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## **The Economic Crisis as a Threat to the Stability of Law Recent Developments in the Case Law of the Italian Constitutional Court**

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**Abstract** This article analyses the impact of the economic crisis on the Constitutional Court's role in the Italian legal order, particularly focussing on the paradox of a Court that is at the same time subject to the Rule of Law and guardian of the Rule of Law. This article argues that this paradox emerges in a clear manner when the Court is called to rule on austerity measures. To do this, the article analyses the main, unprecedented developments that affected the 'unwritten constitution' during the times of euro crisis. The article illustrates a first season of the Constitutional Court's case law on the crisis legislation (2011-2014), characterized by a cautious and partly ambiguous approach. Subsequently, the article illustrates the latest developments in the Court's case law. The article goes into the details of three recent and notable judgements, revealing a new approach of the Court to the crisis legislation. This article argues that unlike a wide perception, the economic crisis affected the Constitutional Court's role in a very significant manner. More specifically, this paper argues that the Court's recent decisions to overrule its settled case law with regard to the temporal effects of its judgements raise serious concern with regard to the adherence to the Rule of Law.

**Keywords** Rule of law, economic crisis, euro crisis, constitutional court, constitutional transformations.

### **1. The Rule of Law in Italy: Far from an Idyllic Picture**

It is no secret that the performance of the Italian Republic in terms of adherence to the Rule of Law (RoL) has never been highly positive. In various RoL rankings, Italy's position is remarkably low compared with countries with the same regional area.<sup>1</sup> In one of the most influential writings about the RoL, Lon Fuller describes an imaginary King Rex coming to the throne with the zeal of a reformer: 'For generations the legal system had known nothing like a basic reform. Procedures of trial were cumbersome, the rules of law spoke in the archaic tongue of another age, justice was expensive, the judges were slovenly and sometimes corrupt.'<sup>2</sup> Fuller's description sounds bitterly familiar to the Italian reader. Furthermore, the economic crisis posed new challenges. Not because the economic crisis is a novel experience in Italy, but because the specific character of this crisis triggered unprecedented legal challenges in Italy's legal order. In fact, the economic crisis had a

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<sup>1</sup> According to the Rule of Law Index reported in 2015 annual report of the World Justice Project, Italy's regional rank (i.e. Italy's rank compared to countries of the same geographical area) is 19 out of 24. For further details, see Rule of Law Index 2015, p. 102.

<sup>2</sup> Fuller 1977, p. 33.

remarkable impact on the role of constitutionalism in the modern state and this impact emerged in a dramatic manner in the Italian experience.

Section 2 of this article draws a general overview of the peculiar impact of the crisis on the Italian constitutional system. The article analyses the main, unprecedented developments that affected the ‘unwritten constitution’ with a specific focus on the transformation of the interactions between the parliament, the government, and the President of the Republic. In Section 3, this article tests the common sense of the Italian constitutional scholarship by focusing on the latest developments of the Court’s case law. Section 4 focuses on a dilemma affecting the Constitutional Court role in the system, namely the fact of being at the same time guardian of – and subject to – the RoL. Section 5 illustrates a first season of the Constitutional Court’s case law on the crisis legislation (2011-2014), characterized by a cautious and partly ambiguous approach. Section 6 introduces the latest developments in the Court’s case law. In Sects. 7, 8, and 9, the article goes into the details of three recent and notable judgements, revealing a new approach of the Court to the crisis legislation. This article argues that unlike a wide perception, the economic crisis affected the Constitutional Court’s role in a very significant manner. More specifically, this paper argues that the Court’s recent decisions to overrule its settled case law with regard to the temporal effects of its judgements raise serious concern with regard to the adherence to the RoL.

## **2. The Euro Crisis in Italy and Its Systemic Consequences on the Constitutional System**

In Italy, the global character of the financial crisis is intertwined with some specific domestic problems.<sup>3</sup> One of the most peculiar domestic complications of the economic crisis in Italy is linked with the enormous volume of the public debt that has constantly increased since the 1960s, reaching unprecedented rates of growth during the 1980s. The dimension of the public debt can be largely connected with some peculiarities of the Italian political system during the first decades of the Republic’s history. The Christian Democratic Party played a pivotal role in a political system that through a tacit consensus cut the Communist Party out of the spectrum of government. Because of this implicit agreement (known as *conventio ad excludendum*), the political parties struggling for a majority in the parliament needed to maintain high spending policies to secure sufficient consensus. Tellingly, the first attempts to approve debt reduction measures emerged in the early 1990s, exactly when the Italian political system collapsed under an overwhelming corruption scandal.<sup>4</sup> The effects of these spending policies allowed Italy to join the Economic and Monetary Union.<sup>5</sup> However, despite this accession, the overall effect with regard to the dimension of the public debt has been limited.

The high volume of Italian public debt had a catastrophic effect when the current financial crisis erupted in 2008. In midst of the crisis, Italy presented itself as a perfect target for speculative aims. This was the result of a fatal combination of factors, with a reduction of GDP (and a consequent decline in tax revenues) and a significant increase in public spending connected to both the increased needs of social safety nets and the liquidity crisis of the private sector. Consequently, Italy experienced an unsustainable increase in the interest rates of public debt bonds and for the first time, the effects of the economic crisis emerged at the constitutional level, both with regard

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<sup>3</sup> On the peculiar character of the impact of the global economic crisis on Italian economy see Groppi et al. 2013.

<sup>4</sup> This scandal is known as *Mani Pulite* (literally ‘clean hands’, drawing from the first investigations into political corruption in the area of waste management), or *Tangentopoli*, meaning ‘Bribesville’. On this political period, see Rhodes 2015.

<sup>5</sup> For a detailed analysis of the troubled process of accession of Italy to the European Monetary Union, see Janni 1999; Quaglia 2006.

to the written document and with regard to the ‘living constitution’. Starting from the latter, the economic crisis had a huge impact on the interpretation of the form of government after 2011. The (in)famous letter sent from the ECB to the Italian government on 5 August 2011<sup>6</sup> was just one (even though very remarkable) of a series of unprecedented developments in the interaction between state powers, and between national and supranational actors.

In a very short span of time, Italy’s political life experienced the collapse of the fourth Berlusconi’s executive, the appointment of Mario Monti as lifelong senator, and his consequent appointment as president of the government. The executives that replaced Berlusconi’s center right one was led by the former European commissioner Mario Monti and was composed of technical ministers (devoid of a parliamentary mandate). The support of the President of the Republic, then Giorgio Napolitano, was decisive to build this technical government. It is not novel to the history of the Italian republic that the President of the Republic plays a more active role in times of crisis. However, the latest development of the Napolitano’s presidency led to extraordinary developments, until his re-election for a second term in 2013. The re-election of President Napolitano, an unprecedented event in the history of the Italian Republic, occurred a few weeks after the new general elections in February 2013 and was closely related to the fragile outcomes of the elections.

