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Global world provided new challenges for constitutional courts. The first one is about the inclusion of constitutional judges in political decisions because they are called to supply or sometimes to replace parliaments, which are enables to make unpopular choices. «Exceptionality» and «promptness» are two new and challenging developments that Constitutions have to face when entering the global world. The challenge for the Constitutional Courts is an insidious and unnatural one: they were born to govern, with certain and predictable rules, moments that are at times exceptional: the relationship with continuous exceptionality and emergency shines the spotlight on their inadequacy. Moreover, there is also a continuous and palpable tension between Constitutions – which are designed to last, theoretically, for all eternity so as to be immortal and in force indefinitely – and the precarious nature of the fast time frames and contracts now demanded of state institutions in order to regulate increasingly fleeting and fluid current phenomena.
Keywords: Constitutional courts, immigration, terrorism, economic crisis, global challenge.

1. The economic crisis and the Italian democracy

Over the past decade, the Italian constitutional system has been impacted by considerable economic and financial crisis, associated with a deeper political one, due mainly to the crisis of representation in Parliament. Many and varied in nature, the causes of this political crisis include a malfunctioning representation model now unable to express the different values and principles existing in a pluralistic society.

In fact, the Italian Parliament suffers from an inability to produce a satisfactory form of mediation of different needs in so fragmented a society[1]. It is unclear whether this is a classic crisis of representation or,

[1] Many authors have analysed the crisis of political representation, which is the first of the problems facing contemporary Parliaments and the crisis of democracy. The relationship between representation, political parties and pluralism has been examined by C. Crouch, *Post-Democracy*, Polity Press, 2004; C. Offe, *Crisis and Innovation of Liberal Democracy: Can Deliberation Be Institutionalised?*, in *Czech Sociological Review*, 47, 2011, 447-472 and M. Luciani, *Unità na-*

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rather, a crisis of the «represented» – that is, a crisis of identity relating to common democratic and social values that can no longer be easily traced after the collapse of nation states, and above all after the rise of global economic (and perhaps) political systems breaking up all political unity.

This Constitutional crisis has impacted all modern democracies called upon to respond quickly to technological and scientific evolution and to the consequently hasty and rapid change in human conditions[2]. For this reason, managing new conflicts upsetting political societies throughout the world is particularly strenuous, and not only for Italy. As Bruce Ackermann asserts in his «diagnosis» of the diseases of contemporary democracies, these democracies are under continuous attack. The roots of the most recent dysfunctions can be found in a «change in the relationship of the State, the market and technologies of the destruction»[3] – and with the latter term he meant terrorism. I am not sure we ought to speak of «diseases»; democracy is able to accept the challenge of its transformation, because, as Italian philosopher Alessandro Ferrara argues, the essence of this form of government is to be «open»[4]. In the current democratic government, he traces three challenges to be overcome: a new reading of the principle of separation of powers; an expansion of deliberative democracy; and control over emergency through democratic categories[5]. In my opinion, one may also add control over pluralism that must not become hyper-pluralism, which plays against unity of the State, and against the persistence of democratic models.

These are the new challenges to which European democracies, too, are called upon to respond: a new juridical world, partly globalized and partly still tied to national States, that must renew its categories with-

zionale e struttura economica. La prospettiva della Costituzione repubblicana, in *Diritto e Società*, 2011, 636-719. For an overview of the issues related to today's crisis, C. Drigo, *Interpretation and Use of Principles in Constitutional Reasoning. Some Remarks on the Challenges Stemming from the Recent Italian «Constitutional Case Law of Crisis»*, in *Federalismi.it*, 2017, 6 and M. Renner, *Death of complexity. The Financial Crisis and the Crisis of Law in the World Society*, in P.F. Kjaer, G. Teubner, A. Febbrajo (eds.), *The Financial Crisis in Constitutional Perspective: The Dark Side of Functional Differentiation*, London, 2011, 93-112.

[2] We are witnessing the deepest and most intense transformation of contemporary democracies, as argued by P. Rosanvallon, *La démocratie inachevée*, Paris, 2000, 426-434, where sovereignty, viewed as the expression of a collective will, no longer exists. There remain the «two illusions» of a restoration of the collective will through nationalism and strict control of the boundaries. or through the management of globalization.

[3] B. Ackerman, *Before the Next Attack: Preserving Civil Liberties in an Age of Terrorism*, Yale, 2006, 14.

[4] A. Ferrara, *Democrazia e apertura*, Bruno Mondadori, 2011, especially 47 ff., where the author illustrates democracy's passion for openness, consisting of an open attitude towards the new.

[5] *Ivi*, 84 ff.

out betraying the primacy of democracy and, above all, of its Constitutions. Terrorism, financial crisis and migration rules have put European Constitutions to the test as they try to bypass the democratic principles contained therein; but these principles seem to be maintained in all Constitutional charters thanks to the role of the guardians of the Constitutions played both by Parliaments and by Constitutional courts in each country to a different extent.

Italy's particular situation is marked by chronic political and financial issues dating back to earlier periods of the most recent crisis: a historically lacking sense of unity has made our country unable to produce common values and shared political choices; this in turn is the cause and effect of a polarized system of political parties[6]; the result is a weak Parliament and a non-cohesive parliamentary majority, so neither Parliament nor the Government has the strength or authority to impose long-term vision, but are exposed to populism and hasty decisions. This is especially evident in migration.

The lack of long-term political programs is also one of the reasons leading to a high degree of indebtedness: such a system makes it possible only to squander resources in myriad ways; real investments for the long term, aimed at improving the overall quality of life of society as a whole, cannot be made[7].

One of the most important Constitutional transformations focuses on the economic and financial crises[8] that have impacted and transformed several Italian institutions: the national Parliament's legislative power and its control over financial deliberations is called into question[9]; the Government has increased its exceptional regulatory power, because of what is mistakenly considered a period of economic emergency and not a perma-

[6] M. Luciani, *Costituzione, istituzioni e processi di costruzione dell'unità nazionale*, in *Rivista AIC*, 2, 2011, 1-16.

[7] P. Ignazi, *Power and the (Il)legitimacy of Political Parties: An Unavoidable Paradox of Contemporary Democracy?,* in *Party Politics*, 20, 2014, 160–169.

[8] For a broad comparison on crisis in the European countries, see X. Contiades X., (Ed.), *Constitutions in the Global Financial Crisis: A Comparative Analysis*, London, 2013, 1. For an analysis of the relationship with political globalization and the Constitutional crisis, see I. Ciolli, *The Constitutional Consequences of Financial Crisis and the Use of Emergency Powers: Flexibility and Emergency Sources*, in *Rivista AIC*, 1, 2015, 1-22.

[9] C. Fasone, *National Parliaments in the Eurozone Crisis: Challenges and Opportunities*, in *Toruskie Studia Polsko-Woskie*, 11, 2015, 7-27, which analyses some transformations taking place in parliamentary decisions, such as those on transparency, on relationships in the bicameral system, and on the scrutiny of the Chamber in executive power in light of the new budget procedures; see also K. Tuori, K. Tuori, *The Eurozone Crisis. A Constitutional Analysis*, Cambridge, 2014, 194-206 as regards the loss of autonomy of national parliaments in budget procedures.

nent transformation[10]. We are also witnessing a «presidentialization» of politics and of executive power[11] that a fragmented parliamentary majority encourages because a decision-making by a single leader can help avoid long and often unsuccessful bargaining in Parliament or even within the executive; although not very democratic, the leader's resolution comes quickly and, above all, there is certainty as to the amount of time that will be needed – an important element when having to follow (sudden) market trends. This also explains the real abuse of the emergency rules by the Government during the economic crisis[12].

