Developments in Italian Constitutional Law: The Year 2016 in Review

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Year-in-Review

[Editor's Note: Today we publish the 2016 Report on Italian constitutional law, which appears in the larger 44-country Global Review of Constitutional Law, now available in a smaller file size for downloading and emailing: https://ssrn.com/abstract=3014378.]

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I. Introduction

The Constitution of Italy entered into force on January 1, 1948, following its adoption by a popularly elected Constituent assembly, which led Italy out of a difficult transition from the fascist regime to a full-fledged democracy. The Constitution is based on a series of fundamental principles that are common heritage of liberal states: separation of powers, checks and balances, due process of law, universal suffrage, and fundamental freedoms (of expression, of association, of assembly…). Among the most significant departure from the previous regime – which was characterized by a flexible, liberal constitution (Statuto Albertino) – was the incorporation of social rights into the new Constitution, and the safeguarding of the Constitution through its rigidity. Consequently, constitutional provisions have a higher rank than ordinary legislation and this higher rank is safeguarded through judicial review of legislation. The establishment of the Italian Constitutional Court (ICC) was one of the most impacting institutional novelty by the Constitution. It represented one of the earliest examples of the post-war European model of constitutional adjudication.[1] However, its implementation was far from an obstacle-free route.[2] The clearest sign of the distrust of political actors towards this institutional novelty was the delayed implementation of the ICC, which was only able to pronounce its first judgement in 1956. In 2016, the Court celebrated the 60th anniversary of its first judgement. It is undisputed that the Court has become one of the most influential and stable authorities in the Italian constitutional architecture. Although, there has been many changes in 60 years, one permanent character of the Court's activity has been its "relational character"[3]: the ICC has always maintained an open and relational approach to other constitutional actors, both domestically and in the supranational and international dimension. This trend was also present during 2016 and emerges from the case law reported here.

This report firstly provides a brief introduction to the Italian Constitutional system, with a particular emphasis on the system of constitutional justice (section II). Secondly, the report contains a narrative exposition of two particularly important controversies from 2016 (section III). In these decisions, the ICC actively engaged as the supranational dimension of constitutional law, showing at the same time a high level of compliance to the principle of openness towards supranational and international law, and a firm stance in upholding the complex substantive and institutional balance of the Italian Constitution. In section IV, the report provides an overview of landmark judgements adopted by the ICC in 2016. The last section draws some conclusions.

In 2016, a far-reaching constitutional reform law was passed by the Parliament, to transform its second house (*Senato*) into a body representing the regions within national lawmaking procedures, and at the same time to expand national legislative competences. This reform was rejected in a constitutional referendum held on 4.12.2016. In the meantime, a new electoral law, concerning the first house of the Parliament (*Camera dei deputati)*, had already been passed (in 2015). The ICC was just marginally involved in these two highly controversial topics. First, the constitutional referendum that called upon the Court to rule that a consumers' association had no standing to directly challenge the acts summoning the referendum.[4] Second, the important ruling on the law for the election

of the Chamber of deputies, which was initially scheduled for October 4, 2016, was postponed until 2017 (and subsequently announced on January 25, 2017).

II. The Constitution and the Court

The Italian Constitution provides the basic provisions regulating fundamental rights and constitutional institutions. As above-mentioned, it was adopted by the popularly elected Constituent Assembly that led Italy out of the constitutional transition from the pre-war fascist regime to a fully-fledged democratic state. It followed a "revolutionary path". According to a recent categorization,[5] outsiders used the constitution to commit their new regime to the principles proclaimed during their previous struggle. It is a rigid constitution[6], as it possesses higher rank than ordinary legislation. Constitutional provisions may not be amended or derogated by ordinary legislation. Moreover, a special procedure for constitutional amendment is provided by the Constitution in order to ensure that any amendment to the Constitution is the outcome of a meditated decision to be adopted with a relatively broad political and electoral consensus. The ICC is part of the safeguards of the 1948 rigid Constitution. Its establishment was one of the most impacting institutional innovations of the 1948 Republican Constitution. Its nature and function was immediately revealed by the collocation of constitutional provisions regulating its functioning under the section entitled "Guarantees of the Constitution". In fact, the Court was charged with jurisdiction "on cases related to constitutional legitimacy of laws, and acts having the force of law, of the state and the regions; on conflicts regarding the allocation of power among the branches of the state and on those between the state and the regions, and among the regions; and on charges brought against the President of the Republic, according to the Constitution." Subsequently,[7] the Court was charged with an additional significant task, namely the review of admissibility of requests for abrogative referendums of legislative acts.

