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## **Principles in Constitutional Jurisprudence. The Principle of Human Dignity and the Epistemological Challenges for the Interpreter – Some Brief Reflections on the Recent Case Law of the Italian Constitutional Court**

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### **Abstract**

With this work I want to analyze the epistemological difficulties related to the use, by the Constitutional Court, of principles (equality, human dignity, reasonableness, proportionality) as interpretive parameters and basis for their decisions.

This *modus operandi* is open to some difficulties, not least those arising from the difficulty of defining conceptually some of them and from the large margin of discretion related to the introduction of the principles as autonomous sources of decision.

In particular we want to focus attention on the interest and on the sensitivity that the constitutional judges – especially the Italian – have expressed to the principle of human dignity, declined as a *right to have a free and dignified life*.

The challenge of this work is also to highlight the difficulties related to the legal definition of human dignity. The compliance with this principle and its invocation as a source of decision can be considered a rule of interpretation useful (if not necessary) to define the so called “*hard cases*” in which the respect of economic and financial needs is at odds with the need to protect the core of social rights provided in the Constitution.

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With this work I want to analyze the epistemological difficulties related to the use, by the Constitutional Court, of principles as interpretive parameters used as a basis for their decisions.

In recent years in Europe there has been a situation of economic crisis that can be defined as “systemic” and not merely “cyclical”, in which social rights’ protection, more than other rights’ protection, seems to be in danger and in which the traditional interpretative tools used by the constitutional judges are undermined by the new challenges posed by the evolution of the society.

Consequently, in Europe, some Constitutional Courts have tried to propose solutions that concretely balance the economic and financial needs of the states (often negatively affected by the parameters set at the European level) with the protection of the “core” of social rights<sup>1</sup>.

In this context, some constitutional judges, such as the Italian, but also Spanish and Portuguese ones, have structured their own decisions following as *fil rouge* a reasoning based on “fundamental principles”, more or less sharp according to the cases.

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<sup>1</sup> On this case law see, *ex multis*: X. Contiades, *Constitutions in the Global Financial Crisis, A Comparative Analysis*, Ashgate, 2013; F. Donati, *Crisi dell'Euro, governance economica e democrazia dell'Unione europea* in *Il diritto dell'unione europea*, 2013, 337 ff.; F. Fabbrini, *The Euro Crisis and the Courts: Judicial Review and the Political Process in Comparative Perspective*, in *Berkeley Journal of International Law*, 32, 1, 2014; G. De Almeida Ribeiro, L. Pereira Coutinho Luis (eds), *O Tribunal Constitucional e a Crise*, Lisbona: Almedina, 2014, 69 ff.; V. Canas, *Constituição prima facie: igualdade, proporcionalidade, confiança (aplicados ao “corte” de pensões)*, [www.e-publica.pt](http://www.e-publica.pt), 2014; L. Menezes Leitão, *A Constituição e a crise financeira*, in [www.dn.pt](http://www.dn.pt), 2011; D. Caterina, *La protezione dei diritti sociali attraverso il prisma della crisi. Riflessioni sul caso portoghese e spunti di comparazione con quello italiano*, in *Desafios del constitucionalismo ante la integración europea*, editum, Murcia, 2015; C. Fasone, *Constitutional Courts Facing the Euro Crisis. Italy, Portugal and Spain in a Comparative Perspective*, in *EUI Working Paper MWP 2014/25*, available at [http://cadmus.eui.eu/bitstream/handle/1814/33859/MWP\\_WP\\_2014\\_25.pdf?sequence=1](http://cadmus.eui.eu/bitstream/handle/1814/33859/MWP_WP_2014_25.pdf?sequence=1).

### **Epistemological challenges of principles in the legal reasoning: some reflections**

The reference to the principles of equality, reasonableness, proportionality – and even human dignity (at least in some cases) – has been the way the constitutional justices referred to define some problematic situations and to overcome some deficiencies of politics (and of the Legislative power).

This *modus operandi*, however, opens to some relevant difficulties:

- a) the one arising from the difficulty of defining conceptually some of those principles, which are characterized by an intrinsic semantic vagueness which lends itself to a subjectivist, utilitarian and even manipulative use of them<sup>2</sup>;
- b) the one resulting from the large margin of discretion deriving to the interpreter from the use of principles as an autonomous source of decision;
- c) the one arising out of the concrete ways of use of those principles: not always coherent in terms of normative justification and consistency of the legal reasoning followed<sup>3</sup>.

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2 It must be stressed that the vagueness and the polysemic nature of certain concepts do not always represent a negative element in the process of juridical interpretation of legal provisions. Indeed, as well expressed by a scholar, M. Taruffo [*La prova dei fatti giuridici*, Giuffrè, Milan, 1992, 206-207], “the vagueness, in other words, is not in itself an element of subjectivism or irrationality: very simply it is a very common, and often irreducible, character of the language that requires a ‘special’ logic to be formalized, but that does not exclude every possible rationalization (...) the reasoning on vague notions is imprecise and approximate, but this does not imply that it is something necessarily irrational or unreasonable, because vague notions may give rise to functions logically determined” (our translation). On this point see also: T. Mazza, *Forme di razionalità delle decisioni giudiziali*, Giappichelli, Turin, 1996.