A whole transformation going to the Constitution's very core[13] also involved the Constitutional Court, called upon to interpret the text of the Constitution in light of the new situation.

The Constitutional judges' role in economic fields has changed and is at times transfigured: sometimes the Constitutional Court replaces the Court of Auditors and becomes an accounting judge[14]; at other times – and of far greater concern – it replaces Parliament in its role as political negotiator. In these cases, its decisions involve a high level of discretion, because it is called upon in the absence of the Parliamentary assembly. The court balances the rights contained in the Constitution with one another and with other fundamental principles, and does not always

[10] G. Agamben, *Stato di eccezione*, Milano, 2003, 3 speaks about a «permanent» state of exception; B. Ackermann, *The Emergency Constitution*, in 113 *The Yale Law Journal*, (2004), 1029-1091. recalled that the emergency should not endanger the fundamental principles of democratic order and should instead be constitutionally provided for and disavowed.

[11] Th. Poguntke, Th. P. Webb, *The Presidentialization of Politics: A Comparative Study of Modern Democracies*, Oxford, 2007, 1 ff. which takes into consideration different forms of concentration of power – even in parliamentary regimes – which consists not only of a polarization of the decision in the Executive power, but precisely of a progressive form of concentration of power around a leader in a democratic political system.

[12] This is well explained in R. Calvano (ed.), *«Legislazione governativa d'urgenza» e crisi*, Napoli, 2015, 1-24, which casts light on the marginalization of parliamentary debate, 6 ff., G. Rivosecchi, *Decretazione d'urgenza e governo dell'economia*, in R. Calvano (Ed.), *op. cit.*, 119-154, which speaks of the «twisting imposed on constitutional norms by the use of the decree laws» and F. Bilancia, *Il decreto-legge come strumento di attuazione del diritto UE dell'emergenza finanziaria. Riflessioni conclusive*, in R. Calvano (ed.), *op. cit.*, 219-236; he illustrated how the decree law would be an instrument entrusted to domestic EU law implementation. See, also S. Ragone, *La incidencia de la crisis en la distribución interna del poder entre parlamentos y gobiernos nacionales*, in *The Impact of the Economic Crisis on the EU Institutions and Member States*, Navarra, 2015, 527-550 for the same trend in Spain.

[13] As argued, C. Drigo, *op. cit*., 2.

[14] Especially in judgment no. 70/2012, where the Italian Constitutional court performed a direct audit of the budget of the Campania region, and declared unconstitutional the regional law that provided this budget, because it also included funds that were not reliable and not yet available in regional funds. See, on this point D. Morgante, *La costituzionalizzazione del pareggio di bilancio*, in *Federalismi.it*, 2012, 1-39.

strictly follow the principles of proportionality, or of graduated, appropriate measures[15].

2. The «emergency» of new incoming migration flows and constitutional guarantees in a time of stress

Italy and the European Union continue to consider the migratory phenomenon as an exceptional moment, to be solved with exceptional tools. It is now clear to all scholars who have dealt with this issue that only an ordinary regulatory framework can find solutions that can simultaneously take into account the security needs of countries that receive the flows – especially at a time of particular alert for global terrorism and the protection of migrants' rights. Failure to reconcile interests may lead to a breach in one of these constitutional principles.

In recent times, a rupture of Constitutional values and principles, and violations of Constitutional rights, were avoided mostly due to the great and arduous work of the Constitutional Court, which has intervened several times to protect the freedoms of non-citizens and the stateless. Instead, Parliament has been repeatedly led by demagogic forces and has availed oneself of emergency sources for solving what is in fact a structural matter. In Italy, the recent Decree law no. 13/2017 was converted by Parliament into law no. 46/2017 under the pressure of the new migration flows arriving in Southern Italy, with the goal of identifying migrants' needs[16] in greater detail. The Italian Constitution tolerates no violation of civil liberties and personal freedoms, so this law might be declared uncon-

[15] Although, the use of this principle is also a problem, because it might overturn the relationship between lawmaker and judge in favour of the latter. The strict proportionality scrutiny stated from the outset that the judge also assessed the impact and effects of his judgment, which is a predominantly political activity, and suggested replacing the latter with a more reassuring rule of the judges. The debate, focusing on the relationship between judge and legislator, now strongly skewed towards the judges, is examined by R. Hirschl, *Towards Juristocracy. The Origins and Consequences of the New Constitutionalism*, Harvard, 2007; the *querelle* about the principle of proportionality is deeply examined especially by A. Barak, *Proportionality*, Cambridge, 2012. In Italy, the Constitutional court's judgments do not apply the principle of strict proportionality and therefore that relationship between judges and legislators is balanced, but nevertheless a progressive assertion of jurisprudential activity on legislation, due to its absence, is examined by O. Chessa, *I giudici del diritto. Problemi teorici della giustizia costituzionale*, Milano, 2014. For the transformation of constitutional law and the relationship between proportionality and the doctrine of neo-constitutionalism, see A. Stone Sweet, J. Mathews, *Proportionality Balancing and Global Constitutionalism*, in 14 *Yale law school Faculty Scholarship Series*, (2008), 72-164.

[16] This is the latest regulatory framework on the subject, which only partially modifies Law no. 122/2016 and Legislative Decree no. 203/2016, as well as the *corpus* of the immigration's legislation embodied in Law no. 189/2002, called the Bossi-Fini Law.

stitutional because it appears to conflict with the Constitutional guarantees of due process of law: the new rules set up a special process that does not include first instance and appeal to reject the Decree of expulsion from national territory (art. 17); specific and dedicated tribunals are provided for migration affairs (art. 16); the first and only instance does not ensure the principle of the adversarial process or the guarantees contained in articles 24 and 111 of the Italian Constitution (art. 16)[17].

In this case, a generic need for security cannot be considered a fundamental principle, nor must it be balanced with personal freedom and others fundamental rights. Vigorously reaffirmed is what was already stated in several previous judgments, in which Constitutional judges declared unconstitutional some parts of the so-called? Bossi-Fini law[18].

In criminal law, too, defendant's guarantees are being unconstitutionally set aside. One example of this concerns alternative detention measures, which are not sufficiently protected for immigrants because it is difficult to guarantee home-based detention when residence itself is a requirement rarely met by these people – although, theoretically, these measures should also be granted to irregular immigrants and those without residence permits[19]. For everybody, it provides the guarantee of not being repatriated to the country escaped from and where the person would face persecutions; this means that in these cases, expulsion cannot be applied as a substitute sanction or alternative measure of detention[20]. Respect for Constitutional rights is at risk when asylum seekers, upon arrival on Italian territory, are deprived of personal freedom because they are accompanied to closed centres, and thus into situations of substantial detention, without having committed a crime and in the absence of the guarantees reserved for prisoners, mostly under inhuman and degrad-

[17] The Constitutional Court had declared unconstitutional a similar question contained in the Bossi-Fini Law for the violation of the principle of adversarial process in judgment no. 222/2004; see the comment by G. Bascherini, *La Corte costituzionale dichiara l'illegittimità costituzionale di alcune disposizioni della legge Bossi-Fini*, in *Costituzionalismo.it*, 2004.

