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# ITALIAN CONSTITUTIONAL COURT AND SOCIAL RIGHTS IN TIMES OF CRISIS: IN SEARCH OF A BALANCE BETWEEN PRINCIPLES AND VALUES OF CONTEMPORARY CONSTITUTIONALISM**

*Summary: 1. The difficult role of the Court in times of economic crisis. – 2. The case law of the Italian Constitutional Court on social rights in time of economic crisis. – 3. Conclusions. – Bibliography.*

## 1. The difficult role of the Court in times of economic crisis

In periods of economic and financial crises, the effectiveness of social rights, as "costly rights"[1], has been jeopardized. Indeed, several states have adopted severe austerity measures aimed at curbing public spending, in accordance with their domestic[2] and international duties[3] to balance revenues and expenditures. For instance, European Union (EU) law demands balanced domestic budgets to EU member states to target economic stability. The required measures are capable of affecting social rights of people at large but tend to hit harsher on the most vulnerable groups and individuals. For this reason, common judges, and in particular national Constitutional Courts are engaged in a difficult interpretative activity to

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1 Holmes, Sunstein (1999), especially p. 87 ff.

2 Gianniti (2011); Lippolis et alii (2011); Bilancia (2012); Brancasi (2012), pp. 108-111; Cabras (2012) pp. 111-115; Ciolli (2012); Id. (2014); Coronidi (2012); Dickmann (2012); Grasso (2012); Luciani (2012); Perez (2012), p. 929 ff.; Aa.Vv. (2014); Giupponi (2014), pp. 51-78; Morrone (2014); Gambino (2015); Marchese (2015); Belletti (2016); Carlassare (2016).

3 See, ex plurimis, Besselink, Reestman (2012); Bonvicini, Brugnoli (2012); Poiares Maduro, De Witte, Kumm (2012); Rossi (2012); Donati (2013); Baratta (2014); Pisaneschi (2014).

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justify austerity measures[4], striking a balance between conflicting interests, values and principles.

Italian membership to the EU and its acting on the global market entail a multi-layered institutional and regulatory set-up. In this context, it emerges the contradiction between an existing system of domestic social and welfare policies, on the one hand, and the substantive transfer of decisions on economic and financial policies, on the other hand, now even outside the EU legal and institutional framework.

The Italian Constitutional Court (also "the Court") cannot avoid guaranteeing constitutionally established social rights, although compressed and qualified by the principles of "graduality"[5] and "balance" of interests[6], so that they do not remain completely defenseless vis-à-vis externally decided austerity measures that are likely to impact on the welfare state.

The Court, during the current crisis, has received an increasing number of cases of judicial review ("question of constitutional legitimacy") regarding measures affecting the socio-economic rights of different groups of people (pensioners, non-contracted public servants, magistrates and, in general, contributors). Its decisions have not always been crystal clear, and doubts remain regarding the actual share of "sacrifices" that they entailed and about their suspect politicization, especially when references are made to the economic crisis or to elements of political economy as arguments to "save" rules that would otherwise have been declared as unconstitutional.

In some cases, the Court has condoned measures that restricted social rights, as means to reduce costs; in others, the decisions have had a "centralizing" function and limited the autonomy of the competent territorial authorities, arguing for the need of lower spending and greater efficiency. Moreover, in other cases, the Court has also modulated the effects of its decisions in order to limit their impact on the country's economy. Overall, some findings have generated doubts about the impartiality of the Court[7]. This concern does not regard its role of formal guardian of constitutional values and principles[8], but it is about that of concrete adjudicator of socio-political conflicts[9].

However, it cannot be ignored that all constitutional courts, at least those of western countries, are today asked to play a very difficult game when they adjudicate on the constitutional legitimacy of legislative measures that negatively affect social rights. Indeed, they

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4 Contiades (2013); Abbiate (2014), p. 515 ff.; Cocchi (2014); Donati (2014); Fabbrini (2014); Fasone (2014); Fontana (2014); Roman (2014); Brancati (2015); Faraguna (2016); Marchese (2016), p. 32 ff.

5 The principle of "gradual realization" or "graduality" of the Italian constitutional theory corresponds to that of "progressive realization" in international human rights law. It reflects the idea that socio-economic rights require steps of a legislative, economic and technical nature to be realized. Social rights need the allocation of available resources and, although recognized in the Constitution and international legal sources, they cannot be fully realized and enjoyed immediately, but "gradually" or "progressively" but their core content.

6 BOGNETTI (1993), p. 46 ff.; LUCIANI (1995), p. 97 ff.

7 MIDIRI (2011), p. 2235 ff.; BENVENUTI (2012), p. 375 ff.; ID. (2013), p. 969 ff.; SALAZAR (2013).

8 It is not possible here to offer an answer to the question about the correct definition of *principle* and to specify its differences with the concept of *value*; see, *ex multis*, BALDASSARRE (1991); D'ATENA (1997); GUASTINI (1998), p. 641 ff.; DI BLASI (1999); BONCINELLI (2007), p. 61 ff.; FERRAJOLI (2007); LONGO (2007); SCACCIA (2011); MEZZETTI (2015); ID. (2016), p. 21 ff.