3 This has some implications on the (proper) ways of development of the legal reasoning. On this point, for further details see: A. Costanzo, *L'argomentazione giuridica*, Giuffrè, Milan, 2003, 15.

It is well known, indeed, that one has to keep separate “the issue of the legal validity of the singular normative provision – that constitutes the

Before addressing the analysis of some recent examples of so called “case-law of the crisis”, that summarizes these issues, it seems useful to make some general consideration.

A survey on the use of interpretive techniques used by judges shows that they run the risk of come across on some barriers which are not represented (or not only) by the polysemy that characterizes the concept of *principle*, but rather by the ways of its identification or construction and by its uncertain deontic status<sup>4</sup>.

As acutely observed by Norberto Bobbio the problem stems from the fact that, the “general principles do not constitute a simple and unified category”<sup>5</sup>, under this label, we tend include different concepts: provisions with a high degree of generality; rules with a content particularly vague and elastic (the so-called general clauses whose application requires an analytic concretization by the interpreter); programmatic norms; and rules “that play a fundamental role in the legal system or in the political one, also jointly considered”<sup>6</sup>. So principles can be considered metanorms

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content of the judgment (validity that depends on an direct activity of the judges) – from the issue of the logical validity of the legal reasoning” (our translation): V. Boccinelli, *I valori costituzionali fra testo e contesto*, Giappichelli, Turin, 2007, 19.

4 On this point see: V. Boccinelli [*I valori costituzionali fra testo e contesto*, cit., 61-62] that analyses the role of principles on the constitutional interpretation activities.

5 N. Bobbio, *Principi generali del diritto*, in *Novissimo Digesto Italiano*, XIII, Utet, Turin, 1966, 893-894. But see also, N. Bobbio, *Teoria generale del diritto*, Giappichelli, Turin, 1993, spec. 270 ss.

As said by M. Weber [*La scienza come professione (1918)* in Id., *Il lavoro intellettuale come professione*, ed. 1980, Einaudi, Turin] we are witnessing the era of the “polytheism of constitutional values”, that characterizes the constitution of modern democracies.

For a deep analysis of the polysemic nature of the concept of juridical principle see L. Mezzetti, *Valori, principi, regole*, in Id., *Principi costituzionali*, Giappichelli, Turin, 1 ff.; 21 ff. On this point also A. Baldassarre, *Costituzione e teoria dei valori*, in *Politica del diritto*, 1991, 639 ff.

6 N. Bobbio, *Principi generali del diritto*, cit., 893-894. See also, on this point, R. Guastini, *Principi di diritto e discrezionalità giudiziale*, in M. Bessone (ed.),

whose function is to “direct the selection of the provisions or rules applicable in several circumstances”<sup>7</sup>.

It is not possible here to offer an answer to the question about the correct definition of *principle* (and to specify its differences with the concept of *value*)<sup>8</sup>, however, for the purpose of this investigation, it seems useful to start from a different perspective trying to understand which is the position that principles have in the legal reasoning and, therefore, which is their role in the legal order.

In this regard, eminent scholars argue that one can distinguish at least two assumptions.

There would be reasonings in which a principle serves as a conclusion and reasonings in which a principle acts as a premise (or as topic or as reason) in favor of a conclusion.

While in the first case it can be seen that an upward movement from certain premises comes to demonstrate the existence of a legal principle, in the second it is the principle (or a plurality of principles properly combined within lines of reasoning more or less established and consolidated) to provide the basis for demonstrating certain conclusions<sup>9</sup> and the analysis of some recent decisions of the Italian Constitutional Court seems to go in this last direction, however, not without showing some critical aspects.

Within the legal discourse, studies on the nature and role of principles have focused attention on the role that principles play

*Interpretazione e diritto giudiziale, I. regole, metodi, modelli*, Giappichelli, Turin, 1999, 91 (our translation).

<sup>7</sup> R. Guastini, *Principi di diritto e discrezionalità giudiziale*, cit., 91 ff.

<sup>8</sup> On this see L. Mezzetti, *Valori, principi, regole*, cit., 1-178, but also L. Ferrajoli, *Principia juris, Teoria del diritto e della democrazia*, Laterza, Roma-Bari, 2007; V. Crisafulli, *Per la determinazione del concetto dei principi generali del diritto*, in AAVV, *Studi sui principi generali dell'ordinamento giuridico*, Pisa, Arti grafiche Pacini Mariotti, 1943; N. Bobbio, *Principi generali del diritto*, cit., 877 ff.; Id., *Teoria generale del diritto*, cit., 270 ss.; S. Bartole, *Principi generali del diritto (dir cost)* in *Enciclopedia del Diritto*, XXXV, Giuffrè, Milan, 1986, 494 ff.

<sup>9</sup> R. Guastini, *Principi di diritto e discrezionalità giudiziale*, cit., 89 ff.

in the legal reasoning and on their suitability to guide the interpreter in the arrangement of a wide legal materials<sup>10</sup>. As said, “[i]n terms of constitutional law, principles lose their function of synthesizing or summarizing a given order and constitute necessarily many opportunities for a development in a prescriptive key of values and interests”<sup>11</sup>.