[18] The Constitutional Court intervened several times to defend the rights of migrants as human beings: in judgment no. 105/2001, it declared unconstitutional any restriction, for anyone, of personal freedom (citizens and non-citizens alike) without respect for jurisdictional guarantees. In judgments no. 222/2004 and no. 223/2004, it intervened because Legislative Decree no. 286/1998 did not respect the limits and guarantees contained in art. 13 of the Italian Constitution (judgment no. 222) and the principle of the due process of law (Judgment n. 223).

[19] Judgment no. 299/2010. The Constitutional Court maintained the proper interpretation of the Constitution and proposed considering «domicile» to include «housing accommodations» at «reception centres», for people without accommodations (judgment no. 61/2011).

[20] Art. 16, paragraph 9, Immigration Law.

ing detention conditions that were censured by the European Court of Human Rights in Khlaifia *v*. Italy[21].

The permanent state of fear and the economic crisis make it difficult for Parliaments to recognize social rights for immigrants as well, even though domestic and European immigration regulations establish that social rights could be an instrument of integration; however, above all, the principle of equality under article 3 of the Constitution does not allow a distinction to be made between needy citizens and needy non-citizens, as long as the latter have entered the country legally[22]. EU legislation follows the same vein[23]. In addition, the provision of social benefits also involves the Italian Regions[24]. Therefore, the picture becomes even more complicated by the multilevel government, which legitimizes a substantial «graduated scale» in the provision of rights and services to non-citizens as well[25]. Some social rights are only granted to foreigners who are long-

[21] *Khlaifia and others v. Italy*, ECHR 2016-16483/12 where Italy was condemned for violation of Article 5, paragraph 1 (and consequently of Articles 5, par. 2 and 5, par. 4), on account of a lack of legal basis for the deprivation of the applicants' liberty. Their *de facto* detention without any formal decision had deprived them of the constitutional *habeas corpus* guarantees afforded to individuals held in a removal centre and, even in the context of a migration crisis, this could not be compatible with the aim of Article 5 of the Convention taken together with Article 3, in respect of the conditions of detention. See, on this point, E. Rinaldi, *L'Unione europea e le deroghe alla libertà di circolazione in funzione di governo dei flussi migratori*, in *Costituzionalismo.it*, 3, 2016, 325-354.

[22] C. Corsi, *Stranieri, diritti sociali e principio di eguaglianza nella giurisprudenza della Corte costituzionale*, in *Federalismi.it*, 3, 2014, 1-30.

[23] F. Biondi Dal Monte, *I diritti sociali degli stranieri tra frammentazione e non discriminazione. Alcune questioni problematiche*, in *Le istituzioni del federalismo*, 5, 2008, 557-595.

[24] Art. 117 Const., paragraph 2 attributes to the State legislative competence for a) asylum and legal status of citizens of non-EU states; b) immigration. The Constitutional Court specifies that State legislation must be limited to «programming policy of the immigration flow in the national territory» (judgment no. 134/2010) and the policy of regularization of irregular foreigners (judgment no. 201/2005). Therefore, the Italian Constitution and immigration legislation does not exclude the competence of the Regions, called upon to regulate others aspects of the life of non-citizens, like health, social assistance and education, which includes all public service facilities (judgments no. 156/2006, no. 300/2005, no. 299/2010). Legislative Decree no. 286/1998, referred to as the Immigration Law, is the framework with which regions can adopt broader norms in line with state prescriptions, except in social welfare, where the regions have full competence (judgment no. 10/2010). Article 3, paragraph 5 of the Immigration Law requires Regions and other local authorities to «take the necessary measures to remove obstacles to the full recognition of the rights and interests recognized for foreigners in the territory of the State, in particular the right to housing, social integration, the study of the Italian language, with respect for the fundamental rights of the human being». In practice, this model of sharing competence between the State and Regions is not so clear and undisputed; on this point, see C. Corsi, *Immigrazione e diritti sociali: il nodo irrisolto del riparto di competenza tra Stato e Regioni*, in E. Rossi, F. Biondi Dal Monte, M. Vrenna (eds.), *La governance dell'immigrazione. Diritti, politiche e competenze*, Bologna, 2013, 229-251; L. Ronchetti (ed.), *La Repubblica e le migrazioni*, Milano, 2014.

[25] As stated in art. 41 of the Immigration Law; see C. Salazar, *Leggi statali, leggi regionali e politiche per gli immigrati: i diritti dei «clandestini» e degli «irregolari» in due recenti decisioni della*

time residents in the same place, even though the Constitutional Court has specified that the residence requirement should not weigh excessively on the delivery of services[26] and is not to be considered in the case of application of the principle of equality to a fundamental right that affects all human beings[27].

The right to public housing has often been an overestimated requirement[28]. Even if he Constitutional Court has considered it an «inviolable human right»[29] provided for by article 2 of Italian Constitution[30], regional law does not extend to illegal aliens access to publicly funding housing, because the Immigration Law (art. 40, paragraph 6) provides for such measures only for legal aliens[31].

Corte costituzionale (Sentenze. n. 134 e 269/2010), in AA.VV., *Studi in onore di Franco Modugno*, Napoli, 2011, IV, 3237-3274.

[26] In the field of social assistance and social services, the Constitutional Court has stated that social provisions do not tolerate distinctions based either on citizenship or on particular types of residence, because any requirement regarding residence or domicile excludes, paradoxically, precisely the needy and troubled persons that this assistance model aims to address in the pursuit of social purposes" (judgment no. 40/2011). In its judgment no. 269/2010, the Constitutional Court recognized that Tuscany's regional law no. 29/2009 (rules on the reception, participatory integration, and protection of foreign nationals in the Tuscany Region) stated that extending to non-citizens, even without a valid residence permit, an irreducible core of the protection of the right to health protected by the Constitution as an inviolable domain of human dignity, is not contrary to the principle and spirit of the Constitution. For an analysis of regional policies for foreigners, see P. Carrozza, *Diritti degli stranieri e politiche regionali e locali*, in C. Panzera, A. Rauti, C. Salazar, A. Spataro (eds.), *Metamorfosi della cittadinanza e diritti degli stranieri*. *Atti del Convegno Internazionale di Studi, Reggio Calabria, 26-27 marzo 2015*, Napoli, 2016, 86 ff. and E. Grosso, *Stranieri irregolari e diritto alla salute. L'esperienza giurisprudenziale*, in R. Balduzzi (ed.), *Cittadinanza, Corti, Salute*, Padova, 2007, 157-170.

[27] Constitutional Court, judgments no. 10/1993, no. 198/2000, no. 105/2001, no. 252/2001, no. 222/2004, no. 224/2005, no. 432/2005. Some of these decisions are alongside – and others before – the constitutional amendments of 2001, when regionalism was strengthened. As regards the recognition of fundamental rights for all people in order to protect human dignity, see Constitutional Court, judgment no. 148/2008.

[28] Constitutional court, Judgment n° 432/2005. For a comprehensive picture of the security and social rights of the weakest, see M. Ruotolo, *Sicurezza, dignità e lotta alla povertà. Dal «diritto alla sicurezza» alla «sicurezza dei diritti»*, Napoli, 2012, 1-276. On the requirement of a qualified residence in order to access regional welfare, see E. Monticelli, *La giurisprudenza costituzionale italiana in materia di residenza qualificata e accesso al* welfare *regionale*, in *Osservatorio AIC*, 2, 2016 and E. Olivito, *Il diritto costituzionale all'abitare*, Napoli, 2017, esp. 150 ff.