The electoral outcomes resulted in a substantial tie between three main political players, namely the center-left and the center-right coalitions, and the anti-system ‘five star movement’ led by the former comedian Beppe Grillo. Napolitano’s re-election was deemed necessary as the only way out from the post-electoral political deadlock. In fact, the re-elected President successively appointed Enrico Letta of the Democratic Party<sup>7</sup> as head of a new government. His government remained in charge less than a year and was forced to resign when Matteo Renzi, Head of Government currently in office, became the new secretary of the Democratic Party. Matteo Renzi was appointed the President of the Council of Minister on 22 February 2014. In the meanwhile, the electoral law was declared unconstitutional by the Constitutional Court with its landmark Judgement No. 1 of 2014.<sup>8</sup>

Apart from the very quick replacement of governments (far from a novel character in Italy), the structural significance of these developments has been underlined by the constitutional scholarship.<sup>9</sup> The most critical commentators advanced highly provocative reinterpretations of the

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<sup>6</sup> The (in)famous letter from the BCE to the Italian government was dated August 5, 2011. The letter contained recommendations to take appropriate action to implement a comprehensive reform strategy to liberalize professions and privatize local public services, to reform the collective wage bargaining system and to review the rules regulating hiring and dismissal of employees. Although it was meant as a confidential letter, after the collapse of the fourth Berlusconi’s government, the existence of that letter and its content were leaked to the press. On these developments, see among many others Bastasin 2012, pp. 300 ff.

<sup>7</sup> The Democratic Party gained a disproportional majority in the lower house thank to the majority prize guaranteed by the electoral law then in force, later declared unconstitutional by the Constitutional Court with its landmark Judgement No. 1/2014.

<sup>8</sup> See the official translation of the Court’s judgement, <[http://www.cortecostituzionale.it/documenti/download/doc/recent\\_judgments/1-2014\\_en.pdf](http://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/1-2014_en.pdf)>. Accessed 13 September 2016. For an in-depth analysis of this decision, see E. Longo and A. Pin. ‘Don’t waste your vote (again!). The Italian Constitutional Court’s decision on election laws: an episode of strict comparative scrutiny’, paper presented at the ICON·S Inaugural Conference (Florence, June 26-28, 2014), ICON·S Working Paper – Conference Proceedings Series, 10/2015. <<http://www.irpa.eu/wp-content/uploads/2015/02/ICON-S-WP-10-2015-Longo-and-Pin.pdf>>. Accessed 13 September 2016.

<sup>9</sup> See generally, Angelini and Benvenuti 2012; Groppi et al. 2013; Tega 2014. On the constitutional impact of the euro-crisis from the European point of view, see Tuori and Tuori 2014.

basic features of the Italian parliamentary system, connecting these reinterpretations with the interference of supranational players on domestic policies. In their view, the constitutional provision requiring the government to have the confidence of both Chambers<sup>10</sup> had to be reinterpreted, including the financial markets as holders of the source of confidence.<sup>11</sup> The impact of the economic crisis on the relationship between government and parliament emerges clearly from the observation of the quality of the legislative process during the crisis. Normally, the legislative function shall be exercised by the parliament. Only exceptionally, the government may adopt decrees having the force of law, pending subsequent ratification by the parliament.<sup>12</sup> Although the excessive use of decree laws is a well-known and old problem in the Italian legal order,<sup>13</sup> the situation worsened significantly after 2008, with a staggering increase since 2011. Statistics on the governmental use of decrees having the force of law during the economic crisis are self-explanatory.

*Table 1. Use of decrees having the force of law during the economic crisis\**

<i>March 2013 – December 2014</i>	
Presented to the Chambers	51
Approved and Converted	43
Under examination	3
Approved but not converted	0
<i>December 2011 – December 2012</i>	
Presented to the Chambers	34
Approved and Converted	28
Under examination	6
Approved but not converted	1
<i>December 2010 – December 2011</i>	
<i>Presented to the Chambers</i>	11
Approved and Converted	13
Under examination	1
Approved but not converted	1

<sup>10</sup> Article 94 of the Italian Constitution states that ‘The Government must have the confidence of both Chambers’. This essential character of Italian bicameralism is currently subject to a wide process of revision, through a constitutional bill that will not enter into force before the end of 2016.

<sup>11</sup> Ruggeri 2011.

<sup>12</sup> According to Article 77 of the Constitution, the government may not, without an enabling act from the Houses, issue a decree having force of law. When the government, in case of necessity and urgency, adopts under its own responsibility a temporary measure, it shall introduce such measure to parliament for transposition into law. During dissolution, parliament shall be convened within five days of such introduction.

<sup>13</sup> On this point, see Barsotti et al. 2015, pp. 165 ff.

<i>July 2009 – December 2010</i>	
Presented to the Chambers	27
Approved and Converted	20
Under examination	4
Approved but not converted	2
<i>December 2008 – December 2009</i>	
Presented to the Chambers	18
Approved and Converted	18
Under examination	3
Approved but not converted	1

\* Data are extracted from the Statistic Report of the Italian Senate for the 17<sup>th</sup> and 16<sup>th</sup> legislature. <<http://www.senato.it/Leg17/2983>>. Accessed 13 September 2016. The overall number of converted decree laws may be higher than the number of presented decree laws in one period, because of a conversion of a decree law presented before the considered time gap.

The economic impact of the crisis is not limited to the ‘unwritten constitution’. The economic crisis is acknowledged as the trigger of the constitutional revision that introduced, in 2012, the principle of a balanced budget.<sup>14</sup> This constitutional revision was unusual for several reasons. Firstly, the Italian constitutional legal order is rather unfamiliar with constitutional revisions in general. The text of the Constitution has only been modified sixteen times since 1948 and many constitutionally relevant developments have been accepted through innovative interpretations of the original constitutional text. Secondly, for the first time, a constitutional amendment was based on external pressure: a balanced budget amendment was foreseen in the Euro Plus agreement approved on 11 March 2011 as a suitable means to comply with the terms of the agreement. A similar provision was then included in the so-called fiscal compact. Although none of these acts introduced a proper legal obligation to approve a balanced budget amendment, they have been far from insignificant in the approval of the constitutional revision. Thirdly, the constitutional amendment has been approved following an unprecedented and quick procedure that received the parliamentary support of an exceptionally wide majority.<sup>15</sup>

### **3. The Economic Crisis before the Constitutional Court**

The economic crisis certainly played a massive role in the transformation of the living constitution as far as the interaction between the parliament, the government, and the President of the Republic is concerned. However, the impact of the economic crisis on the role of the Constitutional Court in the institutional system has been equally remarkable. Until recently, a broadly shared common

<sup>14</sup> For further details on this constitutional revision, see among many others Lupo 2012; Boggero and Annicchino 2014; Ciolli 2014; Giupponi 2014.

<sup>15</sup> It can be interesting to note that the constitutional amendment that in 2007 ultimately banned death penalty (beforehand admitted in very marginal cases) had been approved with one vote against. On the contrary, no votes against the balanced budget amendment had been cast in three out of the four necessary deliberations.

sense in the legal scholarship assumed that the impact of the economic crisis on the Constitutional Court's role in the legal order had been rather limited,<sup>16</sup> at least compared with the extraordinary constitutional developments described above. This common sense is contradicted by the newest developments in the Constitutional Court's case law. These developments are highly significant with regard to the conception of the RoL in times of crisis.