Therefore, principles assume the position of fundamental rules of a particular legal system (or of one of its parts), and thanks to their purposive and unconditional structure, they are able to confer axiological identity to the legal order and to provide justification for all the other legal rules<sup>12</sup>.

As assumed the position of the fundamental rules of a particular legal system, principles should be able to offer to the interpreter the epistemological directives necessary to ensure as much as possible the axiological consistency of the legal provision with which he has daily to operate with.

This also explains the centrality that has always been recognized to the so called “systematic interpretation” of the constitutional provisions. This is because of the expression of the need of a rationalization for the legal provisions seen in the light of the values and purposes immanent to the legal order.

The Italian Constitutional Court in several decisions has emphasized the importance of the systematic interpretation of the constitutional text and in times of economic crisis that has been reaffirmed, for instance with the decision n. 264 of 2012. In this case the Court stressed the need for a systematic interpretation of the Constitution with regard to the protection of the rights and other competing constitutional principles and values, in order to read the constitutional text in a unitary and integrated way and

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<sup>10</sup> See *supra*, footnote n. 9.

<sup>11</sup> S. Bartole, *L'inevitabile elasticità delle costituzioni scritte fra riconoscizione dell'esistente e utopia dei valori* in AAVV, *Il metodo della scienza del diritto costituzionale*, Atti del convegno AIC, Messina, 23 febbraio 1996, Cedam, Padua, 1997, 17 (our translation).

<sup>12</sup> On the difference between principles, values and rules see spec. L. Mezzetti, *Valori, principi, regole*, cit., 1 ff. See also R. Guastini, *Principi di diritto e discrezionalità giudiziale*, cit., 89 ff.

to balance potentially divergent claims stemming from the Constitutional text<sup>13</sup>.

It must be born in mind, however, that the Constitution does not show an abstract normative hierarchy between competing values and principles. Consequently they are opened to a wide, and potentially opposite or manipulative, interpretation that appears to be more the result of contingent and subjective reasons than expressions of an analytical or deductive demonstration.

In this context the judges are those called to find, case by case, the equilibrium point between the necessity to apply strictly and formally legal provisions and the necessity to avoid the possibility that this could lead to dystonic and unjust practical effects.

This dilemma is not one of a merely hermeneutical nature but it clearly opens to an ethical inquiry<sup>14</sup>, above all because it leads to a reflection on the proper role of the judicial action, especially if constitutional, that is further more and more involved in the activity of definition of the core and of the object of fundamental human rights.

In our pluralistic societies we are, thus, witnessing the affirmation of a value based constitutionalism where it has been affirmed the tendency to shift the center of definition, protection and implementation, of many fundamental rights from the (general) legislative activity of elected Parliaments to the (concrete) case-law of courtrooms<sup>15</sup>. The former (Parliaments)

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13 On this point see, *ex multis*, M. Cartabia, *I principi di ragionevolezza e proporzionalità nella giurisprudenza costituzionale italiana*, XV Trilateral Conference of the Italian, Portuguese and Spanish Constitutional Courts, Rome, Palazzo della Consulta, 24- 26 October 2013, 10. Text available at [http://www.cortecostituzionale.it/documenti/convegni\\_seminari/RI\\_Cartabia\\_Roma2013.pdf](http://www.cortecostituzionale.it/documenti/convegni_seminari/RI_Cartabia_Roma2013.pdf).

14 For further considerations on this point see: G. Scaccia, *Valori e diritto giurisprudenziale*, in *Diritto e società*, 2011, 147.

15 This has the consequence of reducing significantly the edge between the law-making and the phase of implementation, until reaching almost to the point of undermining the consolidated idea (at least in civil law's legal orders) that pluralistic (and representative) decisions are much more justified and show a much more rational power, responding to superior moral values, than individual ones.

often suffered the difficulty of agreeing on principles and goals to be achieved and suffering the consequent difficulty of finding a satisfactory mediation of values and principles stemming from a pluralistic society.

### Challenges posed by *human dignity*

In the context described above it seems of great significance the interest and sensitivity that constitutional judges – especially the Italian ones – have demonstrated with regard to certain principles of which the constitutional court has often made use of to define issues in which the principle of human dignity was involved, both conceived in an axiological manner, and defined as the right to live a “free and dignified existence.” (art. 36 Const.). It must be born in mind that the principle of human dignity is often protect implicitly. Indeed judges prefer to refer to other interpretive parameters, such as the principle of reasonableness<sup>16</sup> or the principle of proportionality<sup>17</sup>, conceived as limits to the discretionary power of the legislative power, or invoking principles

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16 On the strict connection between human dignity and reasonableness see J. Luther, *Ragionevolezza e dignità umana*, in A. Cerri (ed.), *La ragionevolezza nella ricerca scientifica e il suo ruolo specifico nel sapere giuridico*, Quaderno monografico della rivista 2006 *nova juris interpretation*, II, Rome, 2007, 210.