[29] The Constitutional Court, in judgement no. 404/1988 declares that all personal and some social rights must be recognized for human beings. For a point of view regarding the right to housing and its recognition for all human beings with no distinction made between citizens, qualified residents and immigrants, including illegal ones, see F. Pallante, *Gli stranieri e il diritto all'abitazione*, in *Costituzionalismo.it*, 3, 2016, 135-155.

[30] Judgment no. 209/2009; Order no. 76 of 2010.

[31] Judgment no. 61/2011.

In the protection of the right to health as well, the difference between legal and illegal aliens persists, even though it is a fundamental right that should be guaranteed to all. Illegal immigrants are entitled to life-saving care alone; other health benefits are solely for legal aliens and citizens. The recurring reason for violating rights – including those of immigrants - is always that of saving economic resources, especially in times of crisis, which deprives the regions of their legislative autonomy. It should be a regional responsibility to activate the rights to participation in local life[32] and the question of the social inclusion of foreign citizens[33], but these are considered rights that come at an economic cost and that are not in line with first aid. Even when the State wants to set up funds to foster a specific purpose, such as implementing foreign education, it cannot do so because regional autonomy does not allow the central institution to finance the territories for precise purposes[34], as these must be chosen by local politicians. Often, however, the regions cannot justify to their electorates such courageous (and expensive) choices, nor do they have sufficient funds to do so.

The issue of immigration is rather complex and it should be pointed out that the legislation and the decisions of Constitutional courts have long established a system of a graduated scale of rights for non-citizens; however, not only the principle of equality pursuant to art. 3 of the Italian Constitution, but also the respect for equal social dignity included in it, excludes this hypothesis[35]: even in cases of scarce resources, a choice in the matter of redistribution must be reasonable, and discrimination could never be considered consistent/compatible with the Supreme Law, as regards either freedoms or social rights. In addition, a ceiling of common guarantees is needed in order to avoid discrepancies between the different categories of non-citizens, which include all foreigners, European citizens, non-EU citizens, those with or without residence permits, stateless persons and asylum seekers[36]. Such

[32] Judgments no. 372 and 379/2004.

[33] Judgments no. 300/2005.

[34] Judgment no. 50/2008.

[35] A. Ciervo, *I diritti sociali degli stranieri: un difficile equilibrio tra principio di non discriminazione e pari dignità sociale*, in F. Angelini, M. Benvenuti, A. Schillaci (Ed.), *Le nuove frontiere del diritto dell'immigrazione: integrazione, diritti, sicurezza*, Jovene, 2011, 367-388, M. Benvenuti, *La protezione internazionale degli stranieri tra polarità vecchie e nuove*, in F. Angelini, M. Benvenuti e A. Schillaci (eds.), *Le nuove frontiere del diritto dell'immigrazione: integrazione, diritti, sicurezza*, Napoli, 2011, 59-92.

[36] For the different juridical treatment of asylum seekers and refugees, see T. Guarnier, *La cittadinanza e la condizione giuridica degli stranieri nell'ordinamento italiano*, in M.P. Paternò (ed.), *Questioni di confine. Riflessioni sulla convivenza giuridico-politica in una prospettiva multidisciplinare*, Napoli, 2014, 131-156.

differences cannot affect the guarantees that the Court has rightly based on the human person and not on his differentiated legal status.

Even the most recent debate, in which financial issues have become a super-constitutional principle[37], the spending limit is fixed not only through legislation, but by the Constitution as well. Legislators can decide to exclude some categories of people for public benefits, but without distinguishing between immigrants and citizens, because the principle of equality does not allow for different treatment of equal situations: all the needy are in the same condition; a certain differentiation may be assumed for those who have no residence permit. Constitutional judges recognized and extended most social benefits to immigrants and non-citizens, when immigrants needed them or were in situations of social discomfort, and if these benefits were closely related to the human being's needs[38]. The debate becomes more heated when it comes to rights not linked to the bare necessities for survival. In several cases, the Supreme Constitutional Court also extended benefits to legal non-citizens. In this case, the Constitutional Court won the challenge by managing to maintain the level of rights protection without drawing a distinction between citizens and non-citizens, taking pains not to give up the guarantees of the rule of law, even for immigrants[39].

3. Terrorism, emergency, and suspension of Constitutional guarantees

Italy has had a long history of political terrorism. During the 1970s, political terrorism emerged and a balance between security and rights already saw the attention of lawmakers and the Constitutional Court. The government adopted some Legislative Decrees (59/78 and 625/1979) establishing

[37] I. Ciolli, *The balanced budget rule in the Italian Constitution: it ain't necessarily so… useful?*, in *Rivista AIC*, 4, 2014, 1-21.

[38] The Constitutional Court extended benefits to non-citizens (but with a regular residence permit) when unable to work (judgments no. 11/2009, 187/2010, 22/2015, 230/2015) and requiring assistance by means of economic resources (306/2008, 329/2011, 40/2013). Such aid may not, moreover, be subject to the condition of long-term residence (judgement no. 2/2013). See M. Cartabia M., *Gli «immigrati» nella giurisprudenza costituzionale: titolari di diritti e protagonisti della solidarietà*, in C. Panzera, A. Rauti, C. Salazar, A. Spataro (eds.), *Quattro lezioni sugli stranieri*, Napoli, 2016, 3-21.

[39] For example, free access to regional transport for the disabled, although a benefit that could not be included in the essential levels of assistance, is extended to all people in this condition, without considering the citizenship requirement (Constitutional Court, judgment no. 432/2005).

new and vague offences, with lesser guarantees both in police custody and in body or home searches, as well as in interception. The Government adopted the emergency measures, which were ratified by Parliament without hesitation (Laws no. 191/78 and no. 15/80). The Constitutional Court was called upon to control the constitutionality of the question of the maximum length of detention *ante judicium* for some terrorists, and its judges ruled that the Constitution had not been violated because it was an emergency situation that demanded emergency tools[40]. They strongly underlined that

> if it is to be admitted that a general situation in which terrorism is causing death leads to a state of emergency, it must be agreed that the emergency, in its most specific sense, is certainly an abnormal and serious condition, but also by essence *temporary*. Consequently, it legitimizes unusual measures, but these would lose any legitimacy if they were unjustifiably protracted over time[41].

This condition of temporariness is not included in the recent emergency condition that has become a permanent condition[42]. Nevertheless, many measures of limitation of personal freedom were also considered to be in line with the Constitution by anti-terrorism laws after 9/11, although they are not limited in time. This is their first and most obvious infringement upon the Constitution[43].

However, the phenomenon of international terrorism that began with the attack on the World Trade Center is another matter, and demands new tools and new strategies that are relevant to a globalized and interactive world. Furthermore, terrorism and emergency in migration flows are often seen as only a matter of public order requiring exceptional measures, despite being long-term conditions and therefore not limited in time and space, which are the requirements distinguishing emergency sources[44].

[40] They reaffirmed that the principle of the inviolability of personal freedom is the rule and limitation an exception.

[41] Judgment no. 15/1982, point 7.

