The Italian Constitutional Court and Balancing the Budget

Judgment of 9 February 2015, no. 10
Judgment of 10 March 2015, no. 70

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The context

Two recent decisions of the Italian Constitutional Court have brought to the forefront an issue that had already been raised in the debate among legal scholars in the past and reached its peak at the start of the 1990s:[1] how should the Constitutional Court act when one of its judgments declaring a law to be unconstitutional may result in economic consequences for the State, which are of such gravity as to weigh upon the balance of public finances?

From a theoretical viewpoint, the problem can be broken down into three distinct issues, according to whether the questions concern[2] one of the following: (i) tax laws and revenue laws in general; (ii) laws allocating resources, i.e. so-called expenditure laws and, among the latter; (iii) laws defining the rights to benefits, above all where social security benefits are concerned.

In order to understand the delicacy of such cases, we need only consider, firstly, that each lies at a crossroads among different State powers, since in the Italian system of constitutional justice, access to the court is prevalently through ordinary

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[1] Constitutional court, 'Le sentenze della Corte costituzionale e l'art. 81 u.c. della Costituzione' [*The Judgments of the Constitutional Court and art. 81, last paragraph, of the Constitution*]. Proceedings of the seminar held in Rome, Palazzo della Consulta, on 8 and 9 November 1991 (Giuffrè 1993).

[2] V. Onida, 'Giudizio di costituzionalità delle leggi e responsabilità finanziaria del Parlamento' [*Opinion on the Constitutionality of Laws and the Financial Responsibilities of Parliament*], in Constitutional court, *supra* n. 1, p. 30.

European Constitutional Law Review, 12: 177–191, 2016

doi:10.1017/S1574019616000110

courts ('indirect').[3] What comes into play is thus not only the relationship between the constitutional court and the legislative branch, but also the role of the ordinary courts from which the questions originate and which are generally entrusted with the protection of rights.

Secondly, any reasoning with respect to the 'costs' of judgments must remain within the confines of two fundamental principles: on the one hand, the duty of solidarity under Art. 2 of the Italian Constitution,[4] which may justify economic sacrifices being borne by the wealthier segments of society in order to protect the weaker ones; on the other hand, however, the principle of equality enshrined in Art. 3 of the Constitution must be guaranteed. For this reason, the Court's judgments are based, in the majority of cases, on an evaluation of the reasonableness of legislative choices and the need to achieve a balance between budget requirements and the rights concerned.

The problematic character of such cases – which is self-evident – takes on a nearly dramatic tone when, as in recent cases addressed by the Constitutional Court, the judgments must take into account two further, closely intertwined elements: one a question of law, the other of fact.

The legal element is represented by the 'new' constraints to budgetary policy introduced by the constitutional reform of 2012 (constitutional law no. 1 of 2012, whereby Italy expressly introduced the principle of a balanced budget into the Constitution: Article 81), and the obligations confirmed between 2011 and 2013 on a European level,[5] with the 'Six Pack', the 'Two Pack' and the so-called 'Fiscal Compact', in regard to (among other things) compliance with deficit, debt and public spending rules.

The factual element is obviously represented by the precarious national economic situation, aggravated by the economic crisis; the economy was

[3] *See* R. Bin and G. Pitruzzella, *Diritto costituzionale* [*Constitutional Law*] (Giappichelli 2015) p. 459-516. We must also point out that in this particular matter, another kind of judgment is highly relevant: I mean controversies over competencies between territorial and functional bodies of the State (*principaliter* proceedings), involving, for example, expenditure for health care services and the coordination of public finance. However, this kind of judgment is different from those at issue, because it primarily concerns the division of powers between the central state and the territorial autonomies, as provided for by Arts. 117 and 119 of the Constitution: *see again* Bin and Pitruzzella, p. 293-301 and p. 425-440.

[4] The English translation of the Italian Constitution is available at <www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf>, visited 19 February 2016.

[5] The Fiscal Compact and the Two Pack did not introduce a legal obligation to amend the Constitution, but recommended the introduction of a balanced budget rule 'preferably at the constitutional level'. On this point *see* G. L. Tosato, La riforma costituzionale del 2012 alla luce della normativa dell'Unione: l'interazione fra i livelli europeo e interno [*The constitutional reform of 2012 in light of EU legislation: the interaction between European and domestic levels*], report presented at the seminar held in Rome, Palazzo della Consulta, on 22 November 2013, available at <www.cortecostituzionale.it/documenti/convegni_seminari/Seminario2013_Tosato.pdf>, visited 19 February 2016.

particularly at risk in the second half of 2011, when the effect of contagion in the sovereign debt crisis gave rise to a likely scenario of default.[6]

