The Constitution of Italy: Axiological Continuity Between the Domestic and International Levels of Governance?

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Abstract The Italian Constitution (1948) belongs to the group of constitutions described as ‘constitutions born from the Resistance’, forged to reject totalitarian experiences. According to the report, the concept of the ‘*Stato di diritto*’ is similar to

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the *Rechtsstaat*, with two key dimensions: (a) constitutional provisions on access to courts and judicial review; and (b) the legality principle, which subordinates administrative acts to parliamentary statutes. Under the latter, the introduction of criminal offences and imposition of obligations and taxation is permissible only on the basis of a parliamentary statute. The need to protect these tenets in the context of implementing the European Arrest Warrant system gave ground to extensive concerns on the part of governmental committees and legal scholars, leading to the introduction of fundamental rights safeguards, which, however, were criticised by the European Commission. Other areas where constitutional values have come under strain include the protection of social rights and the powers of the regions. More broadly, the report explores how to ensure axiological continuity between the principles and values that govern the life of a given polity within its boundaries and those that should characterise the international community. The report also observes that the autonomous language of transnational ‘constitutionalism’ does not readily correspond to what constitutional lawyers mean by the same word. In Italian scholarship, a number of scholars have come to speak about ‘weak’ or ‘post-modern’ constitutionalism, typical of the era of globalisation. Constitutional amendments regarding the EU are limited; further amendments have been considered, including a reference to ‘supreme principles of the Italian legal order and of the inviolable human rights’.

Keywords The Constitution of Italy • Amendment of the Constitution in relation to EU and international co-operation • The Italian Constitutional Court
‘Stato di diritto’/Rechtsstaat • The rule of law, the legality principle, access to courts and judicial protection • European Arrest Warrant and fundamental rights safeguards • Defence rights and *nulla poena sine lege* • Data Retention Directive
 Changing language of constitutionalism at the transnational level
 Fundamental rights • General principles of law and the principle of proportionality
 Supremacy and *controlimiti* • Fundamental rights protection in the international fight against terrorism

1 Constitutional Amendments Regarding EU Membership

1.1 *Constitutional Culture*

1.1.1 The Italian Constitution belongs to the group of constitutions that Mortati has called ‘constitutions born from the Resistance’,¹ as they were forged with the clear intent to deny and overcome the whole of the ‘values’ (or anti-values) that had characterised the Fascist (or elsewhere, totalitarian) era. By ‘constitutions born from the Resistance’, Mortati also referred to other documents, for instance, the French

¹ Mortati 1973, p. 222.

(IV Republic) and German constitutions. As Carrozza² has recently noted, today we could include the Portuguese, Spanish and Greek constitutions that were promulgated during the 1970s within this group.

Openness is precisely one of the most evident features that characterises these texts, and it is possible to find the roots of this phenomenon even earlier, looking back at what, in the thirties, Mirkine-Guetzévitch called the ‘internationalization of modern constitutions’.³ In other words, openness seems to belong within the core of the ‘*nouvelles tendances du droit constitutionnel*’. It is possible to find this element in many constitutions born from the Resistance, which have been the product of a political compromise among very different democratic forces that had, as their only common point, the rejection of the totalitarian experiences, and that are characterised by a strong programmatic character, inspired by the sincere denial of the features of the previous regime and by the need for an entirely different society. Some of these constitutions (including the Italian Constitution) claimed the need for new societal models and were very rich in declarations of principle, reflecting a wish to produce a break with the past. In some cases, these so-called announced revolutions⁴ have remained solely on paper, as one of the most influential members of the Italian Constituent Assembly, Calamandrei, bitterly acknowledged with regard to many provisions of the Italian Constitution a few years after it came into force.⁵ This programmatic character implied the need for a real turning point in the ways of conceiving not only the values and premises of the social life within the national boundaries, but, frequently, they also induced the founding fathers of these constitutions born from the Resistance to hazard the codification of the values that should inspire the life and contribution of their nations to the international arena and community (external openness). Usually, it is said that the Italian Constitution is the result of a political compromise (‘*compromesso*’) among the three most important forces that acted as the engine of the constituent phase: the liberal, the Christian democratic and the socialist-communist (left-wing) traditions. They gathered together in the National Liberation Committee (CLN), and the ‘glue’ of this compromise was their shared anti-fascism. Indeed, the Italian case is very interesting for the study of constitutional openness that can be understood as a product of the anti-fascism⁶ that had a crucial role in unifying the leading forces of the CLN. Unlike the German case, the Italian constituent experience is less known abroad and, at the same time, it is probably a more genuine case of a constituent phase because of the lesser impact of foreign influences, at least in the writing of the constitution. This does not mean that there was no foreign influence on the Italian constituent process, but scholars have shown that the Italian Constituent Assembly

² Carrozza 2007, p. 180.

³ Mirkine-Guetzévitch 1931, p. 48.

⁴ Calamandrei 1966, p. 421.

⁵ Calamandrei 1965, p. 553.

⁶ Luciani 1991, p. 191. See also Delledonne 2009.

was really free to write a new constitution that was an ‘autogenous product’ of the Assembly.⁷

The Italian Constitution came into force on 1 January 1948. All of the main members of the Constituent Assembly, although so different in their cultural and political backgrounds, were united around the memory of the past.

As we will see, all of the constitutional provisions that govern the foreign relations of the Italian Republic result from this idea, starting with Art. 11, which is devoted to the pacifist principle.

1.1.2 The Constitution is composed of 139 articles, with its main parts organised as follows: the first 12 articles are devoted to Fundamental Principles. Thereafter, Part I concerns the ‘Rights and Duties of Citizens’, while Part II is devoted to the ‘Organisation of Republic’ (Arts. 55–139). Part I (Arts. 13–54) contains the following subsections: ‘Civil Relations’; ‘Ethical and Social Rights and Duties’; ‘Economic Rights and Duties’, and ‘Political Rights and Duties’. Part II is divided into six ‘Titles’: the Houses and the Legislative Process; the President of the Republic; the Government; the ‘Judicial Branch’, covering both the ‘Organization of the Judiciary’ and the ‘Rules on Jurisdiction’; and ‘Regions, Provinces, Municipalities’ (amended in 2001). Part II also contains a section entitled ‘Constitutional Guarantees’, which concerns the structure, composition and functioning of the Constitutional Court (Arts. 134–137) and includes the relevant provisions concerning ‘Amendments to the Constitution and Constitutional Laws’ (Arts. 138–139). According to the case law of the Italian Constitutional Court (ItCC) the formula ‘Republican form’ included in Art. 139 (devoted, as we will see, to the impossibility to amend the ‘Republican form’) corresponds to the supreme principles included in the very first articles of the Italian Constitution.⁸ The logic is the following: any change concerning these principles would result in a revolution in the technical sense of the word. These fundamental principles thus represent the ‘centre of gravity’ of our Constitution.

1.2 The Amendment of the Constitution in Relation to the European Union

1.2.1 At first and for a long time, the ItCC used Art. 11 in order to cover the necessary limitations of sovereignty required by the European integration process (see Sect. 3.1.1 for the full wording of the article). This was the case until 2001 when the first important amendment concerning European integration was introduced with codification of the duty to exercise legislative power in compliance with Community law. Other amendments were introduced in 2012 to constitutionalise the so-called ‘golden rule’. For details see Sect. 1.2.3.

⁷ Bruno 1980, p. 59.

⁸ ItCC, Decision No. 1146/1988.

1.2.2 The constitutional amendment procedure is governed by Art. 138 of the Italian Constitution:

Laws amending the Constitution and other constitutional laws shall be adopted by each House after two successive debates at intervals of not less than three months, and shall be approved by an absolute majority of the members of each House in the second voting. Said laws are submitted to a popular referendum when, within three months of their publication, such request is made by one-fifth of the members of a House or five hundred thousand voters or five Regional Councils. The law submitted to referendum shall not be promulgated if not approved by a majority of valid votes. A referendum shall not be held if the law has been approved in the second voting by each of the Houses by a majority of two-thirds of the members.⁹

No other options are available and thus this was the procedure followed to change, *inter alia*, Art. 117. It is interesting to note that more recently, according to the reform proposed by the Renzi Government, it has been suggested that Art. 117(1) should be terminologically amended by replacing ‘Community law’ with ‘EU law’, following the terminology adopted after the coming into force of the Lisbon Treaty.

1.2.3 The new Art. 117(1) currently reads, ‘[l]egislative powers shall be vested in the State and the Regions in compliance with the Constitution and with the constraints deriving from Community and international obligations’. A more recent amendment was introduced to change the text of Art. 81 of the Constitution to introduce an express mention of the ‘balanced budget’ principle through Constitutional Law No. 1/2012. Articles 97, 117 and, above all, the first paragraph of Art. 119¹⁰ were also amended.

Looking at the judicial parameter, we will see that Art. 117(1) has provoked interesting innovations in the ItCC’s case law. Soon after the reform, the interpretation of this norm created a division among scholars.¹¹ According to some, Art. 117(1) simply codified the pre-existing situation: it granted a sort of *a posteriori* assent to European primacy¹² as had been developed by the Court of the Justice (ECJ) and accepted across the European Union. Other scholars, on the other hand, emphasised

⁹ The translations of the Italian Constitution reported in this chapter, with some limited exceptions, have been taken from the following sites: https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf and <http://www.servat.unibe.ch/icl/it00000.html>

¹⁰ Article 81 Italian Constitution: ‘General government entities, in accordance with European Union law, shall ensure the balance of their budgets and the sustainability of the public debt’. The Italian Constitution goes on to limit the scope of action of Regions and Local Authorities in the field of matters of regional and local finance, by introducing new constraints on the local authorities. Art. 119 Italian Constitution: ‘Municipalities, provinces, metropolitan cities and regions shall have revenue and expenditure autonomy, subject to the obligation to balance their budgets, and shall contribute to ensuring compliance with the economic and financial constraints imposed under European Union law. ...’. For a general discussion of these reforms, see Groppi, 2012.

¹¹ For an overview, see Chieppa 2007.

¹² Pinelli 2001, p. 194.

the importance of the constitutional status given to primacy of EU law, and asserted that Art. 117 paved the way for acceptance of the Italian monist thesis.¹³

1.2.4 It is interesting to note that there have been other attempts to revise the Constitution: for instance we can recall three *ad hoc* parliamentary committees (in 1983–1985 the so-called ‘Bozzi Bicameral Committee’; 1992–1994 the so-called ‘De Mita-Jotti Bicameral Committee’; and 1997–1998 the so-called ‘D’Alema Bicameral Committee’) that worked with no immediate outcome.¹⁴ The D’Alema Committee (named after former Prime Minister Massimo D’Alema, who chaired the committee in 1997–1998) had a certain impact on the reforms adopted in 1999 and 2001 (especially with regard to the reform of Italian regionalism). The D’Alema Committee prepared a text which proposed the inclusion of Title VI, entirely devoted to participation of the Italian Republic in the European Union and composed of three articles (Arts. 114–116) in the Constitution. In particular, the proposed Art. 114 would have codified respect of the ‘supreme principles of the Italian legal order and of the inviolable human rights’ as a condition for participation in the ‘European unification’ (sic!) process, in order to promote and encourage ‘an order based on the principles of democracy and subsidiarity’. The same provision stated that the limitations of sovereignty should be covered by a law passed by an absolute majority of the members of each House, and then added:

The law is subject to a popular referendum when, within three months of its publication, such request is made by one third of the members of a House or eight hundred thousand electors or five regional councils. The law submitted to referendum shall not be promulgated if not approved by a majority of valid votes.

The proposed Art. 115 regulated the involvement of the Parliamentary Houses in EU affairs and the duty of the Government to inform them. Article 116 was devoted to participation of the regions in the EU integration process.¹⁵ The wording of Art. 114 as proposed by the D’Alema Committee was recently used in some proposed amendments to Art. 11 that aimed at introducing a specific reference to the EU and the possibility of a referendum, should there be any further limitations of sovereignty, and at codifying the duty to respect the fundamental principles and inviolable rights recognised by the Italian legal order.¹⁶ Italian scholars have emphasised the insufficiency of Art. 11 to regulate the EU integration process and have advocated for a possible reform of its wording.¹⁷

¹³ Paterniti 2004, p. 2101; Pajno 2003, p. 814.

¹⁴ Fusaro 2005.

¹⁵ See the Italian version at: <http://www.camera.it/parlam/bicam/rifcost/dossier/aindice.htm>.

¹⁶ See Fasone 2010.

¹⁷ Cassese 1975, p. 583. For this debate, see Fasone 2010.

As we will see, the conservative approach to our constitutional text, the complicated procedure for constitutional amendments and the fact that Art. 11 is included in the very first part of the Constitution are the main reasons for the failure of these attempts (so far at least).