The following sections focus on the specific impact of the economic crisis on the RoL and in particular on the role played by the Constitutional Court with regard to the RoL in times of crisis. At this point, a detailed analysis of the concept of the RoL would be necessary. Nonetheless, it is clear that such an investigation would go beyond the aim of this article, as the RoL is an 'essentially contested concept'.<sup>17</sup> The beneficial effects of the adherence to the RoL are uncontested in principle; however, the interpretation of the meaning of this concept raises deep disagreements amongst scholars.<sup>18</sup> Consequently, the desirable emergence of a global 'rule of law consensus'<sup>19</sup> had the undesired side effect of developing ever more diverging substantial disagreements on the interpretation of the concept. Therefore, 'the rule of law has gained a great deal in modishness but less, actually nothing, in clarity'.<sup>20</sup> This occurs when 'a political ideal captures the imagination of large numbers of people its name becomes a slogan used by supporters of ideals which bear little or no relation to the one it originally designated'.<sup>21</sup>

Whatever conception of the RoL one may adopt – thin,<sup>22</sup> thick,<sup>23</sup> intermediate – most of them share the idea that the RoL is aimed at fighting arbitrariness of power and guaranteeing citizens against the arbitrary exercise of power. This article will not deal with the dispute regarding the definition of the RoL, but will take for granted that predictability, stability and certainty of law are principles connected with the RoL. On this basis, the subsequent sections of the article will investigate the impact of the Euro Crisis on these principles, adopting the perspective of the Constitutional Court's case law. This perspective may shed new light on some very recent developments: in fact, the impact of the economic crisis on fundamental principles of constitutionalism has been a widely investigated topic in recent times. Nonetheless, most of the analysis elaborated on the impact of the crisis on the substantial conception of constitutional values. A massive amount of literature has been developed on the impact of the crisis on the welfare state, dwelling on the curtailment of fundamental rights and in particular social rights.<sup>24</sup> Conversely, legal scholars devoted much less attention to the impact of the economic crisis on

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<sup>16</sup> See, among others, Groppi et al. 2013, p. 104; Fasone 2014, p. 17. It is not my intention to raise criticism on the assumption of those authors, who considered the impact of the crisis on the Constitutional Court's case law rather limited. Their assumption was well grounded until the end of 2014. What I will try to show is that the Constitutional Court case law has been deeply influenced by the economic crisis, even though this impact emerged with some delay.

<sup>17</sup> Waldron 2002.

<sup>18</sup> For a necessarily only partial overview of these disagreements, see Fuller, n. 2; Raz 1979; Waldron, n. 18; Trebilcock and Daniels 2009; Finnis 2011; Møller and Skaaning 2014.

<sup>19</sup> Call 2007, p. 4. According to the Author, this consensus implies two basic assumptions: '(1) the belief that the rule of law is essential to virtually every Western liberal foreign policy goal – human rights, democracy, economic and political stability, international security from terrorist and other transnational threats, and transnational free trade and investment; and (2) the belief that international interventions, be they through money, people, or ideas, must include a rule-of-law component.'

<sup>20</sup> Krygier 2015, p. 780.

<sup>21</sup> Raz, n. 19, p. 210.

<sup>22</sup> Among the many authors who share this position, see prominently Hart 1961; Raz, n. 19; Walker 1988.

<sup>23</sup> For a very prominent example, see Dworkin 1985.

<sup>24</sup> See, among many others, de Witte 2002; Dawson and de Witte 2013; Tuori and Tuori, n. 9; Ascoli and Pavolini 2015.

RoL connected principles. This article aims at filling this gap, considering the impact of the economic crisis on the rule-of-law-connected values of predictability and legal certainty. Moreover, it addresses the role played by the Constitutional Court with regard to the threat that these values have been subject to in the very recent developments of the crisis legislation.

#### **4. Constitutional Courts: Guardians of – and Subject to – the Rule of Law**

In principle, the role of Constitutional Courts has always been problematic with regard to traditional conceptions of the RoL. The Italian constitutional system makes no exemption, being based on a centralized model of constitutional review of legislation, with an ad hoc Constitutional Court designed to this end.<sup>25</sup> Both abstract and concrete review of legislation is available in Italy and in both cases, the review of constitutionality takes place *ex post*, once a law is in force. Therefore, whenever the Constitutional Court declares a law unconstitutional, its decision affects an act that had already been able to produce legal effects. In principle, a declaration of unconstitutionality has retroactive effects.<sup>26</sup> This effect can be problematic with regard to rule-of-law-connected values of predictability and stability of law. Citizens should be aware that they must conform their behaviour to law, and that a law in force can be removed from the legal order through a decision of the Constitutional Court. This apparently contradictory elements result from essential features of constitutional states, where the legal order is ultimately based on the elementary assumption that laws are subject to Constitutions.

When the Court strikes down a legislative provision as unconstitutional, it acts on the basis of the (constitutional) law. Therefore, the removal of an unconstitutional law from the legal order is a restoration of the rule of (constitutional) law, and not an infringement of it. Nevertheless, the constitutional legal basis of this power in the Italian constitutional system raised specific interpretative issues. In fact, the Italian Constitution states that ‘when the Court declares the unconstitutionality of a law or enactment having force of law, the law ceases to have effect the day following the publication of the decision.’<sup>27</sup> According to a literal interpretation, this constitutional provision apparently aims at the removal of future effects of laws that have been declared unconstitutional. In short, a literal interpretation of Article 136 of the Constitution seems to provide only *ex nunc* effects to judgements of the Constitutional Court. This has not been the case, as Article 136 should be interpreted in light of the provisions of the constitutional law No. 1 of 1948 and of the ordinary Law No. 87 of 1953. The former carries implementing measures for the Constitutional Court, and introduces an adjudication model that is mostly based on the submission of cases as incidental questions in proceeding pending before an ordinary judge.<sup>28</sup> The latter links the incidental character of the system of adjudication with the indisputable retroactive effects of the declaration of unconstitutionality, providing that ‘any provisions declared unconstitutional become inoperative from the day following the date on which the Court judgment is published’.<sup>29</sup>

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<sup>25</sup> For a detailed and up-to-date overview of the Italian system of constitutional justice, see Barsotti et al., n. 13.

<sup>26</sup> Barsotti et al., n. 13, pp. 82 ff.

<sup>27</sup> Article 136 of the Italian Constitution.

<sup>28</sup> Article 1 of the Constitutional Law No. 1 of 1948 states: ‘Questions of constitutionality regarding an Act of Parliament or a central government statutory measure having the force of law raised by a court or by a party to judicial proceedings or not deemed by a court of law to be manifestly groundless, shall be referred to the Constitutional Court for a decision.’

<sup>29</sup> Law No. 87 of 1953 enacts procedural rules for the composition and functioning of the Court. For further details, see Barsotti et al., n. 13, pp. 41 ff.

The legislative implementation allowed for a shift of meaning of the constitutional provision: decisions end up having *ex tunc*, thus retroactive effect.

