The rule of law crisis in Italy in the framework of the European Union

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1. The Italian democratic Constitution

The Italian democratic rule of law – Italy being one of the EU founding Member States – was not only consolidated in parallel with the start of the European integration process, but was also spurred on by it.[1] The entrenchment of liberal constitutionalism in Italy and the construction of the European Communities were coeval and, thus, one needs to go back at least to the moment in which the democratic Constitution entered into force, on 1 January 1948, following a constitution-making process certainly affected by the start of the Cold War but also shaped by people's engagement and civic participation unlike what happened in Poland after 1989.
Indeed, the new Constitution represented a turning point in the way the notion of the rule of law, *Stato di diritto*, has been conceptualized in Italy.[2] First, the new Constitution broke with the authoritarian and fascist past, namely with the experience of a former 'liberal State' ruled under a flexible and *octroyée* constitutional document[3] – the Statuto Albertino of 1848 – which had proved unable to prevent the rise of an autocratic and, according to some, totalitarian regime.[4] The Statuto Albertino, however, similar to other Constitutions granted in European continental countries in that period, endorsed a very 'thin' notion of the rule of law.[5] Indeed, it was mainly focused on ensuring the principle of separation of powers against the risk of an absolutist monarchy, to provide safeguards to the exercise of parliamentary powers, and to acknowledge the protection of basic civil liberties, e.g. the right to habeas corpus, freedom of expression, the right to property, and equality before the

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1 On the idea of 'democratic rule of law', see L. Morlino, The Two 'Rules of Law' Between Transition To and Quality of Democracy, in L. Morlino and G. Palombella (eds), Rule of Law and Democracy. Inquiries into Internal and External Issues, Brill, 2010, pp. 39-63,

2 See S. Fois, la "riserva di legge". lineamenti storici e problemi attuali (giuffrè, 1963) and a. di giovine, introduzione allo studio della riserva di legge nell'ordinamento italiano (Giappichelli, 1969).

3 See V. E. Orlando, principii di diritto costituzionale, 4th ed. (Barbera, 1912).

4 The Italian fascist experience has been described as a form of 'imperfect totalitarism' (totalitarismo imperfetto), totalitarian in its ambitions, but not in the final achievements: see G. Sabbatucci, V. Vidotto, Storia contemporanea. Il Novecento, Laterza, Bari, 2008, p.142

5 As it will be argued in the following, however, it is disputed whether we can really talk about the rule of law in the European continental context and in the Italian one: see P. Costa, Lo Stato di diritto: un'introduzione storica, in P. Costa and D. Zolo (eds), Lo Stato di diritto. Storia, teoria, critica, Milan, 2003, p. 89 ff.; G. Zagrebelsky, La legge e la sua giustizia, Bologna, 2008, p. 111 ff.

law. A corollary of such a configuration of the Italian liberal Constitution was the centrality of the principle of legality as a limit to the discretion of the executive power and of the judiciary, in a two-fold meaning: to define the boundaries for the action of these two branches of government and as a device to protect negative liberties, i.e. freedom from the State's interference, against an arbitrary use of the public powers to the detriment of the citizen.[6]

This *octroyée* Constitution, which was never formally amended – not even following the shift from a diarchic system of government, centered on the King, to fully-fledged parliamentarism[7] or after the unification of the Kingdom of Italy in 1861 – had been de facto gradually suspended since 1922 and since 1935 the Parliament, from which the principle of legality gained its legitimacy, ceased to exist. The Senate, appointed by the King, was divested of its (limited) powers, while the elected Chamber of Deputies was abolished and replaced by a Chamber appointed by the regime to represent the interests of social and business organizations. By 1938, with the enactment of the racial laws, even the facade of the liberal State and the associated Stato di diritto had gone.

The liberal Parliament, however, was not a democratic one. Next to the appointed Senate of nobles, stood the Chamber of Deputies elected by no more than 9% of the male citizens, given the requirements of census and alphabetization that had been set by the electoral legislation.[8] It was only after WWII, first in the administrative election of 1945 and then, in 1946, with the plebiscite between Monarchy and Republic and with the election of the Constituent Assembly, that the suffrage became eventually universal. The Assembly drafting the Constitution (1946-1947) and the resulting elected Parliament were able to represent the pluralism existing in the Italian society eventually. This paved the way to the consolidation and the strengthening of mass parties, the Christian democrats, the socialist and the communist parties, on whose accord the new constitutional pact was sealed, although the Cold War had become a reality in the meantime. The Christian democrats, the party gaining the relative majority of seats in Parliament, in alliance with some small center-right and center-left parties, ruled the country for almost 40 years, with the socialists (until the 1960s) and the communists (until the 1990s) being excluded from the government (*conventio ad excludendum*)[9] because of their pro-USSR stance in the framework of an internationally divided scenario and the Italian alliance with Western partners. The arrangement could work and be accepted by all parties because there was a tacit agreement, always respected, that any reform or bills touching upon the constitutional compromise would never be passed without the political consent of the three major political parties. Such an arrangement gave particular strength to the

6 See F. Modugno, Legge in generale, in Enciclopedia del diritto, XXIII, Milano, Giuffrè, 1973, p. 873 ff. and G.U. Rescigno, Sul principio di legalità, in Diritto pubblico, 1995, p. 247 ff.

7 This shift happened when Cavour was appointed as Prime Minister for the first time and consolidated afterward as a constitutional convention.

8 Law no. 666 of 1912 and, then, Law no. 1985 of 1918, which eventually granted the suffrage to all male adult citizens. See A. Colombo, Zanardelli, la riforma elettorale e la lunga marcia della democrazia italiana, in Il Politico, no 4, 1982, pp. 649-659.

9 An effective formula coined by L. Elia, Governo (forme di), in Enciclopedia del diritto, vol. XIX, Milan, 1970, p. 634 ff.

Parliament as locus of deliberation and the place where the compromise amongst the three main political actors – two of which were excluded from the government for some time – could be reached. Consequently, parliamentary legislation, i.e. statutory law, enjoyed special consideration.[10]

The new Constitution was a watershed with regard to the status of the principle of legality and the role of the Parliament. As in any system where there is a rigid and entrenched Constitution in force, the principle of legality is no longer absolute, and the Parliament cannot be considered as sovereign. The constitutional legality prevails over the legislation passed by the Parliament, should a conflict arise.[11] In addition to a special and cumbersome procedure to be followed to pass constitutional amendments (Art. 138 Const.), a Constitutional Court was foreseen with a view to check the constitutionality of legislation according to a centralised-Kelsenian model of constitutional adjudication.[12] In the presence of a rigid Constitution, the very nature of the rule of law Stato di diritto is transformed. The source of the law in which the general will, or better formulated, the will of the majority is enshrined can no longer prevail over the fundamental law that protects pluralism and individual rights, in particular those pertaining to the minorities.

With regard to rights, the 1948 Italian Constitution entailed a shift from a pure *Rechstaat to a Sozialstaat*, from negative freedoms (right to habeas corpus, freedom of expression, freedom of association, etc.) to an ample catalogue of social rights (right to education, to health care, to social assistance, etc.) and to a substantive understanding of the principle of equality, entailing an active stance of the State in removing the obstacles to the full deployment of one's own personality (Art. 3, second section, Const.).[13] The implementation of these constitutional novelties would have never been possible without the Constitutional Court, established only in 1956. Against a certain interpretation of the Constitution, quite widespread at the moment of its enactment, even amongst ordinary judges, according to which the fundamental law was only meant to set a program for the activity of the legislature while many of its provisions were devoid of an immediate legal force – the so-called 'programmatic norms' – the Constitutional Court took a different stance since its first judgment (no. 1/1956). In particular, it claimed that:

1) all constitutional provisions can be used as standards for review without ad hoc measures of implementation; 2) with regard to individual rights, including social rights, the core and essential element of the right at stake cannot be disregarded by the public authorities even though the Parliament can certainly clarify the reach and

10 And, indeed, there has been an abundance, if not an abuse, of parliamentary legislation, passed even to regulate hyper-specific issues or single-issue questions which could have been well regulated by administrative measures. See A. Predieri, Parlamento 1975, in A. Predieri (ed), Il Parlamento nel sistema politico italiano, Milano, 1975, p. 11 ff.

11 F. Modugno, Legge in generale, cit.,p. 873 ff.

12 M. Cappelletti, Judicial Review in Comparative Perspective, in California Law Review, 58(5) 1970, p. 1036 ff. and V. Barsotti, G.C. Carozza, M. Cartabia and A. Simoncini, Italian Constitutional Justice in Global Context, Oxford, 2015, especially ch. 1.

13 See R. Bin, Lo Stato di diritto, Bologna, 2004, pp. 39-43.

the scope of that right afterwards.[14] This case-law of the Constitutional Court was of paramount importance for the proper functioning of the constitutional Stato di diritto in Italy.[15] Indeed, it was the Constitutional Court that undertook the task of adapting the existing legislation, including the one of the fascist period, which had remained in force, to the new constitutional principles. And it did so in a context where the Parliament was reluctant to take the lead in repealing the 'unconstitutional' legislation while the judiciary and the public administration were used to apply it, as no systematic epuration occurred in the transition to democracy.[16]

A final element of the new Italian *Stato di diritto* emerging from the adoption of the 1948 Constitution has to be pointed out in comparison to the regime set by the Statuto Albertino, which lacked any provisions on the international commitments of the country: the strong emphasis on the openness of the Italian legal system to the principles of international law.[17] In particular, the Constitution offers substantive protection to the foreigners in the territory (Art. 10 Const.),[18] rejects the war 'as an instrument of aggression against the freedom of other peoples and as a means for the settlement of international disputes', and provides for the self-limitation of national sovereignty with a view to promote 'a world order ensuring peace and justice among the Nations' and to encourage 'international organization furthering such ends' (Art. 11 Const.). These constitutional provisions, and in particular the last one, which has provided the 'legal basis' for the Italian membership of the European Community,[19] can be seen as tools that have shaped the Italian conception of Stato di diritto as a limitation and constraint to the use of public power not just on a domestic level, but also in relation to the outside world.[20] This internationally friendly attitude of the Italian Constitution, despite the different standpoints among the three major political parties, is one of the reasons behind the general and long-standing pro-European attitude of the Italian institutions and citizens, at least until recently.[21]

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14 See S. Bartole, Interpretazioni e trasformazioni della Costituzione repubblicana, Bologna, 2004, ch.4 ff.