[42] I. Ciolli, *The Constitutional Consequences of Financial Crisis and the Use of Emergency Powers: Flexibility and Emergency Sources,* cit., *6.*

[43] T. Groppi, «*Business as usual*». *Le dialogue judiciaire sur les affaires antiterroristes après le 11 septembre 2001*, in J. Iliopoulos-Strangas, O. Diggelman, H. Bauer (Eds.), *Etat de droit, Sécurité et Liberté en Europe*, Athènes, Bruxlles, Baden Baden, 2010, 325 ff.

[44] For an idea of the «ordinary emergency», see T. Groppi, «*Business as usual* », cit., 8, and G. De Minico, *Costituzione, emergenza e terrorismo*, Napoli, 2016, 7, see also C. Tripodina, *Lotta al terrorismo e tutela dei diritti fondamentali*, Torino, 2009.

Terrorism laws and judicial remedies are always so homogenous because the tools are similar: the government exercises the legislative emergency power; the principle of legality is respected only formally, because Parliament simply ratifies the government decisiveness. It is not just a tyranny of the majority as many authors have argued, but a tyranny that the ordinary legislator exercises over the founding fathers and the rule of law: even for strong Constitutions, Parliaments modify the rules that represent the heart of constitutions, such as their fundamental principles, thus shattering the deeper meaning of the Constitutional pact with no limitation in time – and therefore, in theory, permanently. The core of the content is considering the security as a «right» that must be balance with others fundamental ones. In this interpretation security could be considered an obligation of *facere* for the national States, that can compress other fundamental rights. This is the main interpretation in this last period and it products also less politics of inclusions of diversity. In a social constitutional State on of the priority consists in the defence and the guarantee of the constitutional intents that only partly consist on security or emergency questions[45].

The legislative measures against terrorism are not so different in different Countries: everywhere, they consist of placing limitations on court guarantees and on the right to privacy, and of preventive detention, including of terrorist suspects, foreign terrorists and those suspected of terrorism, with no special procedural guarantees, and with easier searches.

Scholars' reactions differ: some authors have tried to defend the hard core of freedoms[46] while others believe that the suspension of some fundamental rights, outside Constitutional provisions, is natural, and that special emergency powers have to be provided for; it is merely because emergencies cannot be anticipated[47]. And if in Italy, in 2006, Paolo Bonetti

[45] See M. Ruotolo, *Costituzione e sicurezza tra diritto e società*, in A. Torre (ed.), *Costituzioni e sicurezza dello Stato*, Rimini, 2013, 587-588 and M. Dogliani, *Il volto costituzionale della sicurezza*, in G. Cocco (ed.), *I diversi volti della sicurezza*, Milano, 2012, 6-10.

[46] B. Ackermann, *The Emergency Constitution*, cit., 1029-1091, at 1030 had guessed, as early as the attack on the Twin Towers, that democracy was at stake because the emergency powers that tried to steer the crisis suspended too many liberties and guarantees.

[47] But G. De Minico, *Le libertà fondamentali in tempo di ordinario terrorismo*, in *Federalismi.it*, 10, 2015, 1 raises the most burning issue as to what are the limits of the compression of fundamental freedoms to ensure preventive control of the terrorism phenomenon. When speaking of prevention, the extent of gravity can only be assumed; so much depends on the state of alert that is created and the state of fear that is generated in public opinion. O. Gross, *The Normless and Exceptionless Exception: Carl Schmitt's Theory of Emergency Powers and the «Norm-Exception» Dichotomy*, in 21 *Cardozo Law Review*, 1999-2000, 1825-1868 speaks of a dichotomy between norm and exception, which cannot be overcome with a constitutional legal provision

believed that the Italian system, like other democratic systems, allows derogations from the Constitution only during a state of war, but provides for ordinary instruments to safeguard security needs without sacrificing the protection of liberties[48], Giovanna De Minico[49], in 2015, when the special emergency legislation had already yielded its effects, raised the most burning issue, asking what were the limits on the compression of fundamental freedoms to ensure *preventive* control of the terrorism phenomenon. In other words, today's terrorism prevention policies call for renouncing the protection of our rights to be safeguarded against a «future and uncertain» threat that we cannot quantify[50]. Among the Constitutional changes that this involves is a new way of understanding balance, which necessarily becomes uneven. In the most recent period of terrorism or of economic crisis, political decisions or constitutional controls have often been adopted by evaluating in an unequal way the principles, values and rights contained in the Constitution. The principle of proportionality has become the central tool of Constitutional affairs. When considering the generic protection of «future generations» that is always taken into account in balancing social costs, the phenomenon becomes clearer. We attempt to protect a category of subjects to whom to transfer a protection

of state of exception: the response to emergency could be undemocratic. O. Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, in 112 *The Yale Law Journal*, (2002-2003), at 1021-1026, and at 1058-1081, after the attack on the Twin Towers, explains that: «the Business as usual model is based on notions of constitutional absolutism and perfection. According to this model, ordinary legal rules and norms continue to follow strictly with no substantive change even in times of emergency and crisis. Other models of emergency power may be grouped together under the general category of "model of disaccommodation" insofar as they attempt to accommodate, within the existing normative structure, intact as much as possible, some exceptional adjustments introduced to accommodate exigency. […] I suggest that these traditional models may not always to be adequate: both as a matter of theory and practice». Gross criticizes this model because it is naive and hypocritical in the sense that it disregards the reality of governmental exercise of emergency that is hidden by the ordinary system, and especially because this model is likely to make the emergency permanent. L.H. Tribe, P.O. Gudridge, *The Antiemergency Constitution*, in 113 *The Yale Law Journal*, 2004, 1801-1870at 1803 are also critical of Ackerman's thought and they consider his scheme with «the vaguest contours». The emergency clauses seem to be «improvised» and conferred an «unspecified institutions and at unspecified times». For a recent point of view of United States idea of security and about the Supreme constitutional court positions see A. Di Martino, *Political branches, Corte suprema e corti di Common law nei casi su Guantanamo*, in A. Torre (ed.), *op. cit.*, 762-808, at 784 ff. See, also, T. Groppi, *Business as usual*, cit., 325 ff. dedicate to the role of judges and especially of the constitutional court in the defence of the rights and freedom in a time of terrorism emergency.

[48] P. Bonetti, *Terrorismo, emergenza e Costituzioni democratiche*, Bologna, 2006, as recalled by Legislative Decree no. 144/2005 (converted into law no. 15/2005), which extended the anti-Mafia law to the fight against terrorism, and also includes some measures concerning the juridical condition of foreigners.

[49] G. De Minico, *Le libertà fondamentali,* cit., 1.

[50] Ivi, 4

we do not know will be commensurate with future times and needs; we renounce protecting some (social) rights for today, betting on a better future[51]. The same can be said with regard to the precautionary principle, which arises in international law (hence with more flexible and non-national rules) and then in European law with the Maastricht Treaty, in particular to defend people against unknown dangers concerning the protection of the environment, and which has expanded until the legislative power and the court's decisions are increasingly discretionary and are spreading unequal balance[52]. Reflection, principles of proportionality and precaution exist alongside another limit that traditionally has to be balanced with rights of liberty in exceptional situations: public order. The proliferation of ancient and modern limits makes the exercise of rights more difficult. In this context, it is easy to contain freedom to speech or privacy and mobile communication interceptions before a threat of terrorism[53].

