

A world map is visible in the background, rendered in a dark red color. The map shows the outlines of continents and countries. The text is overlaid on the map.

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Italy

DEVELOPMENTS IN ITALIAN CONSTITUTIONAL LAW

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INTRODUCTION

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

It may be worth mentioning that in 2016 a far-reaching constitutional reform law was passed by the Parliament to transform its second house (*Senato*) into a body representing the Regions within national lawmaking procedures and at the same time expand national legislative competences. This reform was rejected in a constitutional referendum held on 4.12.2016. In the meantime, a new electoral law concerning the first house of the Parliament (*Camera dei deputati*) had already been passed (in 2015). The ICC was just marginally involved in these two highly controversial topics. First, the constitutional referendum that called upon the Court to rule that a consumers' association had no standing to directly challenge the acts summoning the referendum.¹ Second, the important ruling on

the law for the election of the Chamber of deputies, which was initially scheduled for 4.10.2016, was delayed to 2017 (and subsequently announced on 25.1.2017).

THE CONSTITUTION AND THE COURT

The Italian Constitution, entered into force on the 1st January 1948, provides the basic provisions regulating fundamental rights and constitutional institutions. It was adopted by the popularly elected Constituent Assembly that led Italy out of the constitutional transition from the pre-war fascist regime to a fully-fledged democratic state. It is a rigid constitution,² as it possesses higher rank than ordinary legislation. Constitutional provisions may not be amended or derogated by ordinary legislation. Moreover, a special procedure for constitutional amendment is provided by the Constitution in order to ensure that any amendment to it is the outcome of a meditated decision to be adopted with a relatively broad political and electoral consensus. The ICC is part of the safeguards of the 1948 rigid Constitution. Its establishment was one of the most impacting institutional innovations of the 1948 Republican Constitution. Its nature and function were immediately revealed by the collocation of constitutional provisions regulating its functioning under the section entitled "Guarantees of the Constitution".

However, the Constitution provided only a regulatory sketch of the Institution's main tasks and duties. It took a long time for the Court to be equipped with the regulation that

¹ C Cost no. 256 of 2016.

² Albert Venn Dicey, *Flexible and Rigid Constitution* (Clarendon Press 1901) 124–213.

the Parliament was in charge of adopting. Only eight years after the entry into force of the Republican Constitution, the ICC was eventually able to function and to deliver its first judgment. The ICC is composed of fifteen judges, appointed through three different channels. Five of them are elected by the Parliament, five are appointed by the President of the Republic, and five are elected by members of the three superior tribunals (Supreme Court, Council of State, and Court of Auditors). Eligibility criteria are designed to guarantee a high level of independence and technical expertise. Each judge is appointed for a nine-year term of office, a relatively long term for constitutionally relevant offices in the Italian legal system. The term is not renewable nor extensible. The ICC is an essentially collegial organ, as no dissenting or concurring opinions are admitted and decisions are taken collectively.

The access to the ICC is characterized by a mixed system. On the one hand, Regions and the central Government have a direct access to the Court. The latter is entitled to contest regional legislative acts alleged to be incompatible with the Constitution while the former are entitled to contest national legislative acts alleged to be prejudicial to their own legislative competence as guaranteed by the Constitution. On the other hand, the “general” system of access to the Court is an indirect one, where questions of constitutionality may only be raised by judges within the framework of a controversy where the legislative act deemed unconstitutional needs to be applied. Additionally, referring judges are called to play the role of filters, as they may refer a question of constitutionality only if their doubt on the constitutionality of the given act is “not manifestly unfounded” and the question of constitutionality affects a norm to be applied in the case at bar. In this sense, common judges, given their essential role in triggering the Court’s jurisdiction, have been depicted as “gatekeepers”³ of constitutional adjudication.