Fitting into this complex and difficult context are the first Judgments (no. 10/2015 and no. 70/2015) in which the Constitutional Court addressed and decided upon some questions of constitutionality raised with respect to so-called 'crisis legislation'. This expression is used to indicate a series of urgent legislative provisions adopted starting from 2008, first by the fourth Berlusconi government, to 'restore order to public finances' (the first was law decree no. 112/2008), then by the Monti government (2011-2013), in an attempt to regulate the trend in economic indicators and thereby curb the uncontrolled upsurge of the spread on government bonds: hence the name 'Save Italy' attributed by the Monti government to the package of measures adopted in 2011 (law decree no. 201/2011). All these measures were characterised by tax increases designed to bring in new revenue quickly and massive across-the-board spending cuts. It was thus inevitable that those disadvantaged in various ways by such measures would challenge their constitutional legitimacy.[7]

The main legal issues

The heart of the problem of potentially costly judgments lies in the importance to be attributed to the balanced budget constraint, both in the context of the Constitution, and in terms of its repercussions on the legal system considered as a whole.

From this point of view, the situation in the Italian legal order reflects, first of all, the considerable hastiness in approval of the constitutional reform:[8] barely seven months elapsed between the presentation of the initiative and its enactment (for a procedure that entails double approval for each House, with qualified majorities for the final approval: Article 138 of the Constitution), with practically no debate, not only at the level of public opinion, but also within the scientific community and even in Parliament. As a result, the theoretical assessment of the

[6] J-P. Fitoussi, *Il teorema del lampione* [*The Streetlamp Theorem*] (ed. it. Einaudi 2013).

[7] Although the Court has never expressly taken a stand on this point, it is necessary to clarify that, despite the fact that constitutional law no. 1/2012 was adopted some years after the approval of law decrees (2008-2011), it was nevertheless still in force at the time of the judgments of the Court. In 2015 the 'balanced budget clause' (Art. 81, new version) was hence a constitutional parameter and the Court was constrained to deal with it, as it is a standard for review. This kind of situation is not so unusual in the Italian system of constitutional justice, where access to the Court is prevalently indirect: the leading case is judgment no. 1/1956, where the Court scrutinised the validity of laws which entered into force prior to the Italian Constitution of 1948 (*see* Bin and Pitruzzella, *supra* n. 3, p. 476-477).

[8] This assessment is almost unanimously shared by legal scholars and economists. On the procedure for approval of the reform, reference may be made to C. Bergonzini, *Parlamento e decisioni di bilancio* [*Parliament and Budget Decisions*] (Franco Angeli 2014) p. 161-193.

https://doi.org/10.1017/S1574019616000110 Published online by Cambridge University Press

impacts on the system came with a certain delay. Over three years after the approval of constitutional law no. 1/2012, legal scholars are still divided between those who consider protecting the budgetary equilibrium to be an objective that *must* be included in the reasoning of the Constitutional Court, even if it means limiting or reducing the rights to benefits and public spending in general; and those who, on the contrary, feel that this type of evaluation should not be left to the Court, which when formulating a judgment on constitutionality should not concern itself with matters of a substantially political nature. There are clearly other elements underlying the debate – which may be only briefly mentioned here – including a different conception of the relationship that should exist between the body created to uphold the constitution and the legislative branch. As regards the Court, this can be roughly summed up as an alternative between a co-legislative role and a function of mere oversight of political majorities.

In any case, only if one adheres to the former approach will a further, procedural problem arise, regarding whether the effects of costly judgments should be limited over time and, if this is the case, by what means. This operation must be carried out completely on an interpretative basis, since in the Italian system there are no provisions that expressly allow the effects of judgments to be moderated, in contrast to (just to mention the best-known example) the German Constitutional Court. In Italy, according to the letter of the Constitution and the law governing the functions of the Constitutional Court (law no. 87/1953), the Court's rulings have retroactive effect, in the sense that 'from the day following the publication of the decision' (Article 136 of the Constitution) the laws declared to be unconstitutional 'cannot have application' (Article 30(3), law no. 87/1953), even in previously established legal relationships. Over time, the Italian Court has developed various decision-making techniques that have enabled it to establish the constitutional illegitimacy of a law whilst formally complying with that rule,[9] but without ever elaborating a case law comparable to that of *Bundesverfassungsgericht* (so firmly consolidated as to lead to amendment of the law concerned). Indeed, given the particular implications of limiting retroactive effects, the few Italian precedents, dating back to the late 1980s, aroused so much controversy (in the Parliament of that time and among legal scholars: *see supra*) that the Court was induced to rapidly abandon that road.