The recent package of measures proposed by the Renzi Government has focused, among other things, on the necessity to constitutionalise the role of the parliamentary chambers in EU affairs.¹⁸

1.3 Conceptualising Sovereignty and the Limits to the Transfer of Powers

1.3.1 The ItCC originally established that Art. 11 of the Italian Constitution was the basis for accepting Community law as supranational law with primacy and direct effect. This acceptance, however, did not come about immediately. On the contrary, it was the result of a long series of judgments. One of the reasons for this can be attributed to the absence of an explicit European clause in the Italian Constitution. In fact, Art. 11 was originally conceived to deal with Italian membership in organisations like the United Nations rather than to justify the consequence of supranationalism (a phenomenon that was unknown at the time the Italian Constitution came into force). This changed in 2001 with the constitutional reform of Title V of the Italian Constitution, with the introduction of Art. 117(1). Because of the dualist tradition, to which we will come back, international treaties acquire the same force as the domestic statutes adopted for their entry into force in the domestic legal system. This explains why, since the beginning, EU law has been considered as a primary source in the Italian legal system.

1.3.2–1.3.4 If we take a look at the history of the ItCC's case law regarding EU law, it is possible to notice a progressive departure from the pure dualist view first adopted by the Court. Over the years, this purity has been overcome and the ItCC, when referring to the domestic order and to the EC order, began to talk about two 'autonomous and separated, although coordinated'¹⁹ legal systems. At the same time, the ECJ, in often adopting a benign and tolerant attitude, has demonstrated that it appreciates the efforts made by the national courts. Some scholars have labelled this partial convergence with the term *(limited) flexibilization of supremacies*.²⁰ Despite this rapprochement, the expansion of the European Communities' competences has often given rise to some degree of tension between

¹⁸ See proposal A.S. 1429-A, Art. 55 It. Const ('functions of the Chambers'). See also proposal regarding Art. 70 Italian Constitution, which makes the law establishing forms and deadlines for the compliance with the obligations stemming from EU membership a constitutionally necessary law.

¹⁹ ItCC, Decision No. 170/1984, *Granital* [1984] CMLR 756.

²⁰ Ferreres Comella 2005, pp. 80–89.

the domestic judiciary and the EC courts, each time that the allocation of competence on borderline issues has been at stake. First of all, the ECJ has progressively obtained the trust of ordinary national judges, who also play a fundamental role in the constitutional review proceedings at domestic level. Such influence has resulted in the deterioration of the relationship between ordinary judges and the ItCC: when ordinary judges want to obtain an explanation regarding the relationship between EC law and the national constitution, they do not refer to the ItCC, but rather to the ECJ. This is a consequence of the self-exiled status of the ItCC, which has normally preferred not to address questions concerning the relationship between legal orders. Suffice it here to recall that for instance in 2002, the ItCC decided only ten cases (of a total of 500) that were related to the EC legal order.²¹ In case No. 14/1964²² the ItCC interpreted the relationship between national and EC acts in light of the chronological criterion *lex posterior derogat priori* (since the enabling domestic act ratifying the Treaties was an ordinary legislative act); later on, in case No. 183/1973²³ the ItCC changed its position and claimed that the constitutional basis for EC law primacy can be found in Art. 11 of the Italian Constitution. As we know, this provision was originally conceived to justify Italy's membership in the United Nations, rather than in the EU. EU membership, in fact, imposes limitations of sovereignty for goals that clearly go beyond 'peace and justice between nations'. Thus the ItCC was forced to 'manipulate' the original meaning of Art. 11 in order to allow for these limitations.²⁴ The ItCC had kept the task of monitoring respect for primacy of EC law (as a control of indirect violation of Art. 11 occurring when national provisions are found to be in conflict with EC law), but the consistency of EC law with the Italian Constitution could not be reviewed by the ItCC, given that it can rule on the validity of Italian norms only. Confirmation of the progressive flexibilization of the Court's original position can be found in the words used in *Granital*,²⁵ in which the Court found it necessary to 'clarify further the way in which the relationship between the two legal systems works'²⁶ and recognised that 'conclusions reached in previous decisions must therefore be rewritten'.²⁷

An important specific feature of the approach of the ItCC to EU law is the counter-limits doctrine, devised by the ItCC in 1973, soon after the well-known *Internationale Handelsgesellschaft*²⁸ case before the ECJ. In that judgment, the ECJ pointed out the primacy of EU law over national law, including national constitutional principles. In this respect the Italian position – along with that of Germany

²¹ Cartabia and Celotto 2002, p. 4477.

²² ItCC, Decision No. 14/1964.

²³ ItCC, Decision No. 183/1973, *Frontini*, [1974] 2 CMLR 372.

²⁴ Since 2001, an explicit reference to the European Community legal order is contained in Art. 117, as noted above.

²⁵ ItCC, Decision No. 170/1984, *Granital*, n. 19. On this issue, see Cartabia 1995.

²⁶ ItCC, Decision No. 170/1984, *Granital*, n. 19.

²⁷ *Ibid.*

²⁸ Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125.

– is relevant for a complete understanding of the reasons for the ‘resistance’. Constitutional courts have claimed to maintain their own role (the role of the guardians of the national constitutional identity) without exceptions. They have denied the acceptance of dangerous monist visions in order to preserve the constitutional identity of their legal orders. On the contrary, they have raised some ultimate barriers against the penetration of EU law in order to define the fundamental principles of the legal orders of which they are the guardians. Hypothetically, if an EU provision were to conflict with the fundamental principles of the national legal order, the constitutional court could strike down the national statute executing the EC Treaty, thus causing a ‘rupture’ between the national and supranational legal orders. Constitutional courts in fact normally have jurisdiction over national legislation (including the legal source of execution of treaties) but not over EC provisions: the latter are beyond their jurisdiction because, as they argue, they belong to another legal order. If one proceeds from this approach, one can understand why the constitutional courts have traditionally refused the possibility to strike down EU law provisions, since the acceptance of this option would imply adhesion to the monist theory of the ECJ. It is by a legal fiction that it is possible to defend the hard core of constitutional legal orders by preserving the formal autonomy of the national and supranational orders and the jurisdiction of the ECJ. The identification of these barriers to European integration represents the essence of the counter-limits doctrine (*dottrina dei controlimiti*), devised by the ItCC in the *Frontini* judgment²⁹ (but see also the *Granital* judgment³⁰). The consequence of a possible declaration of invalidity could spell Italy’s withdrawal from the EU. According to Cartabia, in these two cases the counter-limits test was conceived of as a way to carry out an exceptional control of respect of the conditions for constitutionality of the Italian accession to the EU.³¹ Following this reconstruction, the counter-limits originally worked as conditions for evaluating the legitimacy of the limitations of sovereignty accepted by the Italian accession to the European venture. Later on (with the *Fragd* judgment³²), the nature of the counter-limits doctrine changed and was transformed from an exceptional control into a ‘simple’ control of the compatibility of EU law with the Constitution which could not threaten Italy’s membership of the EU. Because of the ‘transformation’ of this doctrine, the counter-limits have worked as a limitation to European primacy: that is why, according to the same scholarship, starting from the *Fragd* judgment, the ItCC has implicitly admitted that a possible conflict with the Constitution would not cause the invalidity of the statute adopted for execution of the EC Treaty, but just the non-applicability of the EC rule.³³

²⁹ ItCC, Decision No. 183/1973, *Frontini*, n. 23.

³⁰ ItCC, Decision No. 170/1984, *Granital*, n. 19.

³¹ Cartabia 1995, p. 110.

³² ItCC, Decision No. 232/1989. In English: *Fragd*, [1990] 27 CML Rev. 93.

³³ See Cartabia and Weiler 2000, pp. 171–172.

Concerning the possibility to overcome such limitations of sovereignty by referendum, it is necessary to recall what the ItCC pointed out in *Frontini* decision:

The doubt that the limitations of sovereignty consequent upon the signature of the Rome Treaty and the entry of Italy into the EEC could require the use of the procedure of constitutional amendment for approval of the ratification and implementation Bill has its exact equivalent in the analogous doubt already expressed in 1951 on the occasion of the approval of the Treaty instituting the European Coal and Steel Community: a doubt correctly resolved by the Italian Parliament deciding that the ratification and implementation of that Treaty could be made by means of an ordinary statute. In truth, as this Court has already stated in *COSTA v. ENEL*, Article 11 means that, when its pre-conditions are met, it is possible to sign treaties which involve limitation of sovereignty and to agree to make them executory by an ordinary statute. The provision would finish emptied of its specific normative content if it were held that for every limitation of sovereignty covered by Article 11 recourse had to be had to a constitutional statute. It is clear that it has not only a substantive but also a procedural value, in the sense that it permits such limitations of sovereignty, on the conditions and for the ends therein set out, releasing Parliament from the necessity of making use of its power of constitutional amendment.³⁴

Nevertheless, more recently, with particular regard to the Treaty establishing a Constitution for Europe, Marta Cartabia has advocated the necessity to ‘cover’ the reform of the EU Treaties by means of a constitutional law.³⁵ Finally, according to the case law of the ItCC, the formula ‘Republican form’ used in Art. 139 of the Italian Constitution corresponds to the supreme principles included in the first part of the Italian Constitution. This means that in case of correspondence between the content of the counter-limits doctrine and that of the Republican form, no referendum may be used to surpass these limits.

1.4 Democratic Control

1.4.1 Specific measures for the involvement of the Parliament (and regional assemblies) in EU affairs have been codified in law No. 11/2005 (the so-called ‘*Legge Buttiglione*’), devoted to participation of Italy in EU decision-making with regard to the involvement of the State and regions in the preparatory phase of the EU decision-making process. This statute has been replaced by law No. 234-2012, which provides for measures concerning, among other things, the direct involvement of the national Parliament in the subsidiarity check of EU draft legislation and the obligation of information of the Government vis-à-vis the Parliament.³⁶ Further mechanisms have been implemented in the new Rules of Procedure of the Chambers. As written elsewhere in this report, in the package of measures proposed by the Renzi Government there is also a specific provision (Art. 55) aimed at constitutionalising the role of the national chambers in EU affairs.

³⁴ ItCC, Decision No. 182/73. See also Fasone 2010.

³⁵ Cartabia 2004.

³⁶ Committee of Regions, 2013.

1.4.2 The ratification of EU Treaties does not require a referendum. The only EU-related referendum in Italy was held in 1989, but it was ‘consultative’, as it asked whether the Italian population was in favour of the transformation of the European Communities into a European Union with a Government accountable to the European Parliament, and with a European Parliament entitled to draft a Constitution for Europe. The outcome was highly positive, with 88.03% of the population in favour and only 11.97% of the population against. Nevertheless, the referendum was conceived to have symbolic value rather than any legal implication, also since in the Italian legal order referendums are only allowed either to abrogate parliamentary laws (as per Art. 75 of the Constitution) or to confirm a parliamentary constitutional law aimed at revising the Constitution (as per Art. 138 of the Constitution). In this respect, a specific constitutional law was adopted (Law No. 2 of 3 April 1989) in order to have such a ‘consultative referendum’ on the future of the European Union.

1.5 The Reasons for, and the Role of, EU Amendments

1.5.1–1.5.2 As noted above, the EU–amendments have been limited in their content and have codified some of the content of the ItCC’s case law. This can be explained in light of our ‘conservative’ approach to the constitutional text due to two technical reasons: the complicated procedure of Art. 138 and what Calamandrei calls the ‘far sighted’³⁷ nature of many constitutional provisions. In other words, our Constitution is rich in programmatic provisions containing generic guidelines that have guaranteed the ‘adaptability’ of our constitutional text. The detailed provisions dealing with the new challenges of the EU integration process have been introduced by means of primary legislation.

1.5.3 At the time of its adoption, the Italian Constitution was considered a long and detailed constitution. The updating of the constitutional pact has been guaranteed by the interpretative function carried out by the relevant constitutional actors, but also by a sort of cascade system of norms designed by the constitution. In other words, in Italy, many of the issues that have been called ‘constitutional’ in this questionnaire have been treated, over the years, by means of primary sources that have developed the guidelines included in the Constitution (either statutes of Parliament or the internal Rules of Procedure of the Chambers). This choice has a price, of course. First of all, if the legislator is negligent many provisions may never be implemented and that is why it would be better to constitutionalise some of these matters. As stated above, it is interesting to note that the last version of the package of measures proposed by the Renzi Government contains several welcomed proposals to this effect.

³⁷ Calamandrei 1955a.

2 Constitutional Rights, the Rule of Law and EU Law

2.1 *The Position of Constitutional Rights and the Rule of Law in the Constitution*

2.1.1 As noted above, fundamental rights are codified in Part I of the Constitution and divided into three sub-groups of provisions which more or less correspond to civil, political and social rights. In terms of the position of principles, some principles are codified in our Constitution (e.g. the principle of equality) or can be traced back to some constitutional provisions (the proportionality test is frequently associated with reasonableness³⁸ in the case law of our Constitutional Court and employed in cases concerning discrimination). There are also some general principles that cannot be considered as ‘constitutional’, such as the principle of separation of powers.³⁹ Some of these provisions remain just on paper or have very limited justiciability. Social rights are a classic example of this.