Against this procedural framework, declarations of unconstitutionality of acts having financial implications can prove to raise specific concerns. On the one hand, the declaration of unconstitutionality could affect the rights acquired by citizens while the unconstitutional law was in force. On the other hand, the financial consequence of the declaration of unconstitutionality of spending cuts measures could be unsustainable for the public finance. The Constitutional Court is thus conflicted: while it should be very careful in striking down spending cuts measures, spending cuts are capable of infringing individual rights protected by the Constitution. During the so-called ‘first Republic’ (1948-1992), the Constitutional Court paid little attention to the financial consequences of its judgments when a declaration of unconstitutionality was necessary to safeguard constitutionally protected rights.

The above attitude certainly contributed to the extension of the welfare state: at the same time, the Court was held (co)responsible for boosting public expenditure through its judgements. Particularly in the 1960s and 1970s, the Court had widely used decisional techniques for which it had been severely criticized. ‘Additive rulings’ used to declare a law unconstitutional insofar as it did not provide for a specific norm.<sup>30</sup> This type of decisions often had the result of extending social benefits to categories that had been excluded by the law, restoring the equality principle on the highest available standard. Therefore, the Court was held (co-)responsible for a decisive growth in public expenditure. At this time, the Court paid little attention to the financial sustainability of its decisions. Moreover, the limitation of temporal effects of Constitutional Court’s decisions had no legal basis. Unlike other legal orders, such as Germany, Austria, Spain, or Portugal, neither the Constitution nor constitutional laws regulating Court’s powers and attributions mention the limitation of temporal effects.<sup>31</sup>

This lack of legal basis explains why the Court had always been highly reluctant in splitting the declaration of unconstitutionality and its temporal effects. In a centralized system of constitutional adjudication, where most of cases are submitted as an incidental question in a proceeding pending before an ordinary judge, the limitation of temporal effects would curtail the rights of the plaintiff of the case causing the constitutional controversy. Only in some highly debated and special case in the end of 1980s,<sup>32</sup> the Court attempted to limit the temporal effects of its judgments. This case law attracted harsh criticism from the legal scholarship. Starting from the 1990s, the Court renounced to apply such limitations and started to apply a balancing test to accommodate social rights protection with the financial limits deriving from the availability of financial resources. During the last decade of the twentieth century, the Court developed the first section of its economic-crisis case law, introducing the concept of ‘graduality’<sup>33</sup> of pension reforms and of ‘conditioned rights’.<sup>34</sup>

## **5. The Economic Crisis before the Italian Constitutional Court: Act I**

In 2012 to 2013, the Constitutional Court has opted for a cautious stance, adopting a deferential and sometimes ambiguous approach in reviewing austerity measures.<sup>35</sup> In theory, the Court always

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<sup>30</sup> See Barsotti et al., n. 13, pp. 88 ff.

<sup>31</sup> For a detailed comparative analysis of the limitations of temporal effects of judicial rulings, see Steiner 2015.

<sup>32</sup> Corte Costituzionale, Judgements Nos. 266 of 1988, 501 of 1988 and 50 of 1989.

<sup>33</sup> Corte Costituzionale, Judgements Nos. 99 and 390 of 1990.

<sup>34</sup> Corte Costituzionale, Judgement No. 455 of 1990.

<sup>35</sup> For an overview of this cautious case law, see Tega, n. 9.



reaffirmed that constitutional principles should be protected in times of crisis. However, in practice, the Court decided to scrutinize austerity measures from a case-by-case perspective, taking into account contingencies and peculiarities that justified the adoption of those measures.<sup>36</sup> In these cases, the Court decided not to split the declaration of unconstitutionality from its effect, instead upholding the validity of the norms under review or striking down the legislation as unconstitutional with no limitations of the related temporal. Resemblances of the theoretical framework elaborated in the beginning of the 1990s emerged in the first years of the financial crisis: the concept of conditioned rights appears for example in a case where the Court specified that the guarantee of medical assistance is a financially conditioned right, subject to availability of resources.<sup>37</sup> In general, the Constitutional Court relied on its previous crisis jurisprudence to argue that a balancing of social rights and financial concerns was not only possible, but also necessary.

In a recent case, the possibility of this balancing test was challenged by a pronouncement of the European Court of Human Rights (ECtHR). Nonetheless, the Italian Constitutional Court decided to stay firmly its position in the *Swiss Pensions* case.<sup>38</sup> In this case, a retroactive interpretative legislation was enacted in Italy to adjust the calculation of pensions of cross-border Italian-Swiss workers. The application of this interpretative guidelines assured lower pensions than before, and therefore, the ECtHR declared the legislative interpretation to be in breach of Article 6.1 of the European Convention on Human Rights (ECHR).<sup>39</sup> Nonetheless, the Constitutional Court upheld the legislative interpretative act, finding that this act was inspired by the principle of equality and solidarity. The Court expressly mentioned the necessity to strike a balance between the available resources and benefits paid.<sup>40</sup>

In other decisions, however, the Court included other constitutional values in the balancing test. Finally, the balancing process resulted in a very different outcome. In its decision No. 223 of 2012, for example, the Court explicitly refused to justify the constitutionality of a freezing of salary adjustments and the cut in allowances for judges. The Constitutional Court struck down the legislation as unconstitutional. On the Court's account, the contested provisions undermined the independence of the judiciary *vis-à-vis* the other branches of state. The Court considered that whilst certain temporary reductions justified by public finances could be justified in the name of the economic crisis, the contested provisions should have been treated differently. In fact, legislation regulating the remuneration of judges had to be considered in light of the constitutional principle of separation of powers, as the judiciary performs a function that is vested in the Constitution. In addition, the economic crisis was not a sufficient justification for a cut of judges' allowances.

The peculiar character of the economic crisis has been mentioned by the Court in other decisions upholding austerity measures. In its Judgement No. 310 of 2013, the Court emphasized that the Euro-crisis led to a new configuration of the budget cycle, now based on long-term and multi-annual prospect. This aspect had an impact on the Court's evaluation of austerity measures,

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<sup>36</sup> In this direction, see the analysis of the Constitutional Court's case law by Tega, n. 9.

<sup>37</sup> Corte Costituzionale, Judgement No. 248 of 2011.

<sup>38</sup> Corte Costituzionale, Judgement No. 264 of 2011.

<sup>39</sup> ECHR, *Maggio and others v. Italy*, 31 May 2001.

<sup>40</sup> According to the Constitutional Court, 'the effects of the said provision are felt within the context of a pension system which seeks to strike a balance between the available resources and benefits paid, also in accordance with the requirement laid down by Article 81(4) of the Constitution' – old version – 'and the need to ensure that the overall system is rational', thus preventing changes to financial payments to the detriment of some contributors and to the benefit of others. In doing so, it guarantees respect for the principles of equality and solidarity, which, due to their foundational status, occupy a privileged position within the balancing operation against other constitutional values': Corte Costituzionale, Judgement No. 264 of 2012, para. 5.3.

leading the Court to consider that ‘sacrifices may apply for periods, certainly defined, but longer than those taken into account’.<sup>41</sup> The Court finally used the argument of the persistent and violent impact of the financial crisis to uphold a decree law, introducing a freeing of salary adjustments for non-contracted workers in certain sectors of the public administration.