The issue has reappeared today, with all the complications deriving from the enormous difficulties facing public finances. And today – partly because of the objective difficulty of the subject matter (which extends into the economics and accounting realms), partly because of the rapid evolution of the legal framework

[9] *Cf.* S. Lieto and P. Pasquino, 'Metamorfosi della giustizia costituzionale in Italia' [*Metamorphosis of Constitutional Justice in Italy*], 2 *Quaderni costituzionali* (2015) p. 351 at p. 368-376.

(also on a European level), and partly because of the previously mentioned delay in the theoretical elaboration of the problem – the burdensome task of interpretation has come to weigh almost entirely on the Constitutional Court.

Judgment no. 10/2015 (Robin Hood Tax)

In the context just described, Judgment no. 10 of 2015[10] represents the Court's first attempt to limit the retroactive effects of a ruling of unconstitutionality to protect budgetary equilibrium. The judgment triggered divergent reactions: on the one hand it has been welcomed by some scholars, who appreciated the novel use of proportionality.[11] On the other hand, it has been criticised by other scholars, because the Court asserted its power to establish that the decision would not produce effects *even in the very proceeding from which the question originated*, thus calling into question the foundations of the Italian model of determining constitutionality (subsequently and via indirect review).[12]

Essentially, Judgment no. 10 annuls a tax provision (the so-called *Robin Hood Tax*) introduced by the aforementioned law decree no. 112 of 2008 in the form of a 'surcharge' on the excess profits earned in some sectors of the oil industry. In reality, according to the Court, the tax was tantamount to an increase in the overall tax burden imposed on a single category of taxpayers in an unreasonable and disproportionate manner: based on well-established case law, such provisions violate Articles 3 and 53 of the Constitution.

For the limited purposes of this discussion, the problem is that the judgment came four years after the ruling of the tax court which had to decide on a refund claim filed by several oil companies (March 2011) and seven years after the entry into force of the legislation (June 2008), which in the meantime had obviously produced effects, i.e. tax revenues amounting to several billion euros.

In view of this circumstance, the Court felt it had to take account of any financial consequences of a 'normal' ruling of unconstitutionality that might result

[10] The full text of the judgment is available at <www.cortecostituzionale.it/actionPronuncia.do>, visited 19 February 2016. English translation at www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S10_2015_en.pdf, visited 19 February 2016.

[11] *See*, for example, the papers by A. Anzon, L. Antonini, A. Pin and E. Longo at <www.forumcostituzionale.it/wordpress/?p=6585>, visited 19 February 2016.

[12] The opinion is shared by a large majority of legal scholars: *see* the numerous contributions published at <www.giurcost.org/decisioni/2015/0010s-15.html>, visited 19 February 2016 and <www.forumcostituzionale.it/wordpress/?p=6585>, visited 19 February 2016, and particularly R. Romboli, 'L'"obbligo" per il giudice di applicare nel processo *a quo* la norma dichiarata incostituzionale *ab origine*: natura incidentale del giudizio costituzionale e tutela dei diritti', 6 April 2015 at <www.forumcostituzionale.it/wordpress/wp-content/uploads/2014/12/nota_10_2015_romboli.pdf>, visited 19 February 2016.

in a serious breach of the balanced budget obligation under Article 81 of the Constitution, since the macroeconomic impact of the tax refunds would cause such an imbalance in the state budget as to imply the need for an additional financial corrective legislation, also in order to comply with the Italy's commitments towards the EU and international bodies and, in particular, the annual and multi-year provisions set forth in the stability laws, in which the revenue was considered structural (point 8, *Conclusions on points of law,* henceforth *Conclusions*).

Again, according to the Court, it was necessary to avoid an 'unreasonable redistribution of wealth' to the advantage of economic operators that may have benefited from a favourable market situation. The Robin Hood Tax law envisaged a mechanism designed to prevent the tax burden from being passed on to consumers; however, based on the assessments of the regulatory authority for the industry (mentioned in the judgment), it appears to have been impossible to verify whether the prohibition on transfers had actually worked. Therefore, any refund of amounts collected by the State would have risked reimbursing companies that had in reality already transferred the costs to others. This would result in a 'period of enduring economic and financial crisis affecting the weakest in society', causing 'irremediable prejudice to the principles of social solidarity and a serious breach of Articles 2 and 3 of the Constitution' (point 8, *Conclusions*).

These arguments led to the need to seek a balance – albeit using a questionable strategy – between guaranteeing the rights of taxpayers subjected to an illegitimate 'surcharge' and ensuring a balanced budget, to be achieved by modulating the former over time to safeguard the latter. Essentially, these were the grounds on which Court justified its manipulation of the rules governing its own activity, so as to prevent any declaration of illegitimacy from determining 'effects which are even more incompatible with the Constitution' (point 7, *Conclusions*).