15 See V. Barsotti, G.C. Carozza, M. Cartabia and A. Simoncini, ItalianConstitutional Justice in Global Context, cit., ch. 1.

16 See G. Melis, Storia dell'amministrazione pubblica italiana 1861-1993, Bologna, 1996, ch. 5. Indeed, until the Constitutional Court was established, Italy provisionally adopted a decentralised system of constitutional adjudication that did not prove to be effective.

17 Italy has always been, however, a dualist legal system in relation to the treatment of international law domestically.

18 See the remaining part of Article 10 Const.: 'The legal status of foreigners is regulated by law in conformity with international provisions and treaties. A foreigner who, in his home country, is denied the actual exercise of the democratic freedoms guaranteed by the Italian constitution shall be entitled to the right of asylum under the conditions established by law. A foreigner may not be extradited for a political offence.'

19 The acknowledgment, by the Italian Constitutional Court, of Article 11 of the Constitution as the basis to justify and uphold the primacy of Community law over national law came rather late, at the end of a long series of decisions where the Court had tried to disregard the case law of the Court of Justice letting domestic law prevail over European law in matters covered by Community competence. See P. Barile, Il cammino comunitario della Corte, in Giurisprudenza costituzionale, 18 (1), 1973, p. 2406 ff. and G. L. Tosato, I regolamenti delle Comunità europee, Milano, 1965, esp. P. 300 ff. The turning point can be identified with the Frontini case, Italian Constitutional Court's judgment no 183 of 1973 and by the subsequent decision no 170 of 1984 in the Granital case. See, in particular, M. Cartabia and J.H.H. Weiler, L'Italia in Europa. Profili istituzionali e costituzionali, Bologna, 2000, p. 186 ff.

20 See M.P. Iadicicco, la riserva di legge nelle dinamiche di trasformazione dell'ordinamento interno e comunitario (Giappichelli, 2007), 1 ff.

21 The Eurobarometer Reports show, however, that the traditional pro-European attitude of the Italian citizens has declined and the turning point can probably be identified in the Eurozone crisis started in 2008-2009. Indeed, while in October 2007 64% of the Italian citizens interviewed declared to be optimistic vis-à-vis the European integration project,

2. The Italian notion of Stato di diritto *and its domestic and EU challenges*

Italy has embraced the European continental version of the rule of law,[22] the Stato di diritto, with a strong emphasis on the role played by parliamentary legislation (statutory law) even though in the post-WWII context this has been somewhat mitigated by the idea of constitutional legality. Despite the commonality between the German Rechstaat, the French État de droit and the Italian Stato di diritto on the value assigned to the principle of legality,[23] unlike the other two systems, Italian scholarship and case-law have particularly focused their attention on the legislative activity of the Parliament in relation to the domains reserved to legislation or the legislative reservations.[24] If and how these legislative reservations could be in fact determined by actors different from the Parliament has been the key question in Italy, considering that these demands for parliamentary legislation do fulfil both a democratic ambition – namely to allow the regulation of certain sensitive issues, such as the limitation to fundamental freedoms, by the directly elected representatives of the people – and the ambition to provide a guarantee against the abuse of power, by the other institutions and by the Parliament itself, whose laws can be declared unconstitutional.[25] Moreover, the extent to which an act of the public authority can be considered legislation or not also affects the scope of the jurisdiction of the Italian Constitutional Court,[26] which can only review the constitutionality of laws (leggi) 'and enactments having force of law issued by the State and Regions' (Art. 134 It. Const.).[27]

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in December 2013 the percentage dropped to 40% (see the respective Eurobarometer national report on Italy, available at: https://ec.europa.eu/commfrontoffice/publicopinion/index.cfm/Survey/index#p=1&instruments=STANDARD). Lately the trend has not improved either: indeed, in fall 2018 only 36% of the Italian citizens interviewed affirmed to trust the EU (see Standard Eurobarometer 90 – Autumn 2018, First results, p. 6). As shown by C. Plescia and J. Wilhelm, Pessimism – not rejection – of the EU in Italy. Evidence from RECONNECT pre-election survey, in RECONNECT Blog, 20 May 2019, 66% of the Italian respondents to the survey remain supportive to the Italian continued membership of the EU, but only 33% of the respondents are optimistic toward the future of the EU.

22 See A. Sandulli, il ruolo del diritto in europa. l'integrazione europea dalla prospettiva del diritto amministrativo, milano, 2018, p. 20 ff.

23 Unlike the anglo-saxon rule of law, for example: see L.F.M. Besselink, F. Pennings, and S. Prechal, Introduction: Legality in Multiple Legal Orders, in L.F.M. Besselink, F. Pennings, and S. Prechal(eds), The Eclipse of the Legality Principle in the European Union, Alphen aan den Rijn, 2011,p. 6. On the strong influence of the German idea of Rechstaat on the Italian stato di diritto, see V. E. Orlando, DIRITTO PUBBLICO GENERALE. SCRITTI VARII COORDINATE IN SISTEMA 1881-1940 (Giuffrè, 1954).

24 See, amongst many, S. Fois, LA « RISERVA DI LEGGE », cit., A. Di Giovine, INTRODUZIONE ALLO STUDIO DELLA RISERVA DI LEGGE, cit., F. Sorrentino, LEZIONI SULLA RISERVA DI LEGGE, I (Cooperativa libraria universitaria, 1980), R. Balduzzi, F. Sorrentino, Riserva di legge, in Enciclopedia del diritto, XL (Giuffrè, 1989), 1207 ff., M.R. Donnarumma, Il principio di legalità nella dinamica dei rapporti costituzionali, Padova, 1988 and J. Trumeau, La réserve de la loi. Compétence législative et Constitution, Aix-en-Provence, 1997.

25 The debate over the tension between these two ambitions and the prevalence of one over the other, highlighted by scholars like Lorenza Carlassare, Alfonso Di Giovine, Sergio Fois, Franco Modugno, Gino Scaccia, Federico Sorrentino amongst many, is extensively illustrated by G. Piccirilli, La "riserva di legge". Evoluzioni costituzionali, influenze sovrastatuali, Torino, 2019, p. 24 ff.

26 Ibid., p. 38 ff.

27 In fact, 'laws' is a much broader notion than the Italian 'leggi', the latter being referred only to legislation passed by the Parliament or the regional legislative assemblies. As pointed out in the book edited by A. Pizzorusso, Law in the making. A comparative survey, Berlin, 1988, indeed, the sources of law are one of the most difficult things to compare across legal systems. There is always the risk of a terminological distortion.

That said, the Italian concept of *Stato di diritto*, as shaped by the democratic Constitution and its interpretation, has been put under pressure in many regards. Some of these pressures are common to most countries in the world, like the challenges brought by the executive dominance to the separation and cooperation amongst constitutional powers or the effects of globalization on the protection of social rights.

Next to these common trends, the country had to face several internal threats to its stability, like terrorism in the 1970s and 1980s and the collapse of the party system due to the combined effect of corruption scandals and trials and the change of the electoral system in the 1990s.

Although the constitutional system was deeply shook by these threats – a former President of the Council of Ministers and then President of the Christian Democrats, Aldo Moro, was kidnapped and killed by terrorists in 1978 – it somewhat managed to stick to the principles of the Stato di diritto, which was also due to its membership in the European Community. Yet, the implementation of the Italian Constitution has not been easy. Relying on a constitutional compromise among three very different political forces, vetoes and delays in the adoption of reforms and in the enforcement of the Constitution have been inevitable, like in the cases of the creation of ordinary regions and in the approval of the law on referendums, both dating back to 1970.

Perhaps, before the current challenges to the Italian constitutional system occurred, the most tense period the *Stato di diritto* had to cope with started in the 1990s, with significant repercussions still being felt today.[28] It was back then that the relationship between politics and the judiciary in Italy changed, with a negative effect for the legitimacy of the judicial branch.[29] Due to the extensive corruption net between the elites of the major political parties, the public administration and business corporations, the judiciary basically dismantled through criminal proceedings and convictions – and it could hardly be otherwise – an entire political class.[30] Public prosecutors and judges led a sort of political catharsis of the then elites in the name of the principle of legality, this time understood according to a broad conception of the rule of law, including certainty and effectiveness of the law.

In turn, new political actors emerged, amongst whom stood the former entrepreneur Silvio Berlusconi who, thanks to the majority gained in Parliament, controversially managed at the same time to rule the country and to hold a large share of national media.[31] For most of the 20 years during which he remained a prominent political figure, an anti-judicial rhetoric – to which the decision of some public prosecutors and judges to convert themselves into politicians did not help either – orchestrated by

28 See M. Bull and M. Rhodes, Between crisis and transition: Italian politics in the 1990s, in West European Politics, 20(1), 1997, p. 1 ff. Although the Constitution was not changed, many started to (improperly) talk about the consolidation of a 'Second Republic', after the first established in 1948: see G. Sartori, Seconda Repubblica? Si, ma bene, Milano, 1992.

29 C. Guarnieri, The judiciary in the Italian political crisis, in West European Politics, 20(1), 1997, p. 157 ff.

30 See D. Della Porta and A. Vannucci, Corruption and anti-corruption: The political defeat of "Clean Hands" in Italy, in West European Politics, 30(4), 2007, p. 830 ff.

31 See M. Hibberd, Conflicts of interest and media pluralism in Italian broadcasting, in West European Politics, 30(4), 2007, p. 881 ff.

his party dominated the public discourse, while he was convicted for several criminal offences. The allegation of a politicized judiciary and of a *fumus persecutionis* against him and politicians in general became obsessive and was further echoed by the media. Laws, subsequently declared invalid by the Constitutional Court, were passed aiming to extend the immunity from criminal prosecutions for the highest public offices so as to waive criminal proceedings for them without clear limitations.[32] The legacy of the Berlusconi era has deeply affected subsequent democratic and rule of law developments in Italy.[33]

Although this anti-judicial discourse, by any means, has led to the subversion of the fundamental rule of law principle of the independence of the judiciary, it has nonetheless discredited the role of courts in the eyes of citizens and has gradually instilled a certain degree of distrust in judges.[34] While the level of confidence in representative institutions was not particularly high either, this rhetoric, fueled by the media, was gradually extended from judges to other non-elected officials, to technocratic and independent bodies, including those of the EU. In other words, the idea conveyed, also by other political parties, like Lega and the 5SM more recently,[35] was that in a democratic system the only source of legitimation for institutional actions are elections and the will of the majority. This idea inevitably clashes with the principles of the constitutional *Stato di diritto* which conceives of the three branches of government as of equal importance under the Constitution and the limits imposed, through independent institutions, to the exercise of political powers (as to prevent potential tyranny of the majority), a value and a safeguard to be carefully protected.