However, the Constitution provided only a regulatory sketch of the Court's main tasks and duties. It took a long time for the Court to become equipped with a set of regulations adopted by the Parliament. Only eight years after the entry into force of the Republican Constitution, the ICC was eventually able to function and to deliver its first judgment: No. 1/1956[8]. The ICC is composed of fifteen judges, appointed through three different channels. Five of them are elected by the Parliament, five are appointed by the President of the Republic, and five are elected by members of the three superior tribunals (the Supreme Court, the Council of State and the Court of Auditors). Eligibility criteria are designed to guarantee a high level of independence and technical expertise. Each judge is appointed for a nine-year term of office, a relatively long term for constitutionally relevant offices in the Italian legal system. The term is not renewable nor extensible. The ICC is an essentially collegial organ, as no dissenting or concurring opinions are admitted and decisions are taken collectively. Consistently with this picture, the President of the Court is considered as a *primus inter pares*: he is elected by the judges in a secret ballot by absolute majority, and beyond his or her external representative function, his or her powers consist of assigning the role of case rapporteur, drawing up the Court calendar as well as convening and directing the work of the Court.

Among the functions of the Court, the first and, historically, the most characteristic task of the Court is to rule on controversies or disputes regarding the constitutional legitimacy of legislative acts and acts having the force of law. Legislative acts cover not only statutes enacted by Parliament, but also legislative decrees enacted by the Government pursuant to authority delegated by Parliament and decree-laws as well as emergency decrees adopted by the Government that expire unless converted into permanent law by Parliament. Legislative acts issued by the regions and the autonomous provinces, which have their own legislative power in the Italian constitutional system, are also covered by the jurisdiction of the Court.

The issue of the player entitled to activate the jurisdiction of the ICC has not been settled by the Constituent Assembly in the text of the Constitution, but is regulated by a further constitutional act approved in 1948. This constitutional act opted for a mixed system of access to the ICC. On the one hand, regions and the central government have a direct access to the Court. The central government may contest regional legislative acts alleged to be incompatile with any constitutional provision, while regional" authorities are entitled to contest national legislative acts alleged to be prejudicial to their own legislative competence as guaranteed by the Constitution. On

the other hand, the “general” system of access to the Court is an indirect one, whereby a question of constitutionality may only be raised by judges within the framework of a controversy where the legislative act deemed unconstitutional needs to be applied. Additionally, referring judges are called on to act as filters, as they may refer a question of constitutionality only if their doubt on the constitutionality of the given act is “not manifestly unfounded” and the question of constitutionality affects a norm that is to be applied in the case at hand. In this sense, common judges, given their essential role in triggering the Court’s jurisdiction, have been depicted as “gatekeepers”[9] of constitutional adjudication.

Referrals are inadmissible and the ICC does not consider their merits if the referring judges fail in exercising their role as gatekeepers (e.g., if they do not explain why the resolution of the matter is relevant in the case over which they are presiding; if the question is inherently contradictory; or if it does not involve an act having the force of law). When the Court reaches a decision on the merits of a referred question regarding the constitutionality of a legal provision, it will issue a decision that either sustains (*pronuncia di accoglimento*) or will reject the challenge (*pronuncia di rigetto*). In the former cases, the Court declares the law unconstitutional. The consequence of these decisions is that the challenged law loses effect retrospectively: the law can no longer be applied by any judicial organ or public administration from the day following the publication of the Court’s decision in the official bulletin. This decision also precludes the application of the unconstitutional provision to past events. The Court’s declaration is definitive and generally applicable, in that its effect is not limited to the case in which the question was referred. Only recently, the Court started to use some techniques of modulation of the temporal effects of its judgement (e.g. Judgement 10/2015). However, these decisions are rare and have been harshly criticized by the legal scholarship.

On the contrary, it is common that a declaration of unconstitutionality affects only a portion of a law that is deemed incompatible with the Constitution. This may happen also with legislative vacuum, thus calling the Court to exercise an “innovative” function that is far from the kelsenian idea of the “negative legislator”[10]. This may only happen when the innovation is imposed in only one admissible direction by the Constitution, leaving no room for political discretion. When the Court rejects a constitutional challenge, it only declares the referred question “unfounded”, but does not prevent other judges from raising the same question (even at a different stage of the same proceeding), nor the same referring judge from raising a different question. Additionally, the Court may substantively modulate the effects of its decision by adopting interpretative judgements. These decisions confer a crucial role on interpretation and the related distinction between provisions and norms[11]. The ICC may use an interpretative judgement to strike down an interpretation as unconstitutional, while keeping parliamentary texts integer.

