profession and responsibilities, and be sufficient to shield them from inducements aimed at influencing their decisions. Guarantees should exist for maintaining a reasonable remuneration in case of illness, maternity or paternity leave […] Systems making judges' core remuneration dependent on performance should be avoided as they could create difficulties for the independence of judges".[44]

The recommendation also associates "security of tenure" and "irremovability" with professionality and a guarantee of competence and independence. While it might be admissible to have a few honorary judges in charge of the administration of tax justice, it is not admissible that all tax justice is administrated by honorary judges only.[45]

Finally, as previously mentioned, Legislative Decree No. 156 of 24 September 2015 also contains amendments to tax trials and their organization.[46] However, the Decree fails to effectively address the foundational problems connected to independence, impartiality, and remuneration existing today in the Italian tax judiciary system.[47] It does not change the structure and organization of the tax judiciary system, which still remains under the supervision of the Ministry of Economy and Finance, nor introduces any changes concerning the current, problematic professional positioning and remuneration of tax judges.

[41] R. Lunelli, *Sulla Opportunità di Assegnare le Controversie di Modica Entità e non Particolarmente Rilevanti a un Giudice Tributario Monocratico*, "il fisco" 2014, No. 33, p. 3244 et seq. See also: M. Conigliaro, *Contenzioso Tributario: dalla Delega Fiscale una Timida e Alquanto Vaga Proposta di Riforma*, "il fisco" 2014, No. 20, p. 1979 et seq.

[42] S. Cantelli, *Cittadini-Contribuenti…*, p. 3651 et seq.

[43] Council of Europe, Recommendation CM/Rec(2010)12 of the Committee of Ministers to Member States on Judges: Independence, Efficiency and Responsibilities, adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Ministers' Deputies.

[44] Council of Europe, Recommendation CM/Rec(2010)12…, Paras. 54–55.

[45] A. Poddighe, *Giusto Processo…*, p. 23.

[46] M. Leo, *La Riforma…*, p. 4016 et seq.

[47] *Ibidem.*

4. Conclusions

This paper investigated the application of the ECHR principles of impartiality and independence of tax judges in the Italian tax judiciary system and specifically in relation to their role in Tax Commissions. Italy adopts a dualistic approach that does not assign an automatic prevalence to international law over domestic law, not even when international conventions are signed and ratified, thus introducing problems of compliance. Because of this situation, the Tax Commissions, whose creation predates the republican Constitution of 1947, find themselves in a problematic relationship with the standards set forth by the ECHR in Art. 6(1), since their impartiality and independence is systemically hindered by the current organizational setup, lack of tenure for tax judges, and ministerial oversight.

In September 2014, with Order No. 280, The Provincial Tax Commission in Reggio Emilia, Italy, raised an issue of constitutionality of the law before the ICC for a possible violation of Art. 6(1) of the ECHR, providing similar arguments to those raised here. The ICC responded with Ordinance No. 227 of 20 October 2016, declaring the appeal inadmissible and replying that resolving such issues is the prerogative of the legislator. This has not happened yet, but it should soon: tax law is a field of law where national states strongly express their sovereignty, but said sovereignty should not come at the cost of the human rights of citizens.

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Abstract

EU law is applied uniformly in all EU Member States as a consequence of its supremacy in the hierarchy of legal sources. The same is not true of the European Convention on Human Rights (ECHR). This paper investigates the application of the ECHR principles of impartiality and independence of tax judges in the Italian tax judiciary system and

specifically in relation to their role in Tax Commissions. Italy takes a dualistic approach that does not automatically give international law precedence over domestic law, even when international treaties are signed and ratified, causing compliance issues. The article identifies several crucial friction points between the current setup of the Italian tax judiciary system and the European Convention on Human Rights, most notably in respect to the principle of independency and impartiality of tax judges, and concludes suggesting that a reform in the field may be necessary.

Keywords: European Convention on Human Rights, ECHR, Italian tax judiciary system, principle of independency and impartiality