With respect to the protection of rights, the Court failed to achieve the objective, given that the sacrifice imposed on taxpayers, despite being declared unconstitutional, could not be redressed by refunding the amounts already paid: the Court ruled in favour of the claimants, but the latter had to content themselves with the 'partial satisfaction' (point 7, *Conclusions*) of not having to pay again in the future. But also on the question of the budget, the Court succeeded in only partly avoiding the repercussions. Though it is in fact true that the judgment left intact the revenues already collected, it is likewise true that replacement sources of revenue would have to be found for the future: according to the law on public accounts (law 196/2009, Articles 10 and 11), and even more so after the constitutional reform of 2012, balancing the budget would entail planning over a period of at least three years. For this reason, the financial effect of the judgment, although attenuated, was by no means neutral, just deferred in time.

What is more, the clumsy attempt of Judgment no. 10 led to an unexpected outcome a few weeks later: in fact, the tax court that had referred the question to

the Court decided not to abide by the ruling and ordered the State to refund the illegitimate 'surcharge'.[13] Much ado about nothing?

Judgment no. 70/2015 (pension revaluation)

Just a few weeks after the episode of the *Robin Hood Tax*, another question was raised before the Constitutional Court. As it regarded pensions, the impact on the budget could be potentially even more devastating: in the days that immediately preceded the decision, the potential new costs to be borne by the State, as reported in the media, were estimated to be close to €20 billion (about three times the costs that Judgment no. 10 aimed to avoid).

The problem regarded part of the so-called 'Save Italy Package'[14] adopted by the Monti Government in November 2011. It is worth pointing out here that the mission entrusted to Senator Monti and his government (called upon to replace the 4th Berlusconi government at the height of the sovereign debt crisis) was, in short, to adopt a series of 'rigorous' measures that had the aim of restoring credibility to Italian finances in order to 'reassure financial markets' and thereby curb the dramatic increase in the spread on government bonds. To this end, one of the principal measures, which had for some time been recommended by the EU Commission and the Italian *Corte dei Conti* [Court of Auditors] (besides being expressly requested in the famous letter sent by the European Central Bank to Italy on 5 August 2011[15]), was an immediate, resolute intervention in the social security system. Therefore, among other things, in Article 25 'Save Italy' provided for a two-year block (for 2012 and 2013) on inflation indexing (automatic revaluation) for all pensions more than three times higher than the Istituto Nazionale Previdenza Sociale minimum (about €1,450 per month).

In its Judgment no. 70/2015,[16] the Court declared the measure to be unconstitutional in that it violated Article 36(1) of the Constitution ('Workers

[13] A. Morelli, 'Principio di totalità e «illegittimità della motivazione»: il seguito giurisprudenziale della sentenza della Corte costituzionale sulla Robin Tax [*Principle of Totality and 'illegitimacy of the reasons': developments in case-law following the judgment of the Constitutional Court on the Robin Tax*] (with regard to the Provincial Tax Commission of Reggio Emilia, 12 May 2015, n. 217/3/15)', 28 May 2015 at <www.giurcost.org/studi/morelli3bis.pdf>.

[14] *See supra*.

[15] For the contents of the letter (sent as confidential but disclosed after the news was leaked to the newspaper Corriere della Sera), 29 September 2011, *see* <www.corriere.it/economia/11_settembre_29/trichet_draghi_inglese_304a5f1e-ea59-11e0-ae06-4da866778017.shtml>, visited 19 February 2016. *See also* L. Phillips, 'Hurling democracy into the volcano to appease the market gods', 16 August 2011 at <www.euobserver.com/opinion/113326>, visited 19 February 2016.

[16] The full text of the judgment is available at <www.cortecostituzionale.it/actionPronuncia.do>, visited 19 February 2016. English translation at <www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S70_2015_en.pdf 1>, visited 19 February 2016.

have the right to wages in proportion to the quantity and quality of their work and in all cases sufficient to ensure them and their families a free and dignified existence') as well as Article 38(2) (workers' right to be provided with adequate means for their living needs in case, among other things, of old age). According to the numerous precedents in this area, these articles must be systematically interpreted so as to offer 'special protection for workers' (point 8, *Conclusions*). In particular, the requirements of proportionality and adequacy of remuneration must also be guaranteed after retirement, and the automatic adjustment is precisely a 'technical instrument intended to guarantee compliance over time with the criterion of adequacy' (point 8, *Conclusions*).