9 COLAPIETRO (1996), p. 3.

might be considered co-responsible for the social inclusion and the well-being of people and the society.

The Italian Constitutional Court, when defending social rights, relies on its function of "centralized" judicial review(er), resorting to a rich list of the constitutionally codified rights, not just of a social nature, and to its fundamental principles: mainly that of human (and social) dignity[10], supported by the «fundamental axiological couple»[11], namely the principles of solidarity and equality (Articles 2 and 3 Const.).

This does not mean, however, that these principles must be interpreted and balanced only following the case law of the Italian Constitutional Court. Conversely, this interpretative activity should look at findings that have been developed by international judges and bodies. Indeed, the principles enshrined in the Italian Constitution are now largely in line with the principles and values of international and EU law[12].

The Court in compliance with the Italian constitutional system and with the internationalist principles on which it is based (Articles 10, 11 and 117, para 1 Const.) appears to be progressively (but not without hesitation) more willing to employ protective standards, principles and values originating either outside the domestic legal framework or by dialoguing with other European jurisdictions. This is the so-called «Constitutional pluralism»[13].

Considering the still-ongoing economic and financial crisis, this paper intends to show the trends of the Italian constitutional case law dealing with social rights, while highlighting its underlying principles and values. This analysis can be useful to identify similarities and differences of the Court's findings with those of other national, regional and international legal orders and their respective jurisprudence. For this reason, in the concluding section of this paper, the analysis will refer to the interpretative approach of the European Committee of Social Rights (ECSR) – the monitoring body of the European Social Charter - and its decisions held during the current economic crisis[14]. They demonstrate that the ECSR has adopted the same principles that the Italian Constitutional Court also employed in its judgements.

I am convinced that the «times of crisis» are critical and significant "hermeneutic times"[15] of legal principles[16] and values, that is when their concrete interpretation is much

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[10] Bartolomei (1987); Ruggeri, Spadaro (1992), p. 221 ff.; Bognetti (2005), p. 85 ff.; Sacco (2005), p. 583 ff.; Ceccherini (2006); Bellocci, Passaglia (2007); Luther (2007), p. 185 ff.; Pirozzoli (2007); Id. (2012); Silvestri (2007); Vincenti (2009); Di Ciommo (2010); Drigo (2011); Id. (2017), p. 6 ff.; Monaco (2011), p. 45 ff.; Ruggeri (2011); Ruotolo (2012); Daly (2013); Piciocchi (2013); Sperti (2013); Düwell (2014); Barak (2015); Politi (2018).

[11] Ruggeri (2015), p. 784 ff.

[12] Silvestri (2006), p. 15 ff.; Akandji-Kombé (2014), p. 301 ff.; Manzini, Lollini (2015), p. 8 ff.

[13] MacCormick (1999); Walker (2002); Id. (2008); Id. (2016); Krisch (2010); Id. (2013); Stone Sweet (2012); Id. (2013); Avbelj, Komarek (2012); Poiares Maduro (2003); Id. (2007); Id. (2012); Bustos Gisbert (2012); Goldoni (2012); Jaklic (2014); Baquero Cruz (2016); Criado Aguilera (2016); Wilkinson (2017).

[14] See, *ex multis*, Nivard (2014); Guiglia (2016).

[15] See Alexy (1986), p. 473 ff.; Mengoni (1996), p. 98 f. In several judgments, the Constitutional Court has emphasized the importance of the systematic interpretation of the constitutional text; in times of economic crisis this has been reaffirmed, for instance with the Judgment No. 264 of 2012. In this ruling, the Court highlighted the need for a systematic interpretation of the Constitution concerning the protection of rights and other competing constitutional principles and values, to balance potentially clashing claims stemming from the Constitutional text.

needed. It is inevitable that different interpreters (including, law-makers, courts or international bodies) are likely to guarantee different degrees of protection for socio-economic rights. The case law of the ECSR, when recalled by the Constitutional Court, can contribute to complement and enhance the constitutional standards. Indeed, the latter are of an "elastic"[17] nature and must be interpreted in the light of international law, to which the European Social Charter belongs.

## 2. The case law of the Italian Constitutional Court on social rights in time of economic crisis

This analysis starts from that right which is arguably the most acclaimed symbol of the Welfare State, and undoubtedly the most expensive, at least in Italy: the right to health. The right to health is recognized in Article 32 of the Italian Constitution as individual right and common interest, and as guaranteeing free health care for the indigent[18].

The Judgement No. 354/2008[19] seems to provide a clear account of the Constitutional Court's approach to the right to health from a social angle. This recalls previous rulings of the 90's[20], including Judgment No. 309/1999, and illustrates the continuing tension between the right to health as a social claim to get healthcare services, which is dependent on the allocation of available resources, and the protection of human dignity, which conversely requires that financial and budgetary considerations cannot affect the minimum core of the right to health as the inviolable core of human dignity/ as inextricably linked to the preservation of human dignity. (No. 4. of the *Considerato in diritto*)[21].