Even though the incidental access is generally considered to be typical of the Italian judicial review system, direct review has played an increasingly important role among the Court’s tasks, and has become the main portion of its workload following the regionalism reform in 2001.

A direct access to the Court is also provided in cases arising from conflicts of attributions, where the Court is called to settle disputes among state bodies. These cases are decided by defining which body is entitled to a certain power. Such conflicts may take origin from a dispute regarding the allocation of powers among state bodies or between state and regions (and among regions). This task is different from the one described above, as the challenged act is not normally a legislative act, but an administrative or judicial one, a factual behavior or even the omission of an act.

Paradoxically, an outline of constitutional adjudication in Italy would be only partial if it was limited to the activity of the ICC and the domestic organs. In the dualistic perspective that traditionally praised the Italian legal system, the ICC has, in principle, the exclusive authority over reviewing legislation. Nonetheless, the ICC needs to cope with the authority of other judicial bodies endowed with the power of adjudication. In particular, the Court of Justice of the European Union and the European Court of Human Rights have been assigned increasingly important tasks that need to be coordinated with national constitutional adjudication. Tasks and functions of the three courts do not overlap; however, they seem to constitute a composite constitutional system[12].

Italy's membership in the EU has, over time, affected the Italian constitutional system in a very significant manner. The Italian model of constitutional adjudication makes no exemption. The European principles of supremacy and direct effect practically introduced a "second judicial review of legislation"[13] that accompanied the one described above. The ICC's mind-set toward this phenomenon has dramatically changed over time. Initially adopting a reluctant approach, the Italian Court has transformed itself into one of the most Europe friendly national constitutional courts, and it has been on a "European Journey"[14] that has developed significantly over the courts of 2016. The next section focuses on these developments.

III. Constitutional Controversies

Over the last ten years[15], the ICC has actively deployed the supranational dimension of constitutional law and rights. The ICC enforced international law and the European Convention on Human Rights (ECHR), as well as EU law. In a few controversial cases, it also upheld the complex balance of substantive and institutional values underpinning the Italian Constitution against some rulings of the ECtHR[16] and International Court of Justice (ICJ).[17] Last year, poignant examples were given for both attitudes, regarding EU law and the ECJ.

Judgment no. 187 is (for now) the epilogue of a lengthy dispute, concerning the compatibility with EU directive on fixed-term work of the extensive use of temporary employment in schools, as authorized by Italian law[18]. Considering that the relevant EU provisions had no direct effect and ought to be enforced through the constitutional scrutiny of national law, the ICC[19] voiced widespread concerns of lower courts and joined one of them in requesting a preliminary ruling from the ECJ to clarify the scope of the directive. For the first time, the ICC requested a preliminary ruling in an incidental judgment (previously, just one request had been filed[20], after a complaint from the national Government against a regional law). With its *Mascolo* judgment[21], the ECJ held that, pending the completion of selection procedures for the recruitment of tenured staff, the renewal of fixed-term employment contracts could not be allowed indefinitely and that fixed-term employees were entitled to compensation for any damage suffered because of such renewal. Following this ruling, and before the constitutional proceedings reached their conclusion (also due to a wise postponement of their final stage), in yet another school reform,[22] the Parliament passed several provisions on the maximum duration of fixed-term employment contracts in schools and on compensation for past temporary staff. Therefore, judgment no. 187 concluded that EU law had been violated, but that the resulting abuse had been subsequently "nullified". Although it may be disputed whether the afforded compensation is enough in every specific case, this sequence of events is a significant instance of cooperation amongst courts and with the legislator (albeit somewhat grudgingly). It is also an example of the ICC operating in its style and capacity of "networking facilitator"[23].

The so-called *Taricco* case, decided – after a lively debate in legal scholarship – on the November 23, 2016, with a ruling published on January 26, 2017[24], is another case of preliminary reference to the ECJ, with remarkably less irenic and harmonic overtones. In its 2015 *Taricco* judgment[25], the Grand Chamber of the ECJ faced a question concerning criminal offences for VAT evasion in Italy. These offences are often perpetrated through elaborate organizations and operations. Consequently, investigations require a long time and prosecution may become time-barred under the relevant provisions of the Italian Criminal Code, which had been modified by the legislator with a significant reduction of the limitation period. Based upon the rather broad phrasing of article 325 of the Treaty on the Functioning of the European Union (TFEU), the ECJ held that national time limitations should neither prevent effective and dissuasive penalties "in a significant number of cases of serious fraud affecting EU financial interests", nor provide for longer periods in respect of frauds affecting national financial interests, than in respect of those affecting EU financial interests. The ECJ also added –somewhat unexpectedly– that national courts should verify by themselves if that was the case and, if need be, disapply the domestic provisions regulating the maximum extension of the limitation period in order to allow the effective prosecution of the alleged crimes. According to the ECJ, this would not infringe article 49 of the EU Charter of Fundamental Rights (principles of legality and proportionality of criminal offences and penalties) (ECHR) nor article 7 ECHR (no punishment without law) with regard to pending