With an analytical reconstruction of its own precedents, the Court points out that it has always recognised the possibility for the legislator to adjust pensions in consideration of the available economic resources. However, based on consistent case law (most recently Judgment no. 316/2010, mentioned several times as the specific precedent[17]), such adjustments must be temporary and progressive according to the band of pension income and reasonable in view of the objectives pursued.

In the case in question, the Court judged that: (i) the two-year duration of the block was excessive; (ii) its application to all pensions more than three times higher than the minimum, without further differentiations, was unreasonable (as explicitly suggested in the judgment: point 7, *Conclusions*); and (iii) the economic reasons given as justification were not adequately illustrated. The conclusion is succinct:

> The interest of pensioners, including in particular those in receipt of modest pensions, is focused on the conservation of the purchasing power of the amounts received, which in consequence gives rise to the right to an adequate pension. This right, which is rooted in constitutional law, has been unreasonably sacrificed in the name of financial requirements that are not illustrated in detail. This means that the fundamental rights pertaining to the pension relationship, which are rooted in unequivocal constitutional parameters – namely the proportional nature of the pension, understood as deferred remuneration (Article 36(1) of the Constitution) and its adequacy (Article 38(2) of the Constitution) – have been violated. The pension relationship must be construed as a certain, albeit not explicit, assertion of the principle of solidarity enshrined in Article 2 of the Constitution, and at the same time as a manifestation of the principle of substantive equality enshrined in Article 3(2) of the Constitution. (point 10, *Conclusions*).

[17] It is worth highlighting that Judgment no. 316/2010 (on a problem similar to the one being considered, but which in that case had 'saved' the law) was expressly cited by the Court as a 'warning' ('unheeded': point 10, *Conclusions*), and it was further noted that 'this Court has set out a consistent framework for the legislator with the aim of preventing the adoption of non-uniform and unreasonable measures' (point 8, *Conclusions*).

https://doi.org/10.1017/S1574019616000110 Published online by Cambridge University Press

The consequent declaration of unconstitutionality is clear and without any limitation of its effects.

It is evident that such a decision gives rise to a series of problems of extraordinary relevance, which have already been the subject of heated debate among Italian legal scholars,[18] and which can only be listed here.

The temporary nature of the measures imposed by the Constitutional Court stands in contradiction to the structural nature of the problems afflicting Italian public finances: one thus wonders if and how it would be possible to intervene in a permanent manner on pension spending, which, as previously said, represents one of the largest chunks of overall social expenditure and leads the latter to be totally skewed towards pensions.

In the background, moreover, there is the interpretation of the principle of equality as understood in a diachronic sense: if the adequacy of pensions is identified *tout court* with automatically maintaining their original buying power, then the crux of the matter, essentially, is intergenerational equity (and the future sustainability of the whole system).

Another critical aspect lies in identifying the threshold of protection below which the measure is definable as unconstitutional: three times the minimum is too low, according to the Court. But is this a decision that should be left to the Constitutional Court? Who should establish the sufficient and adequate amount in different historical periods? And what is more: at a time when protection is guaranteed for the most vulnerable social groups, does not the choice of 'requesting sacrifices' from *everyone* else, without further distinctions, fall within the legislator's discretion? Here there is obviously a direct clash with political decision-makers,[19] and not by chance many of the criticisms, also among constitutionalists, have focused on the Court's 'encroachment'.

Also because (and this is the point of greatest interest here), Decision no. 70 dismisses the problem of 'cost' in a very brief passage, simply noting that the contested law is 'limited to a generic reference to the "contingent financial situation", whilst the overall design of the legislation does not establish why financial requirements should necessarily prevail over the rights affected by the balancing operation, against which such highly invasive initiatives are adopted' (point 10, *Conclusions*).

[18] The variety of criticisms and stances clearly emerges from the contributions to the main online publications, in particular: Forum dei Quaderni costituzionali, Section on 'Giurisprudenza', <www.forumcostituzionale.it/wordpress/?p=6585>, visited 19 February 2016; Federalismi.it, 'Interventi al seminario a porte chiuse sulla sentenza n. 70 del 2015' [*Presentations at the closed seminar on Judgment no. 70 of 2015*], <www.federalismi.it/nv14/articolo-documento.cfm?Artid=29519&content=%3Cdiv+align=%27center%27%3EInterventi+al+Seminario+a+porte+chiuse+sulla+sentenza+n.+70/2015+organizzato+da+%3Ci%3Efederalismi%3C/i%3E%3C/div%3E&content_author>, visited 19 February 2016; Rivista AIC, Notes section, www.rivistaaic.it/note.html, visited 19 February 2016.

[19] *See* the scathing report presented by Enrico Morando, Deputy Minister of Economy and Finance, at the seminar of Rivista federalismi.it, cited *supra*, n. 18.