2.1.2 Some constitutional provisions provide for the possibility of limiting fundamental rights ‘in exceptional circumstances and under such conditions of necessity and urgency as shall conclusively be defined by the law’. Such restrictions are contained, for instance, in Art. 13 (personal liberty), Art. 14 (inviolability of dwelling), Art. 15 (freedom of correspondence) and Art. 16 (freedom of movement).

2.1.3 Although the core concepts of the rule of law belong to the Italian constitutional order, the Italian Constitution does not explicitly mention a constitutional category equivalent or similar to the rule of law. Nevertheless, at least two conceptualisations of the same principle can be inferred from the text of the Constitution and have been developed by scholarly literature, which usually refers to the concept of rule of law by the term ‘*Stato di diritto*’ (similar to *Rechtsstaat*; *État de droit*). On the one hand, there is the *subjective* facet of the rule of law, related to access to courts and to the right of defence, enshrined in Title I of the first part of the Constitution, which is dedicated to civil rights. Article 24 states:

All persons are entitled to take judicial action to protect their individual rights and legitimate interests. The right of defence is inviolable at every stage and level of the proceedings. The indigent are assured, by appropriate measures, the means for legal action and defence in all levels of jurisdiction. The law determines the conditions and the means for the redress of judicial errors.

The right to judicial review is also constitutionally entrenched by Art. 25, according to which ‘[n]o one may be withheld from the jurisdiction previously

³⁸ Scaccia 2007.

³⁹ Modugno 1966; De Marco 1996; Pizzorusso 1981.

ascertained by law', thus ensuring that the tribunal established by law is independent and impartial. On the other hand, the second conceptualisation of the rule of law is related to the so-called '*principio di legalità*' (legality principle), which in the hierarchy of norms subordinates administrative acts to parliamentary statutes (*legge*), as the latter are an expression of the *volonté générale* according to the Rousseauian tradition. In light of this legality principle, the imposition of personal obligations, administrative charges and taxation are only permissible on the basis of a parliamentary statute (see Art. 23). When applied to criminal law, the principle of legality is connected to the principle of non-retroactivity and entails the principle that no one may be punished except by virtue of a law that is in force before an offence is committed (*nulla poena sine lege*).⁴⁰ Also another core element of the rule of law, i.e. the rule that only published laws can be valid, is covered by the concept of *Stato di diritto*.

2.2 *The Balancing of Fundamental Rights and Economic Freedoms in EU Law*

2.2.1 It is almost impossible to have a univocal answer for the Italian context. Even if at first glance we might state that the balancing of fundamental rights with economic free movement rights has not raised significant constitutional issues, it is worth noting that many scholars have complained about lower standards for social rights at the EU level, when compared with the standard set out by many constitutions (including the Italian Constitution) which protect social-democratic values and the rights of workers.⁴¹ The fear that the balancing of the Court of Justice may affect national judges has been raised in the scholarly literature.⁴² The main criticism related to rulings such as *Viking*,⁴³ *Laval*⁴⁴ and *Rüffert*⁴⁵ is that the right to strike is not considered as a human right, thus lowering the standard of protection of Art. 40 of the Italian Constitution, which qualifies it as a fundamental constitutional right.⁴⁶ Indeed, in the ECJ case law, the right to strike can be balanced against internal market fundamental freedoms on equal footing (in the sense that it is considered a legitimate interest that must be protected but its possible infringement of an internal market fundamental freedom must be proportionate).

⁴⁰ For a general overview on the two concepts, see Bin 2004 and Sorrentino 2007.

⁴¹ Gambino 2014, p. 35.

⁴² Giubboni 2009; Caruso 2009.

⁴³ Case C-438/05 *The International Transport Workers' Federation and The Finnish Seamen's Union* [2007] ECR I-10779.

⁴⁴ Case C-341/05 *Laval un Partneri* [2007] ECR I-11767.

⁴⁵ Case C-346/06 *Rüffert* [2008] ECR I-01989.

⁴⁶ Gambino 2014, p. 39.

Moreover, it can also be pointed out that the focus of the ECJ is on the formal facet of the principle of equality (protecting non-discrimination), while the Italian constitutional tradition strongly protects ‘substantive’ rather than merely ‘formal’ equality. In this interpretation, there is a positive obligation upon the State to remove all obstacles to equality by providing economic assistance to people who are poor or discriminated against in order to provide them equal treatment. While it is possible to say that the Italian Constitutional Court has not expressly adjusted its balancing to match the ECJ’s approach, in the field of so-called reverse discrimination, its case law on the principle of equality has been affected by the jurisprudence of the Luxembourg Court.⁴⁷ In order to deal with cases of reverse discrimination the Italian Constitutional Court has progressively extended its scrutiny in light of Art. 3 (principle of equality).⁴⁸ More recently, the issue of reverse discrimination has created ‘problems of coordination’ between the national and supranational levels. In a decision of the ECJ that was recently strongly criticised by Peers,⁴⁹ a woman brought a claim for state compensation based on Directive 2012/29/EU ‘establishing minimum standards on the rights, support and protection of victims of crime’,⁵⁰ after having obtained the conviction of her attacker for sexual assault. Since the offender did not have the money to pay the compensation ordered by the national court, the victim tried to obtain compensation from the Italian state, but the ECJ ruled that the Directive in question was not applicable to purely domestic cases.

2.3 *Constitutional Rights, the European Arrest Warrant and EU Criminal Law*

2.3.1 The Presumption of Innocence

2.3.1.1 The presumption of innocence is a fundamental principle in the Italian constitutional order. It is implicit in Art. 13 which is devoted to personal liberty. Article 13 first states that ‘personal liberty is inviolable and that no form of

⁴⁷ Case C-35-36/82 *Morson and Jhanjan* [1982] ECR 03723; Case C-229/83 *Leclerc* [1985] ECR 00305; Case 355/85 *Cognet* [1986] ECR 03231; Case C-90/86 *Zoni*, [1988] ECR 04285; Case C-33/88 *Allué I* [1989] ECR 01591; Joined cases C-259/91, C-331/91 and C-332/91 *Allué II* [1993] ECR I-04309.

⁴⁸ ItCC, Decisions No. 249/1995, No. 61/1996 and No. 443/1997. On reverse discrimination in the case law of both the ECJ and the ItCC, see Spitaleri 2011 and Dani 2011.

⁴⁹ Case C-122/13 *C* [2014] ECLI:EU:C:2014:59. See the comment by Peers 2014.

⁵⁰ Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, [2012] OJ L 315/58.

detention, inspection nor any other restriction on personal freedom is permitted, except by a reasoned warrant issued by a judicial authority, and only in the cases and the manner provided for by law'. Article 13 then continues:

In exceptional cases of necessity and urgency, strictly defined by the law, law-enforcement authorities may adopt temporary measures that must be communicated to the judicial authorities within forty-eight hours. Should the judicial authorities not confirm such measures within the next forty-eight hours, they are revoked and become invalid.

In order to respect the presumption of innocence, Art. 13(5) specifies: 'The law establishes the maximum period of preventive detention'. In order to protect the presumption of innocence at the same level as in our constitutional order, Italy has introduced an additional ground of refusal when implementing the European Arrest Warrant Framework Decision⁵¹ (EAW Framework Decision). Indeed, according to Art. 18(e) of Law No. 69/2005 implementing the EAW Framework Decision, surrender of the individual shall be refused if the legal system of the Member State issuing the European Arrest Warrant (EAW) does not stipulate maximum limits to the duration of preventive detention. Nevertheless, the Supreme Court has construed this article in a way that has sometimes undermined the level of protection of the presumption of innocence in our constitutional system, in order to provide for a consistent interpretation of domestic law with EU law. The Supreme Court has often been satisfied with the procedural rules of other Member States (even when these have enshrined lower standards of protection) which for example envisage a system of subsequent intermediate periods, which may be extended under jurisdictional scrutiny. In other words, the Supreme Court has adopted a substantive rather than a formalistic approach to the interpretation of the notion of 'maximum limits' contemplated in Italian law, so as to allow for the extradition of accused persons to countries which have a 'similar' or 'equivalent' level of protection of the individual, but not necessarily the same.⁵² It is interesting to note that this position of the Supreme Court (which in the specific case allowed the surrender of an individual upon a request made by Germany) marks a shift in the case law of the same Court. It is worth noting that the Supreme Court had previously refused to surrender a citizen to Belgium because of the absence of maximum limits to the duration of precautionary detention like those in the Italian legal order.⁵³

⁵¹ Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA), [2002] OJ L 190/1.

⁵² Corte di Cassazione, Sezioni Unite, *Ramoci Villaznim* Decision No. 4614 of 30 January 2007. Also the Decision No. 17810 of 24 April 2007 (Sezione sesta penale, caso *Zanotti*) has been criticised for surrendering the individual to Poland, although in that country there were no maximum limits for preventive detention as envisaged by the Italian legal order.

⁵³ Corte di Cassazione, Sez. VI, *Cusini*, Decision No. 16542 of 8 May 2006. On the changing orientation of the Supreme Court of Cassation, see Cavallini 2007.

2.3.1.2 The procedure for surrender of the individual is enshrined in Law No. 69 of 2005 implementing the Framework Decision (from Art. 5 to Art. 27).⁵⁴ The *Corte d'Appello* of the district where the citizen resides is the competent authority for execution of the EAW. While it must be acknowledged that the Italian courts usually execute and very rarely refuse EAW requests, Law No. 69 of 2005 envisages appropriate guarantees for the accused, which include, for example, the possibility to appeal to the Supreme Court of Cassation for a second trial in case of disagreement with the outcome of the first trial before the Court of Appeal.⁵⁵ Moreover, the accused individual has the right to have both a public defender and an interpreter, and to be judged at a public hearing.⁵⁶

2.3.2 *Nullum crimen, nulla poena sine lege*

2.3.2.1 The principle *nulla poena sine lege* is enshrined in Art. 25 of the Italian Constitution, according to which '[n]o one may be punished except on the basis of a law in force prior to the time when the offence was committed'. In this respect, criminal legislation must satisfy the conditions of precision, clarity and predictability, allowing each person to know whether an act constitutes an offence. In this respect, the abolition of double criminality for 32 categories of crimes as provided by the EAW framework decision might be in breach of the principle of legality in criminal matters. While the issue has never reached the Constitutional Court, it has raised a significant debate in scholarly literature.⁵⁷

On the one hand, some scholars have noted that the principle *nulla poena sine lege* is deeply jeopardised by the EAW requirement according to which the State of execution shall provide its assistance in punishing an act which may not be qualified as a crime in the domestic legal order: the focus here is on the breach of the principle according to which only parliamentary statutory law may restrict personal freedom.⁵⁸ On the other hand, there is a second line of criticism which builds on the assumption that the dual criminality rule not only protects the principle of legality but also the principle of sovereignty.⁵⁹ In this respect, abolition of the double

⁵⁴ The text of the Law is available at <http://www.camera.it/parlam/leggi/050691.htm>.

⁵⁵ More generally, it is the Constitution itself, in Art. 111, which states that 'Appeals to the Court of Cassation in cases of violations of the law are always allowed against sentences and against measures affecting personal freedom pronounced by ordinary and special courts. This rule can only be waived in cases of sentences by military tribunals in time of war'.

⁵⁶ An accurate overview of the procedure is available on the website of the Italian National Association of Judges: <http://www.associazionemagistrati.it/doc/1518/il-mandato-di-arresto-europeo.htm>.

⁵⁷ For a general overview, see Calvano 2007.

⁵⁸ Cf. Bartone 2003; Caianello and Vassalli 2002; Gualtieri 2004; Manacorda 2004 and 2007 amongst others.

⁵⁹ Pisa 1973.

criminality rule may also configure a sort of ‘superiority’ of the criminal law of the country issuing the EAW upon the country executing it.⁶⁰

In fact, the problematic aspect of the EAW Framework Decision lies in legal certainty. Indeed, the Framework Decision enumerates the types of crimes for which the rule of double criminality is abolished, but it does not specify the behaviours connected to those crimes, leaving definition of the constitutive elements of the crime to the Member States. Under the same label of corruption, organised crime or drug trafficking, Member States’ law may define very different behaviours. In this respect, individuals who are in a foreign country that has a legal and juridical culture different from that of their home country may experience a ‘journey into the unknown’.⁶¹

For some of the categories of offences listed in Art. 2 of the Framework Decision it is not possible to identify corresponding or common models of incrimination. Some acts may be criminalised in some national legal systems but not in others. This significantly jeopardises the principle of legality in its pivotal function: that of guiding the behaviour of individuals in the light of certain and predictable rules.⁶² In order to avoid this *vulnus* to the constitutionally protected principle of legality, some proposals were put forward to revisit the Italian criminal law framework in order to create a perfect correspondence between the list provided for in Art. 2 of the Framework Decision and Italian material criminal law, to ensure legal certainty without infringing the principle of mutual recognition in the criminal sphere.⁶³

2.3.3 Fair Trial and *In Absentia* Judgments

2.3.3.1 The principle of fair trial is enshrined in Art. 111 of the Italian Constitution, which is composed of a first part related to due process more broadly, and a second part specifically dedicated to criminal trials. According to Art. 111:

Jurisdiction is implemented through due process regulated by law. All court trials are conducted with adversary proceedings and the parties are entitled to equal conditions before an impartial judge in third party position. The law provides for the reasonable duration of trials. In criminal law trials, the law provides that the alleged offender shall be promptly informed confidentially of the nature and reasons for the charges that are brought and shall have adequate time and conditions to prepare a defence. The defendant shall have the right to cross-examine or to have cross-examined before a judge the persons making accusations and to summon and examine persons for the defence in the same conditions as the prosecution, as well as the right to produce all other evidence in favour of the defence.