criminal proceedings. On the one hand, the alleged crimes constituted, at the time when they were committed, one and the same offence and were punishable by the same penalty. On the other hand, the ECJ considered the statute of limitations as a procedural institution. In the ECJ's view, the extension of the limitation period and its immediate application are not prohibited when the offences have never become subject to limitation.

In Italy, some courts (including the Court of Cassation) did not hesitate to disapply the relevant provisions of national law. Other courts (including a different panel of the Court of Cassation) perceived a complex constitutional problem, concerning article 25(II) of the Italian Constitution ("No punishment may be inflicted except by virtue of a law in force at the time the offence was committed"), with at least two facets: the ECJ had called for an *ex post facto* increase of criminal liability, as, according to a well-established Italian legal tradition, the limitation period is part and parcel of the substantive discipline of criminal offences (it is the temporal dimension of criminal liability); and the possibility of disapplying the relevant provisions was not only unforeseen and unforeseeable, but also subject to exceedingly vague conditions, incompatible with the certainty required in criminal law. Therefore, questions were addressed at the ICC, which in its turn – while not disputing the ECJ's construction of article 325 TFEU – asked the ECJ to take into greater account the national principles. The ICC asked if article 325 TFEU requires the disapplication of the relevant national provisions, even in the absence of a sufficiently clear legal basis and when, under national law, time limitations are part of substantive criminal law and thus subject to the principle of legality in criminal matters. The ICC further asked whether the disapplication is mandatory, even when its effect would consist of an infringement on the supreme principles of the national constitutional identity of a member state.

This is a preliminary reference, which, to a certain extent, by itself opens a way for dialogue. The ICC makes some effort to frame national constitutional concerns within EU legal categories (e.g. referencing to Article 4 TEU, and Articles 49 and 53 of the Nice Charter). Nevertheless, by emphatically invoking supreme constitutional principles, the ICC shows itself ready to take a bold stance: activating the so-called counter limits (limits to sovereignty limitations acceptable due to EU law) to interdict the effects of the *Taricco* judgment on national courts. Much will depend on the answer that the ECJ has been asked to provide urgently. This might be the first time a national Constitutional court challenges the compatibility of EU primary law and ECJ rulings, with fundamental rights and acts to neutralize these rulings.

IV. Major Cases*

A. Separation of Powers

1) Judgment No. 52 of 2016: Constitutional Guarantees and Political Discretion on Religion

The case concerned a dispute between the President of the Council of Ministers and the Court of Cassation regarding a decision by the latter upholding an appeal brought by an association of atheists which had sought an order requiring the President of the Council of Ministers to launch negotiations with a view to concluding an agreement (similar to a concordat) with it as a religious organization.

The Italian Constitution (Article 8) guarantees equal freedom and the right to self-organization to all religious denominations; but it also provides that their relations with the state may be the object of special legal provisions, based on agreements with religious representatives. The ICC concluded that the decision whether to start negotiations is reserved to executive discretion. The Government can be held accountable for it as a political matter before Parliament, but not before the courts. Therefore, the matter was considered primarily under the separation of powers perspective, though the decision had a significant indirect impact in the field of freedom of religion.

As the judge rapporteur is not the author of the written ruling, presumably the former opposed the final decision, which must not have been taken unanimously: this is the only, indirect way for internal dissent to be manifested outside the Court.

B. Rights and Freedoms

2) Judgment No. 63 of 2016: "Anti-Mosques" Regional Laws

In this case the Court considered a direct application from the President of the Council of Ministers questioning the constitutionality of portions of a Lombardy regional law modifying regional principles for planning facilities for religious services. The claimant alleged that the legislation violated the equal religious freedom of all religious creeds and exceeded the legislative competences of the region. The Court found that the regulation of religious facilities falls within regional competences only to the extent justified by the city-planning-related interest in ensuring the balanced and harmonious development of inhabited areas and realizing services of public interest. In light of the principle that all religious denominations are entitled to equal freedom to exercise their religion, and that opening places of worship is essential to such exercise, the Court stated that neither the denomination nor the presence or absence of a formalized pact with the state may be a source of discrimination between them, and that placing different conditions upon different classes of denominations to gain access to space for religious facilities would exceed regional competences. On these grounds, the Court struck down those portions of the contested provisions that made such distinctions. The Court also struck down provisions requiring newly-constructed places of worship to install video surveillance systems as exceeding regional competences, since the pursuit of safety, public order, and peaceful coexistence is allocated exclusively to the state under the Constitution. Other questions were considered unfounded or inadmissible.