As for Italian anti-terrorism measures, Legislative Decree no. 7/2015 was adopted and converted into law no. 43/2015. It takes into consideration the new figure of the international terrorist and of terrorism; a general de-territorialisation of the structure of these organizations; and the purpose of this new form of terrorism designed to undermine the founding values of democracies. The transformation of these new terror organizations is noticeable: These are structures based on flexible, light and horizontal associations, sometimes composed of few members, or even only of only a single member, and their attacks on innocent victims are entirely unpredictable, committed for the sole purpose of spreading terror in the population. Therefore, the State's response is also special – some speak of an «emergency criminal law»[54]: As in other legal systems, it punishes the intent, that is, it anticipates the punishment for a crime yet to be committed, and there is a vagueness and uncertainty in the of-

[51] M. Luciani, *Generazioni future, distribuzione temporale della spesa pubblica e vincoli costituzionali*, R. Bifulco, A. D'Aloia (Eds.), *Un diritto per il futuro. Teorie e modelli dello sviluppo sostenibile e della responsabilità intergenerazionale*, Napoli, 2008, 425 ff., who refuses this idea of a juridical category of future generation, because it refers to an abstract person that has not yet existed, and cannot be a holder of rights.

[52] A global vision of this phenomenon, and in particular an accurate examination of the Precautionary Principle, is contained in C.R. Sulstein, *Laws of Fear Beyond the Precautionary Principle*, Cambridge, 2005 C.R. Sulstein, *Laws of Fear Beyond the Precautionary Principle*, Cambridge, 2005, 109-174.

[53] F. Fabbrini, V.C. Jackson (eds.), *Constitutionalism Across the Borders in the Struggle Against Terrorism*, Cheltenham-Northampton, 2016, especially 1-14.

[54] See R. Bartoli, *Legislazione e prassi in tema di contrasto al terrorismo internazionale: un nuovo paradigma emergenziale?*, in *Diritto penale contemporaneo*, 2017, 4.

fense[55]. «Training for activities with purpose of international terrorism» (Article 270 *quinquies* of the Italian criminal code) that is, preparatory acts: the law would thus punish the intent and not the act, thus distorting the sense of criminal law.

In this complex landscape, not only national but also European law has led to the emergence of exceptions from and breaks in the rules set out in the Treaties[56].

4. The economic crisis: the hardest challenge to constitutional rules

As Balaguer[57] argues, the economic crisis has literally overturned domestic constitutional principles from a number of different standpoints: the crisis changes the way to interpret the economic Constitution; it introduces permanent emergency powers that for constitutionalists represent an oxymoron, a contradiction in terms, because emergencies ought be limited in time; it imposes a different relationship between Government and Parliament, that is not caused by the crisis but has become more evident with it; it has transformed the constitutionally enshrined division of competence

[55] R. Wenin, *Una riflessione comparata sulle norme in materia di addestramento per finalità di terrorismo, Comparative Law Observations on the Rules and Regulations Concerning Terrorism Training,* in *Diritto penale contemporaneo*, 4, 2016, 108 and 117 argues on «international policies regarding the issue of training for the purpose of terrorism. This study provides an opportunity to reflect upon the strains faced by "classic" criminal law against the desired anticipation of punishability for purely premonitory conduct, in which the risk of taking on excessive consequences as opposed to actual intent arises. The severity of the threat has prompted the legislature to increasingly anticipate punishments with the risk of affecting socially neutral conduct and the consequential loss of the selective capability of the criminal law.»

[56] I am referring here to the «new Schengen rules» contained in particular in Regulation no. 399/2016 of the European Parliament and of the Council of 9 March 2016 «on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code)»; on their conflict with the goal of freedom of movement, see E. Rinaldi, *L'Unione europea e le deroghe alla libertà di circolazione in funzione di governo dei flussi migratori*, cit., 336 ff.

[57] F. Balaguer Callejón, *Una interpretación constitucional de la crisis económica*, in 19 *Revista de Derecho Constitucional Europeo*, 2013, 449-450 explains «En primer lugar, esa interpretación económica no se limita a insertar en la Constitución la vertiente económica del orden social, sino que pretende, por el contrario, vertebrar todo el orden social y la propia Constitución desde esa vertiente económica, de tal manera que aspira a una concepción global del entero sistema constitucional a partir de la economía. En esto contrasta con la idea de Constitución económica, que se configuraba como una parte de la Constitución que ordenaba la realidad económica, pero no el entero sistema constitucional, y que era compatible con la idea de democracia como un proceso de articulación de intereses plurales de la sociedad». For an interpretation of the crisis as a new model of constitutionalism see also A. Cantaro, *Crisi costituzionale europea e diritto della crisi*, in F. DelVecchio, B. Andò (eds.), *Costituzione, globalizzazione e tradizione giuridica europea*, Padova, 2012, 353-371.

between the State and the Regions, leading to a new centralization in the State[58].

The introduction of the budget rule into the Italian Constitution overturned the placement of the economic Constitution in the constitutional principle. Constitutional amendment no. 1/2012, modifying article 81, introduced strong new relationships within the Constitution; the original intent of the Constitution's founding fathers was to guarantee a social State through a political mediation of different interests; while they regulate economic freedoms, they found contemplation and limits in social purposes, in social functions and human dignity, or other interests as well (articles 41, 42, 43). The introduction of the new article 81 to the Constitution placed rights and expenditure on the same rank as the Social state. The inevitable consequence of these equal recognitions in the Constitution of rights and costs introduces an indirect and hidden idea that rights can be limited or balanced with costs even when that right is constitutionally protected and therefore its enforcement is binding it.

Containing public expenditure became the beacon and guide for the Constitutional court, Parliament, and Government in its regulatory power; the Constitutional Court has even disregarded the principle of the retroactive effect of its decisions on containing costs[59].

The relationship between Parliament and Government has been transformed over these past years. This is not caused by the crisis, but has put the predominance of the executive into relief and legitimizes this anomaly. During the crisis, the fundamental reforms are regulated by Decree Law and by Legislative Decree, and Parliament intervened only to rouse the delegation, or at the end of the legislative process to convert the decrees into law. Parliamentary debates are almost absent, because the Government intervenes during the conversion with a vote of confidence

[58] For this recent constitutional process see T. Groppi, I. Spigno, N. Vizioli, *The Constitutional Consequences of the Financial Crisis in Italy*, in X. Contiades (ed.), *Constitutions in the Global Financial Crisis. A Comparative Analysis*, London, 2013, 102, and S. Ragone, *Constitutional effects of the financial crisis at european and national level a comparative overview*, in *Revista general de derecho público comparado*, 15, 2014, 1-23; as regards the impact of the insertion of this amendment in the Italian Constitution, see T. Groppi, *The Impact of the Financial Crisis on the Italian Written Constitution*, in *Italian Journal of Public Law*, 2, 2012, 1-14.

[59] As C. Bergonzini, *The Italian Constitutional Court and Balancing the Budget*, in *European Constitutional Law Review*, 12, 2016, 181 stated, this judgement «represents the Court's first attempt to limit the retroactive effects of a ruling of unconstitutionality to protect budgetary equilibrium»; in fact, Constitutional court declares unconstitutional the rule containing the Robin Tax for oil companies and the consequence of the retroactive effects of the Court's decisions should have been to refund the tax, for past years as well. This would have represented a serious budgetary problem, so the Court provided only for a future refund. This, however, is a breach of the Italian constitutional model as regards seeking redress at the Constitutional Court.

on its text, which prevents any discussion or amendments by the Assembly. Furthermore, the crisis quickly imposes decisions and assembly generally tends towards reflexive decision-making, while the government guarantees strict times.