⁶⁰ Barazzetta 2004; Picotti 2005; Selvaggi and Villoni 2002.

⁶¹ Mitsilegas 2006.

⁶² On the difficulties for individuals to be aware of the definition and scope of crimes in foreign countries, see Del Tufo 2005 and Di Martino 2006, pp. 133–135.

⁶³ Iuzzolino 2002; Barazzetta 2004.

While Art. 111 of the Constitution, as amended in 1999, seems to provide sufficient protection of the principle according to which the defendant shall be duly informed of the process and shall participate therein, the Strasbourg Court has on several occasions condemned Italy for *in absentia* judgments that do not comply with the procedural guarantees provided for in Art. 6 of the European Convention on Human Rights (ECHR).⁶⁴ The Italian criminal code has very recently been revised by Law No. 67 of 28 April 2014, in order to conform to the ECHR standards that allow prosecution of an alleged offender only where there is certainty of the knowledge of the process and where there is unequivocal evidence of the willingness of the alleged offender to waive the right to participate into the process. The reform significantly changes Italian traditional criminal law which looked at *in absentia* judgments as a right of the defendant, rather than as a possible infringement upon his/her rights.⁶⁵ In this respect, judges will have to collect more evidence about the effective willingness to be absent on the part of the defendant before condemning him/her with an *in absentia* judgment.

In addition, the Italian Constitutional Court has annulled a provision of the Italian criminal code related to *in absentia* judgments in that it violated Art. 6 of the ECHR which enshrines the right of the accused to participate in his or her trial and to be informed promptly.⁶⁶ More specifically, the annulled provision was Art. 175 (2) of the Code of Criminal Procedure, which did not allow the release of the accused person within the time limit for appealing against an *in absentia* judgment, where a similar appeal had previously been proposed by the public defender's office. This judgment is very important in that it marks a shift in the position of the Constitutional Court, which had earlier held that trials against individuals who had ignored allegations against them and had not been properly informed did not violate Art. 111 of the Italian Constitution, and that the ECHR did not grant guarantees greater than those provided for in this Article.⁶⁷ Moreover, it must be stressed that in this judgment, the Constitutional Court, in balancing constitutional values, attributed greater importance to the right of the defendant than to the principle of due process and of the reasonable duration of the process. By way of contrast, the Supreme Court of Cassation stated in a similar case that the reopening of the process with the possibility for the 'uninformed' alleged offender to make an appeal could jeopardise the smoothness and reasonable length of the process protected by Art. 111 of the Constitution.⁶⁸

⁶⁴ ECtHR, *Colozza v. Italy*, 12 February 1985, Series A no. 89; *Somogyi v. Italy*, no. 67972/01, ECHR 2004-IV; *Sejdovic v. Italy* [GC], no. 56581/00, ECHR 2006-II.

⁶⁵ Quattrocolo 2014.

⁶⁶ ItCC, Decision No. 317/2009.

⁶⁷ ItCC, Order No. 89/2008 and Decision No. 117/2007.

⁶⁸ Cassazione penale, Sezioni Unite, Judgment No. 6026 of 31 January 2008.

2.3.4 The Right to a Fair Trial – Practical Challenges Regarding a Trial Abroad

2.3.4.1 The Italian Constitution, in Art. 111, states that in all criminal trials ‘the defendant is entitled to the assistance of an interpreter in the case that he or she does not speak or understand the language in which the court proceedings are conducted’. Nevertheless, in the opinion of many defence lawyers, extradited citizens or residents are unfortunately not provided with quality translation and legal aid or travel expenses. Introduction of a publicly funded state or non-governmental body to provide such assistance would be highly recommended. Some proposals have been made by defence attorneys in order to guarantee appropriate protection of the constitutional rights of residents who are involved in trials abroad. The focus of such proposals largely built on the 2012 Justice Report ‘European Arrest Warrant – Ensuring an Effective Defence’ and stressed the necessity of immediate legal assistance both in the issuing and in the executing Member State, and a high level of specialisation on the part of defence attorneys in order to ensure an effective defence. Moreover, the report suggests a proportionality test on the part of the judge, so as to ensure that the infringement of fundamental rights is proportionate in the light of the seriousness of the crime (especially in the light of the discrepancies between Member States’ sanctions, which would at least require a comparative analysis of the relevant national legal frameworks).⁶⁹

2.3.4.2 Unfortunately, there are no statistical data available to indicate how many extradited individuals have subsequently been found innocent. This is because the Ministry of Justice does not collect data on how many individuals are found innocent even in the course of domestic trials.⁷⁰ Nevertheless, information on the website of the Minister of the Economy and Finance indicates that approximately 50,000 people have been victims of injustice. This data is available since Italian law requires the state to provide such persons with monetary compensation, which is counted as an item of expenditure.⁷¹ While we do not have statistics on extradited individuals or on individuals surrendered subsequent to an EAW request who have subsequently been found innocent, two cases have been covered in the media, both of which related to a mistaken identity. A Spanish doctor, José Vincent Pier Ripoll, was extradited from Spain to Italy and was held in jail for 8 months due to a miscarriage of justice by judges who accused him of being an international drug trafficker. He received 85,000 EUR in compensation.⁷² In 2009, an Italian gardener

⁶⁹ Barletta et al. 2013.

⁷⁰ The only statistics available are at: http://www.giustizia.it/giustizia/it/mg_1_14.wp?frame10_item=4&all=true.

⁷¹ The so called R.I.D. (*Riparazione per ingiusta detenzione*), for which Italy paid 575,698,145 EUR from 1991 to 2013. The data are available at: <http://www.errorigiudiziari.com/errori-giudiziari-statistiche-numeri-dati/>.

⁷² <http://www.errorigiudiziari.com/?vittime=jose-ripoll-scambiato-per-narco-in-carcere-per-8-mesi-da-innocente>.

was jailed for 50 days pursuant to a European Arrest Warrant from Germany in which he was accused of aggravated theft in Austria and Germany, where the gardener had never lived or even travelled.⁷³ In another case (*Arapi*) which was also reported in the news, the defendant was convicted of murder in his absence in Italy, although he was not aware of the trial. After surrender to the Italian authorities was ordered by a UK court, the EAW request was dropped and he received compensation in the amount of 18,000 GBP.⁷⁴

2.3.5 The Right of Effective Judicial Protection and the Principle of Mutual Recognition in EU Criminal Law

2.3.5.1 While the application of the principle of mutual recognition in civil and commercial matters has not raised significant constitutional issues in Italy, its application in criminal law has been quite tormented. In the scholarly literature, the transposition of mutual recognition to the criminal sphere was not only considered as an attack on national sovereignty, but also as ‘the first serious threat of disablement of the constitutional guarantees to the right of liberty’.⁷⁵ Following the same line of reasoning, a significant political debate concerned about a possible infringement upon fundamental constitutional rights, accompanied both the adoption and the implementation of the European Arrest Warrant Framework Decision.⁷⁶

While it did not succeed in jeopardising the adoption of the Framework Decision during the 2001 Laeken Summit or in reducing the list of crimes provided for in Art. 2 of the Decision to only six crimes strictly related to terrorism, the Italian Government managed, together with Austria, to delay the adoption of the decision. It also requested a declaration to be recorded at the moment of the decision. In this political declaration (devoid of any legal value) the Government stressed the need to change the Italian criminal system (with respect to the constitutional principles and in particular respect for fundamental rights) to be able to adapt to what is established in the Framework Decision.⁷⁷ The Government also asked for a *parere pro veritate* from two prominent lawyers, Vincenzo Caianiello and Giuliano Vassalli, both of them former Ministers of Justice and former Chairs of the Italian Constitutional Court. Both of them found that the introduction of the mutual recognition rule in criminal law was incompatible with many of the principles enshrined in the Italian Constitution. Caianiello and Vassalli in particular lamented

⁷³ <http://www.errorigiudiziari.com/?vittime=finisce-in-carcere-per-50-giorni-per-uno-scambio-di-identita>.

⁷⁴ <http://www.fairtrials.org/press/italian-shock-decision-to-drop-european-arrest-warrant-against-edmond-arapi/>.

⁷⁵ Pinelli 2012, p. 2399.

⁷⁶ Salazar 2002.

⁷⁷ Barletta 2006.

about: (a) a violation of the principle of the rule of law, in its facet of the ‘principle of legality’, which should ensure that crimes are foreseen in a predictable and specific way, by national statutory laws, enacted by the Parliament, rather than generically listed in the EAW Framework Decision enacted by EU institutions; (b) a violation of the constitutional principle of personal freedom as envisaged by Arts. 13, 104 and 111 of the Constitution. According to the Italian Constitution, any measure restricting personal freedom, such as for example measures for the enactment and enforcement of custody orders, shall be provided by statutory laws, in that those laws are subject to a strict scrutiny of respect for constitutional fundamental rights carried out by the Constitutional Court; (c) a violation of the rules on extradition contemplated in Arts. 10 and 26 of the Italian Constitution, aimed at protecting the fundamental rights of individuals.⁷⁸

These constitutional concerns have all been translated into a law on implementation of the EAW Framework Decision which does not completely comply with EU law, as pointed out by the European Commission several times. Just to give an example, in order to guarantee effective judicial protection to individuals, Law No. 69 of 2005 significantly increases the grounds for refusal to deny the execution of an EAW, compared to those set out in the EAW Framework Decision. It can be argued that constitutional guarantees related to effective judicial protection have not been undermined by the introduction of the mutual recognition rule in criminal law, in the light of the fact that the Italian constitutional order has preserved some flexibility in implementing the Framework Decision.⁷⁹

2.3.5.2 In our view, mutual recognition, when compared with harmonisation, still represents the method that best suits a pluralistic legal order, allowing for respect for the different legal traditions of the Member States in the European legal space. Nevertheless, transposition of mutual recognition from internal market matters to criminal law is problematic. While the case for mutual recognition in criminal matters was largely based on the success of the principle in the area of the internal market,⁸⁰ the so-called ‘single market analogy’⁸¹ raises the following contested issues. First of all, the freedom of movement of ‘judicial decisions’ may not be compared to the movement of persons, products and services: if mutual recognition requires that practices and standards of other Member States be deemed legitimate in an extra-territorial way,⁸² criminal law has traditionally been considered as a national affair strictly related to national sovereignty. Secondly, while internal

⁷⁸ Caianiello and Vassalli 2002, pp. 462–467; Casetti 2005.

⁷⁹ On the implementation of the EAW Framework Decision in Italy, see Fichera 2011 and Barletta 2011.

⁸⁰ Flore 2009, p. 269.

⁸¹ Lavenex 2007.

⁸² Mitsilegas 2009, p. 118.

market fundamental freedoms considerably expand the sphere of individual rights, the free movement of judicial decisions in criminal matters does not provide an immediate benefit to the individual, but is reflected in a direct benefit for the Member State.⁸³ Indeed, it is the judicial decision of a sovereign Member State which can be executed and recognised in other Member States. By way of contrast, such decisions are often imposed on individuals. Nevertheless, there is an ‘indirect’ benefit upon citizens which comes from more security. In sum, mutual recognition represents a good instrument for guaranteeing efficiency and the security of citizens, only insofar as it does not entail an infringement of fundamental rights related to effective judicial protection. To this end, in order to ensure mutual trust among judicial authorities, the most significant discrepancies between Member States on the core elements of the rule of law should be reduced.