M. Ruotolo, *Sicurezza, dignità e lotta alla povertà*, Esi, Naples, 2012; A. Ruggeri, *Appunti per uno studio sulla dignità dell'uomo, secondo diritto costituzionale*, in Id., “Itinerari” di una ricerca sul sistema delle fonti, XIV, *Studi dell'anno 2010*, Giappichelli, Turin, 2011. On the principle of reasonableness see *ex multis*: A. Morrone, *Il custode della ragionevolezza*, Giuffrè, Milan, 2001; G. Scaccia, *Gli strumenti della ragionevolezza ne diritto costituzionale*, Giuffrè, Milan, 2000.

17 On this, *ex multis*, in English, G.Huscroft, B.W. Miller, G.C.N. Webber (eds.), *Proportionality and the Rule of Law. Rights, Justification, Reasoning*, Cambridge, Cambridge University Press, 2014; A. Barack, *Proportionality*, Cambridge, Cambridge University Press, 2012; A. Stone Sweet & J. Mathews, *Proportionality Balancing and Global Constitutionalism*, in *Columbia Journal of Transnational Law*, vol. 47, 2008, 73 ff.; R. Alexy, *A Theory of Constitutional Rights*, Oxford, Oxford University Press, 2002. But see also, *ex multis*, M. Cartabia, *I principi di ragionevolezza e proporzionalità nella giurisprudenza costituzionale italiana*, cit. above, footnote n. 14.

deriving from articles 3 and 2 of the Constitution that protect, respectively, the principle of equality and the personalistic, pluralistic and solidaristic principles.

Well known are the philosophical and juridical implications and, more generally, the meta-legal implications connected to such concept. When one refers to human dignity, both under the philosophical and the legal point of view, it is quite difficult to define in a clear manner the object of one's study. Indeed the concept of *human dignity* is intrinsically polysemantic; is very ambiguous and vague. Scholars have quoted it both as value, and as a principle or a fundamental principle, and sometimes they have stressed its concrete implications, and so human dignity has been defined as a right or a fundamental right<sup>18</sup>.

It is complex to determine whether and to what extent the respect of human dignity, considered a fundamental value expressed in many legal orders, may be invoked as a source of decision and can be considered a rule of interpretation for which it is useful (if not necessary) to define the so called *hard cases* in which the respect of economic and financial needs is at odds with the need to protect the core of social rights provided by the Constitution.

The issue is not of little importance for the consequences on the legal order (also considered in relation to its democratic structure). Indeed, if it can be easily taken as a constitutional decision based on principles – that leaves a margin of discretion to the interpreter more or less wide depending on the co-existence

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18 Unfortunately there is no room here to take into consideration all the implications of such a sort of semantic discussion. On this point see, *ex multis*: C. Drigo, *La dignità umana*, in L. Mezzetti (ed.), *Diritti e Doveri*, Giappichelli, Turin, 2013, pp. 161 ss.; M. Ruotolo, *Sicurezza, dignità e lotta alla povertà*, cit. above; A. Ruggeri, A. Spadaro, *Dignità dell'uomo e giurisprudenza costituzionale (prime notazioni)*, in V. Angiolini (ed.), *Libertà e giurisprudenza costituzionale*, Giappichelli, Turin, 1992, 221 ff.; U. Vincenti, *Diritti e dignità umana*, Laterza, Roma-Bari, 2009. On the principle of human dignity see also, recently: A. Barak, *Human Dignity: the Constitutional Value and the Constitutional Right*, Cambridge, Cambridge University Press, 2015; E. Daly, *Dignity Rights: Courts, Constitutions, and the Worth of the Human Person*, University of Pennsylvania press, Philadelphia, 2013.

of several factors – for the Constitutional Court is more complex to assume the possibility to exert a judgment based only on values that, for their intrinsic metalegal nature, escape the normativeness that should preside over every legal reasoning.

In general, the Italian Constitutional court appears to prefer an approach of tendential self-restraint, so the reference to human dignity as an autonomous constitutional value (or super-value), that can alone lead to a declaration of unconstitutionality of an ordinary law struggles to manifest itself. On the other hand, one can hardly argue that human dignity is to be seen as having a marginal role: on the contrary, it is its intrinsically axiological nature that lives between the lines of many verdicts of the Constitutional Court on fundamental rights.

In this regard it was noted that effectively “[a]ll issues that are related to rights of personality concern [...] the concept of human dignity. It is a concept that, for a singular paradox (probably insurmountable) seems the more juridically indefinable as intuitively obvious”<sup>19</sup>.

Additional interpretive and reconstructive difficulties stem from the fact that the Constitutional Court has often made a “promiscuous” use of the concept of human dignity, making more complex its concrete qualification<sup>20</sup>.

### **Economic crisis, human dignity and social rights protection**

The case-law of the Constitutional Court about the protection of social rights in connection with the principle of human dignity (often declined implicitly in connection with the principles of solidarity, equality, reasonableness and proportionality) is very rich and articulated and it is not possible, here, to carry out an a thorough analysis of it of it.

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19 A. Ruggeri, A. Spadaro, *Dignità dell'uomo e giurisprudenza costituzionale (prime notazioni)*, cit., spec. 227 (our translation).