Turning to the role of the EU, the participation in the European integration process associates the Member States in facing common challenges for their legal systems. An example thereof is the difficulty to combine the alleged supremacy of rigid Constitutions with the primacy of EU law advocated for by the European Court of Justice.[36] In the Italian case, the achievement of such a balance has placed the Italian Constitutional Court in a crucial position in the long path towards integration. At first, the Court disregarded the principle of primacy,[37] then, once it accepted it, it set counter-limits[38] and threatened to use supreme constitutional principles as part of the national identity to resist the penetration of EU law.[39] In this gradual process of

32 See Law no 140 of 2003 declared unconstitutional by the Constitutional Court in judgment no 24 of 2004 and Law no 124 of 2008 declared unconstitutional in judgment no 262 of 2009.

33 See G. Orsina, IL BERLUSCONISMO NELLA STORIA D'ITALIA (Marsilio ed., 2013) and Id., Antifascism, anticommunism, antipolitics: delegitimation in Berlusconi's Italy, in Journal of Modern Italian Studies, 2017, p. 7-26. On the impact of Berlusconi's legacy on the current populist turn of the Italian political system, see P. Blokker, M. Anselmi, Introduction. Multiple Populisms. Italy as a Democracy's Mirror, in P. Blokker, M. Anselmi (eds), Multiple Populisms. Italy as a Democracy's Mirror (Routledge, 2019), p. 1-14

34 See D. Piana, Uguale per tutti? Giustizia e cittadini in Italia, Bologna, 2016, p. 199 ff.

35 C. Biancalana, Four Italian Populisms, in P. Blokker, M. Anselmi (eds), Multiple Populisms. Italy as a Democracy's Mirror (Routledge, 2019),p. 216 ff.

36 Since the case Costa v. Enel, case 6/64, 16 July 1964, ECR 585.

37 See the judgment no. 14 of 1964 before acknowledging, in judgment no. 170 of 1984, that conflicts between national and Community norms had to be solved based on the criterium of the competence.

38 See the judgment no. 232 of 1989.

39 See order no. 24 of 2017, issuing a preliminary reference to the Court of Justice of the European Union on the "Taricco case".

adaptation, which overall has seen the Italian Constitutional Court as a collaborative actor towards the EU and its court,[40] the principle of legality and the traditional idea of the domains reserved to parliamentary legislation have been somehow displaced and transformed in the complex interplay between domestic and supranational law.[41] For example, the Italian Constitutional Court has managed the problematic legal situation emerging from the adoption of EU measures, even self-executing on some occasions, in the fields covered by legislative reservations according to the national Constitution, through a creative interpretation of the already recalled Art. 11 Const. The Court has thus derogated from the constitutional provisions setting a domain reserved to (domestic) legislation with a view to ensuring the enforcement of EU law.[42] Such an outcome could not have been taken for granted, given the initial position of the Court on the matter and the diminished centrality of the national parliament that this causes.[43]

At the same time, the attitude of the Italian Constitutional Court vis-à-vis EU law has certainly not been passive, but rather engaged and constructive. While the political class has tended to support every move and further steps in the process of EU integration with an acritical endorsement until recently – it suffices to say that the Treaty of Lisbon was ratified by the two Houses of Parliament in 2008 by unanimity – the Constitutional Court has not hesitated to point to potential frictions between EU law and the national Constitution. The elaboration of the counter-limit doctrine, which in the end has never been fully applied against EU law,[44] aims to display to the EU institutions and especially to the Court of Justice the limits to the implementation of EU measures in light of the supreme principles of the Italian Constitution. It has been used as a tool to favor joint judicial solutions, in mutual respect between the

40 Indeed, the Italian Court is one of the Constitutional Courts, after the Austrian and the Belgian ones, that has made the highest number of preliminary referrals to the Court of Justice: 4 in 11 years. See order no 103 of 2008, order no 207 of 2013, order no 24 of 2017, order no 117 of 2019, to be read also in conjunction with the judgment no 269 of 2017 and its obiter dictum on the Charter. On the latter, see critically, D. Gallo, Challenging EU constitutional law: The Italian Constitutional Court's new stance on direct effect and the preliminary reference procedure, in European Law Journal, early view, 8 July 2019. For a positive assessment of the roleplayed by the Italian Constitutional Court in Europe, see N. Lupo, The Advantage of Having the "First Word" in the Composite European Constitution, in Italian Journal of Public Law, no 2, 2018, p. 186 ff.

41 As is well known, unlike what happens at the domestic level and in the Italian legal system, in the EU the legislative nature of an act is purely dependent on the procedure followed for its adoption and is not linked to the subject matter or the issues covered, as confirmed by Article 289(3) TFEU. See R. Schütze, The Morphology of Legislative Power in the European Community: Legal Instruments and the Federal Division of Powers, in Yearbook of European Law, 25(1), 2006, p. 91 ff.; J. Bast, New Categories of Act After the Lisbon Reform: Dynamics of Parliamentarization in EU Law, in Common Market Law Review, 49(3), 2012, p. 885 ff. And the resort to legislative procedures is not necessarily conducive to enhanced democratic accountability, as argued by D. Curtin, Legal Acts and the Challenges of Democratic Accountability, in M. Cremona and C. Kilpatrick (eds), EU Legal Acts: Challenges and Transformation, Oxford, 2018, p. 9 ff.

42 See M. Cartabia and L.: Chieffi, Art. 11, in R. Bifulco, A. Celotto, M. Olivetti (eds), Commentario alla Costituzione, I Torino, 2006, p. 263 ff. and G. Piccirilli, La "riserva di legge", cit., p. 99 ff. In judgment no 383 of 1988 the Court argued that legislative reservations under the Italian Constitution can also be fulfilled through Community measures.

43 Cf., for example, the Italian Constitutional Court's judgment no 14 of 1964, where it argued that antinomies between Community law and national law had to be settled according to the chronological principle.

44 From judgment no 232 of 1989 to the 'Taricco saga', order no. 24 of 2017 and judgment no 115 of 2018, dealing with the principle of legality in criminal matters. As noted by G. Piccirilli, LA "RISERVA DI LEGGE", cit., p. 110, n. 39, the expression was not coined by the Constitutional Court and never used in relation to EU law. It is drawn from a previous writing of P. Barile, Rapporti fra norme primarie comunitarie e norme costituzionali e primarie italiane, in La Comunità internazionale, 1966, p. 23 and expressly mentioned by the Court in the only case in which counter-limits have been activated, against international law, in judgment no 238 of 2014.

domestic and the supranational level, rather than as a 'nuclear weapon' to undermine the EU authority.[45] An outcome of these inter-judicial relationships has been, for instance, an updated and revised vision of the legislative reservation in criminal matters,[46] in particular following the "Tarrico saga" – originated from VAT frauds by Italian tax-payers, the alleged violation of Art. 325 TFEU by the Italian rule on the statute of limitation for tax frauds and the national system of prosecution in these cases – in terms of balance between formal and substantive understanding of the principle of legality in this field.[47]

Notably, EU membership has also favored the adoption of a series of important reforms in Italy, not just in the field of public policies but at the constitutional level as well.[48] The Italian participation in the European Community and then in the Union has been able to impress an acceleration of certain dynamics underway in the constitutional system. Just to appreciate how influential the EU has been on the implementation of the Constitution and on its reform, one can cite three examples. The first is the establishment of the 15 Italian ordinary regions – after their setting up had been postponed for more than 20 years – in parallel with the development of the European cohesion policy and the creation of the European Regional Development Fund in 1975.[49] In other words, there has been a veiled connection between the implementation of the constitutional provisions on the Regions and the Community promotion of a redistributive policy at regional level.

Second, in the aftermath of a serious speculative attack in 2011, in line with the reform of the European economic governance that started that year,[50] and upon request by the European Central Bank,[51] Italy amended its Constitution (Const. Law no. 1 of 2012) with a view to introducing the target of the balanced budget for the State (Art. 81 Const.), for central public administrations (Art. 97 Const.) and for regional and local authorities (Art. 119 Const.). Interestingly, this has entailed an important shift in the wording of the Constitution about the EU. Indeed, before 2012, the fundamental document only briefly referred to the EU in Art. 117, relying instead on the open clause of Art. 11 Const. for EU membership and for any further conferral

45 On this point, see M. Cartabia, current Vice President of the Italian Constitutional Court, Europe today: Bridges and walls, in International Journal of Constitutional Law, 16(3), 2018, p. 741 ff. and M. Dani, National Constitutional Courts in supranational litigation: A contextual analysis, in European Law Journal, 23 (3-4), 2017, p. 207 ff.

46 See D. Tega, Narrowing the Dialogue: The Italian Constitutional Court and the Court of Justice on the Prosecution of VAT Frauds, in Int'l J. Const. L. Blog, 14 February 2017 and G. Piccirilli, The 'Taricco saga': the Italian Constitutional Court continues its Italian journey, in 14(4) European Constitutional Law Review, 2018, p. 814-833.

47 A positive reading of the 'Taricco saga' is offered by M. Bonelli, The Taricco Saga and the consolidation of judicial dialogue in the European Union, in 25(3) Maastricht Journal of European and Comparative Law, 2018, p. 357-373. See also I. Pellizzone, PROFILI COSTITUZIONALI DELLA RISERVA DI LEGGE IN MATERIA PENALE (Milano, 2015).

48 While, by contrast, it has been argued that the Italian influence on the construction of the EU legal system has been much less evident: see A. Sandulli, IL RUOLO DEL DIRITTO IN EUROPA, cit., p. 144 ff.

49 On the influence of the EU on the Member States' regions, see C. Fasone, Secession and the Ambiguous Place of Regions Under EU Law, in C. Closa (ed), Secession from a Member States and Withdrawal from the European Union: Troubled Membership, Cambridge, 2017, p. 48 ff.