Compared to the very recent precedent represented by the decision on the *Robin Hood Tax*, therefore, Judgment no. 70 on the one hand goes back to the most rigorous procedural orthodoxy (declaration of partial unconstitutionality without any limitation of retroactive effects), while on the other hand it seems substantially to ignore Article 81 of the Constitution and the effects on the state budget. When interviewed on this point following the Government's criticism, the President of the Court, Alessandro Criscuolo, stated: 'These data were not available to us. Plus we do not make assessments of an economic character'.[20]

If the decision had been applied literally, the additional cost burden on the state budget would have amounted to around €20 billion, causing a gaping hole in public finances and a violation of the parameters agreed on with the European Commission for the year 2015.[21] However, political decision-makers felt that they were not obliged to fully compensate for the frozen pensions and established a one-off refund for the arrears and a restructuring for bands of pension income up to six times the minimum.[22] On 21 May 2015, the Government thus approved a law decree (no. 65/2015), whereby the costs of reintroducing the remuneration adjustment were reduced to just over €2 billion for 2015 and about €500 million per year starting from 2016.[23] The Government's choice inevitably gave rise to much controversy and the trade unions have already announced further actions to challenge the constitutionality of the legislation.

The elements common to both judgments: two fundamental issues

Thus far we have examined the – macroscopic – differences between the two judgments. What clearly emerges is the increasing inconsistency of the case law in the time span of the financial crisis,[24] which fuels uncertainty as to the outcome of

[20] A. Cazzullo, 'La difesa dei giudici della Corte' [*Defence of the Judges of the Court*], Corriere della Sera, 21 May 2015, p. 1, 10.

[21] *Cf.* hearing of the Parliamentary Budget Office (regarding which, see *infra*, par. succ.) on the report presented by the Government to the Parliament, at <en.upbilancio.it/hearing-on-the-governments-report-to-parliament/>, visited 19 February 2016.

[22] *Cf.* Senate Budget Service 'Notes on interpretation S.A. 1993', at <www.senato.it/japp/bgt/showdoc/17/dossier/929732/index.html#>, visited 19 February 2016.

[23] F. Bogo and F. Fubini, 'Padoan: la Consulta doveva valutare i costi della sentenza sulle pensioni' [*Padoan: the Court should have assessed the costs of the judgment on pensions*], la Repubblica, 22 May 2015, p. 2-3.

[24] The two examined judgements seem to accentuate the 'sometime ambiguous stance' of the Italian Constitutional Court already highlighted by D. Tega, 'Welfare Rights in Italy', in C. Kilpatrick and B. De Witte (eds.), *Social Rights in Times of Crisis in the Eurozone: The Role of*

future Court proceedings, as well as of disputes before ordinary courts.[25] Moreover, we should not underestimate the impact of the Court's decisions on public opinion, as they are often unscrupulously exploited in squalid and overblown political and media rhetoric. There is a risk of delegitimising the very function of upholding the Constitution, at a time when distrust towards Italy's republican institutions has reached alarming levels for a democratic political system.

If we attempt to look beyond the differences and adopt a long view on the fundamental issues, we may discern at least two elements that are common to the judgments commented on, which do not help to dispel perplexities.

The first is the Court's lack of faith in lawmakers and its (implicit but clearly visible) disapproval in view of the degradation and sloppiness that have characterised the legislative function for a number of years now, with a distinct worsening since the beginning of the economic crisis. This explains both the choice to limit the effects of Judgment no. 10 and the decision, in Judgment no. 70, to intervene in such a drastic manner to defend pensions: in both cases the Court judged (it does not matter now whether rightly or wrongly) that the fundamental principles of the Constitution (Article 2 and Article 3) were at risk, and it 'did not trust' political decision-makers to assure the guarantees provided thereunder.

This is a long-standing problem in the Italian legal system, and the discussion should be extended to law-making procedures and the type of oversight that the Court could engage in. In short, it is becoming increasingly clear that the primary cause of questions such as those just illustrated is the poor quality of legislation, almost always approved by decree, which under the Constitution should only be used under exceptional circumstances (Article 76 and Article 77 of the Constitution). The Court had thus found itself judging laws which, despite their

Fundamental Rights' Challenges, EUI Working Paper Law 2014/2015, p. 57 at <cadmus.eui.eu/bitstream/handle/1814/31247/LAW%20WP%202014%2005%20Social%20Rights%20final%202242014.pdf?sequence=1>, visited 19 February 2016.