## **6. The Economic Crisis before the Constitutional Court: Act II**

Until very recently, the legal scholarship widely agreed on the opinion that the impact of the crisis on the Constitutional Court’s case law had been relatively limited. In 2015, the Constitutional Court delivered a number of judgments that deeply challenged this common sense. Concepts such as ‘graduality’ of social reforms and ‘financially conditioned rights’ that had been developed during the 1990s were applied by the Court to the current crisis. Therefore, continuity should be emphasized as a very significant achievement, considering the huge impact of the crisis on the living constitution.

In one of the first judgments of 2015,<sup>42</sup> the Constitutional Court decided to overrule its settled case law on the temporal effects of judgments. In a widely debated (and deeply criticized) decision, the Constitution Court declared a taxation measure enacted to tackle the crisis unconstitutional, but decided to limit the temporal effects of its decision *pro futuro*. This judgment opened a broad discussion on the Court’s power to balance its role as the guardian of constitutional rights and its concerns for the financial consequence of its judgment. Judgment No. 10/2015 inevitably emerged as an argument for discussion in successive judgements that similarly implied significant financial consequences. Despite these similarities, the Court proved to be much more reluctant to use its (self-attributed) power of limiting the temporal effects of its judgements. The Court adopted other judgements that aimed at balancing its role as the constitutional guardian of individual rights and its concerns for financial effects of its judgements.

The subsequent sections of this article analyse three of the most remarkable judgements issued by the Court during 2015 that addressed the legislation enacted to tackle the crisis. This article argues that these judgements show the systemic impact of the crisis on the Court’s role in the constitutional system, focusing on the specific meaning that this paradigm’s shift implies with regard to the double role of the Court: the *guardian of* and *subject to* the RoL.

## **7. The ‘Robin Tax’ before the Constitutional Court: Judgment 10/2015**

The contested legislation provided for an additional levy –a surcharge of 5.5%– on the income tax of certain companies operating in the sectors gasoline, petroleum, and similar products. Only companies that had achieved revenues in excess of 25 million euros during the tax period were subject to the additional levy. It should be noted that the surcharge was applicable to the whole income and not only to the part exceeding the identified threshold. The legislator was concerned with the possible increase of oil prices after the introduction of the surcharge. Therefore, a prohibition for the companies to pass the price of the levy on to consumer prices was introduced in the same law. In addition, an independent authority was in charge of a monitoring duty with regard to this provision.

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<sup>41</sup> Corte Costituzionale, Judgement No. 310 of 2013, para. 13.5.

<sup>42</sup> Corte Costituzionale, Judgement No. 10 of 2015.

By a referral order issued in 2011, a question concerning the compatibility of this legislation with the Constitution was raised. The referring authority objected that several norms of the Constitution had been violated. The Constitutional Court found that the aim of the legislation was compatible with the Constitution in principle, but that specific features of the implementing legislation were on the contrary unconstitutional, with particular reference to the principle of capacity to pay tax (Article 53 Const.<sup>43</sup>) and the principle of equality (Article 3 Const.). In the view of the Court, the combination of these two principles did not require perfect uniform taxation. Any fiscal treatment that provides for different taxation on the basis of economic area or type of taxpayer should be supported by adequate justification. This justification must be consistent, proportional, and reasonably transposed into the structure of the tax. The legislator supported the increase in the taxation of only certain sectorial companies by pointing to the serious economic crisis and the related unsustainability of the prices of primary consumer products. In addition, the legislator based its action on the exceptional and suspect increase in the price of crude oil. The Court considered that taxpayers in the concerned economic area could reasonably have taken advantage of their position.<sup>44</sup> In the view of the Court, this fact was in principle a possible justification of a regulation introducing a fiscal differentiation.<sup>45</sup>

The legislator aimed, on the one hand, at limiting the impact of unsustainable prices for users, in particular weaker consumers and, on the other hand, at limiting the exceptional profitability of the economic activity provided by certain petroleum operators. In the Constitutional Court's view, 'the aim pursued by the legislator appears without doubt to be legitimate'.<sup>46</sup> Nonetheless, the enactment of this legitimate aim was in fact unconstitutional. The legislation adopted fell short to use appropriate or necessary means in order to achieve its aim. Firstly, any connection with the economic downturn was missing in the structure of the law. The levy was far from being temporary or conditional upon the continuation of the economic downturn: it was simply a permanent tax. Secondly, the amount liable to the 'surcharge' was, in the Court's view, irrational, as long as it was not limited to the 'excess profits', but was applicable to the entire income. Thirdly, the tax was found to be 'not suitable for achieving the goals rooted in solidarity, which it explicitly aims to achieve'.<sup>47</sup>

In particular, the prohibition on the transfer of the burden of additional levy to consumer prices was unsuitable to guarantee the result it was aiming for, namely the avoidance of the paradoxical transfer of the effects of the levy to the category that the legislation aimed to protect (consumers). In the Court's view, the mere prohibition was not capable of preventing the transfer of the surcharge from operators to consumers. The prohibition did not prevent to offload the surcharge upstream from one of the operators in the supply chain onto another, with the paradoxical result of charging ultimately consumers in the form of a price rise. Additionally, the Court found that the prohibition of externalization of the extra taxation by increasing the final oil price was not subject to any effective control.

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<sup>43</sup> Article 53 states that 'every person shall contribute to public expenditure in accordance with his/her tax-payer capacity. The taxation system shall be based on criteria of progression.'

<sup>44</sup> The sector is in fact characterized by a little competition between undertakings, due to the oligopolistic nature of that market.

<sup>45</sup> The Court affirmed that 'it is not entirely implausible to conclude that this market sector may be characterized by high profitability due to position rents which is significantly higher than other sectors, thereby theoretically justifying ad hoc taxation, especially given the state's exceptional financial requirements', *Ibid.*, para. 6.5.

<sup>46</sup> Corte Costituzionale, Judgement No. 10 of 2015, para. 6.5.

<sup>47</sup> Corte Costituzionale, Judgement No. 10 of 2015, para. 6.5.3.

The Court, in short, acknowledged that the contested provisions were unconstitutional. Nonetheless, the Constitutional Court continued noting that the ‘Court cannot avoid giving due consideration to the impact which such a ruling will have on other principles of constitutional law with the aim of assessing whether it is necessary to defer the temporal effects of its decision with regard to pending relations’.<sup>48</sup> The Court thus introduced a broad theoretical framework that served as a background for its final balancing of the rights of applicants with the principle of a balanced budget. The Court underlined its role as the ‘guarantor of the Constitution as a whole’.<sup>49</sup> This role requires the Court to avoid any declaration of unconstitutionality from resulting in ‘effects which are even more incompatible with the Constitution’.<sup>50</sup> An ‘even more unconstitutional effect’ of a mere declaration of unconstitutionality was due to the significant impact that the restitution of the sums paid in compliance with the additional levy would have had on the state budget.