50 See the so-called the Euro-Plus Pact of 25 March 2011 and the "six-pack" (EU Regulations no 1173, 1174, 1175, 1176 and 1177 of 2011 and EU Directive 2011/85).

51 See J.-C. Trichet and M. Draghi, Letter of the European Central Bank to the President of the Italian Council of Ministers, European Central Bank, Frankfurt, 5 August 2011.

of powers to EU institutions through Treaty revisions.[52] Following the adoption of Const. Law no. 1 of 2012, in the three main articles that have been changed, there is an ad hoc reference to EU measures and obligations in fiscal and economic matters. This is particularly important as a change of the latter would entail a modification of the interpretation of constitutional standards on the budget.[53] EU fiscal rules have thus integrated the principles defining the Italian understanding of the rule of law.

The third example is the constitutional reform promoted during the Renzi Government that failed at the referendum of 4 December 2016. In the explanatory report to the constitutional amendment bill (A.S. 1429, XVII parliamentary term), which aimed to change the composition and the functioning of the Italian bicameral Parliament amongst other things, the Government made it clear that such a reform had also been promoted with a view to accommodate the Italian institutional and political system to the demands for a more effective participation in the EU decision-making and implementation of the EU policies. The reform of the EU economic governance, with the European Semester, has particularly been cited as an explanation to streamlining parliamentary procedures – especially to remove the double-confidence requirement between the Government and each House of Parliament – and to improve the level of coordination between the State and the regional and local authorities, also enhancing their representation in the Senate.[54]

It is in this context that the financial crisis, first, and then the migration crisis erupted in Italy. Those crises have been chosen here as case studies since they have triggered an unedited combination of systematic violations of rule of law principles, making the Italian participation in the EU affairs problematic, to an extent that the country has never experienced before. These considerations should be matched with the growing anti-politics and anti-elite sentiments dominating Italian civil society,[55] even though, interestingly, the level of trust of the Italian citizens towards the European Parliament (44%) and the Commission (36%) singularly and combined is much higher than that towards the Italian Parliament (27%) and Government (28%).[56]

2.1. The medium-term effects of the financial crisis

Italian political parties, with the partial exception of the communist party, had remained strongly pro-European, sometimes even in an acritical manner for more than 50 years since the enactment of the democratic Constitution. The Eurozone crisis, which hit Europe in 2010, entailed a shift in this regard, with an increasing

52 The broad formulation of Art. 11 Const. had prevented the risk of subjecting the Italian Constitution to amendment at every Treaty revision. Yet, one could also argue that it is precisely the lack of a link between Treaty revision and domestic constitutional momentum that has limited the domestic public debate (and perhaps also contestation) of the EU for decades.

53 See V. Lippolis, N. Lupo, G.M. Salerno, G. Scaccia (eds), Costituzione e pareggio di bilancio, in Il Filangieri – Quaderni 2011, 2012.

54 On the link between this reform and the Italian membership of the EU, see P. Faraguna, How does the European Union challenge bicameralism? Lesson sfrom the Italian case, forthcoming in R. Albert, A. Baraggia and C. Fasone (eds), Constitutional Reform of National Legislatures. Bicameralism Under Pressure, Cheltenham, 2019.

55 See G. Orsina, La democrazia del narcisismo. Breve storia dell'antipolitica, Marsilio, 2018, who analyses the deep roots of anti-politics in Italy and considers as a turning point the political crisis and the corruption scandals of the early 1990s.

56 Source: Standard Eurobarometer 90 – National Reports, Italy, November 2018, p. 4.

Eurosceptic attitude of political parties – especially the Five Stars Movement (5SM) and Lega – and citizens.[57]

The Italian political and legal system was deeply affected by the crisis since its eruption. In 2011, the country asked for and obtained financial support from the European Central Bank (ECB), through the Securities Market Program, in exchange for putting forward a series of reforms. The most remarkable of them is probably the constitutionalization of the balanced budget clause (Const. law. no. 1/2012) agreed with the ECB before the Fiscal Compact was signed (see section 2.2). The relevant constitutional amendments were passed in an unusually short timeframe and supported by an overwhelming majority of political forces in Parliament (two thirds in both Houses). Parliamentary deliberation was heavily constrained by the external pressure exerted by financial markets and the increase in the spread.[58] All subsequent Euro-crisis measures, the EFSF, ESM, Fiscal Compact, were likewise passed with almost no debate in Parliament. Often the deliberation on very different legal tools was merged together and the work of parliamentary committees, usually setting the ground for the decision of the House, was severely sidelined.[59] The same applied for the approval of the budget bill and bills with significant financial implications. The tension between the democratic nature and commitments to democracy of parliamentary procedures, on the one hand, and the need to react quickly to asymmetric shocks and to a well-constrained design of budgetary decision-making, on the other, confined the Parliament to a very marginal position. Concerns about a lack of transparency, information asymmetry, accountability and separation of powers between the legislature and the executive have since dominated the public and the academic discourse.[60]

This tension is exemplified by the recent attempt of a minority of Italian senators to challenge the compliance of the procedure leading to the adoption of the 2019 Budget Act with the Constitution, claiming in particular the impairment of the prerogatives of this minority group in the process. Due to the deadlock in the negotiation of the draft budgetary plan for 2019 between the Commission and the new Italian Government, appointed in June 2018 when the Stability and the National Reform Programs had already been delivered by the previous executive – the draft presented by the Italian Government to the Commission in October 2018 had to be changed significantly on two occasions to meet the medium-term objective. The Parliament, and the Senate in particular, had only a few days to consider a complex fiscal

57 See the latest Eurobarometer figures about the attitude of the Italian citizens to leave the EU (April 2019).

58 Italy was indeed in a particularly weak situation given its level of public debt, then equal to 116,5% of the GDP. The "spread" here refers to the difference in the profit between the Italian public bonds (BTP) and the German public bonds (BUND),

59 C. Fasone "National Parliaments under "external" fiscal constraints. The case of Italy, Portugal, and Spain facing the Eurozone crisis", LUISS Guido Carli School of Government Working Papers 19, June 2014.

60 See D. Jancic, National Parliaments and EU Fiscal Integration, in European Law Journal, Vol. 22, No. 2, 2016. pp. 225-249; I. Cooper, A. Maatsch and J. Smith, (eds.) Governance without Democracy? Analyzing the Role of Parliaments in European Economic Governance after the Crisis, in Parliamentary Affairs, vol. 73(4), 2017 – Special Issue; C. Fasone, Do Constitutional Courts Care About Parliaments in the Euro-Crisis? One the Precedence of the "Constitutional Identity Review", in Italian Journal of Public Law, 2, 2018, p. 351-389.

document like the revised budget. Not only that but, at the very last minute, through a maxi-amendment on which a confidence vote was requested, the Government replaced the entire text of the Budget bill including changes in the text that the Parliament had never examined before and thereby made useless the scrutiny and drafting carried out by the budget committee. The constitutional challenge brought by means of a conflict of attribution, however, was declared inadmissible by the Constitutional Court because of the lack of standing status of parliamentary minorities before the Court (order. no. 17/2019).[61]

These developments highlight a first set of problems triggered by the national reaction to the Eurozone crisis for the Italian democracy and the respect of the *Stato di diritto*, which in the end fueled for the first time a negative perception of the role of the EU in the Italian public debate; a debate which was, however, artificially orchestrated by some political forces.

Indeed, as is well known, in the midst of the most acute phase of the crisis for the country, during the summer and the fall of 2011, following the parliamentary rejection of the annual budgetary report, the Berlusconi Government resigned and a new technical Government led by former European Commissioner Mario Monti was appointed. This government, composed of non-elected officials, mostly university professors, carried out in a very limited time a series of crucial reforms, including the constitutional amendment of the balanced budget clause, a reform of the pension system and of the labor market to respond quickly to the pressure of the financial markets. Given the risk of a national default and the demands coming from the ECB and the European Commission, the adoption of these reforms – that severely undermined the Italian welfare system and the living conditions of the Italian population – was supported by a grand coalition of political forces in Parliament ranging from the left to the right of the political spectrum. Indeed, their approval was considered as inevitable, as if there were no further options. Almost no opposition was exerted by the Parliament, which abdicated to fulfill any scrutiny and oversight function on the Government:[62] the myth of the centrality of parliamentary legislation, which for decades had dominated the Italian discourse, had definitely gone and the saga of the approval of the Budget Act for 2019 is further confirmation of this.

As argued by Issacharoff and as perfectly exemplified by the Italian case, parliamentary passivity and inertia have become one of the four main democracy's deficits of contemporary constitutional democracies with systems.[63] The EU has been blamed for such an outcome by the opposition parties who tried to increase their consensus by using an anti-EU discourse, like the former Lega North (reconverted

61 See, critically, A. Morrone, Lucciole per lanterne. La n. 17/2019 e la terra promessa di quote di potere per il singolo parlamentare, in Federalismi.it, no. 4, 2019; V. Piergigli, La Corte costituzionale e il doppio salto mortale mancato. Alcune osservazioni a margine della ordinanza n. 17/2019, in Nomos, no. 1/2019. See also T.F. Giupponi, Funzione parlamentare e conflitto di attribuzioni: quale spazio per i ricorsi «intra-potere» dopo l'ordinanza n. 17 del 2019?, in Quaderni costituzionali, no. 2, 2019, pp. 291-314.

62 See B. Crum, Parliamentary accountability in multilevel governance: What role for parliaments in post-crisis EU economic governance?, in Journal of European Public Policy,25(2), 2018, p. 268-286.