Some authors have given serious consideration to the possibility of combining mutual recognition with minimum approximation of offences and penalties. They usually refer to the debate during the negotiations of the EAW Framework Decision, when the choice between ‘pure’ or ‘absolute’ mutual recognition (including only formal grounds for non-execution and/or relating to only a few serious offences) and ‘relative’ mutual recognition was discussed. It has also been suggested that the list of types of crimes be reduced to a few core offences, for which common criteria for definition and punishment may be found more easily.⁸⁴ In addition, the EU institutions have underestimated the role of mutual trust. The initial assumption that mutual trust would be generated automatically proved wrong. There are also signs of a shift from a ‘mutual trust’ to an ‘effectiveness’ paradigm.⁸⁵

2.3.5.3 In Italy, some criticisms of the possible change in the role of courts (from providing judicial protection against unwarranted measures by the authorities, to having become actors of loyal co-operation, efficiency and trust) were raised with regard to the Supreme Court of Cassation. This Court, indeed, in some judgments, favoured the logics of co-operation and efficiency inherent in the EAW framework at the expense of the more guarantistic procedures contemplated by domestic law.⁸⁶ Guarantism is the political doctrine developed in the nineteenth century, which aimed at protecting constitutional guarantees for individual liberty and collective freedoms against potential arbitrariness by the public authorities. In the 1960s to 1990s, guarantees in the penal process to avoid arbitrariness in political or judicial power, especially in the context of emergency legislation, became a central element of the concept.⁸⁷ Just to give two examples, the Supreme Court stated that an arrest warrant has to be executed when the requesting Member State respects the right to a fair trial, even if the degree of such protection is lower than the level ensured by the

⁸³ Klip 2012, p. 22; Lavenex 2007, pp. 764–765; Mostl 2010, p. 409.

⁸⁴ Fichera 2011, p. 80.

⁸⁵ Herlin-Karnell 2013, pp. 79–91.

⁸⁶ For a survey, see Barletta 2011.

⁸⁷ The key scholars behind this concept are Luigi Ferrajoli and Norberto Bobbio; for a key book, see Ferrajoli 2009.

Italian Constitution in Art. 111.⁸⁸ Moreover, the Supreme Court of Cassation provided a restrictive interpretation of the ‘safeguard clause’ contemplated in Art. 2 of Law No. 69/2005 implementing the EAW Framework Decision, according to which the application of the Framework Decision shall fully respect fundamental rights as provided by international treaties and the Italian Constitution, and according to which the violation of those constitutional guarantees by the Member State issuing the EAW may result in a refusal to surrender the individual. More specifically, when the ‘safeguard clause’ was invoked, the Supreme Court refused to apply it, by retaining that the absence of alternative measures to detention, aimed at the re-socialisation of the detainees, did not amount to a breach of a common constitutional principle of the Member States.⁸⁹

In our opinion, the fact that the Supreme Court limited the field of application of the safeguard clause provided by Art. 2 of Law No. 69/2005 to the domestic constitutional principles that are also mentioned in Art. 6 TEU, cannot be criticised as such. The reasoning behind this case law is not the sacrifice of constitutional guarantees to serve the goals of efficiency in the area of freedom, security and justice. More simply, the Court of Cassation has tried to mitigate the discrepancies between the EAW Framework Decision and the Italian implementing law, while providing an interpretation of Italian law that is consistent with EU law.⁹⁰

2.3.5.4 In Italy, there have been no explicit calls to reintroduce some form of judicial review in the country of residence of the individual affected. In any case, this is inherent in the law implementing the EAW Framework Decision, which is not completely consistent with the Framework Decision, in that it provides greater protection of constitutional rights. Just to give an example, according to the Italian implementing law, the surrender of the accused individual should be subject to the existence of serious evidence of guilt. The EAW Framework Decision does not include this condition. Indeed, it could be regarded as contrary to the decision itself, to the extent that such a determination results in an undue overlap of assessments carried out by an Italian judge with respect to judgments that fall within the exclusive jurisdiction of the judicial authority of the Member State issuing the EAW. This is clearly inconsistent with the very essence of the principle of mutual recognition.⁹¹ Shifting to the behaviour of the courts, it can be said that

Italian Courts execute the EAW as far as the requesting State offers adequate judicial remedies to the lack of discussion and cross-examination, such as the possibility to appeal (Corte Cass., Sez. VI, *Tavano*, n. 7812/2008; Sez. VI, *Finotto*, n. 7813/2008), to ask for revision of the Judgement (Corte Cass., Sez. VI, *Bolun*, n. 5909/2007, regarding Hungary, and Sez. VI, *Salkanovic*, n. 3927/2008, regarding France) or to start a new phase of the proceedings (Corte Cass., Sez. F, *D’Onorio*, n. 33327/2007, concerning Belgium).⁹²

⁸⁸ See Corte di Cassazione, Sez. VI, *Melina*, Decision No. 17632/2007 of 3 May 2007.

⁸⁹ Corte di Cassazione, Sez. VI, *Hantig*, Decision No. 46296/2008 of 10 December 2008.

⁹⁰ See also Corte di Cassazione, SS. UU., *Ramoci*, Decision No. 4614/2007 of 30 January 2007.

⁹¹ Selvaggi and De Amicis 2005, p. 1814.

⁹² Porchia and Puoti 2013, pp. 441–442.

2.4 *The EU Data Retention Directive*

2.4.1–2.4.2 The implementation of the Data Retention Directive⁹³ has not raised constitutional issues in our country, although the decisions coming from the other countries have been addressed to a certain degree in the Italian literature,⁹⁴ and many have welcomed the decision of the ECJ.⁹⁵ The implementation occurred with some delay by Legislative Decree No. 109/2008. However, before the entry into force of this legislative decree, the Privacy Code already contained Art. 132 on Traffic Data Retention for Other Purposes. After the decision of the ECJ, some colleagues⁹⁶ pointed out the necessity to disapply (due to conflict with Art. 7 and 8 of the Charter of Fundamental Rights,) or to declare unconstitutional Art. 132 of Legislative Decree No. 2003/196 (a.k.a. ‘Data Protection Code’)⁹⁷ in light of Art. 117.

It has been noted that until the entry into force of the Law implementing Directive 2006/24, Italy was among the countries with the provision for the longest retention periods for data traffic, on the basis of Art. 6 of Decree Law No. 144/2005 (converted into Law No. 155/2005) on urgent measures to combat international terrorism, which modified the wording of Art. 132 of the Privacy Code. This latter provision requires that providers retain telephone traffic data for 24 months from the date of the communication to detect and suppress criminal offences, and that electronic communications traffic data, except for the contents of communications, is to be retained by the provider for twelve months from the date of the communication for the same purpose. Article 132(1bis) also allows for data retention of unsuccessful calls for thirty days. As for the modalities of transfer, under Art. 132 (3), data may be acquired from the provider by means of a reasoned order issued by a public prosecutor or at the request of defence counsel, the person under investigation, the injured party or any other private party.⁹⁸

This provision was introduced into our legal system before the entry into force of the Directive.

2.5 *Unpublished or Secret Legislation*

2.5.1 The duty of public entities to publish documents is an important indicator of the true democratic character of a given legal system. In this respect, unpublished

⁹³ Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC, [2006] OJ L 105/54.

⁹⁴ For example, see Passaglia 2010.

⁹⁵ Including Ferro 2014 and Pastena 2014.

⁹⁶ See Vecchio 2014 amongst others.

⁹⁷ For an overview of this code, see: http://www.garanteprivacy.it/home_en/italian-legislation.

⁹⁸ Porchia and Puoti 2013, p. 447.

legislation cannot be deemed to be valid in Italy since publication is considered to be a constitutive element of parliamentary statutes, which are not considered to exist or to be valid until they are published in the ‘*Gazzetta Ufficiale*’ of the Italian Republic. Having said that, the Italian legal order recognises the existence of state secrets, which, as defined by law,⁹⁹ include all acts, documents, facts and activities the disclosure of which may undermine the integrity, independence and defence of the State, its relations with other States, or the functioning of State institutions and bodies of constitutional relevance.¹⁰⁰ The Constitutional Court has ruled that the state secrets privilege is not incompatible with the Constitution, insofar as it is designed to protect national security as per Art. 126 of the Constitution.¹⁰¹ The Penal Code provides that disclosure of information classified as a state secret is punishable by imprisonment of at least five years. More recently, the Constitutional Court stated that the selection of acts, documents and information to be classified as a state secret is a highly discretionary political activity that cannot be subject to judicial review.¹⁰²

2.6 Rights and General Principles of Law in the Context of Market Regulation: Property Rights, Legal Certainty, Non-retroactivity and Proportionality

2.6.1 No specific issues with regard to the standard of protection of property rights, legal certainty, legitimate expectations, non-retroactivity or proportionality have arisen in Italy in relation to EU measures, although in the early days the concern about rights protection in the internal market was the main reason behind the creation of the counter-limits doctrine by the ItCC. Some of these issues have been tackled in relation to the European Convention on Human Rights, which has, for example, increased the standard of protection of property rights by providing for appropriate compensation after expropriation (more specifically, the ItCC invalidated a national parliamentary statute for violation of Art. 1 of Protocol 1 ECHR).

However, an indication that the above principles may play a more prominent role and be subject to a stricter standard of protection in Italy in comparison with the EU system of judicial review may be implied from a study by Gari and Tridimas. Their research shows that Italy’s low success in challenging EU measures may be linked to the fact that Italy has based most of its arguments on violations of general principles, with the following general principles of EC law having been invoked by Italy unsuccessfully: proportionality; statement of reasons; non-discrimination and equal treatment; legitimate expectations and legal certainty; and right to a fair

⁹⁹ Law No. 124 of 3 Aug. 2007, and Law No. 133 of 7 August 2012.

¹⁰⁰ For a general overview see Mastroianni and Arena 2011, pp. 121–123.

¹⁰¹ See ItCC, Order No. 49/1977, Decision No. 82/1977 and Decision No. 86/1977.

¹⁰² ItCC, Decision No. 106/2009.

hearing. The authors have noted that Italy's low success rate (with 8.7% of successful cases) stands in contrast to Spain's higher success rate, which they attribute to arguments that are based on more technical grounds.¹⁰³

2.7 *The ESM Treaty, Austerity Programmes and the Democratic, Rule-of-Law-Based State*

2.7.1–2.7.3 The constitutionality of the Treaty Establishing the European Stability Mechanism (ESM Treaty) has not been questioned in our country, and even the parliamentary debate was very poor. As Pierdominici has pointed out, in both Chambers and in the relevant Parliamentary Committees, the procedure for authorisation by law of the Fiscal Compact was combined with other procedures related to the Treaty amendment in Art. 136(3) TFEU and the ESM Treaty.¹⁰⁴

Some authors have tried to argue that the Fiscal Compact is invalid, but in light of its presumed conflict with the EU Treaties.¹⁰⁵ There has been no constitutional litigation on the validity of these measures and this 'seems to be explained first of all by the way the system of constitutional adjudication is designed'.¹⁰⁶ In other words, because of the absence of something like the *Verfassungsbeschwerde* or the possibility for parliamentary minorities to bring a case before the ItCC, the *Corte Costituzionale* has not had the chance to be involved in this issue. As we will see later in Sect. 3.5 concerning the impact on the welfare state dimension, the ItCC has delivered some decisions in this field.

2.8 *Judicial Review of EU Measures: Access to Justice and the Standard of Review*

2.8.1 Between 1952 and 2013, 1,227 references were sent by Italian judges to the ECJ: 2 from the *Corte Costituzionale*, 119 from the Court of Cassation, 101 from the State Council and 1,005 from other courts or tribunals.¹⁰⁷ According to the study by Tridimas and Gari 'the intra-judicial conversation which takes place via the preliminary ruling procedure pertains in its overwhelming majority to the interpretation of Community law and the compatibility of national action with it rather than the constitutionality of Community action'.¹⁰⁸ As we will see, this

¹⁰³ Tridimas and Gari 2010, pp. 171, 172 et seq. and 152.

¹⁰⁴ Pierdominici 2014.

¹⁰⁵ For instance Guarino 2014.

¹⁰⁶ Fasone 2014.

¹⁰⁷ Court of Justice of the European Union 2015, p. 108.

¹⁰⁸ Tridimas and Gari 2010, p. 139.

conclusion seems confirmed in light of our data. According to the annual report of the ECJ of 2013,¹⁰⁹ between 2006 and 2013 there were 365¹¹⁰ preliminary references from Italian courts. Our search in the ECJ online database identified 306 cases. The overwhelming majority of these preliminary references concerned the interpretation of acts of EU law. In many cases the national judges *de facto* asked the ECJ to decide on the compatibility of a national law with an EU law norm to be interpreted. There was also one case, *Kamberaj*,¹¹¹ where the referring judge tried to obtain an argument to question the established case law of the Constitutional Court (concerning the direct effect of the ECHR, see below for further details) from the ECJ. In only 12 cases did the referring judge question the validity of an EU act, which is consistent with the findings of Tridimas and Gari, according to whom: ‘The ECJ issued few preliminary rulings on the validity of Community measures with a minimum of six in 2001 and a maximum of 12 in 2004’.¹¹² In a nutshell, the ECJ had to deal with the presumed invalidity of EU acts in the following cases: *Fastweb*¹¹³ (public sector); *Torresi*¹¹⁴ (freedom to provide services); *SFIR*¹¹⁵ (sugar industry); *Manzi*¹¹⁶ (transport and environment); *Nunziatina*¹¹⁷ (State aid); *Azienda Agricola Disarò Antonio and Others*¹¹⁸ (milk products sector); *Gowan Comércio Internacional e Serviços*¹¹⁹ (agriculture); *Bavaria and Bavaria Italia*¹²⁰ (registration of geographical indications); *Nuova Agricast*¹²¹ (State aid); *Carp*¹²² (construction products); *Confcooperative Friuli Venezia Giulia and Others*¹²³ (agriculture) and, finally, *RAI*¹²⁴ (State aid). In not one of these cases did the ECJ declare the invalidity of the EU law measure.