3) Judgment No. 76 of 2016: Stepchild Adoption by the Same-Sex Partner

In this case the Court order a referral order concerning the 1983 Law on the minors' right to family. The questioned provisions allegedly impeded a case by case evaluation concerning the recognition of stepchild adoptions within the context of same-sex marriages validly celebrated abroad. In the referring judge's view, as same-sex marriages celebrated abroad did not have any effect in the Italian legal system, the decision determining a stepchild adoption may not have been recognized, without any consideration of the minor's interest. The ICC declared the constitutional questioned inadmissible, as the referring judge failed to identify the correct legal basis of the case. In fact, the recognition of foreign judicial decisions on the adoption of minors may follow two distinct procedures. According to a first one, recognition occurs automatically. According to an alternative procedure, recognition occurs only after a Court's assessment. In the ICC's view, the referring judge did not provide a convincing motivation of the fact that the case at issue was not subject to the first (automatic) procedure of recognition. On the contrary, the referring judge contradicted himself, firstly referring to the automatic recognition procedure, then referring to the necessity of a Court's assessment. In the ICC's, this contradiction was based on the wrong assumption of the referring Court that the case at issue consisted of an adoption by Italian citizens of a foreign child (so-called international adoption), while the case actually involved the recognition of a foreign court ruling, determining the adoption of a foreign child by a foreign citizen, who only subsequently acquired the Italian citizenship.

4) Judgment No. 84 of 2016: Scientific Research on Embryos

In this case the Court heard a referral order concerning the 2004 Law on medically assisted reproduction, in which it was requested to rule that embryos that were destined to be destroyed (as they would not be implanted, where affected by disease) could be used for scientific research, notwithstanding the statutory prohibition on such usage. Relying on ECtHR case law, the Court noted that there was no pan-European consensus on such a sensitive issue and dismissed the application, holding that "the choice made by the contested legislation is one of such considerable discretion, due to the axiological issues surrounding it, that it is not amenable for review by this Court".

5) Judgment No. 213 of 2016 – Health-Care Benefits in *More Uxorio* Cohabitation

In this case, the Court considered a referral order challenging the constitutionality of the denial of certain social security benefits to non-married partners. The provisions at issue entitled spouses and close relatives of severely disable people to a parental leave. The referral order claimed that the law was unconstitutional, as long as it did not include *more uxorio* partners among the beneficiaries of the right to parental leave. This exclusion allegedly violated inviolable human rights, the principle of equality and the right to health (Articles 2, 3 and 32 of the Constitution). The

ICC struck down the omission of the *more uxorio* partner from beneficiaries as unconstitutional, thus extending the parental leave right recognition to them. The Court affirmed that even though *more uxorio* cohabitation and marital relationships are not fully equivalent, it is unreasonable in the case at hand to exclude the former from the beneficiaries of parental leave rights. In the light of the legal goods protected by the norm, and namely the fundamental right to health care of disabled persons within the context of social communities recognized by Article 2 of the Constitution, it is contradictory to exclude *more uxorio* partners from a provision, aiming at protecting the disable people right to health.

6) Judgment No. 225 of 2016 – The Rights of Children in the Separation of Same-Sex Couples

In the case, the referring Court alleged that the contested provisions of the Civil Code regulating parent–child relationships, as modified in 2013, violated the Constitution, as long as they did not allow the referring Court to evaluate on a case by case basis whether it mirrors the interest of minors to maintain a significant relationship with the former partner of the biological parent, within a same-sex couple. The ICC dismissed the case as unfounded, since the referring judge failed to consider a provision of the Civil Code that could offer adequate protection to the interest at issue. In fact, article 333 of the Italian Civil Code allowed the taking into consideration of behaviors that are detrimental to the interest of the child, such as any unjustifiable interruption (imposed by one or both parents) of any significant relationship of the child with third persons. In these cases, judicial authorities are entitled to adopt any suitable measures on a case-by-case basis at the initiative of the public prosecutor, who could possibly be requested to act by the subject that was involved in the unjustifiable interruption of a significant relationship with the minor. The ICC found that there was no legislative vacuum, and that the legal position of the former partner may be adequately protected through these legal arrangements, which the referring judge failed to consider.