[25] As I complete this paper (July 2015), a new judgment, no. 178/2015, has just been published; it relates to the block on collective bargaining in the public sector, introduced with law decree no. 78/2010 and subsequently extended. The decision arrived in a heated political climate, with rumours circulating in the press about the potential costs (as much as €35 billion), dispelled by the Court with a judgment of unconstitutionality which would produce effects as of the date of publication. Unlike in judgment no. 10, however, the limitation of the effects derives from arguments of a substantive nature, rather than a stretching of procedural rules. There is another fundamental difference from the previous judgments: in this case the Court has declared the block on *collective bargaining* to be unconstitutional, without imposing automatic mechanisms in regard to any arrears. Thus the only consequence that is certain at present is that the Government will not be able to extend the block and will have to allow negotiations with trade unions to resume in 2015: only when the result of bargaining is known will it be possible to estimate the costs of the entire operation.

appeal and theoretically commendable intentions, were written badly from the very beginning, often reflecting solely immediate cash needs without any consideration of other interests involved. The Italian Constitutional Court is traditionally very cautious in judging the manner in which legislation is approved by political bodies. However, recent experiences (and the unanimous opinion of legal scholars) suggest that the time may have come for it to change its attitude.

The second element in common, which is more relevant to these considerations on the subject of judgments impacting the budget, is the lack of any preliminary investigative activity on the Court's part.

An explicit choice was made in Judgment no. 70 and it was one of the main reasons for the conflict with the Government.[26] However, in the case of Judgment no. 10, in order to understand the problem it is sufficient to look at the main argument underlying the decision to limit the retroactive effects, i.e. that a 'traditional' declaration of unconstitutionality would have implied the need for 'additional financial corrective legislation' (along with all the feared consequences for the principles of solidarity and equality). What analysis was the conclusion concerning financial consequences based on? In this respect the judgment was wholly apodictic. Apart from a couple of mentions of the regulatory authority for the industry (point 6.4 and point 6.5.3, *Conclusions*), no reference is made to any preliminary inquiry, for which there was certainly no lack of time, and which should have been carried out – and illustrated – in as transparent a manner as possible.

It is true that the Italian Court is not presently supported by a research department specialised in economic and financial matters. Nonetheless, it has broad powers for the acquisition of records and documents, also by derogation from the restrictions established by other laws (Article 13 law no. 87/1953): it could thus seek outside sources.

The first objection to this type of suggestion is a pragmatic one: the natural recipient of any requests concerning economic matters, besides independent authorities, would be the Government. In proceedings involving questions of constitutional legitimacy, however, it is one of the parties involved (through the State Legal Advisory Service) and would therefore autonomously produce documentation to support economic policy choices; in any case, any data provided would be 'one-sided' and would not guarantee sufficient reliability.

This is a valid observation, but the problem can be overcome. Not so much on a theoretical level, with the argument (well-founded but verging on the utopian) that the Government (like all public institutions) should in any case act in the general interest, which undoubtedly includes the certainty that laws are constitutional. Today, however, the solution is to be found on a practical level,

[26] *See* n. 19, n. 20 and n. 23 *supra*.

because the constitutional reform of 2012 (Article 5(1), letter *f* of constitutional law no. 1/2012) introduced a Fiscal Council,[27] called *Ufficio Parlamentare di Bilancio* [Parliamentary Budget Office],[28] into the Italian system. It is modelled after the U.S. Congressional Budget Office, or at least that was the intention. If adequately exploited, the Office would have all the qualifications needed (in short: access to databases, technical competence and independence from the Government) to provide the Court with excellent support in gaining a full understanding of the economic and accounting consequences of its decisions and in assessing the 'costs', if any, of its judgments.

The real objection to the Court engaging in preliminary inquiries thus lies elsewhere, in a much more rooted cause, as reflected in the previously quoted statement of its President Alessandro Criscuolo: '… we do not make economic assessments'.[29] The Court could, but seems not to be doing it, not today at least. The question is: should it?

In my opinion, the underlying problem that occasioned these reflections emerges clearly here. The principle of a balanced budget has been incorporated into the Constitution. The profound meaning of this innovation, above and beyond the alibis (of politicians and media) invoking European demands and international obligations, is the necessity of binding the entire system to a management of public finances that is as responsible, effective and sustainable as possible. In a system like Italy's, this would signify radical changes, in perspective first of all. And to limit ourselves to one aspect only: one of the first prerequisites for an effective economic policy is precisely the availability (and use) of clear, accurate, reliable data. It seems like a logical assumption, besides being amply demonstrated in the international literature.[30]

Certainly, Italian public decision-makers at all levels have always had a problematic relationship with technical information, as well as with transparency in deliberative proceedings. Certainly, economic and financial matters are especially complicated, above all where the public sector is concerned. And above all the obligation of providing means to cover new or greater costs (Article 81(3) of the Constitution) is imposed on lawmakers,[31] not on the Constitutional

[27] The introduction of an independent fiscal council was provided for in Council Directive 2011/85/EU (Six Pack), in relation to national budgetary frameworks. For an overview of international literature, *see* European Central Bank, 'Monthly Bulletin February 2013', p. 73 <www.ecb.europa.eu/pub/pdf/mobu/mb201302en.pdf>, visisted 19 February 2016.