Moreover, he Judgment No. 248 of 2011 also confirms the previous trend of constitutional case law, recalling in particular the decision No. 455 of 1990. The Court, in the midst of the economic crisis, reaffirms that «[the] right to health care is "financially conditioned" because "the need to ensure a universal and comprehensive health care system clashes with limited financial resources that are capable to be allocated annually to this sector, as they are part of the activity of strategic planning of welfare and social interventions"» (No. 6.1. of the *Considerato in diritto*)[22].

Financial constraints and retrogressive measures taken by central and regional legislative powers should, however be respectful of the core of social rights. Judgment No. 10 of 2010 is particularly significant in this respect as it recalls that, «As a result of the 2001 Con-

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16 Zagrebelsky (2004), p. 96 ff.

17 BARTOLE (1997), p. 17.

18 See, *ex multis*, LUCIANI (1991), p. 4 ff.; COCCONI (1998); BALDUZZI, DI GASPARE (2002); MORANA (2002); SIMONCINI, LONGO (2006); TRIPODINA (2008), BOTTARI, ROSSI (2013).

19 See *Consulta OnLine*: http://www.giurcost.org/decisioni/2008/0354s-08.html.

20 See, *ex plurimis*, the Judgments of Constitutional Court No. 455/1990; No. 267/1998; No. 509/2000; No. 252/2001; No. 432/2005; AA.VV. (1993); COLAPIETRO (1996); SALAZAR (2000); DE FIORES (2005).

21 See *Consulta OnLine*: http://www.giurcost.org/decisioni/1999/0309s-99.html.

22 See *Consulta OnLine*: http://www.giurcost.org/decisioni/2011/0248s-11.html. See, *ex multis*, the Judgment of Constitutional Court No. 111/2005.

stitutional Amendments / Reform of the Title V, Part II of the Constitution which re-allocated legislative competences between the state and the regions, the State "determines of the basic level of benefits relating to civil and social entitlements to be guaranteed throughout the national territory" (Article 117 (2) (m) Const.). This State's exclusive competence refers to the establishment of the structural and qualitative levels of benefits which, regarding the fulfillment of civil and social rights, must be guaranteed, in a general nature, to all persons entitled to it.». Thus, it is evident that, despite the crisis, the Court recognizes that the State has «such cross-cutting competence to guarantee that everyone in the national territory can enjoy of essential levels of those rights / services, preventing regional laws from limiting or affecting them.» (No. 6.3. of the *Considerato in diritto*)[23].

Considering these leading decisions, the Italian Constitutional Court shows to consistently embrace the theory of the essential and "irreducible" core content of fundamental rights, that are necessary to respect people's human and social dignity, as of Article 2 Const. At the same time, it should be noted that while acknowledging that social rights are conditioned by the economic development of the country, the Court draws the state's attention to its duties, vis-à-vis the broad legislative powers of the Regions, evocating the article 117 (2) (m) Const., which, as said, guarantees the enjoyment of the benefits of all rights, civil and social, so as not to undermine their essential content.

It seems significant to mention another applicable Judgement, which this time reveals the commitment of the Court to limit health spending by the regions. Even if the 2001 constitutional reform allowed the regions to provide, in the presence of virtuous budgets, better standards and additional health services in their territory, Judgment No. 104 of 2013 stated that a «contested [regional] rule, which bring about further expenditures on the regional budget to ensure an additional level of medical assistance […] , violates the principle of containment of public health expenditure, as a principle of coordination of public finances, and ultimately Article. 117, para 3, Const.» (No. 4.2. of the *Considerato in diritto*)[24].

It is therefore significant that the Court, in view of the economic crisis, and implicitly in the light of Italy's international and EU-related obligations, balanced the interests and the constitutional principles at stake. In the above case, it did so by favoring the austerity policies adopted by the State through very detailed state measures, that include precise prescriptions on the use of regional resources. This seems justified by a kind of superiority of the principle of national co-ordination of public finance over the autonomous regional deliberations. Although regions are recognized with financial autonomy as of Article 119 Const., they are nevertheless subject to the new rules of budgetary balance introduced by the revised Article 81 Const. (Law no. 1/2012 amending constitution)[25]. The latter was clearly inspired by interna-

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[23] See *Consulta OnLine*: http://www.giurcost.org/decisioni/2010/0010s-10.html. See BELLETTI (2012), p. 191 ff.

[24] See *Consulta OnLine*: http://www.giurcost.org/decisioni/2013/0104s-13.html.

[25] GROPPI (2012).

tional obligations about public spending containment and debt reduction (so-called «Fiscal Compact») which are binding on Italy[26].

The revised Article 81 Const.[27] provides that: «The State shall ensure the balance between revenue and expenditure in the national budget, taking into account the adverse and favorable phases of the economic cycle. [...] The content of the budget law, and the fundamental rules and the criteria adopted to ensure balance between revenue and expenditure and the sustainability of general government debt shall be established by legislation approved by an absolute majority of the Members of each House in compliance with the principles established with a constitutional law.».

The budgets cuts of local authorities, especially the municipalities and provinces, which are abundantly carried out in times of crisis, have not, however, undermined an essential principle that regulates the relations between central state and the regions, that is that the allocation of functions to these bodies must necessarily be accompanied by adequate financial resources for the exercise of those functions. The contrary would violate Articles 117, 119 and 97 Const.