20 A. Ruggeri, A. Spadaro, *Dignità dell'uomo e giurisprudenza costituzionale (prime notazioni)*, cit., 221 ff.

What seems important to emphasize is that the case-law of the Constitutional Court has not always been consistent throughout its history and its analysis shows some oscillations, depending also on the social right being questioned. It is stronger when we approach the injury of the essential core of some fundamental rights (emblematic in this regard are many cases relating to the protection of the right to health, but not only these)<sup>21</sup> and more

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21 If the legal protection offered to the right to health (and to rights connected to it) is more intense, in other cases it fades. But one can offer several other examples that show the oscillations of the constitutional case law on this.

For instance, the Constitutional Court, with the *decision n. 80 of 2010*, declared unconstitutional a provision of the National financial act of 2008 according to which, because of a strong cut in the expenditures (that was justified by the need to limit the deficit), it would have been concretely impossible for public schools to hire teachers for physically impaired students. According to the Court, the fundamental and irreducible core of the social right of education represents a strong limit for the discretionary power of the legislator. By contrast, two years later, with the *decision n. 264 of 2012*, the Constitutional Court who was asked to decide on a case about the calculation of the pensions of cross-border workers between Italy and Switzerland, did not find any element of unconstitutionality in a provision that limited the social right involved (on this case see *infra*).

Another interesting case is the one of the so called “Social Card” (*decision n. 10 of 2010*). With the Urgency-Decree n. 112/1998, it was created “a special fund intended to satisfy the basic needs, primarily alimentary, but also energetic and connected to health, of peoples suffering of economic difficulties” and also envisaging the “concession” of the so called *social card* in favor of the “residents of Italian citizenship in conditions of greater economic difficulty”

Several Regions challenged the constitutionality of this Urgency-Decree as the national legislator would have been invaded their legislative competences (on “Social Policies”, i.e. social services and welfare regulation) formally reserved to the regional sphere. The Court in upholding the constitutionality of the challenged provisions, gave emphasis to the peculiar “purposes” pursued by the legislation at issue and to the context on which it impacted. Indeed, the Court, from one side, recognized that the contested provisions were abstractly related to “social policies”, but, from the other side, it stated that the State

indefinite/vague in all those cases where the systematic interpretation of the constitutional text calls for a concrete balancing and also where there emerges concrete and non-axiological aspects of human dignity, such as those arising from Articles 36<sup>22</sup> and 38 Const<sup>23</sup>.

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normative intervention was justified as to “effectively ensure the protection of people, who are in conditions of extreme need and that have a fundamental right which, since it is closely related to the protection of the essential core of human dignity, (...) must be guaranteed over the entire national territory in an uniform, appropriate and timely manner, through a regulation consistent and appropriate to that purpose (decisions no. 166 of 2008 and no. 94 of 2007, about the determination of the minimal levels of housing needs of particularly disadvantaged population)”. In particular, the fundamental right that allows the State to overstep the legislative residual competence of the Regions in matter of social services and welfare is a particular social right arisen “in the articles 2 and 3, par. 2, art. 38 and art. 117, par. 2 of the Constitution”, i.e. “a right that is primarily derived from the principle of economic and social solidarity (art. 2 Const) and from the principle of substantive equality (Article 3 Const.), the right to welfare support (Article 38 Const.), and the determination of the basic level of benefits throughout the national territory (Article 117.2, lit. m Const.). This right is “the right to obtain essential benefits to relieve situations of extreme need – especially alimentary –”. Moreover, the recognition of this right implies a duty for the State, that is to ensure its “irreducible core” and establish its “qualitative and quantitative characteristics, in the case the lack of such a provision may jeopardize it” (our translation)(in similar terms, see also the *decision n. 62 of 2013*). The Constitutional Court, thus, found the challenged provisions of urgency-decree in compliance with the Constitution in the light of “the extraordinary, exceptional and urgent the situation following the international economic and financial crisis that hit also our country in 2008 and 2009” (our translation).

22 Whose 1st paragraph provides that “[w]orkers have the right to a remuneration commensurate to the quantity and quality of their work and in all cases to an adequate remuneration ensuring them and their families a free and dignified existence”.

23 According to which “[e]very citizen unable to work and without the necessary means of subsistence has a right to maintenance and social assistance. Workers have the right to be assured adequate means for their subsistence needs in the case of accident, illness, disability, old age

Moreover, a certain level of inconsistency on the use of certain principles in the legal reasoning of constitutional judges can also be detected with reference to decisions concerning similar theoretical issues. And the recent case-law on solidarity contributions, blocks of salaries and retirement pensions seems a good example of this, especially if compared with decisions that in similar cases have been taken by other constitutional judges, where it emerged openly the connection between certain legal provisions and the protection of human dignity and the principle of equality and proportionality (see, for example, the decision of the Portuguese Constitutional Tribunal n. 187/2013, but also some subsequent decisions)<sup>24</sup>.

However, in Italy, there have been rulings that can be compared to the Portuguese constitutional case-law, both for the subject and for the economic and financial implications<sup>25</sup>.

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and involuntary unemployment. Disabled and handicapped persons have the right to education and vocational training. The tasks laid down in this article are performed by bodies and institutions established or supported by the State. Private-sector assistance may be freely provided”.