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

A declaration of unconstitutionality may affect only a portion of a law that is deemed incompatible with the Constitution. This may happen also with a legislative vacuum, thus calling the Court to exercise a creative function that is far from the Kelsenian idea of the “negative legislator”.⁴ This may only happen when the judicial addition is imposed in only one admissible direction from the Constitution, leaving no room for political discretion. When the Court rejects a constitutional challenge, it only declares the referred question “unfounded” but does not prevent other judges from raising the same question (even at a different stage of the same proceeding), nor the same referring judge from raising a different question. Additionally, the Court may substantively modulate the effects of its decision by adopting interpretative judgements. These decisions confer a crucial role to interpretation and the related distinction between provisions and norms.⁵

With interpretative judgement, the ICC may strike down interpretation as unconstitutional while keeping parliamentary texts integer.

Another access to the judicial review of the ICC is the direct method of judicial review to settle controversies arising between the Regions and the State. In these cases, the Government can appeal directly against a regional law, and a Region can appeal directly against a national law or a law enacted by another Region. Even though the incidental access is generally considered the one characterizing the Italian judicial review system, direct review has played an increasingly important role among the Court’s tasks, and became the larger part of the workload since the reform of regionalism that occurred in 2001.

A direct access to the Court is also provided within the category of cases arising from conflicts of attributions, where the Court is called to settle disputes among State bodies. These cases are decided by defining which body is entitled a certain power.

Paradoxically, a description of constitutional adjudication in Italy would be only partial if limited to the activity of ICC and domestic organs. In the dualistic perspective that traditionally praised the Italian legal system, the ICC bears, in principle, exclusive authority of reviewing legislation. Nonetheless, the ICC needs to cope with the authority of other judicial bodies endowed with the power of adjudication. In particular, the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR) have been assigned with increasingly important tasks that need to be coordinated with national constitutional adjudication. Tasks and functions of the three Courts do not overlap; however, they seem to develop a composite constitutional system.⁶

In particular, Italy’s membership in the EU has, over time, affected the Italian constitutional system in a very significant manner.

³ Piero Calamandrei, “Il Procedimento per la Dichiarazione di Illegittimità Costituzionale”, *Opere giuridiche*, vol III (Morano 1956) 372.

⁴ Hans Kelsen, *General Theory of Law and State* (The Lawbook Exchange, Ltd 1945) 268–69.

⁵ Vezio Crisafulli, *Lezioni di diritto costituzionale: 1* (2 edizione, CEDAM 1970) 41.

⁶ Leonard FM Besselink, *A Composite European Constitution* (Europa Law Pub 2007)

The ICC's mind-set toward this phenomenon has dramatically changed over time. From a reluctant approach, the Italian Court transformed itself into one of the most European friendly national constitutional courts on an ongoing "European Journey"⁷ that experienced some significant developments during 2016. The next section focuses on these developments.

DEVELOPMENTS AND CONTROVERSIES IN 2016

In the last ten years,⁸ the ICC has actively engaged the supranational dimension of constitutional law and rights. The ICC enforced international law and the ECHR, as well as EU law. In a few controversial cases, it also upheld the complex balance of substantive and institutional values underpinning the Italian Constitution against some rulings of the ECtHR⁹ and ICJ.¹⁰ Last year, poignant examples were given for both attitudes, regarding EU law and the CJEU.

Judgment no. 187 is (for now) the epilogue of a lengthy dispute concerning the compatibility with an EU directive on fixed-term work of the extensive use of temporary employment in schools, as authorized by Italian law.¹¹ Considering that the relevant EU provisions had no direct effect and ought to be enforced through the constitutional scrutiny of national law, the ICC¹² voiced widespread concerns of lower courts and joined one of them in requesting a preliminary ruling from the CJEU to clarify the scope of the directive. With its *Mascolo* judgment,¹³ the CJEU held that, pending the completion of selection procedures for the recruitment of tenured staff, the renewal of fixed-term employment

contracts could not be allowed indefinitely and that fixed-term employees were entitled to compensation for any damage suffered because of such renewal. Following this ruling, and before the constitutional proceedings reached their conclusion, in yet another school reform,¹⁴ the Parliament passed several provisions on the maximum duration of fixed-term employment contracts in schools and on compensation for past temporary staff. Therefore, judgment no. 187 concluded that EU law had been violated, but that the resulting abuse had been subsequently "nullified". Although it may be disputed whether the afforded compensation is enough in every specific case, this sequence of events is a significant instance of cooperation amongst courts and with the legislator (albeit somewhat grudgingly). It is also an example of the ICC operating in its style and capacity of "networking facilitator".¹⁵