The Judgments No. 188 of 2015[28] and No. 10 of 2016[29] are interesting in this regard because they recognize that the sharp reduction of financial allocation for services that cannot be interrupted and in areas of considerable social relevance is obviously unreasonable because of the absence of proportionate measures that can somehow justify it. Austerity measures which determine the lack of adequate funding of local services which are necessary for the enjoyment of social rights violate Art. 3 (1) Const., which enshrines the principle of formal equality, as well as the principle of substantial equality referred to in the second paragraph of Art. 3 Const.

The aforementioned Judgments that were served in 2015 and 2016 play a central role for the financial autonomy of local (sub-regional) authorities (municipalities and provinces), as they require the Regions to ensure the appropriateness of the resources allocated to local authorities to provide services of social relevance to the citizen.

However, it is also true that, to limit public spending, the regional autonomy is appreciably limited: at least temporarily, they cannot use the resources that they have, even when their budgets are in balance (see Judgment No. 104 of 2013).

The Judgments No. 193 of 2012 and No. 70 and No. 178 of 2015 are also relevant in this respect as they are not only concerned with the autonomy of the territorial authorities, but they went on to establish that (see no. 4.2. of the *Considerato in diritto*)[30] the measures of fiscal balance and those aimed at the containment of expenditure must be transitory.

Following the revision of art. 81 Const., which took place during the economic crisis, the jurisprudence of the Constitutional Court about social rights was further refined the

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[26] BOGGERO, ANNICHINO (2014).

[27] BELLOCCI, FULGENZI, NEVOLA (2011).

[28] See *Consulta OnLine*: http://www.giurcost.org/decisioni/2015/0188s-15.html.

[29] See the Judgment of Constitutional Court No. 10 of 2016, Nos. 6.1., 6.2., 6.3. of the *Considerato in diritto.* For further details, see *Consulta OnLine*: http://www.giurcost.org/decisioni/2016/0010s-16.html.

[30] See *Consulta OnLine*: http://www.giurcost.org/decisioni/2012/0193s-12.html.

Judgment No. 10 of 2015[31] which has been much discussed because it ruled out of so-called "Robin Hood Tax", but it did so without retroactive effect. This lack of retroactivity was meant to guarantee the respect of the highest principles of solidarity (Article 2) and equality (Article 3. Indeed, «the overall consequences of a retroactive judgement, in a period of persistent economic and financial crisis, could have resulted in more problems, that is the unreasonable redistribution of the wealth to the benefit of the wealthy, and to the detriment of the most vulnerable with irreparable harm on the needs of social solidarity, in violation of Articles 2 and 3 Const. » This regardless, the decision of the Court was intended to avoid that a budgetary imbalance «could have prevented Italy from meeting its obligations under EU and international law (No. 8. of the *Considerato in diritto*). Therefore, the Court seems to coordinate the general principle of retroactivity in Article 136 with the criterion of proportionality. Indeed, the principle of proportionality would be compromised by the retroactivity of such a judgement because of the severe financial consequences as of art. 81 Const. In other words, the Court is balancing the principle of budget balance, now contained in the new article of the Constitution, and the general principle of retroactivity resulting from art. 136 Const. in addition, the arguments used by the constitutional court suggest that the budgetary balance has become a supreme principle, also capable of justifying restrictions of rights, particularly social rights.

The finding of the Court's Judgment No. 70 of 2015[32] are in stark contrast with those of the previously mentioned decision. On that occasion, the Court declared the unconstitutionality of an act (Decree-Law no. 201 of 2011, known as "Save Italy" which prevented the automatic increase of those pensions that were three times higher the minimum value recognized by the National Institute for Social Security (INPS) in 2012 and 2013. This decision was taken regardless of its economic consequences: an expected a loss of earnings for state budget of around 17.6 billion euros in 2015 and 4.4 billion in 2016.

In this case, the Court did not consider that financial arguments were of such a paramount importance to rule out any conflicting interest, and operated a scrutiny under the principles of reasonableness and proportionality (No. 10. of the *Considerato in diritto*). The Court thus sets limits to the discretion of the legislative powers by weighting its choices with the above mentioned constitutional parameters, without referring to the irreducible core of the social rights involved.

In the Judgment No. 70 of 2015, the Court also considers the principle of graduation. In line with a previous Judgment, No. 316 of 2010[33], the Court essentially demonstrated not to be concerned about the economic consequences of his decision. In the light of the principle of graduation, the Court considered the non-temporary differentiated treatment of certain

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[31] See *Consulta OnLine*: http://www.giurcost.org/decisioni/2015/0010s-15.html, in Italian, and: https://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S10_2015_en.pdf, in English.

[32] See *Consulta OnLine*: http://www.giurcost.org/decisioni/2015/0070s-15.html, in Italian, and: https://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S70_2015_en.pdf, in English. For further details, see ANZON DEMMIG (2015); BARBERA (2015), p. 2 ff.; CECCANTI (2015); LIETO (2015); MORRONE (2015).