2.8.2 A univocal answer to whether there is a lower standard of judicial review by the EU courts than in Italy probably does not exist. In other words, the situation created by a different standard of protection depends on the specific case. Italian scholars are of course aware of some deficiencies in the EU legal system. It is likely

¹⁰⁹ Court of Justice of the European Union 2015, p. 106.

¹¹⁰ References by year: 34 (2006); 43 (2007); 39 (2008); 29 (2009); 49 (2010); 44 (2011); 65 (2012); 62 (2013).

¹¹¹ Case C-571/10 *Kamberaj* [2012] ECLI:EU:C:2012:233.

¹¹² Tridimas and Gari 2010, p. 140.

¹¹³ Case C-19/13 *Fastweb* [2014] ECLI:EU:C:2014:2194.

¹¹⁴ Case C-58/13 *Torresi* [2014] ECLI:EU:C:2014:2088.

¹¹⁵ Case C-187/12 *SFIR e a.* [2013] ECLI:EU:C:2013:737.

¹¹⁶ Case C-537/11 *Manzi e Compagnia Naviera Orchestra* [2014] ECLI:EU:C:2014:19.

¹¹⁷ Case C-138/09 *Todaro Nunziatina & C.* [2010] ECR I-04561.

¹¹⁸ Case C-34/08 *Azienda Agricola Disarò Antonio and Others* [2009] ECR I-04023.

¹¹⁹ Case C-77/09 *Gowan Comércio Internacional e Serviços* [2010] ECR I-13533.

¹²⁰ Case C-343/07 *Bavaria and Bavaria Italia* [2009] ECR I-05491.

¹²¹ Case C-390/06 *Nuova Agricast* [2008] ECR I-02577.

¹²² Case C-80/06 *Carp* [2007] ECR I-04473.

¹²³ Case C-23/07 *Confcooperative Friuli Venezia Giulia and Others* [2008] ECR I-04277.

¹²⁴ Case C-305/07 *RAI* [2008] ECR I-00055.

that the future accession of the EU to the ECHR will contribute towards solving these, and some weaknesses related to the original, purely economic nature of the EU integration process will be challenged (for instance the problematic issue of the application of insufficient review when dealing with the Commission's determinations in competition proceedings).¹²⁵ Scholars have also pointed to the important factor of 'incoherence' in the case law of the ECJ due to an oscillating use of proportionality, depending on whether the measure under review was taken by an EU institution or by a Member State. In the first scenario, the ECJ rarely declares the illegality of the measures, and generally acts as a third party arbiter at best. In contrast, with regard to the Member States, the Court adopts a stricter stance, and often derives additional duties from the interests of integration, declaring a violation of the duty of loyal co-operation set by the Treaties.¹²⁶ However, cases like those treated in the *Kadi* saga¹²⁷ should be taken into account before condemning the EU legal system *in toto* from this point of view.

2.8.3 The ItCC has a limited jurisdiction, since it may adjudicate cases concerning the constitutional legitimacy of laws and enactments having the force of law issued by the State and Regions. This excludes other administrative or regulatory acts. The only acts of the Government that may be subject to the jurisdiction of the Court are its decree laws and legislative decrees (governed respectively by Arts. 77 and 76 of the Italian Constitution). The former are acts issued in case of necessity and urgency and adopted under its own responsibility by the Government. They are provided with the force of law. The latter are the product of the exercise of the delegation of the legislative function on the basis of some principles and criteria established in an enabling act of the Parliament. Article 77 of the Italian Constitution provides that decree laws lose effect from the beginning if they are not transposed into law by Parliament within sixty days of publication. In 1996 the ItCC declared decree laws that reiterated the contents of other decree laws that had not been converted into law by Parliament to be unconstitutional.¹²⁸ After a long period in which the Constitutional Court seemed to not scrutinise the prerequisite of necessity and urgency of decree laws, the ItCC has more recently begun to declare decree laws unconstitutional for a manifest lack of necessity and urgency.¹²⁹

As for regulations (which are from a formal point of view administrative acts), the consistency between these measures and the law is guaranteed by the administrative judges who are empowered to annul them in these cases. In theory, the

¹²⁵ Bernatt 2014.

¹²⁶ Harbo 2010, p. 172, 'Proportionality in the narrow sense – *stricto sensu* – is, according to the claim, applied whenever the court finds it suitable in order to promote the desired outcome. Accordingly, the proportionality analysis conducted by the court is not objective in the sense that it is value-neutral. On the contrary, the analysis is informed by a very strong substantial bias, namely that of promoting European integration'. In Italian, see Galetta 2005.

¹²⁷ Avbelj, Fontanelli and Martinico 2014.

¹²⁸ ItCC, Decision No. 360/1996.

¹²⁹ ItCC, Decision No. 171/2007.

notion of ‘violation of law’ in this case also covers cases of violation of the Constitution, but if the regulation in question has been adopted on the basis of a law, the administrative judge will probably prefer to refer a question of constitutionality to the ItCC.

No statistical data on constitutional and judicial review by Italian courts was available at the time of writing (August 2014).

2.8.4 We discussed the issue of the extent to which the Constitutional Court and Supreme Court review measures that implement EU legislation when dealing with questions 1.3.2 and 1.3.3. After *Internationale Handelsgesellschaft*, the ItCC was the first court to react to the doctrine of absolute primacy by raising the walls of the counter-limits and threatening to exercise an indirect review of EU legislation. As we know, the counter-limits doctrine in Italy was primarily prompted by fundamental rights protection.

2.8.5 We do not think that an unequivocal answer to the question of potential gaps in judicial review exists. It depends on the specific field and on the structure of the balancing in the specific case. Of course, because of the origin of its legal order (law of the common market), the ECJ still sometimes establishes a lower standard, but in other cases the standard employed by the Luxembourg Court might appear higher. This is inherent in the logic of a system in which each level contributes to improving the protection of the multilevel fundamental rights in the other, and is part of the normal dialectic between the levels. On accession of the EU to the ECHR, see Sects. 2.13.1–2.13.2.

2.8.6 In Italy, there is an important judgment of the Constitutional Court that tackles the issue of equal treatment of individuals falling within the scope of EU law and those falling within the scope of the domestic protection of constitutional rights. Notoriously, Law No. 69/2005 implementing the EAW Framework Decision has significantly expanded the grounds of refusal that an Italian Court of Appeal can invoke to deny the execution of a European Arrest Warrant, and it has also rendered mandatory a ground that is deemed to be optional in the EAW Framework Decision. Article 18 of Law No. 65/2009 lists the grounds of refusal and states in letter r) that the surrender of Italian citizens sentenced to custody, or security measures involving deprivation of liberty can be refused but must be subordinated to the execution of the detention order or of the sentence in Italy. The Italian Constitutional Court, with its judgment No. 227 of 2010, found this provision discriminatory in that it did not apply to non-Italian citizens. The limitation provided by Art. 18 was indeed declared incompatible with the equality principle enshrined in Art. 3 of the Italian Constitution, with Arts. 11 and 117 of the Italian Constitution and with the principle of non-discrimination codified in Art. 18 TFEU. Indeed, with regard to the EU principle of non-discrimination, the Court underscored that using the criterion of nationality to determine the applicability of this ground of refusal was disproportionate and, ultimately, contrary to the *ratio* of Art. 4(6) of the EAW Framework Decision.

2.9 *Other Constitutional Rights and Principles*

2.9.1 There are no other significant issues that have arisen in Italy with regard to constitutional rights or the rule of law, apart from those arising from the questionnaire.

2.10 *Common Constitutional Traditions*

2.10.1 Undoubtedly the Charter of Fundamental Rights of the EU represents a good starting point for identifying the rights that form part of the common constitutional traditions. However, we must consider that, according to certain literature, general principles (as inspired by common constitutional traditions) have a scope of application or a content which might be broader than that of the Charter. A good example of this inexact correspondence is represented by the principle of good administration as pointed out by Hofmann and Mihaescu.¹³⁰

This imperfect correspondence between common constitutional traditions and the Charter would also explain why the ECJ might still refer to them in the future, even when fundamental rights are codified by the Charter. In other words, reference to general principles would be a way to use general principles as a Trojan horse to enlarge the scope of EU law by circumventing Art. 51 of the Charter. A confirmation of this reading might be found in the approach followed by the ECJ in some cases where it has adopted the general principles as a starting point for its reasoning, and has recalled only subsequently that the given principle is also codified by the Charter.¹³¹ The written nature of the Charter will of course open the door to a sort of integrative function for the unwritten common constitutional traditions, especially in the future.

2.10.2 The natural instrument for rendering the common constitutional traditions more relevant would be the preliminary ruling mechanism; this would be particularly true if the constitutional courts that have so far refused to send a preliminary reference to the ECJ were to change their practice. However, Member States might have an important role in this field even if they rely on other procedural instruments, for instance if they try to justify apparent violations of EU law in light of the national identity argument. Although ‘national’¹³² (or, according to another terminology ‘constitutional’¹³³) identity and common constitutional traditions are two different concepts, the former might serve as a source of inspiration for the latter.

¹³⁰ Hofmann and Mihaescu 2013.

¹³¹ On this debate, see Safjan 2012.

¹³² Guastaferrero 2012.

¹³³ Saiz Arnaiz and Alcobarro Llivina 2013.

2.11 *Article 53 of the Charter and the Issue of Stricter Constitutional Standards*

2.11.1 There have been no issues in terms of the standard of protection comparable to *Melloni*¹³⁴ in our country (except for EAW issues as set out in previous sections). More problematic is the answer with regard to the ECHR. Our Constitutional Court has sometimes departed from the interpretation given to a particular right of the ECHR by the Strasbourg Court. When doing so, the ItCC has taken into account the case law of the European Court of Human Rights (ECtHR) in order to find a solution to the case, but then has decided not to follow the conclusion reached by the ECtHR, and has justified this decision either in light of the particular national context or in light of the different structure and type of balancing. In other words, like other courts have done elsewhere,¹³⁵ the ItCC has distinguished the type of balancing struck by an international court from the balancing by the Constitutional Court. For instance in *Maggio*,¹³⁶ the ECtHR considered a retroactive legislative act of ‘authentic interpretation’ to be in breach of Art. 6 of the ECHR. In confirming the constitutionality of the same act, the ItCC recalled:

In contrast to the European Court, this Court carries out a systemic and not an isolated assessment of the values affected by the provisions reviewed from time to time, and is therefore required to carry out that balancing operation, which falls to this Court alone.¹³⁷

In Decision No. 223/2014, the Court added that

in the field of fundamental rights, the respect of international obligations can never cause a decrease of protection in comparison with the protection guaranteed by domestic law ... on the other hand, Art. 53 of the ECHR expressly states that the interpretation of the provisions of the Convention may not limit or impair human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party (or under any other agreement to which it is a party): confirming, thus, that the guarantee scheme of the Convention aims to strengthen the protection offered at national level, and never impose limitations, as would claim the a quo judge.¹³⁸

2.12 *Democratic Debate on Constitutional Rights*

2.12.1 While the adoption of the EU Data Retention Directive did not raise significant political debate, the adoption of the EAW Framework Decision was quite

¹³⁴ Case C-399/11 *Melloni* [2013] ECLI:EU:C:2013:107.

¹³⁵ UKSC, *R v. Horncastle and Others* [2009] UKSC 14, para. 11.

¹³⁶ *Maggio and Others v. Italy*, nos. 46286/09, 52851/08, 53727/08, 54486/08 and 56001/08, 31 May 2011.

¹³⁷ ItCC, Decision No. 264/2012.

¹³⁸ ItCC, Decision No. 223/2014.

problematic (see the reconstruction of the political and legal debate surrounding the implementing law No. 65 of 2009 in Sect. 2.3.5.1).