If the judgment were to be applied retroactively, it ‘would result first and foremost in a serious violation of the balanced budget requirement under Article 81 of the Constitution’.<sup>51</sup> Therefore, the Court found it compatible with (if not imposed by) the Constitution to limit the temporal effects of its judgment. The Court’s decision regarding the limitation of temporal effects only had a few of highly controversial and remote precedents in the Constitutional Court’s case law. The Court devoted much attention to justify the abstract possibility to limit the temporal effects of its judgments, with more or less convincing arguments,<sup>52</sup> and some comparative reference.<sup>53</sup> In this case, the Court found that it was necessary to give due consideration to the impact that a retroactive decision would have had on the principle of a balanced budget. With greater reason, this was the case after the constitutional amendment enacted in 2012 (Constitutional Law No. 1 of 20 April 2012 – Introduction into the Constitution of the principle of a balanced budget), which – in the interpretation of the Court – ‘reasserted the need to respect the principles of a balanced budget and sustainability of the public debt’.<sup>54</sup>

The burden that a retroactive decision would put on the state exchequer would have been equivalent to a budgetary imbalance ‘on such a scale as to imply the need for additional financial corrective legislation, which would also be necessary in order to avoid a breach of the principles which Italy has obliged to abide by under EU and international law’.<sup>55</sup> Moreover, a retroactive decision would have led to an infringement of the principle of social solidarity, and hence a violation of Articles 2 and 3 of the Constitution. A ‘normal’ declaration of unconstitutionality would have implied the duty to refund sums that companies subject to the additional levy had already paid. In the reasoning of the Court, this would have been ‘an unreasonable redistribution

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<sup>48</sup> Ibid., para. 7.

<sup>49</sup> Ibid.

<sup>50</sup> Ibid., para. 7 drawing on Judgment No. 13 of 2004.

<sup>51</sup> Ibid., para. 8.

<sup>52</sup> The Court’s decision raised a vehement discussion in the legal scholarship. Among many others, see the proceedings of a Seminar held on March 18, 2015 on the Judgement No. 10 of 2015. Some of the contributions are now published in *Note e Commenti, Quaderni Costituzionali* (2015), vol. 1.

<sup>53</sup> Corte Costituzionale, Judgement No. 10/2015, para 7: ‘A comparison with other European constitutions – such as for example the Austrian, German, Spanish and Portuguese constitutions – shows that it is commonplace to constrain the retroactive effects of decisions that legislation is unconstitutional, including in interlocutory proceedings, irrespective of whether the constitution or the legislator explicitly vested the Constitutional Court concerned with such powers.’

<sup>54</sup> Ibid. The original text of the Constitution provided a duty for any law but the Budget to provide its financial cover: Article 81 paras. 3 and 4 stated that ‘The Budget may not introduce new taxes and new expenditures. Any other law involving new or increased spending shall detail the means therefor.’

<sup>55</sup> Ibid.

of wealth in favour of those economic operators that may by contrast have benefited from a favourable economic climate, during a period of enduring economic and financial crisis affecting the weakest in society'.<sup>56</sup> With regard to this argument, the Court also paid due consideration to the above-mentioned flaw of the prohibition to transfer the surcharge to consumers. This provision indeed had a legitimate aim, but was – in the view of the Court – very likely unsuitable to achieve its goal due to the lack of means to guarantee the norm. The Court considered that an obligation of full reimbursement would have led to a paradox. In fact, the state would have needed to reimburse also economic subjects that had been able to externalize the extra taxation, in violation of the spirit of the contested law.

Finally, the Court decided to dispose the termination of the effects of the provisions declared unconstitutional 'only from the date of publication in the Official Journal of the Republic'.<sup>57</sup> This solution was able, in the view of the Court, to grant the best possible balancing of the constitutional principles involved. Moreover, the legislator was given the opportunity to act promptly, ensuring a continuous and full achievement of a balanced budget target and the compliance of EU and international law obligation. The decision adopted by the Court fell short of satisfying the plaintiffs' claims, as long as its effects have been limited to future cases. Nonetheless, on the Court's account, the plaintiffs' interests should not be considered as completely neglected. According to the Court, 'it must not be forgotten that, by virtue of a declaration that legislation is unconstitutional, the interest of the applicant will in any case be partially satisfied by the removal, albeit only with future effect, of the provision ruled unconstitutional'.<sup>58</sup>

## **8. Pension Cuts before the Court: Judgment 70/2015**

Only one month after the Constitutional Court's Decision No. 10 of 2015, another important judgment was pronounced on the legislation introduced to reset the economy and tackle the crisis. Judgement No. 70 of 2015 decided on a case questioning the constitutionality of a piece of legislation that had frozen (in 2012 and 2013) the annual increase for old-age pension above a certain amount (three times above the minimum, viz approx. above 1,200 euros net per month). The Court struck down the legislation as unconstitutional, as the piece of legislation included in the so-called 'Rescue Package for Italy' violated the principles of reasonableness and proportionality.

Firstly, the Constitutional Court gave a brief overview of the historical development of legislation regarding pensions. Particularly, the Court focused on provisions introducing automatic pension increases. These are technical tools aimed at guaranteeing compliance over time with the parameter of adequacy laid down by Article 38(2) of the Constitution.<sup>59</sup> The Court emphasized the main differences between the precedent legislative intervention on these tools and the regulation under scrutiny. Only in the case of the contested legislation, the suspension had been imposed for a significant span of time (two years) and affected lower pensions. Previously, a freezing of the automatic pensions increases had involved only much richer pensions (above eight times the minimum) and only for shorter spans (one year). Secondly, the Court reminded that in a previous,

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<sup>56</sup> Ibid.

<sup>57</sup> Ibid.

<sup>58</sup> Ibid.

<sup>59</sup> Article 38(2) states that 'Workers have the right to be assured adequate means for their needs and necessities in the case of accidents, illness, disability, old age and involuntary unemployment.'

recent judgment, the legislator had already been granted wide discretion in the necessary balancing process between the rights of pensioners and the state's interest to rescue the economic system. Nonetheless, in the same judgement,<sup>60</sup> the Court warned the legislator that an indefinite suspension of the automatic increase mechanism or its frequent freezing – even if for a limited period – would infringe the principles of reasonableness and proportionality.

Finally, the Court found in its decision No. 70 of 2014 that ‘the warning addressed to the legislator in the Decision No. 316 of 2010 was not heeded’.<sup>61</sup> Whereas the legislator is in principle free to curtail rights in the name of economic necessity, some limits were infringed in the contested case. More specifically, the poor pensioners shall always be granted full protection in their entitlements. Other limits are set for every category of pensioners. Even for the richer classes of pensioners, the principles of equality, proportionality, and reasonableness shall be protected. The Constitutional Court found that the legislator did not give enough reasons to justify the measure at hand. This lack of justification affects the compliance with the principles of reasonableness and proportionality. In the view of the Court, the contested provision ‘is limited to a generic reference to the “contingent financial situation”, whilst the overall design of the legislation does not establish why financial requirements should necessarily prevail over the rights affected by the balancing operation, against which such highly invasive initiatives are adopted.’<sup>62</sup>

While the Court found that a correct balancing between economic necessity and pensioners rights and expectations is a legitimate aim in the hand of the legislator, in the contested case, the right to an adequate pension was unreasonably infringed in the name of financial requirements (which are not illustrated in detail). The Court declared, ‘the contested provision is therefore unconstitutional insofar as set out above’. The overall value of the application of this decision was calculated as more than 16 billion euros.<sup>63</sup> Nonetheless, the Court decided not to consider the financial impact of its decision. Thus, no limitations to the temporal effects have been introduced and the principle of a balanced budget was not even mentioned.