[28] The website is <en.upbilancio.it>, visited 19 February 2016.

[29] *See* n. 20 *supra*.

[30] *See* n. 27 *supra*.

[31] Such obligation was included in the Italian Constitution since its enactment in 1948. In the original text, it was provided under section 4 of Art. 81: 'Any law involving new or increased expenditure shall indicate for the resources to cover such expenditure'. Now, after the constitutional

Court. However, it is called upon to judge the products of legislation and usually does so by evaluating its reasonableness: how can it adequately fulfil this task unless it has a complete and reliable picture of the data and contexts of reference?

From this perspective, asking the Court to conduct an in-depth inquiry and give an explanation of the findings when setting forth the reasons for its judgments does not mean forcing it in any way to perform a political role, nor does it mean an attempt to limit its autonomy; it just means asking it to base its decisions on solid, documented arguments. This could contribute, among other things, to making its case law more predictable, wholly to the advantage of legal certainty, and its individual judgments less exposed to criticism, wholly to the advantage of the institutional climate.

The parliamentary reaction

A push in this direction has come from the Parliament. On 9 June 2015, a proposal was presented to amend the law on the functions of the Court (law no. 87/1953) in respect of preliminary investigation and transparency in its assessments of constitutional legitimacy;[32] the accompanying statement makes explicit reference to the problems highlighted by Judgments no. 70 and no. 10.

The proposal addresses:

(i) the technical consulting role of the Parliamentary Budget Office, which the Court may apply to *ex officio* or at the request of the parties;
(ii) the Government's obligation to take prompt action upon being informed by the Parliamentary Budget Office that a judgment of the Constitutional Court (or of another court) will give rise to costs not accounted for in the already approved budgets. Up to here, it is a matter of rules that in reality are already derivable from the system, i.e. such activities could be carried out even without amending existing legislation. Nevertheless, the fact of explicitly providing for them could foster a climate of cooperation among the different players on the scene. These provisions would be accompanied by

reform of 2012, the obligation is provided under section 3 of the same article and the original wording 'shall *indicate*' has been replaced by the (more rigorous) 'shall *provide*'.

[32] Senate Act no. 1952, 18th legislature, first signatory Linda Lanzillotta (PD), <www.senato.it/leg/17/BGT/Schede/Ddliter/45737.htm>, visited 19 February 2016. On this point *see* C. Favaretto, 'Le conseguenze finanziarie delle decisioni della Corte costituzionale e l'opinione dissenziente nell'A.S. n. 1952: una reazione alla sentenza n. 70 del 2015?' [*The financial consequences of the Constitutional Court decisions and the dissenting opinion in S.A. no 1952: a reaction to the judgement no. 70/2015?*], 2 *Osservatorio sulle fonti* (2015) at <www.osservatoriosullefonti.it, visited 19 February 2016 >.

https://doi.org/10.1017/S1574019616000110 Published online by Cambridge University Press

(iii) an express acknowledgement of the Court's power to modulate its decisions over time: a sort of parliamentary recognition of the solution tried out in judgment no. 10/2015, with the declared objective of regulating it.

The critical point of the proposal lies, however, in a provision which is based on the U.S. model and aims to introduce into the Italian system the possibility for individual constitutional judges to express a dissenting opinion, to be published at the bottom of judgments. Legal scholars are far from reaching agreement on this subject,[33] and it risks considerably complicating the barely-initiated legislative process of a parliamentary initiative which, if further developed with an eye to collaboration, rather than merely to containing the Court's powers, would be truly desirable.

[33] A. Anzon *et al.*, *L'opinione dissenziente* [*The Dissenting Opinion*] (Giuffrè 1995); S. Panizza, *L'introduzione dell'opinione dissenziente nel sistema di giustizia costituzionale* [*Introduction of the Dissenting Opinion in the Constitutional Justice System*] (Giappichelli 1998); S. Cassese, 'Una lezione sulla cosiddetta opinione dissenziente' [*A Lesson on the So-called Dissenting Opinion*], 4 *Quaderni costituzionali* (2009) p. 973; D. Tega interview with G. Silvestri, 'La Corte costituzionale vista da vicino' [*A Close-up View of The Constitutional Court*], 3 *Quaderni costituzionali* (2014) p. 757.