[33] See *Consulta OnLine*: http://www.giurcost.org/decisioni/2010/0316s-10.html.

retirement benefits, as a consequence of the legislator's choices, no longer tolerable, and thus radically unconstitutional.

There is thus an "unequal" balance[34] between the interests involved (social security rights vs. budget balance), which can be appreciated because of the "graduality test", that the norms under the strict scrutiny of the Court did not manage to pass.

Some Scholars have argued that that the mentioned ruling did not realized a "technical balance" between social rights and the new art. 81 Const. On the contrary, the Court would have resorted to the criterion of "hierarchy" between constitutional rights and principles. In other words, the constitutional judges would have drawn a hierarchy of values according to which the right to social security (Article 38 Const.) is given precedence over the requirements of balance of the public budget (Art. 81 Const.)[35].

The financial effects of the ruling on the state budget were, however, partially limited to the maximum amount of 2.8 billion euros thanks to the enactment of the so-called "*Decreto Renzi*", Decree-Law no. 65 of 2015, converted into Law no. 109 of 2015. This act was also appealed against before the Constitutional Court for violation of the provisions of the Judgment No. 70 of 2015 and hence art. 136 Const., the latter of which established that the legislator must respect any constitutional judgment.

In addition, the Judgment No. 178 of 2015[36] has recently contributed to clarify the concept of the "temporary measures" that are taken in times of crisis. Indeed, therein the Court declared constitutionally unlawful a legislation that determined, because of the economic crisis, a prolonged suspension of the procedures of collective bargaining (trade union freedom: Article 39 Const.). What brought the Court to a declaration of non-compliance with the constitution was the long-lasting nature of the suspensive effects of the collective bargaining procedures, as they «modify the bargaining dynamics whereas the collective contract are assigned a central role» (No. 17. of the *Considerato in diritto*).

It is worth noting that the Court has considered legitimate the prevalence of the interest of budgetary balance (art. 81 Const.) over the enjoyment of trade union rights (art. 39 Const.) in so far as the measures were temporary, necessary because of the circumstances, non-discriminatorily applied to all public servants and grounded on the principle of solidarity. Moreover, unlike in the Judgment No. 10 of 2015, the Court adopted the technique of «supervened unconstitutionality» to reduce the financial impact of its findings in the Judgment No. 178 of 2015. This means that the declaration of unconstitutionality does not fully rule out a norm, but the Court identifies the "moment", following the entry into force of the law, from which the latter stops having normative force.

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[34] With this wording, the Italian constitutional doctrine refers to the resolution of clashes between constitutional principles / norms that have not the same "value". Although it is necessary because neither of them can be neglected, it is not a "real" activity of balancing, as it does not take place between principles of equal value in the constitutional edifice. For instance, as for it concerns us, the "end / goal" of realizing social rights is arguably superior to that of systemic economic efficiency, and for that reason the former can be qualified by the latter (but only to a certain extent).

[35] MORRONE (2015), p. 4 ff.

[36] See *Consulta OnLine*: http://www.giurcost.org/decisioni/2015/0178s-15.html, in Italian, and: https://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S178_2015_en.pdf, in English.

This methodology was first adopted by the Court in the 1980s. In the Judgement No. 178/2015 the Court fixed the effects of unconstitutionality from the moment when the judgment was published, with the consequence of arriving at the same concrete result of Judgment No. 10 of 2015, namely to exclude the retroactivity of the ruling.

## 3. Conclusions

At this point, we can draw some conclusions.

The Court, despite the revision of art. 81 Const., has demonstrated in these years to still considering its two main arguments that are able to limit the legislative discretion and that were often employed in a complementary manner:

• the theory of the protection of the "essential core" of fundamental rights, to ensure the respect of human dignity as of Art. 2 Const. (individual and social dignity) and Art. 117 (2) (m) Const. (related to the essential levels of services to guarantee civil and social rights);

• the theory of balance[37]of constitutional principles and interests, which must, however, respect the essential core of the (human /fundamental) rights and be compliant with the constitutional principles, including: equality (art. 3 Const.); solidarity (art. 2 Const.); and proportionality (see Judgment No. 70 of 2015).

In any case, from the list of judgements that were above mentioned, it can be said that the Constitutional Court, rather than guaranteeing the observance of each individual constitutional right, tends to give priority to the overall functioning of the constitutional system, which is composed by rights and principles, also of supranational and international origin and in which its decisions are meant to produce effects.