## **9. Judgement 178/2015: A Masked Limitation of Temporal Effects**

In a case decided on 23 July 2015, the Court considered two referral orders challenging legislation that extended the suspension of collective bargaining rounds and pay increases for public sector workers on the grounds that it violated the principles of equality, protection of work, and the proportionality of the remuneration of work carried out and the freedom of collective bargaining. In a mixed judgment, the Court dismissed most of the objections raised by the referring courts, but struck down the legislation<sup>64</sup> as unconstitutional on a supervening basis (in the sense that the

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<sup>60</sup> Corte Costituzionale, Judgement No. 316 of 2010.

<sup>61</sup> Corte Costituzionale, Judgement No. 10 of 2015.

<sup>62</sup> Corte Costituzionale, Judgement No. 70 of 2015, para. 10.

<sup>63</sup> A controversial follow-up between the government and the Constitutional Court emerged after the publication of the Judgment. The government firstly accused the Court of a lack of institutional courtesy (the government claimed not to have been previously informed of the incumbent publication of such an impacting judgement), then considered the judgement as a non self-executing decision. An unofficial position of the Court leaked to the press, according to which the judgment should have been considered fully applicable. Successively, the Court released an official note with regard to the news apparently leaked from the Court, simply specifying that the President of the Court did not release any declaration on that point.

<sup>64</sup> The challenged provisions were part of several subsequent normative acts, carrying an explicit connection with the economic crisis: Article 9(1) and (17) of the Decree Law No. 78 of 31 May 2010 (as converted into Law 122 of 30 July 2010) entitled ‘Urgent measures on financial stabilization and economic competitiveness’; and Article 16(1) of

restrictions were first legitimate when enacted, but only on the strength of their transient nature, and subsequently became unlawful when extended and put on a structural footing).

The Court dismissed the objections raised with regard to the freezing of the remuneration of the public sector workers falling under the collective bargaining regime, which the contested regulation extended for the 2010-2014 period without any possibility for recovery. As regard the legal restrictions on collective autonomy, the Constitutional Court based its reasoning on a settled case law, according to which restriction of the freedom protected under Article 39(1) of the Constitution are justified in ‘exceptional and eminently transitory situations, provided that the safeguarding of higher general interests is at stake’.<sup>65</sup> In principle, a balancing of rights protected under Articles 36(1) and 39(1) of the Constitution with the collective interest of containing public spending is admissible, as long as this balancing is ‘adequately weighed up within the context of the progressive deterioration of the equilibrium of the public finances’.<sup>66</sup> The Constitutional Court drew these considerations from a case law developed in the early 1990s, with the remarkable specification that ‘today’s measures are more stringent, following the introduction into the Constitution of the requirement of a balanced budget’.<sup>67</sup>

The Court emphasized the need of a long-term assessment of the contested provisions. Adopting such a long-term perspective allowed the Court to acknowledge that the general nature of the measures enacted meets the requirement of governing a significant public expenditure item that had registered unchecked growth, overtaking the increase in private sector remuneration. In this way, the Court dismissed those objections of the referring Courts that alleged the violation of Article 36(1) of the Constitution. On the Court’s account, ‘the sacrifice of the right to remuneration that is commensurate with the work carried out and the right to access collective bargaining procedures is, within the framework set out above, neither unreasonable nor disproportionate’.<sup>68</sup> On another front, other parts of the legislation were declared unconstitutional, with some important limitations and specifications. These measures consisted of a suspension of contractual and bargaining procedures since 2010, determining a violation of trade union freedom. The Constitutional Court considered the ‘block’ on financial bargaining from a unitary perspective, assessing its impact on the constitutional values involved. Among these values (the trade union freedom, bargaining autonomy, duties of solidarity, principle of equality, and the efficiency of the Public Administration), many are supported and specified by international and supranational acts that the Court carefully evaluated in its judgement.

In its previous case law, the Constitutional Court ruled that the freezing of bargaining and contractual procedures for more than one year was incompatible with the Constitution. In this decision, the Court acknowledged that this span of time could be extended ‘in relation to various measures within a different emergency context’, but found ‘equally undeniable that these periods must in any case be defined and may not be extended at will’.<sup>69</sup> The Court struck down the contested legislation as unconstitutional, as the systematic nature of the contested freezing of the collective bargaining rights consisted of an unreasonable balance between trade union freedom and the requirements relating to the rational distribution of resources and control of spending

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Decree Law No. 98 of 6 July entitled ‘Urgent provisions on financial stabilization’ as converted into Law No. 111 of 15 July 2011.

<sup>65</sup> Corte Costituzionale, Judgement No. 178/2015, para. 10.2, quoting Judgment No. 124 of 1991.

<sup>66</sup> Ibid., para. 10.3, quoting Judgment No. 361 of 1996.

<sup>67</sup> Ibid.

<sup>68</sup> Corte Costituzionale, Judgement No. 178 of 2015, para. 12.

<sup>69</sup> Ibid., para 17.

within a coherent financial program. In short, ‘precisely for this reason, the sacrifice of the fundamental right protected under Article 39 of the Constitution is no longer tolerable’.<sup>70</sup>

In this decision, the Court provided very relevant specifications, significantly limiting the judgement’s financial impact. Unlike its recent judgment on the additional levy for oil operators, the Court did not expressly limit the temporal effects of its judgment. On the contrary, the Court specified ‘it is only now that the structural nature of the suspension of bargaining procedures has been made fully evident, that it may hence be concluded that it has become unconstitutional on a supervening *ex post* basis’.<sup>71</sup> It followed that the effects of the judgment will apply after its publication, as the unconstitutionality only developed at that time. Consequently, it will be for the legislator to start the ordinary contractual dialectic, spending its political power in a form that best reflects the nature of collective bargaining and in accordance with spending constraints. In short, the Courts shifted back the discussion to the political spectrum.

## 10. The Financial Crisis and the Italian Constitutional Court’s Role: A Systemic Impact

In 2014, the dominant idea in the Italian legal scholarship assumed that the impact of the financial and economic crisis had been significant on the constitutional system overall, but rather limited on the role played by the Constitutional Court.<sup>72</sup> The Court still played its role of guardian of the Constitution, focusing on fundamental rights more than on financial constraints. Whereas its case law experienced an increased sensitivity to financial aspects, its focus was still placed on the protection of individual rights. First signs of a change of route appeared in the annual reports of the President of the Constitutional Court. In these reports, the concept of economic crisis had not been mentioned before 2010.<sup>73</sup> After 2010, the expression ‘economic crisis’ recurred almost every year and the concept played a pivotal role as an element influencing the judicial policy of the Court. Other warnings can be traced in the first pronouncements of the Court on the crisis legislation. In these cases, the Court still upheld legislative measures enacted to tackle the crisis, but warned the legislator that its deferential approach had limits. In 2010, the Court upheld a cancellation of the annual increase for high value pensions (greater than eight times the minimum pensions). In this decision, however, the Constitutional Court warned the legislator that an excessive temporal extension in the application of these mechanisms would enter into conflict with the principles of reasonableness and proportionality. According to the Court, ‘pensions, even those for higher amounts, could not be sufficiently defended against changes in the purchasing power of money’.<sup>74</sup> Finally, the Court’s Decision No. 10 of 2015, limiting the judgement’s temporal effects, inaugurated a new jurisprudential trend.<sup>75</sup> Even though the pivotal role played by financial

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<sup>70</sup> Ibid.