The so-called *Taricco* case, decided on 23.11.2016, with a ruling published on 26.01.2017,¹⁶ is another case of preliminary reference to the CJEU, with remarkably less irenic and harmonic overtones. In its 2015 *Taricco* judgment,¹⁷ the Grand Chamber of the CJEU faced a question concerning criminal offences for VAT evasion in Italy. These offences are often perpetrated through elaborate organizations and operations. Consequently, investigations require a long time and prosecution may become time-barred under the relevant provisions of the Italian Criminal Code, which had been modified by the legislator with a significant reduction of the limitation period. Based upon the rather broad phrasing of Article 325 TFEU, the CJEU held that national time limitations should neither prevent effective and dissuasive penalties "in a significant number of

cases of serious fraud affecting EU financial interests", nor provide for longer periods in respect of frauds affecting national financial interests, than in respect of those affecting EU financial interests. The CJEU also added—somewhat unexpectedly—that national courts should verify by themselves if that was the case and, if need be, disapply the domestic provisions regulating the maximum extension of the limitation period in order to allow the effective prosecution of the alleged crimes. According to the CJEU, this would not infringe Article 49 of the EU Charter of Fundamental Rights (principles of legality and proportionality of criminal offences and penalties) nor Article 7 ECHR (no punishment without law) with regard to pending criminal proceedings. On the one hand, the alleged crimes constituted, at the time when they were committed, the same offence and were punishable by the same penalties. On the other hand, the CJEU considered the statute of limitation as a procedural institution. In the CJEU's view, the extension of the limitation period and its immediate application are not prohibited when the offences have never become subject to limitation.

In Italy, some courts perceived a complex constitutional problem concerning Article 25(II) of the Italian Constitution ("No punishment may be inflicted except by virtue of a law in force at the time the offence was committed"), with at least two facets: the CJEU had called for an *ex post facto* increase of criminal liability, as, according to a well-established Italian legal tradition, the limitation period is part and parcel of the substantive discipline of criminal offences (it is the temporal dimension of criminal liability); and the possibility of disapplying the relevant provisions was not only unfore-

⁷ Paolo Barile, 'Il Cammino Comunitario Della Corte' [1977] *Giurisprudenza Costituzionale* 2406.

⁸ Since C Cost nos. 348 and 349 of 2007.

⁹ C Cost no. 264 of 2012.

¹⁰ C Cost no. 238 of 2014.

¹¹ Council Directive 1999/70/CE of 28 June 1999 concerning the Framework Agreement on fixed-term work concluded by CES, UNICE, and CEEP [1999] OJ L155/43.

¹² C Cost no. 207 of 2013.

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

¹⁴ Legge 13 luglio 2015, n. 107, (Riforma del sistema nazionale di istruzione e formazione e delega per il riordino delle disposizioni legislative vigenti).

¹⁵ Vittoria Barsotti, Paolo G Carrozza, Marta Cartabia, and Andrea Simoncini, *Italian Constitutional Justice in Global Context* (OUP USA 2016).

¹⁶ C Cost no. 24 of 2017.

¹⁷ Case C-105/14 *Taricco and Others* (2015) EU:C:2015:363.

seen and unforeseeable but also subject to exceedingly vague conditions, incompatible with the certainty required in criminal law. Therefore, questions were addressed at the ICC, which in its turn asked the CJEU to take into greater account the national principles. The ICC asked whether the disapplication is mandatory, even when its effect would consist of an infringement on the supreme principles of the national constitutional identity of a Member State.

In its preliminary reference, the ICC makes some effort to frame national constitutional concerns within EU legal categories (e.g. referencing to Article 4 TEU, and Articles 49 and 53 of the Nice Charter). Nevertheless, by emphatically invoking supreme constitutional principles, the ICC shows itself ready to take a bold stance: activating the so-called counter limits (limits to sovereignty limitations acceptable due to EU law) to interdict the effects of the *Taricco* judgment on national courts. Much will depend on the answer that the CJEU has been asked to provide urgently.