7) Judgment No. 286 of 2016 – In the Mother's (Sur)name

In this case, the ICC declared unconstitutional several provisions of the civil code, insofar as they did not allow the parents, by mutual consent, to attribute to their children at the moment of birth the maternal as well as the paternal last name. The Court had already heard very similar referrals approximately thirty and ten years earlier: at that time, the Court firstly found that a modification of the contested norms was "desirable" and probably in line with social conscience (decision No. 176 of 1988) and then declared that the contested provisions were not in line with the Constitution, but nonetheless it was in the legislator's political discretion to adopt one of the many legislative solutions that might be compatible with the Constitution (decision No. 61 of 2006). In 2016, ten years after the latter decision, the legislator had not intervened yet, and the ICC finally held that the voided legal provisions violated the child's constitutional right to his or her own personal identity and the constitutional right to equal dignity between parents and spouses. Moreover, the ICC relied on article 8 (right to respect for one's private and family life) and article 14 (non-discrimination) of the ECHR, and on the relevant case law of the ECtHR, which had recently declared that the obligation to transmit only the father's name was in violation of the ECHR (*Cusan and Fazzo v. Italy, App.no. 77/07, 7 January 2014*). As a result of the ICC's decision, parents may agree to add the maternal last name after the paternal last name to their child's name, at the moment of birth or adoption. However, in the absence of an agreement between the parents, the existing provisions related to the attribution of the paternal last name remain applicable, in expectation of a legislative intervention destined to regulate the matter comprehensively, in accordance with criteria eventually compatible with the principle of parity.

C. Foreign, International and/or Multilateral Relations

8) Judgement 102 of 2016: *Ne Bis in Idem* 1

One of the most controversial aspects of the ECHR implementation in Italy concerns the different notions of "criminal matter" adopted by each system: narrower in Italy, broader in Strasbourg. A number of questions stemmed from this very significant divergence.

In Judgment n. 102 of 2016, the Court heard two referral orders, from criminal and tax divisions of the Court of

Cassation, concerning the punishment of the illegitimate use of nonpublic financial information with both criminal, and administrative sanctions, allegedly in violation of the *ne bis in idem* principle (ECHR Protocol 7, article 4). All the questions were found inadmissible, for various reasons: most notably, because, although a double line of punishment may be in breach of the ECHR (if a formally administrative sanction is substantially afflictive), it is up to the legislator to settle the issue by making the appropriate choices, also taking into account the fulfilment of obligations under EU law. This may include keeping both criminal and administrative sanctions, while unifying or coordinating existing investigation and punishment procedures.

9) Judgement 193 of 2016: *Lex Mitior*

The Court heard a referral order concerning administrative sanctions for the violation of labor law: their unusual severity had been mitigated by a subsequent law, but only after they had been definitively applied to the party; the question was whether the Constitution and the ECHR require the subsequent and more lenient law (*lex mitior*) to prevail also over *res judicata*. The question is unfounded: while in the abstract the *lex mitior* principle may apply to administrative sanctions, the question should focus on single sanctions, and on the specific norms governing them, in order to assess their afflictive character; not –as it was the case– on the general norms applicable to all administrative sanctions, as some of them might fall beyond the scope of constitutional and ECHR guarantees.

10) Judgment No. 200 of 2016: *Ne Bis in Idem* 2

In this case the Court heard a referral order concerning a provision of the Code of Criminal Procedure which limits the applicability of the *ne bis in idem* principle to the same legal fact as regards its constituent elements (*idem ius*), rather than to the same historical fact (*idem factum*), with the result that the criteria for establishing whether the fact is the same are more restrictive under Italian law (which considers both legal and material elements) than under the ECHR (which only considers material elements). The Court ruled the legislation unconstitutional insofar as it did not provide that the applicability of the *ne bis in* idem principle must be assessed with reference to the same historical-naturalistic fact, albeit considered with reference to all of its constituent elements (conduct, event, causal link). Italian law must base its assessment on the *idem factum*, and has no scope under *idem ius*.