<sup>71</sup> Ibid.

<sup>72</sup> After having described the terrific impact of the crisis on the action of constitutional players, an analysis published in 2013 assumes that if the constitutional interpretation issued by the Constitutional Court is considered, ‘we cannot state that, to date, it has been strongly influenced by the current financial crisis’: see Groppi et al. 2013, p. 104. In a similar direction, see Fasone, n. 17, p. 17; Tega, n. 9.

<sup>73</sup> Fasone, n. 17, p. 42.

<sup>74</sup> Corte Costituzionale, Judgement No. 361 of 2010, para. 4.

<sup>75</sup> The impact of this new trend on the Court’s approach toward the crisis legislation was emphasized by those authors who observed that ‘[t]his decision, however, could have finally put an end to a vexed trend in the CC’s case law. Admittedly, starting from 2008 especially, the CC saved many debatable tax laws and budget cuts, fearing that negative decisions with retrospective impact would have created a hole in state budgets. This trend could be over’: E. Longo, A. Pin (2015) ‘An evolution in ‘Italian style’: The Constitutional Court says it will govern the effects of its judgments (and will use the proportionality test to do it)’ Int’l Const. L. Blog



concerns had been allegedly based on the introduction of the balanced principle amendment in the constitutional text, there are many reasons to doubt that the balanced budget principle was the only/main justification of such a remarkable overruling. Some important judgement followed this decision and proved that the sole financial dimension is not sufficient to limit the temporal effect of a declaration of unconstitutionality. After the inauguration of this new legislative trend, the Court decided in its Decision No. 70 of 2015 to strike down as unconstitutional the legislation freezing of the automatic increase of pensions. In that case, no limitation of the temporal effects of the judgement were introduced by the Court to soften the financial impact of its pronouncement, even though the cost of this decision was approximated on a higher amount compared with the cost of its precedent No. 10 of 2015.

Subsequently, the Court decided to limit the temporal effects of its decision to strike down the legislative measures freezing collective bargaining procedures for more than four years (Decision No. 278 of 2015), even though the effect of limiting the temporal effect was reached through a different technique. What emerges from this oscillating case law is that the Court is gradually dismissing its deferential approach towards political actors. Thus, financial concerns became more and more part of the Court's reasoning and terms of the constitutional balancing. This trend allowed the Court to overcome its traditional reluctance to split the declaration of unconstitutionality from its effect, even though there is no legal basis that justifies the exercise of this power. The absence of any legal basis raises serious concerns with regard to the principle of legality. In addition, the first developments of this jurisprudential path seemed to be largely unpredictable. This is problematic, as unpredictability and uncertainty represents serious threats to the RoL.

The above explains why the Court's overruling has been welcomed by a dominant reaction of criticism in the legal scholarship, devoted to underlie the absence of any legal basis and clear guidelines to rationalize a very powerful decisional tool.<sup>76</sup> On the one hand, the Court's shift of orientation with regard to a fundamental aspect, such as the effects of its own judgement, shows that the financial crisis had a systemic impact not only on the interaction between policy makers, but also on the Constitutional Court. On the other hand, the financial dimension is not a sufficient argument to limit the temporal effects of the Court's decisions. The Court decided not to provide any temporal limits for more expensive judgements than those where the Court limited the effects of its own decisions only for future cases. This orientation seems to be driven by substantial consideration, connected with the constitutional principles involved in the specific balancing enacted by the Court.

It had been already noted before 2015 that the Constitutional Courts' reasoning in times of crisis has likely been oriented by 'strategic and undisclosed reasons'.<sup>77</sup> The most recent developments seem to confirm this idea, adding additional indicators that suggest that the action

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<<http://www.icconnectblog.com/2015/03/an-evolution-in-italian-style-the-constitutional-court-says-it-will-govern-the-effects-of-its-judgments-and-will-use-the-proportionality-test-to-do-it>> Accessed 13 September 2016.

<sup>76</sup> In fact, the Court 'conceded that no explicit legal text endows it with this new power. Rather, the CC [Constitutional Court] seemed persuaded that this power is simply part of the common heritage of constitutional adjudication. It stems from the very idea of judicial review of legislation and from the CC's need to address the Constitution as a whole'. This part of the reasoning of the Court was mainly considered 'striking': see E. Longo, A. Pin (2015) 'An evolution in 'Italian style': The Constitutional Court says it will govern the effects of its judgments (and will use the proportionality test to do it)' *Int'l Const. L. Blog* <<http://www.icconnectblog.com/2015/03/an-evolution-in-italian-style-the-constitutional-court-says-it-will-govern-the-effects-of-its-judgments-and-will-use-the-proportionality-test-to-do-it>> Accessed 13 September 2016.

<sup>77</sup> Fasone, n. 17, p. 40.

of the Constitutional Court is oriented by ‘strategic reasons’. The process of constitutional balancing has recently become more open to consider the weight of ‘constitutional items’ that have been introduced during the crisis, such as the balanced budget principle. Nonetheless, the weight of this principle is constantly recalibrated on a case-by-case basis. On the one hand, financial concerns prevailed when the contrasting values consisted of the protection of the principle of equality in the taxation system for oil operators. On the other hand, financial concerns succumbed when the constitutional balancing found constitutionally protected rights of pensioners as the other term of the balancing test.

This theoretical framework is far from being beyond any criticism. In fact, the absence of any legal basis to regulate the limitation of temporal effects of the Court’s decisions conflicts with basic conceptions of the principle of legality and makes the Court’s judgements highly unpredictable in terms of their effects. Such an unpredictable outcome is highly significant in a system of constitutional adjudication characterized by a prevalent incidental access to the Constitutional Court. In fact, parties in the case pending before the referring Court will not take advantage of the Constitutional Court’s judgement. This very dangerous side effect reveals a very weak judicial protection. In short, the Constitutional Court declares a law unconstitutional, and nonetheless that law applies in their case pending before the referring judge. Another source of criticism is focused on the (im)possibility of using the financial concerns as a term of a constitutional balancing test with individual rights. This inclusion seems only apparent, if not improper. The rule on the balanced budget is inhomogeneous if compared with most of the provisions of the constitution. Constitutional rights cannot be balanced with the balanced budget principle, not because one is superior to the other, but because they belong to non-overlapping categories.<sup>78</sup>

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<sup>78</sup> The legal possibility of a balancing process of constitutional rights with budgetary constraints is a point of harsh disagreement in the constitutional scholarship. In the sense of admitting such a constitutional balancing see A. Morrone, *Crisi economia e diritti*; the opposite (and here preferred) opinion is shared by Bin 1992; Pinelli 2012.

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