24 In Italy, at least until the recent *decision n. 70 of 2015*, the Constitutional Court did not take decisions that, for the potential impact on the State Budget were fully comparable to the Portuguese’s ones (cfr. spec. the Acórdão n. 187 of 2013). It must be remembered that in Portugal the organ of constitutional adjudication can take a stand also if the challenges are filed by the President of the Republic or by parliamentary minorities, and certainly this represent a significant aspect of differentiation with the Italian model of constitutional adjudication. On this point see: M.L. Duarte, C. Amado Gomes, *Portogallo*, in A. Celotto, J. Tajadura, J. de Miguel Bàrcena (eds.), *Giustizia Costituzionale e Unione Europea*, Esi, Naples, 2011, 299 ss.; C. Fasone, *Constitutional Courts Facing the Euro Crisis. Italy, Portugal and Spain in a Comparative Perspective*, cit. above, footnote n. 2.

25 One can recall the decision n. 70 of 2015 cited above, but also the decisions nn. 223/2012 e 116/2013 - on solidarity contributions and blocks of salary for certain categories of workers (i.e. magistrates and government executives – and the decisions nn. 304 e 310 of 2013 – on blocks of salary for diplomats and university professors and researchers (see *infra*).

The constitutional judges from both countries make, in fact, a kind of political mediation of the interests involved in a context in which the provisions legislatively created are not able to provide (culturally and socially) satisfactory or reasonable answers.

If in Italy the constitutional judgments on the Euro-crisis law have strengthened tendencies or confirmed precedents that already featured the case-law of the Constitutional Court, in other countries, such as Portugal – perhaps because of the greater impact of the fiscal measures imposed – the position of the constitutional Tribunal has been particularly incisive, endorsing expressly the connection between the need to protect human dignity (declined as the right to a dignified existence) and the need to limit the discretion of legislative power in providing for anti-crisis measures affecting deeply the retirement pensions or the salaries (even, perhaps, to the absence of a constitutional provision that requires a balanced budget rule).

Looking at the Italian Constitutional court case-law we can see that the principle of human dignity is to be considered as a value to be concretized through the implementation of active policies by the State<sup>26</sup>.

Such policies, though, are known to be “expensive” under several aspects and, furthermore, not directly “justiciable”, if absent.

With these considerations in mind, the principle of human dignity finds itself placed between the principle of authority and the fundamental rights’ freedoms. For this reason, the self-restraint approach applied by the judges, even constitutional judges, is fully understandable. The judges confirm their reluctance in upholding a decision based only on the principle of human dignity, even in those cases where that principle is formalized at constitutional level<sup>27</sup>.

The judges here clearly prefer to base their reasoning on constitutional standards that can be normatively defined in an easier way than the principle of human dignity.

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<sup>26</sup> See *supra* footnote n. 19.

<sup>27</sup> As in Portugal, for example.

Moreover, it must be born in mind that whenever there is a conflict between values or whenever fundamental rights equally permeate from the principle of human dignity, there arises issues of delicate balancing.

In all those cases, then, I don't think we can completely refer to the worthy expression of a former Italian constitutional judge according to which: "human dignity is not object of balancing but it's itself the scale enabling to balance different rights"<sup>28</sup> at least in all those case where judges are required to resolve a balancing dilemma which is extremely thorny in terms of reasonableness and proportionality.

Indeed it is not possible to sacrifice any of the aforementioned values or rights. On the contrary, it is necessary to find, case by case, the mediation point allowing to grant the essential core of all the values under scrutiny.

On that point, the role of the judges really is essential, especially in situations of deep economical crisis that are so challenging for the social rights protection and even force the scholars to rethink some dogmatic categories of constitutionalism<sup>29</sup>.

In this context scholars should focus their attention on the constitutional court *modus operandi* because the coherence, the clarity and the rationality of its legal reasoning represent a strong condition for the legitimacy of its activity<sup>30</sup>.

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28 G. Silvestri, *Considerazioni sul valore costituzionale della dignità della persona*, 2008, in [www.associazionedeicostituzionalisti.it](http://www.associazionedeicostituzionalisti.it), 1.

29 On this point see: R. Bin, *Nuove strategie per lo sviluppo democratico e l'integrazione politica in Europa. Relazione Finale*, in *Rivista AIC*, 3, 2014, 1 ff.; A. Morrone, *Crisi economica e integrazione politica in Europa*, in *Rivista AIC*, 3, 2014, 1 ff. But see also F. Fabbrini, *The Euro Crisis and the Courts: Judicial review and the Political Process in Comparative Perspective*, in *32 Berkeley Journal of International Law*, 1, 2014, spec. 62-69. Text available in [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2328060###](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2328060###). This last author makes some evocative parallels with the cd "Jurisprudence of the crisis" that characterized the United States of America during the crisis of 1929.

30 R. Bin, *Diritti e argomenti. Il bilanciamento degli interessi nella giurisprudenza costituzionale*, Giuffrè, Milan, 1992, 4 ff.