Furthermore, the case law of the Italian Constitutional Court, vis-à-vis the progressive legislative erosion of the Welfare State which has taken place over the last decades, does not take a straightforward stance, as it operates the above "balance" on a case-by-case basis. These balances can be qualified both as «equal» or «unequal», both in one sense and in the other, among economic interests, strengthened by the crisis and supported by the new art. 81 Const. and international instruments that imposed it, and social rights, anchored to the constitutional principles of equality (Article 3) and solidarity (Article 2). "Unequal balance" does not mean that the ultimate goal of progressively and fully achieving human rights must always be detrimental for the goal of economic efficiency, as the latter cannot be unreasonably limited. According to the constitutional judges, indeed, «All fundamental rights protected by the Constitution mutually complement each other and therefore it is not possible to identify absolute hierarchies [...] The Italian Constitution, like other contemporary democratic and pluralist Constitutions, requires a continuous and mutual balance between fundamental principles and rights, without claiming absoluteness for any of them [...] Correct balances,

[37] SCHLINK (1976), p. 192 ff. The Author identifies in the method of the balance the dogmatic one of the fundamental rights. See, *ex multis*, ALEINIKOFF (1987); MORRONE (2008); STONE SWEET, MATHEWS (2008); URBINA (2017).

that are dynamic and not fixed in advance, –are to be identified by the legislator with norms and by the Constitutional Court during the judicial review- pursuant to the criteria of proportionality and reasonableness, without infringing the essential core of fundamental rights» (Judgment No. 85 of 2013, no. 9. of the *Considerato in diritto*)[38].

In pluralist legal systems like the Italian one, in case of constitutional clash between norms or values, the solution to be sought should not excessively limit either one or the other, but bearing in mind articles 2 and 3 of the Constitution, it must strike a reasonable balance between clashing needs and principles.

Once again, in Judgment No. 275 of 2016, the Court had to adjudicate on the relationships between budgetary balance of the revised Art 81 Const., the financial autonomy of local authorities, and the core content of the right to receive social benefits, including the right to study and to provide school transport service for disabled people. The Court held that «It is the protection of inviolable rights that must be a condition for budgetary choices, while the need of budgetary balance cannot be a condition to provide those services that are needed for the fulfilment of rights. » (No. 11. of the *Considerato in diritto*)[39]. Such a pronouncement does not contradict, however, the previous case law; rather, it confirms that legislative powers cannot ignore the minimum and essential level of the rights to benefits that derive from social rights, which should not be financially conditioned[40].

The contribution of the constitutional jurisprudence, anchored to the paradigm of human dignity and the full development of human beings, has precisely consisted in affirming the prevalence of the core content of social rights over the preservation of scarce of financial resources.

The actual "common feature" of this inevitable fluctuating case law is arguably the undisputed constitutional commitment to safeguarding human dignity, which requires the enjoyment of the «essential core» of human rights also in times of crisis. There is no doubt that, whether the struggle for budgetary balance led to the enactment of austerity measures that are capable of violating the essential core of the social rights which is connected with the inviolable human dignity, there would be an evident case of unreasonable exercise of legislative discretion.

Another case of this swinging case law on social rights is represented by the recent Judgment No. 250 of 2017 on the so-called «Renzi Decree**»,** with the latter issued to avoid

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[38] See *Consulta OnLine*: http://www.giurcost.org/decisioni/2013/0085s-13.html, in Italian, and: https://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/85-2013.pdf, in English.

[39] For further details, see *Consulta OnLine*: http://www.giurcost.org/decisioni/2016/0275s-16.html, in Italian, and: https://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/2016_275_EN.pdf, in English.

[40] See Judgment, No. 275 of 2016, No. 11. of the *Considerato in diritto*: «It is also not possible to accept the argument that a violation of Art. 81 would arise if the contested provision was not to establish a limit to the financial allocation in the national budget. Even without considering that the absolute core of minimum guarantees that give effect to the right to study and education of disabled pupils, once identified through legislation, cannot be subject to absolute and general financial constraints, it is entirely evident that the supposed violation of Article 81 of the Constitution is the result of a misunderstood conception of the concept of budgetary balance, Indeed, […] It is the guarantee of inviolable rights that must be a condition for budgetary "manoeuvres", whilst the need of budgetary balance cannot be the condition to provide such services.».

the financially detrimental effects of the mentioned Judgment No. 70 of 2015. A statement, issued by the Court it on the day of the decision, leaves no doubt about this: «The Constitutional Court rejected the allegations of non-compliance with the Constitution of the Decree-Law No. 65 of 2015 [«Renzi Decree**»**] about the adjustments of retirement benefits, as the Decree was intended to "implement the principles set out in the Judgment of the Constitutional Court No. 70 of 2015". The Court held that - unlike the "Save Italy" Decree which had been ruled out in 2015- the new and temporary regulations provided for by Decree-Law no. 65 of 2015 realizes a reasonable balance between the rights of retired people and the needs of public finances.»[41].

Considering this domestic case law in times of crisis, It should be recommendable for the Court to make use of the interpretative standards of international bodies in this regard Among them, the jurisprudence of the European Committee of Social Rights (ECSR) proves particularly useful, as therein the principle of non-retrogression[42] of rights, even during times of crisis, protects from situation of multiple vulnerabilities, without using arguments based exclusively on the "minimal" core content of social rights.

The principle of non-retrogression (i.e. the prohibition of legislative setbacks on social rights) can be derived from the obligation to progressively fully realize the rights recognized by the European Social Charter (ESC), as indicated in Art. 12 § 3 on the right to social security and in the Preamble ESC. The ECSR, while does impose an absolute ban to adopt retrogressive measures, when they are needed because of the shortage of available economic resources, requires the states to give evidence that the measures were necessary and based on an in-depth examination of the possible alternatives, and that no less afflictive measures on the most vulnerable people could be adopted[43].