Concerning the Constitutional Court's position with regard to the most recent crisis, in my view it swings from strict compliance with constitutional regimes even when recognizing the existence of an economic emergency, to a reversal of the rules, as in the case of judgment no. 10/2015. Also relevant is its general «judical policy», which consisted of taking the crisis into consideration but without creating its own personal position, its own doctrine of the crisis[60]. But it is undeniable that many of its decisions were oriented, during those periods, towards prioritizing lower public spending among the interests involved but without renouncing its confirmation of guarantees on social rights or other constitutional rights and powers (for example, concerning State-Regions relations). The first result is a sort of concurrence with the role of the Parliament in choosing the best interest of stakeholders[61]. For these reasons, its decisions swing from an absolute prevalence of the principle of equality on budget rules, to a mere minimum (and formal) content of the right to housing in order to contain public expenditures in a time of crisis[62]. Clearly, there are more differences, and the constitutional judges must follow such principles as proportionality and reasonableness, but these are the open clauses that provide for a certain amount of discretion as judgment no. 10/2015 shows or, to the contrary, could be used to defend the social right to an adequate wage (article 36 Const.) and an adequate retirement pension (art. 38) as judgment no. 70 pointed out.

Sometimes, the Constitutional Court seems to adhere to the theory of a graduated access to the rights and conditioned rights, which are based in the German theory of *Vorbehalt des Möglichen*. This occurs when it declares that in periods of scarce resources, only the core of rights that cost money could be protected[63]. This could affect the prescriptive nature of constitutional rights, which would be conditioned by available resources and thus deferred in their implementation.

[60] M. Benvenuti, *Brevi considerazioni intorno al ricorso all'argomento della crisi economica nella più recente giurisprudenza costituzionale*, in *Giurisprudenza Costituzionale*, 2, 2013, 969-979.

[61] *Ibidem.*

[62] Judgment no. 121/2010, where the right to housing is considered to be satisfied not by obtaining housing but by being included on waiting lists until public resources are available for the purpose.

[63] As in judgment no. 316/2010, when the Supreme Court judges did not apply the principle of pegging public wages to the cost of living as the Constitution prescribes, basically to speed its return.

Globalization and the complexity of the juridical world require a multilevel government, which is regionalism, but in this last decade, the Constitutional Court has preferred to legitimate a re-centralization of the legislative competence in the State, even when the Constitution entrusts concurrent competence shared between State and Regions, or in rare cases re-centralization removes competences conferred by the Constitution to the regions alone[64]. The constitutional judges, through the use of such technical tools as the «clause of the prevalence» of State competence, or the «coordination of public finance, are tending inexorably towards a new and solid return to the central State for implementing an economy of scale where the State can better control the use of the public resources».

The challenge to maintain the territorial set-up imposed by the 2001 constitutional reform appears to be lost.

5. Final considerations

The changes and events impacting constitutional law and its institutions are now global in scope – the responses to them, at least as regards Western democracies, are quite homogeneous. In particular, all of Europe has suffered from and continues to grapple with what is now a cyclical economic and financial crisis – a crisis that has imposed prompt and exceptional measures aimed at filling the gaps and following the markets' trends, both in European Union law and in the Member States.

This «exceptionality» and «promptness» are two new and challenging developments that Constitutions have to face when entering the global world. The challenge for Constitutional Courts is insidious and unnatural: they were born to govern, with certain and predictable rules, moments that are at times exceptional[65]: the relationship with continuous exceptionality and emergency shines the spotlight on their inadequacy. Moreover, there is also a continuous and palpable tension between Constitutions – which are designed to last, theoretically, for all eternity so as to be immortal and in force indefinitely – and the precarious nature of the fast time frames and contracts now demanded of state institutions in order to regulate increasingly fleeting and fluid current phenomena.

[64] Judgments no. 10/2010 and no. 62/2013.

[65] I am referring to Articles 77 and 78 of the Italian Constitution.

The time factor has made its impact by demanding faster and faster decisions, aimed at circumventing complex ones – decisions that require more time for debate and approval than those adopted by a single person, or by the Government. This is the reason for the increasingly frequent recourse to urgent legislations – not so much, or not only, because the decision is taken without having to bargain with parliamentary minorities, but also because it proves faster and more prepared to follow the markets' own timing, and to reassure markets in order to keep them from considering the States as unreliable. But in this way, Constitutions are navigating by «dead reckoning», losing their ability to guide events, and to plan and foresee behaviour. It does not need to be mentioned that this also impacts the arrangements of the form of government, and the relationship between constitutional bodies: the relationship that exists between the Government and Parliament is increasingly skewed towards the former, and the role of the latter is becoming that of «ratifying» the political choices imposed by the majority. But within the Government, too, relationships are changing: there is no more time for bargaining within the Council of Ministers; the "presidentialization of the executives is a phenomenon impacting Italy and other democracies. I am thinking of the personal and not strictly party-linked rise of France's President Macron; but I am also thinking of the Italian executive, where collegiality was sacrificed in the name of a more marked leadership by the Prime Minister.

The speed also brought its effects on the rules of constitutional amendment: the norm that introduced the balanced budget into the Italian Constitution[66] was approved in accordance with the times imposed by art. 138 of the Constitution (a three-month interval between the first and second vote on the revision law), but under duress, with some inconvenience and without waiting one day more than required. The Constitution was thus respected in form but not in substance: the parliamentary debate needed for constitutional review was lacking; public opinion was not involved; and the very meaning of the review as an opportunity for reflection was therefore overturned.

On the other hand, the rules to contain the deficit and the public debt were adopted in a regime of emergency that was imposed upon the normal juridical rules of both the Union and of its Member States. This has meant that the relationship between the law and the economy was overturned: it is no longer the Constitutions that dictate the rules – within the framework of their own principles and values – within which the eco-

[66] Constitutional law no. 1/2012.

nomic Constitution can function, but it is the latter, as a part now detached from everything the constitutional pact is, that is the model within which rights must be played out, and in light of which constitutional principles must be interpreted. The social state, which has for some time undergone the attacks of the doctrine closest to ordoliberalism, was given greater vigour by the crisis. Although representing the true new development and the very essence of the post-War constitutions, in recent years it has been seen as an expensive accessory, and has been strongly conditioned by the central importance of controlling spending[67]. The Italian Constitutional Court, after the entry into force of Constitutional Law no. 1/2012 which introduced the balanced budget into the Constitution, yielded oscillating decisions, often protecting social rights but on one occasion in such a way as to transfigure the very system of seeking redress in court, in decision no. 10 of 2015[68]. But it cannot be said to have renounced the rights of the weakest; in fact, in this field, it attempted to interpret national legislation favourably to them, without distinguishing among the needy parties to be given benefits, whether they were immigrants or citizens in conditions of economic and social precariousness[69]. However, after decision no. 10, some perplexities with regard to striking a balance between rights and the need to contain expenses had appeared on the horizon. Part of the doctrine deemed that it could represent the first step for a subsequent restriction of rights, especially of all those demanding a benefit from the

[67] F. Losurdo, *Lo Stato sociale condizionato. Stabilità e crescita nell'ordinamento costituzionale*, Giappichelli, 2016, 155 ff., illustrated the transformations, including profound ones, of European and national rules in the matter of the social state, casting light on how the rules on balancing the budget, from the fiscal compact to Italian constitutional review, have literally bent the fundamental norms of the EU treaties and of the Italian Constitution.