Therefore, it is probably difficult to assume that human dignity can be considered as a real evaluation parameter useful (if not necessary) to decide “hard cases”. What seems certain is that this value “lives” in the substance of many decisions Constitutional judges, (the Italian but also of many European constitutional judges) and can be considered a limit for the discretion of the legislative power<sup>31</sup>.

However many problems arise if we look at the internal consistency of several decisions: that is not always present, in my opinion, regarding the use that the Italian Constitutional Court makes of principles in its legal reasoning. Indeed the Italian constitutional case-law has shown some profiles of inconsistency that expose the Constitutional Court to the charge of being too deeply involved in politics and that, at a certain extent, might undermine its legitimacy.

A brief description of the case law on solidarity contributions, block of salaries and pensions seems a good example of this.

In 2012, for example, in the Constitutional Court’s decision n. 264, the judges ruled in favor of a limitation of social rights in a situation in which a retroactive legislative act of “authentic interpretation” stated that the Italian retirement pension had to be calculated on the basis of the actual level of Swiss contributions rather than on that of the Italian contributions and thus resulted in lower pensions for these workers. Surprisingly the Italian Constitutional Court, in spite of a former ECHR verdict, did not detect any profile of unconstitutionality of the law under scrutiny<sup>32</sup>. Indeed the Court justified its contrast with the ECHR’s decision stating that “this Court carries out a systemic and not an isolated assessment of the values affected by the provisions reviewed from time to time, and is therefore required to

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31 See: C. Drigo, *La dignità umana*, cit. above, 161 ff.

32 The decision of the Constitutional Court seemed to take in no account a previous decision of the ECHR (*case Maggio and other v. Italy* of 31 May 2011- applications nn. 46286/09, 52851/08, 53727/08, 54486/08 e 56001/08), according to which that legislative act of ‘authentic interpretation’ was to be considered in breach of Article 6.1 of the ECHR.

carry out that balancing operation, which falls to this Court alone”.

Consequently the workers did not have a legitimate expectation to a pension calculated according to the more favorable treatment, and the Court recognized that the law of ‘authentic interpretation’ whose constitutionality was challenged had to be considered respondent to the principle of equality and to the principle of solidarity<sup>33</sup>.

Similarly, in a former case (decision n. 316 of 2010), the Italian Constitutional Court, asked to rule on provisions that provided for the block of the automatic equalization for retirement pensions superior to a certain amount<sup>34</sup>, did not declare their unconstitutionality. The legal reasoning of the judges was based on the assumption that it was in the discretionary power of the Parliament to balance reasonably the financial needs and the social right whose protection was invoked<sup>35</sup>. But the freedom of

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33 According to the Constitutional Court, the effects of the provisions under scrutiny “are felt within the context of a pension system which seeks to find a balance between the available financial resources and benefits paid, in accordance also with the requirement laid down by Article 81(4) of the Constitution [...] and the need to ensure that the overall system is rational”.

34 It ruled on art. 1, par. 19, of the law n. 247 of 2007.

35 According to the appellants the provision contested was in breach of the article 38, par. 2 of the Constitution and also of the articles 36 and 3 of the Constitution because it would have jeopardize the proportionality between pensions and salaries received during one’s working life. Consequently there would have been an unresonalbe discrimination between those who receive higher pensions and those who receive lower pensions. By contrast, according to the constitutional judges, the purpose of the contested provision had to be considered the contribution to the solidarity actions on retirement pensions so that the block of the automatic equalization for one year did not jeopardize the issue of the adequacy of pensions.

According to the Court there would have not been either a breach of the principle of proportionality of pensions and salaries (that have to ensure a “dignified existence” to the workers and their families) guaranteed by article 36 of the Constitution because this principle did

action of the Parliament was limited by the necessary protection of the essential and basic needs of people (concept related to the protection of human dignity – as stated in previous decision n. 30 of 2004)<sup>36</sup>.

However, the Italian Constitutional Court, either before or after the decision n. 264 of 2012, had occasion to issue some verdicts on social rights that appear to mark the distances from the legal reasoning that sustained that decision and seem also to be based on weaker assumptions.

Some of these decisions were issued after the approval of the Urgency-decree n. 78 of 2010 which was part of several normative measures approved with the purpose to contain the deficit of public budget and to stabilize public accounts. Some of these measures, in the light of the principle of solidarity, were directed to collect resources for disadvantaged people and one of the ways that was chosen was to reduce the pensions or the incomes of richer people.

For instance, in the decision n. 223 of 2012, the Constitutional Court declared that the provisions of Urgency Decree n. 78 that blocked the salary adjustment mechanism for magistrates and the reduction of their special allowance were considered in breach of the principle of equality (Art. 3 Const.) and of Article 53 (about the progressive nature of the tax system).

Notwithstanding the fact that those provisions were approved with the purpose of implementing the principle of solidarity (affecting a category of workers who benefit from high incomes), the Court stated that the principle of equality had to be considered as being jeopardized by the introduction of measures referred only to a specific category of workers, the magistrates,

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not require a constant hooking between pensions and salaries (as stated in the *decision n. 62 of 1999*).