MAJOR CASES¹⁸

Separation of Powers

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

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

The ICC concluded that the decision whether to start negotiations is reserved to executive discretion. The Government can be held accountable for it as a political matter before Parliament, but not before the courts. Therefore, the matter was considered primarily under the separation of powers perspective,

though the decision had a significant indirect impact in the field of freedom of religion.

Rights and Freedoms

Judgment No. 63 of 2016: “Anti-Mosques” Regional Laws

In this case, the Court considered a direct application from the President of the Council of Ministers questioning the constitutionality of portions of a Lombardy regional law modifying regional principles for planning facilities for religious services. The claimant alleged that the legislation violated the equal religious freedom of all religious creeds and exceeded the legislative competences of the Region. The Court struck down those portions of the contested provisions that made distinctions based on the relative size of the denomination or the presence or absence of a formalized pact between the State and the denomination. The Court also struck down provisions requiring newly-constructed places of worship to install video surveillance systems as exceeding regional competences, since the pursuit of safety, public order, and peaceful coexistence is allocated exclusively to the State under the Constitution.

Judgment No. 84 of 2016: Scientific Research on Embryos

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

Judgment No. 213 of 2016: Health-Care Benefits in More Uxorio Cohabitation

In this case, the Court considered a referral order questioning the compatibility with the

Constitution of the exclusion from certain social security benefits of non-married partners. The provisions at issue entitled spouses and close relatives of severely disabled people with parental leave. The referral order claimed that the law was unconstitutional as long as it did not include *more uxorio* partners among the beneficiaries of the right to parental leave. The ICC struck down the omission of the *more uxorio* partner from beneficiaries as unconstitutional, thus extending the parental leave right recognition to them. The Court affirmed that even though *more uxorio* cohabitation and marriage are not fully equivalent, it is unreasonable in the case at hand to exclude the former from the beneficiaries of parental leave rights, as disabled persons have the same needs and right to health care, whichever is their marital status.

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

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

¹⁸ The ICC provides some official full-text translations of its decisions. These translations are available at the ICC official website: <http://www.cortecostituzionale.it/actionJudgment.do>. The following summaries rely on official translations, where available.

uum, and that the legal position of the former partner may be adequately protected through these legal arrangements, which the referring judge failed to consider.

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

In this case, the ICC declared unconstitutional several provisions of the civil code, insofar as they did not allow the parents, by mutual consent, to attribute to their children at the moment of birth the maternal as well as the paternal last name. The Court held that the voided legal provisions violated the child's constitutional right to his or her own personal identity and the constitutional right to equal dignity between parents and spouses. Moreover, the ICC relied on Article 8 (right to respect for one's private and family life) and Article 14 (non-discrimination) of the ECHR, and on the relevant case law of the ECtHR, that recently declared that the obligation to transmit only the father's name is in violation of the ECHR (*Cusan and Fazzo v. Italy*, App.no. 77/07, 7 January 2014). As a result of the ICC's decision, parents may agree to add the maternal last name after the paternal last name to their child's name at the moment of birth or adoption. However, in the absence of an agreement between the parents, the existing provisions related to the attribution of the paternal last name remain applicable in expectation of a legislative intervention destined to regulate the matter comprehensively in accordance with criteria eventually compatible with the principle of parity.

Foreign, International and/or Multilateral Relations

Judgment 102 of 2016: Ne Bis in Idem no. 1

One of the most problematic frontiers with the ECHR concerns the different notions of "criminal matter" adopted by each system: narrower in Italy; broader at Strasbourg. A number of questions stemmed from this very significant divergence.