11) Judgment No. 275 of 2016: Concept of Punishment in National Law and the ECHR

In this case the Court considered several Referral Orders on the 2012 law providing for the suspension of officials elected in local and regional bodies, when they are found guilty, although not definitively, of certain offences (and also prohibiting, in the same cases, to run for office). This also applies when the offences where committed before 2012. Many questions were raised, and all were found inadmissible or unfounded. Some points are particularly relevant: for the ICC, the effects of the questioned norms cannot be constructed as a ‘punishment’, neither under Italian constitutional law, nor under the article 7 of ECHR and the ECtHR case law (analyzed in detail by the ICC); rather, they are precautionary measures, aimed at preventing illegality in public administration[26], and at enforcing the constitutional duty of citizens entrusted with public functions “to fulfil such functions with discipline and honor” (article 54 of the Italian Constitution); therefore, these measures may take into account also previous offences and convictions, in barring access to (and permanence in) office. The ICC analysis is especially significant, as it dwells on issues which will be considered in the upcoming Strasbourg judgment on the (partially similar) *Berlusconi* case[27].

12) Judgment No. 225 of 2016 – The Rights of Children in the Separation of Same-Sex Couples

In the case, the referring Court alleged that the contested provisions of the civil code regulating parent-child relationships, as modified in 2013, violated the Constitution, in the parts where they did not allow the referring Court to evaluate on a case by case basis whether it mirrors the interest of minors to maintain a significant relationship with the former partner of the biological parent. In the case at hand, the former partner was part of a same-sex couple. The referring judge claimed that the contested provisions violated several constitutional provisions: the recognition of “social communities”, including same-sex partnerships; the principle of equality and reasonableness,

as the contested provision discriminated children born from a heterosexual union from children born within the context of a same-sex union; and finally the constitutional reception of international obligation with regard to the protection of child-parents relationship and the ECHR, and in particular of Article 8. The ICC dismissed the case as unfounded, as the referring judge failed to consider another provision of the civil code (i.e. Article 333) that could offer adequate protection to the interest at issue. In fact, Article 333 of the Civil Code considers unjustifiable interruptions (imposed by one or both parents) of any significant relationship of the child with third persons possibly detrimental to the interest of the child. In these cases, judicial authorities are entitled to adopt any suitable measures on a case by case basis at the initiative of the Public Prosecutor, who could possibly be requested to act by the subject who was damaged by the unjustifiable interruption of a significant relationship with the minor. The ICC found that there was no legislative vacuum and that the legal position of the former partner may be adequately protected through these legal arrangements, which the referring judge failed to consider.

V. Conclusion

Fifty years after the publication of John Henry Merryman's series of articles on the "Italian style"[28] in comparative law, the ICC stays true to this peculiarity. In particular, its attitude in the European constitutional space assumed a characterizing stance of active participation in the so-called judicial dialogue. This active participation consists of a continuous engagement with both the ECJ and the ECtHR case law. Even though the general trend of the ICC engagement has been a collaborative one, the Court has not missed any opportunity of remaining true to its own interpretation of the Italian constitutional tradition. This attitude towards supranational and international "relationality"[29] is a recent development in the Court's attitude towards the globalization (and, in particular, the Europeanization) of constitutional adjudication. In particular, as to relations with European Courts, the ICC has significantly changed its stance over time. Firstly, the Court opted for a sort of institutional isolation. Subsequently, it turned its attitude into an informal and silent interaction with European Courts. Only recently, the ICC adopted a truly relational attitude, which was dramatically developed in its case law in 2016. On the one hand, many of the reported judgments rely on the European courts' case law and make a proactive effort to ensure the highest level of compliance with EU law and with the ECHR[30]. On the other hand, when it came to the core values of the constitutional identity of Italy, the ICC openly embraced a distinct position from the one of the ECJ. By submitting a reference for preliminary ruling, the opportunity arose for further collaboration with the ECJ.[31] Consequently, some distinctive features of the national legal order might become elements for common values in a system fostering pluralism. Only the future will tell if this invitation to cooperate will be taken up by the ECJ. As to the present, the attitude of the ICC toward supranational and international law should be evaluated and considered by taking into account this complex and articulated picture. This effort may help to overcome the scholarly temptation of focusing on a single judgement (or a single line of a single judgment), and thus missing the woods for the trees.