[68] Even though the Court itself appears to explain that it takes so innovative a decision in the matter of complying with art. 81 Const. precisely because the balancing is not between a social right and the needs for containing expenditure contained in art. 81 Const. In fact, the decision – by preventing a considerable outlay by the State – makes it indirectly possible to use, at a moment of profound economic crisis, the sum saved for public interventions, and even those social in nature: in point 8 of the «Considered in law» clause, the Court maintains that the overall consequences of the decision's retroactive effect would end up requiring, in a period of persisting economic and financial crisis weighing upon the weaker segments of society, an unreasonable distribution of wealth in favour of those economic operators that may instead have benefited from a favourable economic trend. This would thus irremediably prejudice the requirements of social solidarity, gravely violating articles 2 and 3 Const.

[69] Most recently, order no. 95/2017 in the matter of also granting maternity benefits to women applying for asylum and holding a humanitarian residence permit but not a long-term residence permit, in which the Court declared the question inadmissible because the judge *a quo* could have recognized that right on the strength of art. 34, paragraph 5, of Legislative Decree no. 251/2007. For the most recent constitutional court approach of social rights see M. Massa, *Discrezionalità, sostenibilità, responsabilità nella giurisprudenza costituzionale sui diritti sociali*, in *Quaderni costituzionali*, 2017, 73-93.

state so that these rights might be effectively enjoyed. However, subsequent decisions showed the Court's ability to adjust its aim and to demonstrate that the Constitution held firm when it came to protecting rights. Therefore, more than a overruling, subsequent decisions clarified how art. 81 can impact the Constitution, but without excessively restricting rights, and without affecting their essential nucleus. Clearly, it is for lawmakers and the Court itself to quantify and assess how much protection may be included in the essential nucleus. Certainly, not even budget requirements can legitimate a violation of articles 36 and 38 of the Constitution, which regard the right to fair pay and a fair pension. Similarly, it held as unconstitutional the freeze, repeated over time and now almost permanent, of wages for workers in the public sector, and not even the constitutional principle of balancing the budget inserted into art. 81 Const. could legitimate this right.

In other words, the Court found that constitutionally guaranteed rights should continue to be so, that every restriction must always be in proportion to the end to be achieved, and, above all, that every restriction of rights must be limited in time, thereby re-establishing the concept of temporariness in emergency regulatory measures. This concept was stressed by the constitutional judges in decision no. 275 of 2016, in which, even where there are particular and serious spending requirements, the rights of the weakest, in this case the disabled's right to education, must at any rate be protected, in spite of the strict budgetary limits imposed by the Region. The Court holds that it must be politics to choose how to employ resources, but in compliance with the Constitution and with protection of rights[70].

It is however with respect to the Italian regionalism that the crisis deployed all its (bad) influence: Italy's decentralized system was put to a difficult test by the economic crisis, since in times of scarce resources, a centralization within the state of both political decisions and of spending is classically proposed. In this case, the same constitutional norms on sharing jurisdiction were bent by lawmakers due to the crisis's exceptional nature, and this was endorsed by the Constitutional Court which, for example, «rewrote» the financial rules governing the delicate relationships between the State and the Regions, by «inventing», in the matter of coordinating public finances, an exclusive state jurisdiction not present in the Constitution. It recognized the exceptional nature of the

[70] It is in this decision that the Court states «It is the guarantee of non-restrictable rights that impacts the budget, and not its balancing that conditions its necessary distribution».

situation, and even admitted that some competences could be modified to combat the crisis and guarantee protection to the weakest parties[71]; it similarly found that the special Regions, too, albeit not in deficit conditions, should also reduce healthcare benefits if they were not deemed strictly necessary[72]; continuing to remain with the theme of containing public spending in compliance with art. 81 Const., it also found that the Regions in deficit could not guarantee care, even if directed towards citizens with serious pathologies, that was not considered essential in the Court's assessment[73].

On a number of occasions, the Court used the issue of the economic crisis, mentioning it as if it were an element that could actually modify constitutional norms by the very fact of its existence. That is, it has been taken for granted that it could modify the spirit of the Constitution and could in some way condition it. The question takes on all its importance when we consider that one of our country's points of pride is that of not having turned our back on the Constitution, even to overcome the bloodiest terrorism of the 1970s.

It is precisely in the matter of terrorism that the challenge to the guarantees offered by rigid Constitutions is most insidious: the need to prevent a centralization of powers and to ensure, in every situation, the constitutional guarantees of the rights of freedom, was put to a hard test by the legislation adopted after the attacks on the World Trade Center and above all after the recent acts of terrorism affecting every part of the world. Western democracies have reacted with emergency legislation and with the use of such instruments as wiretapping that have limited their citizens' private lives. As always takes place, the phenomena were intertwined, and thus the economic crisis, along with intense flows of migration and with international terrorism, has produced an age-old phenomenon – the fear of others[74] – and a new phenomenon: attempting to «prevent» these

[71] In judgement no. 10/2010, the Court dealt with the «social card» – a card allowing the poor to purchase food. It found that for reasons of extraordinary need and urgency, although the assignment of the social card was included among the matters under the region's purview, it could be considered, on an entirely exceptional basis, a state matter for the purpose of maintaining the law and guaranteeing, through this instrument, a protection of the primary right to access food.

[72] Constitutional Court, judgement no. 115 of 2012, with comment by N. Lupo, G. Rivosecchi, *Quando l'equilibrio di bilancio prevale sulle politiche sanitarie regionali*, in *Regioni*, 2012, 1062 ff.

[73] Constitutional Court, judgement no. 192 of 2012 where the Court says that «The principle of prior coverage of the expenditure in the legislative setting, provided for by art. 81 Const., is imperative».

[74] F. Bilancia, F.M. Di Sciullo, F. Rimoli, *Paura dell'Altro. Identità occidentale e cittadinanza*, Roma, 2008.

ills, to conceive a principle of precaution to be applied to social facts and not merely to those involving health and the environment. The distinctive juridical element to be grappled with is the limitation of historically established rights, such as for example the secrecy of communications, in favour of a «possible» terror attack; therefore, «certain» historical guarantees of the rights of freedom are renounced in exchange for an «uncertain» greater security. In the name of this uncertain protection, the consequences of a rapid process are accepted, without such jurisdictional guarantees as the right to appeal or respect for the principle of the adversarial system, thus losing sight of the fact that that the proper function of the trial process is a guarantee not only for the individual accused, but for society as a whole when speaking of democratic societies. The same considerations apply for the challenge the immigration phenomenon poses for Western democracies. No extraordinary exodus will ever be able to legitimate degrading conditions for persons fleeing famine, war, and persecution; on this point, the European Court of Human Rights, national lawmakers, and the Constitutional Court itself have thus far taken action to remedy situations of greatest violation of such universally recognized rights as respect for human dignity and for personal freedoms. More difficult, and entirely within the State, is the protection of social rights, for which the Italian Parliament has provided for a graduated scale of protections, in accordance with the legal condition of the foreign national residing or spending time in our territory. The Constitutional Court has attempted to extend the social guarantees whenever it was called to protect the weakest parties, but in this case the real solution might also lie in a simpler granting of citizenship, first and foremost to those resident aliens now belonging to the second generation, born in Italy, who are citizens *de facto* but not under Italian law.

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