2.12.2–2.12.3 In our view, the accommodation of important constitutional issues should occur at the *political* level both in an *ex ante* phase (trying to strengthen the influence of national parliaments upon their respective Governments voting in the Council) and in an *ex post* phase (namely during the parliamentary debates on the adoption of domestic laws transposing EU directives). While we would not recommend suspension of the application of EU law or a review of EU measures where important constitutional issues have been identified by a number of constitutional courts, we think that within the framework of an infringement proceeding constitutional arguments should be put forward in a Member State's defence and should be taken seriously both by the European Commission and by the European Court of Justice.¹³⁹

2.13 *Experts' Analysis on the Protection of Constitutional Rights in EU Law*

2.13.1–2.13.2 We do not have a clear answer as to concerns about an overall reduction in the standard of protection of constitutional rights and the rule of law in the context of EU law, and this depends on the oscillating case law of the ECJ and on the different reactions of the national constitutional courts. The ECJ has alternated between very 'sensitive' (those for instance based on Art. 4(2) TEU)¹⁴⁰ and 'muscular' decisions (the majority now, we would say). With regard to the second group, the *Melloni* decision has been seen as a return to an 'absolute conception of primacy'.¹⁴¹ This decision is in line with other recent rulings of the ECJ in which the Luxembourg Court has not shown great deference towards the national constitutional courts. We are referring for instance to the *Filipiak*¹⁴² and *Winner Wetten*¹⁴³ cases. This does not seem to be coherent with another recent trend which sees constitutional courts more and more open to Art. 267 TFEU and with another series of decisions which can be traced back to a sort of margin of appreciation doctrine of the ECJ.¹⁴⁴ However, if *Melloni* represents the bad side of the coin, more recently

¹³⁹ A call for a possible *ordinary* use of the identity clause, recommending the use of Art. 4(2) TEU (requiring the EU to respect national identities) both in Member States' defences in the context of infringement proceedings and in national Parliaments' reasoned opinions in the framework of the early warning system, can already be found in Guastaferrero 2012 and 2014.

¹⁴⁰ See Guastaferrero 2012 for relevant case law.

¹⁴¹ As recently suggested by Von Bogdandy and Schill 2011.

¹⁴² Case C-314/08 *Filipiak* [2009] ECR I-11049.

¹⁴³ Case C-409/06 *Winner Wetten* [2010] ECR I-08015.

¹⁴⁴ Sabel and Gerstenberg 2010.

the ECJ has decided cases like *Google*,¹⁴⁵ *Kadi II*¹⁴⁶ and *Digital Rights Ireland*,¹⁴⁷ whereby it acted as a constitutional court that was very keen to protect fundamental rights. This combination of factors impedes us from giving a precise answer to the question, but we do think that only a more co-operative relationship between the ECJ and the national constitutional courts could improve the burning issue of the multilevel protection of fundamental rights. Perhaps the accession of the EU to the ECHR (but this is more difficult now after the delivery of Opinion 2/13¹⁴⁸ of the ECJ) will improve the situation at EU level, although it is difficult to foresee the effective impact that such accession will have, not only in terms of the relationship between the Strasbourg and Luxemburg Courts, but also in terms of the ‘usability’ of the ECHR by national judges where the direct effect of the provisions of the Convention is recognised. In this sense, *Kamberaj* seems to confirm our doubts.¹⁴⁹

2.13.3–2.13.4 An example which is partially related to bringing national constitutional concerns to the ECJ is the *Berlusconi* case.¹⁵⁰ A recent comment on this case concerns the use of comparative arguments by the ECJ. Comparative law and a general openness towards the arguments coming from the national courts could improve the situation of fundamental rights in this field, although in *Berlusconi* the ECJ did not make any explicit reference to the national legal materials which were taken into account.

3 Constitutional Issues in Global Governance

3.1 *Constitutional Rules on International Organisations and the Ratification of Treaties*

3.1.1 There are two fundamental provisions in the Italian Constitution regarding the relationship between international and domestic law. Article 10 provides that ‘[t]he Italian legal system conforms to the generally recognised principles of international law’. Article 11 provides that

Italy rejects war as an instrument of aggression against the freedom of other peoples and as a means for the settlement of international disputes. Italy agrees, on conditions of equality with other States, to the limitations of sovereignty that may be necessary to a world order ensuring peace and justice among the Nations. Italy promotes and encourages international organisations furthering such ends.

¹⁴⁵ Case C-131/12 *Google Spain and Google* [2014] ECLI:EU:C:2014:317.

¹⁴⁶ Joined cases C-584/10 P, C-593/10 P and C-595/10 P *Commission and Others v. Kadi* [2013] ECLI:EU:C:2013:518.

¹⁴⁷ Joined cases C-293/12 and C-594/12 *Digital Rights Ireland and Seitlinger and Others* [2014] ECLI:EU:C:2014:238.

¹⁴⁸ Opinion 2/13 pursuant to Article 218(11) TFEU [2014] ECLI:EU:C:2014:2454.

¹⁴⁹ Case C-571/10 *Kamberaj*, n. 111. See Bianco and Martinico 2014.

¹⁵⁰ Case C-387/02 *Berlusconi* [2005] ECR I-03565.

These two articles provide the first important distinction existing in this field in Italy, the distinction between the general rules of international law and international treaties. As for the former, Art. 10 provides for an automatic procedure of adoption, in the sense that such norms are directly incorporated into the Italian system. In this field considerations similar to those made with regard to EU law are applicable. While Art. 11 does not contain any specific reference to the North Atlantic Treaty Organization or the United Nations (although the members of the Constituent Assembly wrote Art. 11 with the possibility of joining the UN in mind), we could say that it includes some guidelines to be followed in case of limitations of sovereignty. Nevertheless, Art. 11 has been used to cover all of the relevant international memberships of the Italian Republic. Since this approach has worked so far, we do not think that it is necessary to introduce specific references to any specific international organisations in Art. 11. The intervention of the national legislature is not required for all treaties, since Art. 80 provides for the necessity of legislation enabling the ratification only with reference to some particular treaties.¹⁵¹ The procedure for ratification is also governed by Art. 87, which empowers the President of the Republic to ratify international treaties.¹⁵² When the intervention of Parliament is required, it intervenes with a normal legislative statute. According to the majority of scholars, this confers a primary force in the national hierarchy of law to norms derived from international treaties.

3.1.2 Apart from the reforms already addressed when dealing with EU law (Art. 117 of the Constitution), there have been no other constitutional reforms concerning the ‘external dimension’ of the Constitution.

3.1.3 Reforms relating to international law and global governance have not been at the heart of the constitutional reform agenda. This could be partly explained by the elasticity of Art. 11 and by the fact that these issues have been covered by primary norms (this is the case e.g. as regards international development co-operation policies).

3.1.4 So far, Art. 11 has proven to be broad enough to guarantee the participation of the Italian Republic in the international context. Moreover, all of the recent attempts at amending the Italian Constitution have renounced dealing with the first part of the text. There has been a kind of silent agreement about the necessity to avoid reforms concerning the very first part of the Constitution (which codifies, so

¹⁵¹ Article 80 of the Constitution: ‘Parliament shall authorise by law the ratification of such international treaties as have a political nature, require arbitration or a legal settlement, entail change of borders, spending or new legislation.’

¹⁵² Article 87 of the Constitution:

‘The President shall: ...

- ratify international treaties which have, where required, been authorised by Parliament.

Article 72 Italian Constitution, provides that: ‘The ordinary procedure for consideration and direct approval by the House is always followed in the case of ... ratification of international treaties’

to say, the axiological part of the Constitution). As written in Sect. 3.1.3, we do not think it is necessary to amend Art. 11.

The Italian Constitution is based on an evident parallelism between the values inspiring the domestic activity of the Italian Republic and those inspiring the external dimension. This is because of the axiological (desired) continuity that exists between the domestic and international levels, and because of the efforts made to construct a better society, even at the international level. This double orientation (internal and external) of the constitutional project was crystal clear to the members of the Italian Constituent Assembly. There are, for instance, at least three reasons for the codification of the pacifist principle in the Italian Constitution. The first is connected to political realism: Italy could not be considered a military power, so the constitutionalisation of an imperialistic foreign policy was not an option.¹⁵³ The second reason was, in a manner of speaking, ethical, and finds expression in the words used, among others, by Don Luigi Sturzo, who defined war as 'immoral, illegitimate and prohibited'.¹⁵⁴ But the main reason was the intent 'to transfer, to the international level, those principles of freedom, equality and substantive respect for the human person' that were to be affirmed and implemented in the domestic order.¹⁵⁵

In light of the above point on parallelism of values, one new challenge for constitutional lawyers, which has been explored in greater detail elsewhere,¹⁵⁶ may be how to continue the existence of an axiological continuity between the principles and values that govern the life of a given polity within its boundaries and those that should characterise the international community, while retaining constitutional values in efforts to construct a better society, even at the international level. In Italian scholarship, a number of scholars also speak about the 'weak' or 'post-modern' constitutionalism typical of the era of globalisation as something dispersed and disconnected from popular initiative rather than being entirely lost.¹⁵⁷

While no immediate solutions are available, elsewhere¹⁵⁸ we have also noted that the idea of constitutionalism propounded by leading pluralists such as Krisch¹⁵⁹ does not readily correspond to what constitutional lawyers mean by the same word. In international law, 'constitutionalism may be conceived as an autonomous concept of international law rather than a concept derived by analogy from the domestic conception of constitutionalism'.¹⁶⁰ The problem is that some scholars in this field have too heavily emphasised only the connection between

¹⁵³ See Nenni 1946, p. 104.

¹⁵⁴ Sturzo 1954, p. 144.

¹⁵⁵ Cassese 1980, p. 519.

¹⁵⁶ Martinico 2014.

¹⁵⁷ Carrozza 2007, p. 172.

¹⁵⁸ Martinico 2014.

¹⁵⁹ Krisch 2010.

¹⁶⁰ Deplano 2013, p. 68.

hierarchy and constitutionalism. This may be explained by taking into account the origin of the debate at the international level, where constitutionalism has been seen as an antidote to the issue of international fragmentation.

3.2 *The Position of International Law in National Law*

3.2.1–3.2.2 Italy is usually seen as a country characterised by a strong dualist tradition, according to which the international and national legal systems are conceived of as autonomous.

As for international treaties, it is necessary for there to be a national act transforming the international act into national law. Another important feature of the Italian legal order is the fact that, unlike in other countries like Portugal and Spain, no specific status is accorded to treaties devoted to human rights. However, as we will show below, dualism has partly been eroded by the importance acquired by some human rights treaties (above all the European Convention on Human Rights) in the national case law of the ItCC. If one looks at the Italian Constitution, one can perceive a sort of tension between the constitutional openness of the Italian Constitution (see above) and the choice in favour of the dualist paradigm. However, the ItCC has only recently relied on external sources (primarily the ECHR and EU law) to review the constitutionality of domestic norms. In terms of protection of fundamental rights, the ECHR has been by far the international agreement with the most evident impact on our national system, which has also created tensions and disagreements between the *Corte Costituzionale* and the ECtHR. If this openness (understood as friendliness towards the international community) gives us the idea of the axiological continuity between the domestic and the external dimension, the choice made in favour of dualism seems to emphasise, on the contrary, the discontinuity and impermeability between the internal and the external spheres. Further developments (especially concerning the application of EU law and of the ECHR) have radically questioned the validity of the traditional dualist category. With regard to EU law, the position of the ItCC is emblematic of a broader trend. With regard to the ECHR, it is necessary to briefly recall its case law to appreciate the departure from the original dualism. As regards the ECHR, the original position of the *Consulta* reflected a dualist conception of the relationship between the ECHR and domestic law. Since the entry of the ECHR into the Italian legal order was enacted by an ordinary law (Law No. 848/1955), for a long time and with some exceptions,¹⁶¹ the ItCC considered the ECHR as a source with primary force and the consequent application of the *lex posterior derogat legi priori* rule in case of conflict between the law regarding the ECHR and another Italian norm. This was the case until the 1990s when the *Corte Costituzionale* started to change its

¹⁶¹ See, for instance, ItCC, Decision No. 10/1993, where the *Consulta* described the ECHR as an ‘atypical source of law’.

approach and began to make a distinction between the content and the form of the laws giving effect to international treaties.¹⁶² In other words, since from a material point of view the content of the ECHR aims at protecting rights codified in the Italian Constitution, it seemed necessary to readjust the previous case law. Another turning point was the reform of 2001 to adopt a new version of Art. 117(1) of the Constitution. Indeed, also on the basis of this new provision, as the literature has already stressed,¹⁶³ the Italian ‘common’ judges started to disapply domestic norms that conflicted with the ECHR.¹⁶⁴ Thus, they extended a mechanism accepted as a consequence of the *Simmenthal* judgment,¹⁶⁵ and aimed at solving the conflicts occurring between national norms and EU law provisions provided with direct effect. This practice induced the ItCC to give two key judgments in 2007.¹⁶⁶

Without going into details,¹⁶⁷ the main content of these two decisions can be summarised as follows:

- (a) The ECHR has a supra-legislative value (i.e. its normative ranking is halfway between statutes and constitutional norms);
- (b) In some cases, the ECHR can serve as an ‘interposed parameter’ for reviewing the constitutionality of primary laws, since the conflict between them and the ECHR can result in an indirect violation of the Constitution (Art. 117);
- (c) This (b) does not imply that the ECHR has a constitutional value; on the contrary, the ECHR itself has to respect the Constitution;
- (d) The ECHR cannot be treated domestically in the same way as EU law, as we will see below;
- (e) The constitutional preferential treatment accorded to the ECHR implies the necessity to interpret national law in light of ECHR provisions.