63 S. Issacharoff, 'Democracy's Deficits', (2018) 85(2) The University of Chicago Law Review 485, 497-504.

into Lega) and by new political movements, like the 5SM, which for some time even campaigned in favor of leaving the Euro and that eventually entered the Italian Parliament in the 2013 general election.[64] The alliance between the domestic and the supranational technocratic elites to restore sound public accounts in Italy, accused of constraining the ordinary function of national democratic decision-making, has been presented as the enemy of the people.[65]

The reading of the new fiscal rules as 'imposed' by the EU in a context of limited sovereignty, according to the discourse put forward by the Italian Eurosceptic parties, has largely prevailed in the public debate and has recently been confirmed by the result of the 2018 general elections. By contrast, the competing reading, based on the principle of political responsibility and responsiveness for the long-term sustainability of the Italian deficit and debt and to regain credibility within the Euro area, has fallen short.[66] The rules and the targets of the European economic governance put in place between 2011 and 2013 and to which Italy committed itself were denounced by the coalition government appointed in 2018 and composed of Lega and 5SM representatives (as well as of technical experts)[67] arguing that they impair the national interests. The allegation was that the EU rules prevented the Government from promoting the redistributive policy the Lega and the 5SM had promised to deliver to enhance the living standards of the Italian citizens.[68] Indeed these rules were, at first, disregarded and only when the threat of the start of a new excessive deficit procedure materialized once again, this time for lack of national compliance with the debt criterion,[69] concrete measures were taken to ensure a realignment of Italian public accounts with the medium-term objective.[70]

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64 See C. Fasone, Taking budgetary powers away from national parliaments? On parliamentary prerogatives in the Eurozone crisis, EUI Working Paper LAW 2015/37, talking about a Euro-national austerity coalition.

65 See S. Puntscher Riekmann and D. Wydra, Representation in the European State of Emergency: Parliaments against Governments?,in Journal of European Integration, 35(5), 2013, p. 565-582.

66 With this regard, L. Morlino and D. Piana, Economic Crisis in a Stalemated Democracy: The Italian Case, in American Behavioral Scientist, 58(12), 2014, p. 1657 describe Italy as a 'stalemated democracy', where the economic crisis occurred 'in an unstable political context characterized by low government effectiveness, low efficiency, corruption, decline of electoral participation, fragmented and radicalized party competition, social inequality, high public debt'.

67 Namely, the President of the Council of Ministers, the Minister of Economics and Finance and the Minister of Foreign Affairs, non-elected MPs appointed in their position because of their technical expertise, also due to the pressure exerted by the Italian President of the Republic. See D. Tega and M. Massa, Why the Italian President's Decision Was Legitimate, in VerfassungsBlog, 28 May 2018, on the presidential refusal to appoint Paolo Savona, supported by Lega in particular, as Minister of Economics and Finance. On the potential techno-populist nature of the Lega-5SM coalition government, see N. Lupo, «Populismo legislativo?»: continuità e discontinuità nelle tendenze della legislazione italiana, in Ragion Pratica, 1, 2019, p. 260 ff.

68 Disregarding that the main problem was the patent deviation from the medium-term objective, set by the previous government, without clear justifications and that national constitutional rules are in fact more stringent than the EU norms and the Fiscal Compact: see R. Ibrido and N. Lupo, Le deroghe al divieto di indebitamento tra Fiscal Compact e articolo 81 della Costituzione, in Rivista Trimestrale di Diritto dell'Economia, no 2, 2017, p. 206-250

69 The Italian public debt indeed has gone beyond 132% of the GDP, while criterion initially set was a maximum of 60% of the GDP. The debt/GDP ratio, however, is interpreted country by country based on national figures, the starting economic situation of the state and the economic and fiscal trends, according to the medium-term objective, and is the deviation from it that creates concerns.

70 In the end, the decision of the European Commission not to propose to the Council the opening of an excessive deficit procedure (Art. 126 TFEU) was announced only on 3 April 2019, after the Italian government adopted its med-year budget for 2019 and further corrective measures on 1 July 2019: see European Commission – Press Release, Commission concludes that an Excessive Deficit Procedure is no longer warranted for Italy at this stage, Brussels, 3 July 2019, https://europa.eu/rapid/press-release_IP-19-3569_en.htm

Such a reaction against the Euro-crisis measures suggests the emergence, if not the consolidation, in the Italian context of two elements that feature the 'politics of resentment' (against the EU) as a constitutional doctrine when Eurosceptic forces conquered the government:[71] the dismissal of supranational institutions as enemies of the people and the treatment of European rules on the budget as obstacles against the fulfillment of the interests of the Italian polity.

The Italian Constitutional Court, however, has firmly remained loyal to the rule of law principles, as set in the new economic governance legal framework, and overall its authority has not been undermined during the hard times of the financial crisis. Also, given the delayed implementation of the constitutional balanced budget clause, which became operational only in 2014, its approach has sometimes been ambiguous.[72] There have been judgments in which the Court has been particularly keen to safeguard the fiscal sustainability of the national decisions,[73] while in others it has offered a very generous protection of social entitlements, and especially of pensions. This came notably with judgment no. 70 of 2015, when the Constitutional Court annulled – at the benefit of the great majority of pensioners – the block of the pension adjustment to the inflation rate in 2012 and 2013 and hence forced the political authorities to give millions of euro back to pensioners in a (judicial) effort to redistribute resources.[74] This notwithstanding, overall the Italian Constitutional Court – alongside the Presidency of the Republic[75] – has taken a very balanced stance in the aftermath of the Eurozone crisis. The Court has tried to accommodate the new fiscal constraints agreed at the EU level with the principles and rights enshrined in the national Constitution, especially in relation to the protection of substantive equality and social rights, which have been affected the most by the crisis, and that instead are an inherent part of the Italian conception of the Stato di diritto. In judgment no. 275 of 2016, for example, the Constitutional Court claimed that 'It is the protection of the inalienable rights that affect the budget, not the balanced budget that conditions the due supply of the service through which the right is guaranteed' (translation by the author).

The Italian Constitutional Court, instead, has been unable to remedy the other serious threat that the Eurozone crisis has posed to the Italian democratic state,

71 On the main elements defining the 'politics of resentment' as a constitutional doctrine, see T.T. Koncewicz, The Capture of the Polish Constitutional Tribunal and Beyond: Of Institution(s), Fidelities and the Rule of Law in Flux, in Review of Central and East European Law, 43(2), 2018, p. 116-173.

72 See, for example, the statement by the then President of the Constitutional Court Criscuolo, interviewed by an Italian newspaper, who candidly admitted that the Italian Constitutional Court decides without taking the financial and fiscal implications of its rulings into account, as if new Art. 81 Const. was not in force: A. Cazzullo, 'La difesa dei giudici della Corte', in Corriere della Sera, 21 May 2015.

73 See, for example, judgments no. 10 and 178 of 2015. See C. Bergonzini, The Italian Constitutional Court and Balancing the Budget: Judgment of 9 February 2015, no. 10 Judgment of 10 March 2015, no. 70, in European Constitutional Law Review, 12(1), 2015, p. 177 ff.

74 See decree-law no 65 of 2015, converted into Law no 109 of 2015.

75 For example, when authorizing the presentation of the Budget bill to the Parliament in 2019, the Head of State sent a letter to the President of the Council of Ministers urging the Executive to engage in a constructive dialogue with the EU institutions. See G. Rivosecchi, Manovra di bilancio 2019: la rientrata procedura di infrazione per debito eccessivo, in Quaderni costituzionali, no 1, 2019, p. 157.

namely the marginalization of the national Parliament as a budgetary authority, further strengthening a trend to sideline the role of the legislature that was already underway.[76] Due especially to the narrow avenues to access the Constitutional Court in Italy and the lack of a judicial construction linking the parliamentary prerogatives to the political rights of the citizens, unlike what some other Courts did in Europe,[77] the limitation of parliamentary powers by the national executive is hard to be made constitutionally justiciable in Italy.[78] Perhaps this is not necessarily a bad thing after all in the current situation of 'politics of resentment' and Eurosceptic rhetoric that dominates the executive branch. A too interventionist court would risk putting this institution at the center of the political struggle with the risk of delegitimizing its role.[79]

2.2. The reaction to the migration crisis

In 2015 and 2016, Italy and the EU probably experienced the greatest migration in flows since their foundation due to the war in Syria and the destabilization of North Africa after the Arab Spring.[80] That was the peak of the migration crisis in Europe. Its repercussions are still very visible today in terms of legal measures taken to react to what then was an emergency situation – but that in the Italian case has now lost the features of an emergency despite the political rhetoric[81] – and of the persistent sense of anxiety cause by a so-called 'invasion' of Italy by third country nationals willing to 'exploit' domestic resources and threaten national security as portrayed in the public debate.[82]

However, the concerns for the rule of law triggered by the country's treatment of migrants, in terms of compliance with international and EU norms as well as with the basic protection of human rights – all elements that, according to Lord Bingham,[83]

76 See N. Lupo and G. Piccirilli (eds), Legge elettorale e riforma costituzionale: procedure parlamentari "sotto stress", Bologna, 2016.

77 See, for example, the German Constitutional Court's case law on the EMU reforms –e.g. BverfG, 2 BvR 987/10, of 7 September 2011, 2 BvE 8/11, of 28 February 2012, 2BvE 4/11, of 19 June 2012, 2 BvR 2728/12, and many others – and the Supreme Court of Estonia's judgment no. 3-4-1-6-12 of 12 July 2012.

78 If not on strictly procedural ground. See C. Fasone, Do Constitutional Courts Care About Parliaments in the Eurozone Crisis?, cit.

79 For this argument, see also M. L. Volcansek, Political Power and Judicial Review in Italy, 26(4) Comparative Political Studies, 1994, pp. 492-509.

80 Indeed, due to wars and failed regimes on the borders of the EU, in 2015 and 2016 in the whole EU more than one million asylum applications were filed per year. The number has now declined again to about 600 000 applications in 2018 and in the same year 37% of the EU first instance decisions had a positive outcome. Source: Eurostat, Asylum Statistics, https://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_statistics. The main countries of destination are Germany, France and Greece, not Italy.

81 See O. Urso, The politicization of immigration in Italy. Who frames the issue, when and how, in 48(3) Rivista italiana di scienza politica, 2018, p. 365 ff. In 2016 the number of arrivals was of 181 436 migrants while in 2018 the number dropped to 16 556 (thus before the measures of the new Government were fully put into force). Source: Dipartimento della Pubblica Sicurezza del Ministero dell'Interno italiano, http://www.interno.gov.it/it/sala-stampa/dati-e-statistiche/sbarchi-e-accoglienza-dei-migranti-tutti-i-dati

82 See C. Bassu, Flussi migratori e democrazie costituzionali: tra diritti umani e sicurezza pubblica, in no. 2 Rivista trimestrale di diritto pubblico, 2019, p. 479 ff. According to the RECONNECT pre-European election survey in Italy immigration is ranked as the third issue, after unemployment and economic growth, to worry the Italian respondents: see C. Plescia and J. Wilhelm, Pessimism – not rejection – of the EU in Italy: Evidence from RECONNECT pre-election survey, cit.