VI. References

- Vittoria Barsotti, Paolo G Carozza, Marta Cartabia and Andrea Simoncini, *Italian Constitutional Justice in Global Context* (OUP USA 2016)
- Marta Cartabia, 'Of Bridges and Walls: The "Italian Style" of Constitutional Adjudication' (2016) 8 The Italian Journal of Public Law 37
- Tania Groppi and Irene Spigno, 'Constitutional Reasoning in the Italian Constitutional Court', *Comparative Constitutional Reasoning* (Cambridge University Press Forthcoming) <https://ssrn.com/abstract=2498966>
- Diletta Tega, 'The Italian way: a blend of cooperation and hubris' (2017) 2 The Heidelberg Journal of International Law/Zeitschrift für ausländisches öffentliches Recht und Völkerrecht, forthcoming
- Giorgio Repetto (ed), *The Constitutional Relevance of the ECHR in Domestic and European Law: An Italian Perspective* (Intersentia 2013)

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[1] Mauro Cappelletti, John Henry Merryman and Joseph M Perillo, *The Italian Legal System: An Introduction*

(Stanford University Press 1967) 75 ff.

[2] On this path, see further Marta Cartabia, 'Of Bridges and Walls: The "Italian Style" of Constitutional Adjudication' (2016) 8 The Italian Journal of Public Law 37.

[3] Vittoria Barsotti, Paolo G Carozza, Marta Cartabia and Andrea Simoncini, *Italian Constitutional Justice in Global Context* (OUP USA 2016) 231 ff.

[4] C Cost no. 256 of 2016.

[5] Bruce Ackerman, 'Three Paths to Constitutionalism – and the Crisis of the European Union' (2015) 45 British Journal of Political Science 705.

[6] Albert Venn Dicey, *Flexible and Rigid Constitution* (Clarendon Press 1901) 124–213.

[7] Legge costituzionale 11 marzo 1953, n. 1.

[8] This judgment was not only the first decision of the Court, but also one of its most important: the Court affirmed both its authority and the normative value of the Constitution itself, by rejecting the assumption that the notion of "unconstitutionality" was only applicable to legislative acts enacted after the Constitution, and inapplicable to those enacted before it. Furthermore, the ICC rejected the distinction between prescriptive norms and norms that have programmatic value, stating that the unconstitutionality of a legislative act may derive from programmatic norms. See on this judgment, Barsotti and others (n 3) 30.

[9] Piero Calamandrei, 'Il Procedimento per la dichiarazione di illegittimità costituzionale', *Opere giuridiche*, vol III (Morano 1956) 372.

[10] Hans Kelsen, *General Theory of Law and State* (The Lawbook Exchange, Ltd 1945) 268–69.

[11] Vezio Crisafulli, *Lezioni di diritto costituzionale: 1* (2 edizione, CEDAM 1970) 41.

[12] Leonard FM Besselink, *A Composite European Constitution* (Europa Law Pub 2007).

[13] Vittoria Barsotti and others, *Italian Constitutional Justice in Global Context* (Oxford University Press 2015) 207.

[14] Paolo Barile, 'Il Cammino Comunitario Della Corte' [1977] Giurisprudenza Costituzionale 2406.

[15] Since C Cost nos. 348 and 349 of 2007.

[16] C Cost no. 264 of 2012.

[17] C Cost no. 238 of 2014.

[18] Council Directive 1999/70/CE of 28 June 1999 concerning the Framework Agreement on fixed-term work concluded by CES, UNICE, and CEEP [1999] OJ L155/43.

[19] C Cost no. 207 of 2013.

[20] C Cost no. 103 of 2008.

[21] Joined Cases C-22/13, C-61/13, C-62/13, C-63/13 and C-418/13 *Raffaela Mascolo and Others v Ministero dell'Istruzione, dell'Università e della Ricerca and Comune di Napoli* [2015] EU:C:2015:26.

[22] Legge 13 luglio 2015, n. 107, (Riforma del sistema nazionale di istruzione e formazione e delega per il riordino

delle disposizioni legislative vigenti).

[23] Barsotti and others (n 3) 241.

[24] C Cost no. 24 of 2017.

[25] Case C-105/14 *Taricco and Others* (2015) EU:C:2015:363.

* The ICC provides some official full-text translations of its decisions. These translations are available at the ICC official website: http://www.cortecostituzionale.it/actionJudgment.do. The following summaries rely on official translations, where available.

[26] See also C Cost no 236 of 2015.

[27] Application no. 58428/13, Silvio Berlusconi against Italy, lodged on 10.9.2013, communicated on 5.7.2016.

[28] John Henry Merryman, 'The Italian Style I: Doctrine' (1965) 18 Stanford Law Review 39; John Henry Merryman, 'The Italian Style II: Law' (1966) 18 Stanford Law Review 396; John Henry Merryman, 'The Italian Style III: Interpretation' (1966) 18 Stanford Law Review 583.

[29] Barsotti and others (n 3) 235.

[30] See Section IV, C of this report.

[31] C Cost no. 24 of 2017, see further in Section III of this report.