More recently, the ItCC has confirmed the preferential treatment to be acknowledged to the case law of the ECtHR.¹⁶⁸ Another indicator of the importance of the case law of the ECtHR in the national legal system is the recent Decision No. 113/2011 of the Constitutional Court.¹⁶⁹ In this judgment the *Consulta* declared Art. 630 c. 1 (a) of the Code of Criminal Procedure to be unconstitutional to the extent that it did not allow the re-opening or review of a case decided for good (and thus with a ruling covered by *res iudicata*), which was subsequently found to be in breach of the Convention.

¹⁶² ItCC, Decision No. 388/1999.

¹⁶³ Biondi Dal Monte and Fontanelli 2008.

¹⁶⁴ See *Ibid.*, p. 891.

¹⁶⁵ Case 106/77 *Simmenthal* [1978] ECR 00629.

¹⁶⁶ ItCC, Decisions No. 348 and No. 349/2007.

¹⁶⁷ For a detailed analysis of these decisions, see Biondi Dal Monte and Fontanelli 2008, and Pollicino 2008.

¹⁶⁸ See ItCC Decisions No. 311/2009, No. 317/2009 and No. 80/2011 amongst others. However, disagreement has not been missing. See for instance ItCC, Decision No. 49/2015.

¹⁶⁹ ItCC, Decision No. 113/2011.

Nevertheless, although EU law and the ECHR have partly questioned the assumptions of the dualist approach, dualism is still formally the premise of the reasoning of the ItCC in many cases. Even the counter-limits doctrine is based on a dualist fiction. In other words, the fact that, in the case of violation of the counter-limits, the ItCC would exercise its jurisdiction over the national acts giving effect to the EU treaties in our legal order, is an evident legacy of the dualist approach.

3.3 *Democratic Control*

3.3.1 Apart from what has been written in the section addressing EU law, as recalled above, the intervention of the national legislature is not required for all treaties, since Art. 80 provides for the necessity of legislation enabling ratification only with reference to particular treaties. As we saw above, the procedure for ratification is also governed by Art. 87, which empowers the President of the Republic to ratify international treaties. With regard to international organisations that differ from the EU, the monitoring functions performed by the national chambers have been included in their rules of procedure according to the cascade system of norms recalled above. An example is given by the provisions concerning the examination and possibly the adoption of resolutions on resolutions and recommendations adopted by international assemblies in which the national delegations of the Chamber of Deputies (Art. 125 r .C) or the Senate (Art. 143 r. S.) participate (for instance the NATO, Council of Europe and OSCE assemblies). Another important provision concerns the examination of the judgments of the European Court of Human Rights and of their national follow-up. In 2004, the Chamber set up a Permanent Observatory of judgments of the ECtHR. There is also a duty of the Government to transmit the annual report on the execution of the decisions of the ECtHR against Italy to both Houses.¹⁷⁰

3.3.2 Article 75 of the Constitution prohibits referendums on laws ‘authorizing the ratification of international treaties’. Apart from what we have already recalled with regard to EU law, the only way to have a referendum on a treaty would be to cover the authorisation of the ratification with a constitutional statute which would permit a referendum according to Art. 138. We already recalled what the ItCC said in *Frontini*, but one could argue that the opinion expressed in that judgment should be limited to EU law due to its particular nature and impact on Italian constitutional law.

¹⁷⁰ For more info: <http://leg16.camera.it/494?categoria=084>;
<http://www.senato.it/static/bgt/listadocumenti/17/1/1323/0/index.html?static=true>.

3.4 Judicial Review

3.4.1. According to Italian scholars, the general rules of international law (which correspond to customary international law) belong to the constitutional level.¹⁷¹ According to some scholars, the international customary law that existed before the entry into force of the Italian Constitution could prevail over the constitutional provisions (because of the application of the chronological criterion), but this does not apply with regard to the principles belonging to the untouchable core recalled in Art. 139 of the Constitution,¹⁷² as the ItCC has seemed to confirm in its recent case law.¹⁷³

Apart from what we have already written about EU law, another interesting case is the ECHR in light of the decisions of 2007 that have already been mentioned. In those decisions, the ItCC specified that the ECHR is considered to be a particular form of public international law. From this, the Court inferred that the ‘constitutional tolerance’ shown by the Italian legal order towards the ECHR is weaker than that shown towards EU law. While ‘counter-limits’ represent, in the ItCC’s case law, a selected version of the domestic constitutional principles (this implies the possibility to decide constitutional conflicts in favour of EU law provisions in some cases), in the case of the ECHR, the Italian Court seems to be less generous. It apparently asks the ECHR to respect the entire Constitution as such:

The need for a constitutionality test on the Convention norm excludes the possibility of having a limited set of fundamental rights that could serve as a counter-limit; indeed, every norm of the Constitution shall be respected by the international norm challenged.¹⁷⁴

In Judgment No. 230 of 2012, the ItCC emphasised the specific features of the domestic legal order vis-à-vis those characterising the system of the Convention,¹⁷⁵ and thus pointed to the possibility of episodic divergences.

According to the ItCC, an important distinction still exists between EU law and the ECHR, and this difference provided the basis of its reasoning:

This is because, according to the constitutional judges, the ECHR legal system has distinct structural and functional legal features as compared to the European legal order. According to the Italian Constitutional Court, the ECHR is a multilateral international public law Treaty which does not entail and cannot entail any limitation on sovereignty in the terms provided by Article 11 of the Constitution.¹⁷⁶

¹⁷¹ De Vergottini 2004, p. 32.

¹⁷² For an overview of the debate, see Cassese 1975, p. 502. According to Quadri, the automatic procedure shall be applied to the international treaties but this remains a minority view. This theory was based on the fact that one of the general rules of international law is the principle *pacta sunt servanda*. Quadri 1989, p. 64.

¹⁷³ ItCC, Decision No. 238/2014.

¹⁷⁴ Biondi Dal Monte and Fontanelli 2008, p. 915.

¹⁷⁵ Ruggeri 2012.

¹⁷⁶ Pollicino 2008, pp. 374–375.

This explains the different treatment reserved for the ECHR both in terms of disapplication and in terms of the necessity to be consistent with the whole Constitution rather than with the counter-limits alone.

3.5 *The Social Welfare Dimension of the Constitution*

3.5.1–3.5.2 Italy has never been in the position to declare a bailout and no issue has arisen with regard to IMF or World Bank conditionality. So far the most important factors to impact the constitutional welfare dimension have been the EU anti-crisis measures.

With regard to the anti-crisis measures taken at EU level, in Italy, constitutional lawyers¹⁷⁷ have been more interested in the impact of the anti-crisis measures on the sustainability of the welfare system, on the protection of social rights and on the effect of such measures on the relationship between the centre and the periphery.

In order to understand the case law of the ItCC, it is necessary to make a premise. As Fasone has explained,

[t]he Italian Constitutional Court has not had the opportunity to judge directly on the constitutionality of EU and international Euro-crisis law. Nor was the constitutional review of the international Euro-crisis law measures really feasible.¹⁷⁸ ... The only way these agreements can become relevant within the Italian system of constitutional adjudication would be if the Constitutional Court is willing to recognize them the rank of interposed norm between ordinary legislation and the Constitution – Art. 117.1 Const.¹⁷⁹

It must also be recalled that the constitutional balanced budget rule was not in full effect until 1 January 2014, and thus could not form a standard for constitutional review of legislation.¹⁸⁰

The only relevant interventions of the ItCC in this field have regarded (primarily at least) the development of the Italian regional state. The Italian government introduced several cuts, and some of these measures have also impacted on the regional structures.

This discipline has been questioned before the ItCC, which, in Decision No. 151/2012¹⁸¹ rejected the very centralising interpretation that the state had given of the measures in Decree Law No. 78/2010. These are just a few examples that show the risk of centralisation in the Italian system induced by the EU anti-crisis measures.¹⁸² As Pierdominici has noted, '[i]f one can be tempted to read this last case as the symbol of a strong judicial opposition of the Constitutional Court against

¹⁷⁷ Gambino and Nocito 2012.

¹⁷⁸ See however ItCC, Decision No. 88/2013.

¹⁷⁹ Fasone 2014.

¹⁸⁰ Ibid.

¹⁸¹ ItCC, Decision No. 151/2012.

¹⁸² See also Falcon 2012, p. 11.

national legislative reforms prompted by the financial crisis, a comprehensive reading tells us, in fact, the opposite'.¹⁸³

There are some interesting decisions concerning the protection of social rights. In Decision No. 248/2011 the ItCC deemed the right of medical assistance to be financially conditional, since its protection depends on the available resources. Another important decision is Decision No. 10/2010 concerning the so-called 'social card', a bonus accorded to guarantee the primary needs of the most disadvantaged members of the population. The ItCC upheld the constitutionality of the decree law and recognised that the intervention of the state was necessary to protect the value of human dignity in a uniform manner in light of Arts. 3, 38 and 117(2) of the Constitution, due to the extraordinary, exceptional and urgent situation following the international economic and financial crisis that in 2008 and 2009 also hit our country. In other words, as Fasone has pointed out, '[i]n a time of scarce resources even social rights must be preferably protected at State level [so] as to set [a] common standard and to decide at the centre how to use those resources'.¹⁸⁴

In Decision No. 80/2010, the Constitutional Court declared unconstitutional a provision of the State Financial Act of 2008 impeding public schools from contracting teachers for physically impaired students due to budgetary reasons. In another decision (No. 264/2012) about the calculation of pensions of cross-border workers, the ItCC acknowledged the possibility to limit social rights. According to the Court,

[t]he 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, in accordance also with the requirement laid down by Art. 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.¹⁸⁵

Another important decision regards the so-called 'golden pensions'. In this case, the Court dealt with some decree laws aimed at collecting resources from the pensions or the incomes of the most advantaged segments of the population. The Court declared unconstitutional Decree Law No. 78/2010 concerning blockage of the salary adjustment mechanism for magistrates. On that occasion, the 'Court considered the reduction of the allowance as a form of taxation and declared them in contrast with the Constitution for the violation of the principle of equality (Art. 3) and of Art. 53, about the progressive nature of the tax system'.¹⁸⁶

¹⁸³ Pierdominici 2014.

¹⁸⁴ Fasone 2014.

¹⁸⁵ ItCC, Decision No. 264/2012, para. 5.3.

¹⁸⁶ ItCC, Decision No. 223/2012, and reported by Fasone 2014.

In Decision No. 310/2013, which departed from its previous decision,¹⁸⁷ the ItCC dealt with Decree Law No. 78/2010, in a case concerning blockage of the salary adjustment mechanism for non-contracted workers in the public sector. The Court concluded that this blockage was a reasonable sacrifice, necessary in a phase of economic crisis. Fasone has found it interesting that the challenge of unconstitutionality was rejected by using *ad adiuvandum* (although not as the main ground for the decision), the new Art. 81 of the Constitution as amended in 2012 and Council Directive 2011/85/EU on requirements for budgetary frameworks of the Member States.¹⁸⁸

3.6 *Constitutional Rights and Values in Selected Areas of Global Governance*

3.6.1 Italian scholars have questioned the compatibility between some anti-terrorist provisions and our standards of protection of fundamental rights, especially when looking at issues connected with the principle of fair trial. For instance, as Porchia and Puoti have pointed out:

Italian scholars consider the issue of the legal proof of the terrorist purposes of an association, as a fundamental challenge for the interpreter in the struggle against terrorism, while ensuring the protection of fundamental rights of the defendants. The proof that a certain activity is pursued for terrorist purposes and not for other reasons (like belligerent actions, violent actions for criminal purposes etc.) is very difficult to achieve in a way that can be used as an admissible evidence in court.¹⁸⁹

An interesting case concerning the burning issue of extraordinary renditions is the famous *Abu Omar* case which also led the ItCC to give an important decision¹⁹⁰ on state secrets, in which it acknowledged that the Italian ‘Prime Minister’ has a broad discretionary power to invoke the state secrets privilege in cases where Governmental agents are involved in extraordinary renditions. The ItCC also stated in that case ‘that any review of the substantive merits of that classification [of the relevant information] was a matter for Parliament and not the courts’.¹⁹¹ The referring court thus ordered the release of five members of the Italian Military Intelligence Agency involved in the kidnapping of Mr. Abu Omar. The ItCC came back to the issue of state secrets in 2014, and confirmed the essence of the decision given in 2009.¹⁹² These decisions are part of a judicial trend which has been

¹⁸⁷ Fasone 2014.

¹⁸⁸ Fasone 2014.

¹⁸⁹ Porchia and Puoti 2013, p. 427.

¹⁹⁰ ItCC, Decision No. 106/2009.

¹⁹¹ From the website of the ItCC: http://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S2009106_Amirante_Quaranta_en.pdf.

¹⁹² ItCC, Decision No. 24/2014.

described as ‘dangerous’¹⁹³ since it ‘keeps the balance between security and protection of constitutional fundamental rights, leaning in favour of the needs of the former, invoking the State secret in order to hide criminal conducts of Governmental agents’.¹⁹⁴

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¹⁹³ Porchia and Puoti 2013, p. 427.

¹⁹⁴ Ibid.

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