These procedural obligations were meant to prevent that terms and conditions to receive international loans could become an easy justification for states to avoid democratic decision-making processes in the development of anti-crisis measures.

Briefly, the ECSR considers that austerity measures decided by the States are inappropriate if it is possible to demonstrate that, in order to achieve the same savings targets (e.g. to reduce the sovereign debt of the state), less afflictive measures (for the realization of social rights) could have been used

The ECSR has also highlighted that states, when they adopt a series of anti-crisis retrogressive measures, they should always concretely weight their «cumulative effects» to

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[41] For detailed argumentation, see *Consulta OnLine*: http://www.giurcost.org/decisioni/2017/0250s-17.html, in Italian, and: https://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S_250_2017_EN.pdf, in English.

[42] For a detailed description of the principle, see HACHEZ (2008), pp. 15-29 and pp. 63-67; ID. (2012), pp. 6-18. See, particularly, MARGUENAUD, MOULY (2013).

[43] The HUDOC database provides access to the Decisions and Conclusions of the ECSR: Decisions adopted by the Committee in the framework of the Collective Complaints procedure and follow-up of the decisions by the Committee of Ministers; Conclusions adopted by the Committee in the framework of the Reporting System and follow-up of the Conclusions by the Committee of Ministers. See http://hudoc.esc.coe.int/eng/#. For the insights on the Decisions of the ECSR of which he treats, see: MOLA (2012); ID. (2013); DELIYANNI-DIMITRAKOU (2013a); ID. (2013b); GUIGLIA (2013); ID. (2017); NIVARD (2012); ID. (2013) ID. (2014); HACHEZ (2014); MELLADO, JIMENA QUESADA, SALCEDO BELTRÁN (2014), pp. 13-48 and pp. 97-238.

prevent that their joint effect could lead to «a significant degradation of people's well-being and living conditions». In doing so, it prevented that the shortage of economic resources, due to the crisis, could justify a disproportionate reduction of the standards of social rights, from which the preservation of people's dignity depends[44].

This interpretative approach can bring significant consequences at national level because it requires to identify that retrogressive measure, among those which achieve the same economic and financial result, which is less detrimental on (non-core elements of constitutionally protected) social rights. After all, it is nothing more than a more careful application of the principles of proportionality and reasonableness in case of austerity measures.

It is also worth mentioning a few recent judgements of the Italian Constitutional Court which, although not dealing with social rights, may in some way be in line with the above ECSR's approach. The Judgments No. 23 and No. 272 of 2015[45], recalling what had been argued in the Judgment No. 1 of 2014 (No. 3.1. of the *Considerato in diritto*), held that «The proportionality test which is used by this Court, common to several other European constitutional courts, and by the EU Court of Justice, often together with that of reasonableness, consists in the assessment of whether a law […], is necessary and appropriate to attain the legitimate goals that it pursues. *This means that, the measures identified by a certain norm, among other applicable solutions, have the least restrictive effects on rights, and they do so without establishing disproportionate burdens to pursue the targeted goals*»[46] (emphasis added).

At this point, my concluding remarks bring me some "classical" reflections about the interpretation of values and principles by judges, including constitutional judges[47], especially when they enhance the protection of human dignity.

The recognition of inviolable rights and the human dignity, as the fundamental and immutable principle of every society, grounded a sort of «universal legality»[48]. This has led to a certain detachment of national law from its historical dimension and politics. Hence, domestic law, as the result of political negotiation, tends to become an overall less prescriptive normative framework, and seems to shift to a "principle-based law»[49], grounded on underlying shared values[50]at regional or universal level, to be interpreted and spelled out by courts and tribunals within their legitimate margin of appreciation.

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[44] See, particularly, the Decision on the merits of 7 December 2012, Complaint No. 76/2012, *Federation of employed pensioners of Greece (IKA-ETAM) v. Greece*, §§ 78-82.

[45] See *Consulta OnLine*: http://www.giurcost.org/decisioni/2015/0023s-15.html; http://www.giurcost.org/decisioni/ 2015/0272s-15.html.

[46] See *Consulta OnLine*: http://www.giurcost.org/decisioni/2014/0001s-14.html.

[47] See, *ex multis*, RUGGERI (1998); CORTE COSTITUZIONALE (2006); SCACCIA (2017a).

[48] CIARAMELLI (2007), p. 96.

[49] ZAGREBELSKY (1992), p. 147 ff. See, particularly, ALEXY (1992), pp. 117-136; MENGONI (1996), p. 95 ff.

[50] «[T]he express inclusion of ethical values in modern constitutions, which gave them the shape of binding principles prevailing over all other sources of law, destabilized the theoretical basis of formalism in legal science.»: SCACCIA (2017a), p. 177.

The contemporary constitutional state, as it has developed in a "multi-level" normative framework, seems to entrust the courts with the responsibility to implement principles and values and engage other internal institutions in a creative elaboration of law.