83 See T. Bingham, The Rule of Law, London, 2010, p. 66 ff.

shape the rule of law principles – predate the coalition Government between the 5SM and Lega and can also be referred to the EU itself.

Based on Art. 78 TFEU, the EU is able to 'develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement' in accordance with the Geneva Convention of 1951 and its Protocol of 1967 on the status of refugees as well as other relevant treaties. The EU has also set the criteria and mechanisms to determine 'which Member State is responsible for considering an application for asylum or subsidiary protection' (Art. 78(2), lit. e, TFEU) through, amongst others, the so-called Dublin III Regulation, EU Regulation 604/2013, which assigns responsibility for dealing with asylum applications to the country of first arrival, hence the strong burden on border States such as Italy. In case of an emergency situation, with one or more Member States experiencing a sudden inflow of third country nationals, the Council, upon proposal from the Commission, can approve provisional derogatory measures, which indeed happened with the Juncker Plan in 2015 and the famous relocation decision taken for the benefit of Italy and Greece.[84] More significant from the point of view of the challenge to the rule of law is the EU-Turkey Agreement of 18 March 2016.[85] In exchange for financial aid and for legal facilitations, in particular on citizens' visa requirements to enter the EU, Turkey agreed to take back all migrants not fulfilling the requirements to obtain international protection who had reached Greece coming from Turkey. Even more controversially, the deal included the resettlement to the EU of one Syrian refugee present in Turkey, according to the UN Vulnerability Criteria, for every Irregular Syrian returned to Turkey from the Greek Islands, treating human beings as if they were goods. The agreement has also been severely criticized for violating the principle of non-refoulement – thus the Geneva Convention, Art. 78 TFEU and Arts. 18 and 19 of the EU Charter – as it disputably considers Turkey as a 'safe third country' where asylum seekers and refugees are in the position to apply for international protection without troubles.[86]

The EU 'model' was followed shortly after at the national level. On 2 February 2017, the Italian Government signed a Memorandum with the Libyan Government,[87]

84 See Council Decision (EU) 2015/1523 of 14 September 2015 and Council decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece, in particular Art 4.

85 It should be pointed out, however, that, despite the way the agreement was presented (including the reference to the Members of the European Council and to the EU in the text), it was not concluded by the EU but by the Heads of State and Government of the Member States, as stated by the General Court in particular when addressing an action for annulment against the agreement. See Order of the General Court (First Chamber, Extended Composition), Case T-192/16, NF v European Council, 28 February 2017 and Order of the Court of Justice, First Chamber, Joined Cases C208/17 P to C210/17 P, 12 September 2018, and the case-note by E. Cannizzaro, Denialism as the Supreme Expression of Realism – A Quick Comment on NF v. European Council, in 2(1) European Papers, 2017, p. 251 ff.

86 See J. Poon, EU-Turkey Deal: Violation of, or Consistency with, International Law?, in European Papers, 1(3), 2016, p. 1195-1203; 4 See M. Gatti, The EU-Turkey Statement: A Treaty That Violates Democracy (Part 1 and 2), in EJIL Talk!, 18 and 19 April 2016, www.ejiltalk.org; S. Peers, E. Roman, The EU, Turkey and the Refugee Crisis: What could possibly go wrong?, in EU Law Analysis Blog, 5 February 2016, http://eulawanalysis.blogspot.com/2016/02/the-eu-turkey-and-refugee-crisis-what.html

87 The English translation of which is available here: https://eumigrationlawblog.eu/wp-content/uploads/2017/10/

aiming to provide military equipment as well as strategic and technological support through development funds in exchange for the commitment of the Libyan authorities to block migrants departing from the national coast towards Italy. As has been documented on several occasions by the United Nations (UN) High Commissioner for Refugees and by the International Organization for Migration and non-governmental organizations (NGOs),[88] this Memorandum has resulted in the building in Libya of overcrowded detention centers where migrants suffer inhuman and degrading treatment disregarding the basic rules on international protection and the right to asylum enshrined in the Geneva Convention, in EU primary law and in the Italian Constitution (Art. 10), to which Italy should abide. Libya, in contrast, has never ratified even the most fundamental international refugee and human rights instruments. The creation of such detention centers might not be considered, at first at least, a direct responsibility of the Italian Government. In fact, it is Italy that has agreed to cooperate with an arguably 'failed state'[89] and that continues to finance this policy of arbitrary detention of thousands of migrants and refugees in inhuman conditions and in complete disregard of their vulnerability with a view to preventing them from reaching safer Italian shores (as well as losing their lives at sea). Furthermore, detention centers have also become a reality on Italian territory, in breach of the fundamental rule of law tenets. In this case, it is the interplay between EU policy and national implementation that has produced such regrettable effects. In May 2015 the European Commission launched in the 'European Agenda on Migration' the 'hotspot approach' as one of the pillars for managing the refugee crisis.[90] From 2015 to 2018, four hotspots were established in Italy, namely Trapani and Pozzallo in Sicily, Taranto in Puglia and in Lampedusa, mainly regulated by soft law at the domestic level.[91] The hotspot teams are composed of Italian police officials as well as officials from EU agencies like the European Asylum Support Office (Easo), the European Police Office (Europol), and the European Border and Coast Guard Agency (Frontex), who carry out an activity of pre-identification, and the European Dactyloscopie (Eurodac), who look after the registration in addition to photo finger printing and medical screening of migrants.[92] Those activities serve the

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88 See, for example, Joint UNHCR/IOM Press Release, UNHCR, IOM condemn attack on Tajoura, call for an immediate investigation of those responsible, 3 July 2019: https://www.unhcr.org/news/press/2019/7/5d1c836c4/unhcr-iom-condemn-attack-tajoura-call-immediate-investigation-responsible.html

89 See R. Ware, House of Commons Library, Libya: the consequences of a failed state, Commons Briefing Papers CPB-8314, 18 May 2018

90 A 'hotspot' has been subsequently defined as 'An area in which the host EU Member State, the European Commission, relevant EU agencies and participating EU Member States cooperate, with the aim of managing an existing or potential disproportionate migratory challenge characterized by a significant increase in the number of migrants arriving at the external EU border' by Art. 2(10) of EU Regulation 2016/1624 on European Border and Coast Guard Regulation.

91 The structure and the functioning are provided for in two governmental documents, Italy's Roadmap of 28 September 2015, http://www.statewatch.org/news/2015/nov/italian-Roadmap.pdf (in Italian), and Standard Operating Procedures Applicable to Italian Hotspots of March 2016, http://www.libertaciviliimmigrazione.dlci.interno.gov.it/sites/default/files/allegati/hotspots_sops_-_english_version.pdf Subsequently domestic primary law has regulated certain aspects of the detention in the hotspot like the maximum length of the stay.

92 See C. Caprioglio, F. Ferri and L. Gennari, Detention and Selection: An Overview of the Italian Hotspot System, in Border Criminologies Blog, Oxford University, Faculty of Law, 10 April 2018, https://www.law.ox.ac.uk/research-subject-

purpose of dividing the migrants between asylum seekers, those entitled to receive humanitarian protection (now special protection), to be transferred to first reception centers or to be relocated, and the irregular migrants who are likely to be expelled. As a matter of fact, the operation of pre-identification and registration may take several days, if not weeks, especially for vulnerable categories like unaccompanied minors, which de facto transforms their stay in the hotspot into informal detention under actual conditions that are difficult to monitor from the outside. The access of NGOs to these hotspots is extremely limited and when allowed they have reported systematic violations of human rights, in particular in Lampedusa,[93] where the asylum applicants sometimes cannot leave the islands for months on end, creating a situation of overcrowding and of deprivation of liberty in breach of Art. 13 of the Constitution and of several international (like Art. 5 of the ECHR) and EU law norms (Art. 6 of the Charter).[94] The risk of transforming the hotspots in detention centers has grown further after Decree Law no. 113 of 2018 has expanded the grounds of detention:[95] in case a third country national is found in an irregular situation in the national territory or has been rescued during search and rescue operations at sea he can be detained in a hotspot for up to 30 days for the authorities to ascertain his/her identity and nationality (Art. 3).

Indeed, the anti-migration turn of Italian politics has been strengthened by the appointment of the coalition government between 5SM and Lega in June 2018 and, in particular, by the agenda pursued by then after the Vice President of the Council of Ministers and Minister of Interior, Matteo Salvini and ultimately endorsed by the whole Cabinet. Two decree-laws, in particular, have been at the very center of constitutional, European and international concerns, once again, for the potential threat to the rule of law they pose in addition to the formal problems they raise due to the abuse of emergency decrees in front of the Parliament, patently lacking extraordinary circumstances of necessity and urgency under Art. 77 It. Const.[96]

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groups/centre-criminology/centreborder-criminologies/blog/2018/04/detention-and. On the complex management of migration inflows on the Sicilian territory, see F. Alagna, Shifting Governance. Making policies against migrant smuggling across the EU, Italy and Sicily, Phd thesis, 2019, p. 81-105.

93 On the unsustainable situation in Lampedusa, even before the creation of the hotspots, and the unacceptable deprivation of liberty and of other rights occurred in the reception centre of Contrada Imbriacola, see European Court of Human Rights, Khlaifia and Others v. Italy (no. 16483/12), where the Court condemned Italy for violation of Arts. 3 (inhuman and degrading treatments), 5(1) and (2) (limitation of liberty and lack of information provided on the ground of detention), 13 (right to an effective remedy) ECHR, and Art. 4 of Protocol 4 (prohibition of collective expulsion of aliens). On the deprivation of migrant's liberties in Italy and in the European context, see M. Savino, Le libertà degli altri. La regolazione amministrativa dei flussi migratori (Giuffrè, 2012), p. 339 ff.

94 See L.L. Liboni, Italian Coalition for Civil Liberties and Rights, Severe Human Rights Violations Found at Lampedusa Hotspot, 12 March 2018, https://www.liberties.eu/en/news/inhuman-conditions-in-the-lampedusa-hotspot/14526. The hotspots of Lampedusa and Pozzallo were temporarily closed in 2018. In 2018, 13777 people entered the Italian hotspots. See also Guarantor for the rights of detained persons, Relazione al Parlamento Italiano 2019, 26 March 2019.