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

cerning the punishment of the illegitimate use of nonpublic financial information with both criminal and administrative sanctions, allegedly in violation of the *ne bis in idem* principle (ECHR Protocol no. 7, Article 4). All the questions were found inadmissible for various reasons: most notably because, although a double line of punishment may be in breach of the ECHR (if a formally administrative sanction is substantially afflictive), it is for the legislator to settle the issue by making the appropriate choices, also taking into account the fulfillment of obligations under EU law. This may include keeping both criminal and administrative sanctions while unifying or coordinating existing investigation and punishment procedures.

Judgment 193 of 2016: Lex Mitior

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

Judgment No. 200 of 2016: Ne Bis in Idem no. 2

In this case the Court heard a referral order concerning a provision of the Code of Criminal Procedure which limits the applicability of the *ne bis in idem* principle to the same legal fact as regards its constituent elements (*idem ius*), rather than to the same historical fact (*idem factum*), with the result that the criteria for establishing whether the fact is the same are more restrictive under Italian law (which considers both legal and mate-

rial elements) than under the ECHR (which only considers material elements). The Court ruled the legislation unconstitutional insofar as it did not provide that the applicability of the *ne bis in idem* principle must be assessed with reference to the same historical-naturalistic fact, albeit considered with reference to all of its constituent elements (conduct, event, causal link). Italian law must base its assessment on the *idem factum*, and has no scope for *idem ius*.

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

In this case the Court considered several Referral Orders on the 2012 law providing for the suspension of officials elected in local and regional bodies when they are found guilty, although not definitively, of certain offences (and also prohibiting them, in the same cases, to run for office). This also applies when the offences were committed before 2012. Many questions were raised, and all were found inadmissible or unfounded. Some points are particularly relevant: for the ICC, the effects of the questioned norms cannot be constructed as a "punishment", neither under Italian constitutional law nor under Article 7 of ECHR and the ECtHR case law (analyzed in detail by the ICC); rather, they are precautionary measures, aimed at preventing illegality in public administration¹⁹ and at enforcing the constitutional duty of citizens entrusted with public functions "to fulfill such functions with discipline and honor" (Article 54, Para. 2, of the Italian Constitution). Therefore, these measures may also take into account previous offences and convictions, in barring access to (and permanence in) office. The ICC analysis is especially significant as it dwells on issues which will be considered in the upcoming Strasbourg judgment on the (partially similar) *Berlusconi* case.²⁰

¹⁹ See also C Cost no 236 of 2015.

²⁰ Application no. 58428/13, Silvio Berlusconi against Italy, lodged on 10.9.2013, communicated on 5.7.2016.

CONCLUSION

Fifty years after the publication of John Henry Merryman's series of articles on the "Italian style"²¹ in comparative law, the ICC stays true to this peculiarity. In particular, its attitude in the European constitutional space assumed a characterizing stance of active participation in the so-called judicial dialogue. Even though the general trend of the ICC engagement has been a collaborative one, the Court has not missed the opportunity of remaining true to its own interpretation of the Italian constitutional tradition. This attitude towards supranational and international "relationality"²² is a recent development of the Court's mindset towards the globalization (and, in particular, the Europeanization) of constitutional adjudication, which was dramatically developed in its case law in 2016. On the one hand, many of the reported judgments rely on the European courts' case law and make a proactive effort to ensure the highest level of compliance with EU law and with the ECHR.²³ On the other hand, when it came to the core values of the constitutional identity of Italy, the ICC openly embraced a distinct position from the one of the CJEU. By submitting a reference for preliminary ruling, the opportunity arose for further collaboration with the CJEU.²⁴ Consequently, some distinctive features of the national legal order might become elements for common values in a system fostering pluralism. Only the future will tell if this invitation to cooperate will be taken up by the CJEU. As to the present, the attitude of the ICC toward supranational and international law should be evaluated and considered by taking into account this complex and articulated picture in its entirety.

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²¹ John Henry Merryman, "The Italian Style I: Doctrine" (1965) 18 *Stanford Law Review* 39; John Henry Merryman, "The Italian Style II: Law" (1966) 18 *Stanford Law Review* 396; John Henry Merryman, "The Italian Style III: Interpretation" (1966) 18 *Stanford Law Review* 583.

²² Barsotti and others (n 15) 235.

²³ See Section IV, C of this report.

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