Proportionality[51] and reasonableness[52], as criteria to assess the concrete adequacy of norms to settled facts, and human dignity, which signifies that everyone has the same worth and value as right-holder, seem more suitable to be handled by Courts than by the legislative powers. Moreover, subsidiarity, as it undisputedly regulates the relationship between authority and freedom, and as a dynamic organizing criterion of public functions, considerably contributes to overcome the formerly strict criterion of separation of powers.

It is undeniable that the achievement of the reference-values of the states and the international community, which can be summarized as "the protection of human rights", often take place at the expenses of the principle of "certainty of law", if not even "the rule of law".

So, It can be stated that whereas practitioners / legal positivists consider that individual rights are "the children" of law, legal theorists who works on values and principles tend to subordinate enacted law to the compliance with fundamental rights, sometimes affecting the certainty of law and its effects.

Against this background, the increasing difficulties for the domestic legislative powers - especially for the Italian ones - to strike balances between different values, in the presence of several social groups with ethical and religious differences, have led to the enactment of weak, elastic, and ambiguous norms. For this reason, the legislative powers have increasingly delegated the courts to resolve the clashes of interests outside any political representation. We can indeed agree that in our legal system, precisely because of deep divisions of an ethical and anthropological nature, the function to adapt the law to the social context and its values is tendentially left to the concrete interpreters, including courts.

As the legislative powers tend not to clearly regulate very ethical and sensitive matters, its normative activity, still very copious, can arguably suffer a "delegitimizing effect". Therefore, this inability to translate into law the constitutional value of human dignity as guiding principle to regulate constitutional conflicts of interests, requires the courts, including the constitutional courts to step in.

The absence of predefined value-related hierarchies at constitutional level and the general impossibility of using values to resolve judicial cases have led the judges to justify their decisions with a detailed analysis of the concrete circumstances of the case. Thus, the "factual circumstances" become the criterion for weighing abstract values, when they are balanced with other values. This means that a certain value becomes concrete and measurable through the "mediation of the fact". However, this work of "weighing" the value and ascribing

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[51] STONE SWEET, MATHEWS (2008); ID. (2009); BARAK (2010); ID. (2012); HUSCROFT, MILLER, WEBBER (2014); JACKSON (2015); JACKSON, TUSHNET (2017); SCACCIA (2017b); URBINA (2017); YOUNG (2017).

[52] Reasonableness is a «*higher-order* value», see MCCORMICK (2005), pp.178, 179; ALEXY (2009); BONGIOVANNI, SARTOR, VALENTINI (2009). See, *ex multis*, LAVAGNA (1973); SANDULLI (1975); BIN (1992); AA.VV. (1994); PALADIN (1997); RUGGERI (2000); SCACCIA (2000); MORRONE (2001), ID. (2009); LA TORRE, SPADARO (2002); D'AVACK, RICCOBONO (2004); D'ANDREA (2005); CERRI (2007); MODUGNO (2007); CELOTTO (2010); PENNICINO (2012); CARTABIA (2013); FIERRO, PORCHIA, RANDAZZO (2013); BARSOTTI (2016), p. 74 ff.

to it a normative content, vis-à-vis antagonistic values, presents high margins of arbitrariness. Nicolai Hartmann observes that, inevitably, «It is neither a "knowledge" in the proper sense, nor an objective grasping where the grasped object remains far-away from the grasper. It is more like to be grasped. The approach is not contemplative, it is emotional, and what comes from the contact has an emotional explanation. It is to take a stand on something through an emotional move»[53].

When adequate norms and stable hierarchical orders are missing, values can be subject to interpretative manipulation, and the resulting priorities can be the consequences of subjective preferences, intuitions, emotions rather than logic reasoning and demonstrations. Authoritative scholarship held that "the denial of an objective hierarchy results in the need of a subjective hierarchy[54]. Therefore, the judge, under the pressure of potential justice denials, acts as legislator in the concrete case.

Against this backdrop, the judicial creation of law through the use of values and principles should not be stigmatized, but rather considered as the inevitable consequence of the inaction of legislative powers, as well as being justified by the constitutional clauses that are elastic and open towards the European and international normative framework. This phenomenon is undeniably useful, and evident in the above-mentioned case law of the Italian Constitutional Court during the economic-financial crisis. However, this might affect essential foundational features of the legal systems of civil law: a collective decision-making, democratically deliberated, which is converted into general and abstract law. There is no doubt, in fact, that even in a civil law system, like the Italian one, for the reasons which were put forward above, it is emerging the idea - not only among scholars - that law should be assisted by a rational interpretative activity of levelling political contrasts and by higher moral values. This activity should arguably be performed by the courts, and in particular by the Constitutional or supreme courts. However, even constitutional judges are not completely "ethically" neutral, regardless of their political views. Therefore, it seems to me that it is worth invoking a classic maxim of Roman law, which should be complied with, both in presence and in the absence of legislative interventions and in spite of the crises or, perhaps, precisely to prevent other, systemic, even more serious crises. In conclusion: *unicuique suum tribuere*.

[53] HARTMANN (1972), pp. 147 ff., especially p. 149. Italian translation by Remo Cantoni.
[54] FINNIS (2011), pp. 92 and 450; SCACCIA (2017a), p. 185.

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