95 Decree Law no 113 of 4 October 2018, converted into Law no 132 of 1 December 2018. F. Cortese, La crisi migratoria e la gestione amministrativa, in no 2 Rivista trimestrale di diritto pubblico, p 435 ff., highlights that beyond the emergency, the Italian response to migration inflows has lacked a mid-term strategy in terms of administrative management of migrants and refugees.

96 For a comprehensive overview of the problems raised by Decree-Law no 113 of 2018, see S. Carta, Beyond closed ports: the new Italian Decree-Law on Immigration and Security, in EU Migration Law Blog, 31 October 2018, https://eumigrationlawblog.eu/beyond-closed-ports-the-new-italian-decree-law-on-immigration-and-security/

Once adopted by the Council of Ministers, Decree-Law no. 113 of 2018 immediately received criticism from the President of the Republic. President Mattarella issued the Decree, under Art. 87 It. Const., but at the same time sent a letter to the President of the Council of Ministers (which is extremely unusual), stating that, even though this is not expressly mentioned in the text, the Decree-Law has to comply with the constitutional and the international obligations, in particular with Art. 10 of the Constitution.[97]

First, Art. 1 of the Decree-Law substantially repeals the national provisions on 'humanitarian protection', which used to be seen as a fundamental pillar of the right to asylum in Italy, alongside the granting of refugee status and of subsidiary protection.[98] Indeed, humanitarian protection could be granted, with some flexibility, to those who had suffered from deprivation of personal liberty, given the objective conditions in the country of origin and the personal situation of the applicant that forced him to flee said country, even though there was no risk of persecution or serious harm. Moreover, due to the Decree-Law, it becomes almost impossible for asylum seekers who see their application rejected to obtain a residence permit, even for humanitarian reasons. The 'special protection' residence permit, which instead is introduced by the Decree-Law, has a very limited scope of application, as it can be claimed just by those who cannot be repatriated due to the principle of non-refoulement. The same applies to other types of residence permits, for exceptionally serious medical conditions, for people carrying out extraordinary civil acts and for people affected by exceptional natural disasters in their home country. These special permits are ordinarily valid for only a period comprised between six months to one year compared to the previous permit for humanitarian protection, which are valid for two years. Moreover, those entitled to a humanitarian residence permit at the time of the entry into force of the Decree-Law loose any right to regularly stay in Italy unless they can receive an alternative permit. Relatedly, asylum applicants who receive a temporary residence permit can reside in the Italian territory but can no longer register at the municipal registry office, a pre-condition to exercising rights like the one to education, to be included in the national health care system and to benefit from other social services, from which thus they remain excluded.[99] Serious doubts have been expressed with regard to the detrimental impact of these provisions

97 And with Article 117, first section, according to which the legislation must be in compliance with the duties deriving from international obligations. The letter, in Italian, is available here: https://www.quirinale.it/elementi/18099

98 M. Savino, Il diritto dell'immigrazione: quattro sfide, in no 2 Rivista trimestrale di diritto pubblico, p. 381 ff. claims, for example, that more attention should be paid to the regulation of the borders and to the effecctiveness of migrants' rights rather than on the impact of the migration inflows on social rights (of migrants and citizens).

99 To date the Italian Constitutional Court has not had the possibility to judge on the validity of these provisions from the standpoint of fundamental rights' protection. Indeed, in judgment no 194 of 2019 the Court decided on constitutional challenges brought by several Regions against the Decree-Law and its Law of conversion for alleged violation of their legislative powers, which the Court dismissed (it only upheld the challenge on the violation of the autonomy of municipalities and provinces due to the new powers granted by the Decree-Law to the prefects). However, on 31 July 2019 the Tribunal of Ancona referred questions of constitutionality to the Constitutional Court on the Decree-Law's provisions excluding asylum seekers from the registration at municipal offices, which would eventually lead the Court to adjudicate also on the alleged limitation of asylum seekers' rights triggered by the Decree.

on the protection of the right of asylum under Art. 10 of the Italian Constitution.[100]
Second, several provisions of this Decree-Law appear in contrast with Art. 13 of the Constitution and with the Geneva Convention as long as the former justify the detention of migrants for the purpose of checking their identity and nationality. Not only can the detention in the hotspots be prolonged for up to 30 days, but to facilitate the return of irregular migrants, third country nationals can remain in a return center for up to 180 days (previously, the maximum was 90 days). Linked to this is the circumstance that the Decree-Law dismantles the existing reception mechanisms in Italy. Indeed, only people who have been granted the refugee status and subsidiary protection and unaccompanied minors are hosted now in ordinary reception centers; asylum seekers stay at collective reception centers or at temporary reception centers that only provide basic services, well below the standard traditionally offered by the ordinary reception centers. Such a novelty, coupled with the length of the asylum procedures, can become very problematic from the perspective of the minimum standard to be fulfilled to offer decent living conditions under Art. 4 of the EU Charter and Art. 3 of the ECHR, interpreted in light of the European Court of Human Rights' case-law.[101]
Third, in case an asylum seeker is subject to an investigation or convicted for one of the serious criminal offences that led to the exclusion or the revocation of international protection (e.g. slavery, robbery, extortion, production, trafficking and possession of drugs) – even if the appeal is still pending and thus there is no final sentence – s/he can be immediately expelled independently of the risk to be killed, tortured or to suffer inhumane and degrading treatment, in breach of Art. 3 ECHR and of Art. 19 of the EU Charter and of the basic procedural guarantees of trials and of the right of defense.
The provisions of the Decree-Law just described exemplifies a trend toward the degradation of the system of protection of fundamental rights of third country nationals in Italy. This is carried out in the name of the alleged guarantee of the national security and of the rights of the Italian citizens whose impairment by the arrival of migrants is neither proved nor logically sound (given the figures on the decreased number of arrivals). The dismantling of the system of human rights protection takes place neglecting basic principles and norms of the Italian Constitution, of EU primary law and of international agreements ratified by Italy. The limits imposed by the enforcement of the Stato di diritto and deriving from constitutional, EU and international obligations were discredited by the coalition Government between the 5SM and Lega as a 'useless', if not dangerous, burden to fulfil the best interest of the Italian citizenry to security and public order.
It is not an overstatement to say that in the 'politics of fear' against the foreigner

100 See S. Curreri, La condizione giuridica del richiedente asilo alla luce del c.d. decreto sicurezza, in Quaderni costituzionali, no 1, 2019, p. 169-171.
101 See case of Tarakehl v. Switzerland, Application no. 29217/12, and Khlaifia and Others v. Italy, Application no. 16483/12. See also, though not referred to Italy, the Court of Justice of the EU's rulings in the cases C-646/16, Jafari c. Bundesamt für Fremdenwesen und Asyl and C-490/16, A.S. c. Slovenia

that has been constantly fueled and in the related bypassing of the Constitution one can detect elements of the 'politics of resentment'. Amongst those elements are the attempt by the politics to prevail on constitutional legality and the presentation of the rule of law principles as obstacles against the attainment of the 'real' interest of the Italians.[102]

The same considerations are applicable to the second Decree, Decree-Law no. 53 of 2019.[103] Amongst other things and in line with previous directives issued by the Minister Matteo Salvini, the new Decree-Law empowers the Minister of Interior, in agreement with the Ministers of Defense and of the Infrastructure and transports, after having informed the President of the Council of Ministers, to limit the access to or deny entry in Italian ports, the passage or the stopping and anchoring in the territorial sea of ships for reasons of public order and security or when the ship engages in the 'loading or unloading of any commodity, currency or person, contrary to the customs, fiscal, immigration or sanitary laws and regulation' (Art. 19(2), lit. g, UN Convention on the Law of the Sea) of the State.

The politics of closed ports has led the UN High Commissioner for Refugees to claim that this Decree-Law violates the UN Convention on the Law of the Sea, the International Convention for the Safety of Life at Sea and the International Convention on Maritime Search and Rescue and, indirectly, the Constitution that prescribes the respect of Italian international obligations. To use the words of the UN Refugee Agency (UNHCR), to rescue people at sea or to let them disembark at the closest and safest port is a 'long-standing humanitarian imperative (...) and an obligation under international law'[104] and the Libyan ports are certainly not safe, given the current situation in the country.

The effects of the first implementation of the Decree-Law is probably well-known, with the Italian Government denying at first on 15 June 2019 the permission to the NGO's ship Sea Watch 3 to enter the territorial sea and then the port of Lampedusa, a refusal that went ignored by the Captain of the vessel.[105] Immediately arrested with several criminal charges, including aiding illegal immigration, the Captain was eventually released on 2 July upon an order of the judge for the preliminary investigations. The judge clarified that the Captain had infringed the prohibition of the Italian Government in order to fulfil a duty which was imposed by norms or orders of the public authority in force in the Italian constitutional system, including the international obligations that Italy has incorporated into its legal order.[106]

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102 On the pillars of the 'politics of resentment', see again, T.T. Koncewicz, The Capture of the Polish Constitutional Tribunal and Beyond, cit. See also A. Kustra, Poland's constitutional crisis. From court-packing agenda to denial of Constitutional Court's judgments, in TORUŃSKIE STUDIA POLSKO-WŁOSKIE XII, 2016, p. 434-366 and W. Sadurski, Poland's Constitutional Breakdown, Oxford, OUP, 2019, p. 162 ff.

103 Converted into Law no. 77 of August 2019.

104 See UNHCR, UNHCR urges Italy to reconsider proposed decree affecting rescue at sea in the Central Mediterranean, press release, 12 June 2019.

105 On the treatment of NGOs in this context, in particular of their allegged relations with smugglers, see F. Alagna, Shifting Governance, cit., p. 130-136 and L: Masera, La criminalizzazione delle ONG e il valore della solidarietà in uno Stato democratico, in no 2 – Special issue, Federalismi.it, 2019.

106 The Order of the Judge for the Preliminary Investigations of the Tribunal of Agrigento is available, in Italian here:

Therefore, such a conduct was exempted from penalty under Art. 51 of the criminal code.

Such an epilogue and the political reaction to this judicial order show one last element of concern about the current degradation of the rule of law principles that Italy is facing. This is the belief that the political power is free to act without checks and balances, an idea against which the judiciary is willing to react (together with the President of the Republic and the Constitutional Court). The political management of the migration crisis reinforces the trend of a latent and pernicious conflict between the political power and the judiciary, which undermines the authority of both branches and that probably goes back to the corruption scandals and the collapse of the Italian political system in the 1990s. Yet, the migration crisis has brought to the fore a sort of existential tension between the measures adopted by the Government, often in patent violation of fundamental rights protected under the Constitution, EU law and international law, and the judiciary, which is engaged to protect the rule of law.

Perhaps the case in which such a tension so far has reached the tone of a constitutional drama has been the Diciotti case, by the name of the Italian Coast Guard ship, 'Ugo Diciotti', that was at the center of the controversy. In August 2018, the Minister of Interior Matteo Salvini prohibited the disembarkment of the Coast Guard ship, anchored in the port of Catania, thereby leaving 177 migrants of various nationalities, including minors, trapped in the ship for several days with precarious health and in unhygienic conditions. The Tribunal of Catania – section for ministerial crimes – wanted to prosecute the Minister of Interior for long-term kidnapping (sequestro di persona pluriaggravato) given the deprivation of liberty to which the migrants had been subject, as Matteo Salvini acted in his capacity of public official, abusing his powers also against minors, when exercising his functions.[107] However, according to Art. 96 Const. and Art. 9 of Const. Law no. 1 of 1989, the President of the Council of Ministers and the Ministers enjoy a special constitutional guarantee for alleged crimes committed when exercising their functions and, in such circumstances, their prosecution shall be previously authorized by the Chamber of Deputies or the Senate. In the Diciotti affaire, Matteo Salvini being a senator, it was the Senate that voted on the request of the Tribunal of Catania. On 20 March 2019 the Senate denied the authorization to prosecute by absolute majority of its members,[108] as set out by Const. Law no. 1 of 1989, because it considered that the Minister had pursued a preeminent public interest when exercising his governmental function.

From a formal constitutional standpoint, this was a perfectly legitimate decision of

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http://www.giurisprudenzapenale.com/wp-content/uploads/2019/07/Rachete-Carola-Ordinanza-sulla-richiesta-di-convalida-di-arresto.pdf

107 The Order of the Tribunal of Catania of 21 January 2019, in Italian, is available here on the website of the Italian Senate: http://www.senato.it/Web/AutorizzazioniAProcedere.nsf/dfbec5c17bce92adc1257be500450dad/4c5c5e58bdf39bbac125838c00431f69/$FILE/Doc.%20IV-bis,%20n.%201.pdf.

108 237 senators voted against the authorization, 61 in favour, and there were no abstentions.

the Senate, which blocked the initiation of criminal proceedings against the Minister of Interior. It is not the first time that the special constitutional guarantee of Art. 96 Const. and of Const. Law no. 1 of 1989 have been used dealing with alleged crimes committed by a Minister in relation to migrants' rights, which likewise triggered serious concerns at European level.[109] It was not even the first occasion when the Minister of Interior refused to authorize the access of an NGO ship arriving with migrants in Italian ports.[110] However, the rate of constitutional conflict that this case has generated appears symptomatic of a democratic and rule of law malaise, of a transfigured idea of what the Italian conception of the Stato di diritto, based on the principle of legality, used to be. The Diciotti case represents the last example of an 'escalation' of a more tense relationship between the executive and the judiciary and of the attitude of the Minister of Interior to justify its conduct in the name of the 'electoral mandate' conferred upon by the voters in the 2018 elections in contrast to 'undemocratic' bodies like courts.[111] Equally problematic is the scope of the constitutional guarantee foreseen for the Ministers: could the preeminent constitutional interest to safeguard the national security and to combat illegal immigration justify any type of criminal offence committed when exercising the ministerial functions?

In some previous judgments, the Constitutional Court – not involved in this specific case – has tried to set some limitations, in particular emphasizing the role that ordinary judges should play in detecting and qualifying the alleged criminal offence.[112] The risk, however, in the very sensitive field of migration and of asylum law, is that the political nature of certain conducts claimed by the Ministers, also in light of the new Decree-Laws, could be used by them to justify what is de facto a systematic violation of basic rights of migrants, in theory protected under the Constitution, EU and international law for the sake of preserving the national collective interest to security and public order.

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109 Back in 2009, the then Minister of Interior Roberto Maroni had been investigated for abuse of power by the competent Tribunal of Ministers, which eventually dismissed the allegation (so that the Parliament was not involved), for the refoulement of 277 migrants rescued at sea in Maltese waters by the Italian Guard Cost and the Finance Guard ships to Libya, against their will, in force of bilateral agreements between Italy and Libya. The case led to a decision of the European Court of Human Rights, Hirsi Jamaa v. Italy, 23 February 2012, in which Italy was condemned for violation of Art. 3 ECHR and Art. 4 of Protocol no 4, prohibiting collective refoulement. See A. Morelli, Principio di legalità vs. "preminente interesse pubblico"? Il caso Diciotti e le sue conseguenze, in Quaderni costituzionali, no 4, 2018, p. 900 and G. Romeo, Diritti fondamentali e immigrazione, in no 2 – Special issue, Federalismi.it, 2019, p. 8.

110 On the case of the Aquarius ship, with 629 people on board, eventually disembarked in Valencia, thanks to the Spanish authorities, see F. Bailo, Il "caso Diciotti" e la prova di forza con l'UE: fare i conti con la legalità, in www.lacostituzione.info, 26 agosto 2018.

111 See A. Morelli, Principio di legalità vs. "preminente interesse pubblico"?, cit., p. 900, who also highlights the devaluation by the then Minister of formal legal tools through which the government is expected to act, namely the use of twitter and facebook to take action and give orders when fulfilling institutional functions. On the attempt to criminalize migrants' conduct and the reaction of courts, see, for example, the judgment of the Tribunal of Trapani, Ufficio del Giudice per le indagini preliminari, GIP Trapani, sent. 23 maggio 2019 (dep. 3 giugno 2019), Giud. Grillo, on which see the comment by L. Masera, La legittima difesa dei migranti e l'illegittimità dei respingimenti verso la Libia (caso Von Thalasa), in Diritto penale contemporaneo, 24 June 2019.

112 See the Italian Constitutional Court's judgments no. 241 of 2009 and nos. 87 and 88 of 2012.

3. Lights and shadows

For decades, the Italian participation in the European integration process has represented a source of stability for Italian democratic institutions and the transformation and the consolidation of the Stato di diritto. This has not occurred without troubles. For decades political parties, with the exception of the Communist party – which moderated its claims against the European Community – almost uncritically supported the evolution of the European integration, Italy being one of the founding members. By contrast, the Italian Constitutional Court has been much more cautious in accepting certain developments triggered by the Court of Justice and by Treaty revisions. The Court has gradually reshaped its case-law on the principle of legality taking into account the pervasive impact of EU law and detecting certain core principles of the Italian Constitution that could not be displaced by the integration process. Lately, it has also engaged in a constructive and direct dialogue with the Court of Justice through the preliminary reference procedure.

The membership of the European Union has also accelerated or favored certain important institutional and constitutional reforms in Italy and, while it has undoubtedly triggered an evolution in the way certain tenets of the Italian Stato di diritto had been conceived, for instance regarding the place and the declining role of parliamentary legislation, overall it has been perceived as beneficial for the Italian constitutional system.

The Eurozone and the migration crises have put in doubt this assumption. The way in which the financial crisis has been managed in the country, through an alliance of domestic and supranational technocratic elites, has questioned the very essence of the democratic procedures and of the mechanism of parliamentary accountability and has undermined the ability of the welfare system to deliver. The main threats to the traditional ideas of the rule of law and democracy anchored in the Italian constitutional system have consisted of a further marginalization of the Parliament and of parliamentary legislation, with fast-track procedures, lack of debate and tight time constraints, and in the dismissal of supranational institutions as 'enemies of the people', pursuing an austerity policy in their own interest or, worse, in the interest of some Member States. Indeed, the European rules of the new economic governance have been treated as barriers to the fulfillment of the interests of the Italian polity.

With the migration and the refugee crisis, the relationship between Italy and the EU has experienced a further break. The initial migratory pressure at the sea borders and the lack of effective and sustainable EU-wide responses have been the excuses in Italy for the steady degradation of migrants' fundamental rights protection, in particular of asylum rights, in breach of the Constitution, of EU law and international law. EU and international norms have been presented as obstacles to achieve the final objectives of the government to have safe borders, to combat illegal migration and to enhance national security. The pursuing of these objectives, and the overcoming of the rule of law 'obstacles', are justified in light of an unspecified electoral mandate that the majority of the voters would have conferred upon the Lega and the 5SM

coalition government.

The attempts of the Italian government(s) to act without checks and balances and disregarding the basic protection of fundamental rights has led to an escalation of the conflict between the executive and the judiciary (also with the European Court of Human Rights), which does not appear to stop presently. The roots of this democratic and rule of law malaise, however, are also to be traced back to certain critical junctures of Italian constitutional history, in particular to the collapse of the party system in the 1990s, the role the judiciary played back then, the advent and domination of Italian politics by Silvio Berlusconi, and the artificial construction of an anti-elitist discourse.

However, in Italy, the 'attempt of politics to dominate the law' has faced the vigorous reaction of the judiciary and of the organs of constitutional guarantee, the Constitutional Court and the President of the Republic, whose independence and autonomy from the political fight is not under threat and which have managed to keep a wise balance between acting as mere watchdogs and active intervention. The final bulwarks of the Italian Stato di diritto are safe for the time being. Furthermore, the latest political developments in the country, with the collapse of the coalition government between the 5SM and Lega, replaced by a coalition government between the 5SM, the Democratic Party and other minor parties in September 2019, might disclose a trend reversal as for the compliance with the basic rule of law principles, the protection of fundamental rights and a more friendly position vis-à-vis the EU. For example, with regard to migration issues, following the change of the Minister of Interior in office,[113] although the very disputed Decree-Laws have remained in force, the policy of 'closed ports', which relied on a discretionary choice of the Minister, has been somewhat abandoned. A different style of political leadership and a narrower interpretation of the contested provisions have emerged thereby also decreasing the rate of institutional conflict with the judiciary.

113 Since 5 September 2019 and at the time of writing the Minister of Interior is Luciana Lamorgese, former prefect of Milan. The appointment of a technical figure, with no previous experience in politics, marked a significant discontinuity with Matteo Salvini's (social media) leadership.