<sup>36</sup> For this reason “It must be recognized to the Legislative power – within an overall plan for the rationalization of the previous pension reform – the freedom to adopt measured [...] of sharing solidarity to the financing of a progressive restructuring of retirement pensions, in order to rebalance the system with cost unchanged” (*decision n. 116 of 2010*).

whose independence and neutrality, guaranteed by the Constitution, depends also on the level of their income<sup>37</sup>.

By contrast, the year later, on December 2013, the Constitutional Court had occasion to rule again on some provisions of the Urgency-decree n. 78/2010. In particular it was required to decide if the block of the salary adjustment mechanism for the non-contracted people working in the public sector (for example University professors and researchers) was in breach of the Constitution. In this case (decision n. 310 of 2013), the Court stated that the challenged provisions were not in breach of the Constitution, both because the block of the salary adjustment mechanism had not to be considered as a form of taxation and because the imposed measure had to be considered reasonable in light of the principle of solidarity, and of the necessity to strengthen public accounts in a time of deep economic crisis. Thus, compared to the decision n. 223, this last decision (and similarly the decision n. 304 of 2013) seems to pay greater attention to the requirements of solidarity arising from the economic crisis. Indeed, in this case, the existence of strong solidarity requirements leads the judges to not consider subsisting the invoked deterioration of the living conditions of the appellants, neither injured the right to a minimum wage (of art. 36 Cost.), that were some of the constitutional parameters invoked. What appears significant in this, however, is that the Court, in rejecting the challenge of unconstitutionality, referred to the new Article 81 of the Constitution<sup>38</sup>, and to the Directive of the *six-pack*<sup>39</sup>,

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<sup>37</sup> Similarly measures are not something new in the Italian legal order. Indeed also in the past, especially during the '90s, were approved measures inspired by the purpose to restore the state budget. For instance, in 1997 and 1999 (*decision n. 245 of 1997* and *order n. 299 of 1999*) the Constitutional Court found some stringent measures adopted not in breach of the Article 3 Const. as their exceptional, transient, non-arbitrary character and as they were considered relevant to the purpose to achieve.

However, the Court did not find the same conditions met by the contested provisions of Urgency-decree n. 78/2010.

<sup>38</sup> As recently amended in 2012 by the art. 1 of the Constitutional Law n. 1 of 2012. On this, in English see, for instance, T. Groppi, *The impact of the*

although they were not the main parameter and justification for the decision.

In any case, the difference between the reasoning followed by the Court in this case and the one followed in the former decision n. 264 of 2012 does not appear justified in any way by the Constitutional judges. In this case seems that the Court, stepping back from its previous orientation, wants to make an overall balancing between social rights referred to a specific group and the sustainability of the welfare system at the benefit of all people living in the country.

The subsequent evolution of the case law, however, seems to be not completely consistent. In particular, in the decision n. 116 del 2013<sup>40</sup>, the balancing between the social rights of specific groups and the sustainability of the welfare system at the benefit of all citizens has been overruled.

The Italian Constitutional Court, indeed, declared unconstitutional the contribution of solidarity applied to some high pensions (over 90.000 €/year)<sup>41</sup>, although recognizing that the contested provisions were adopted in framework measures approved with the purpose of guaranteeing the sustainability of the welfare system.

The Court considered the reduction of the allowance provided by the law as a form of taxation and declared them in contrast with the Constitution for the violation of the principle of equality (Article 3) and of Article 53, about the progressive nature of the tax system.

The breach of the principle of equality and the unreasonableness of the challenged provisions derived from the introduction of a measure that was targeted to a specific group of citizens, the retired people.

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*financial crisis on the Italian written Constitution*, in *Italian Journal of Public Law*, 2, 2012, 1 ff.

39 Council Directive 2011/85/EU on requirements for budgetary frameworks of the EU Member States.

40 But see also the decision n. 241 of 2012.

41 Thus the art. 18, par. 22-bis, of the Urgency-decree n. 98 of 2011 was declared in breach of the Constitution.

Lastly, with the decision n. 70 of 2015 the ICC shown to endorse “the interest of retired people [...] to have a minimum wage that guarantee their spending power”, right that “appears unreasonably jeopardized by provisions adopted with the purpose to guarantee financial needs not expressed exhaustively”. Consequently the provision contested – (according to which, for the years 2012 and 2013, the automatic revaluation of pensions higher three times the minimum was excluded) has been declared unconstitutional because in breach of article 36, par. 1 and 38, par. 2, Const. because the challenged provision did not guarantee “the proportionality of the pensions, conceived as a kind of “deferred salary” and the principle of adequacy”. This last one was conceived as a “certain expression, though not explicit of the principle of solidarity (Art. 2 Const.) and as an implementation of the principle of substantive equality (3 Const., par. 2)”.

This decision, “apparently right-oriented”, i.e. having the apparent purpose – although not mentioned explicitly to protect the right of retired people to live with dignity according to article 36 and 38 of the Italian Constitution – in reality has determined a relevant budget-hole.

The impact of this decision is really significant also because in the reasoning of the Court are not expressed concerns about the need to respect the budget rule under article 81 Const. (a principle that, on the contrary, in a former decision, the n. 10 of 2015, has been considered as having a systemic relevance in the legal order).

This means that the decision n. 70 shows a relevant inconsistency with former decisions in which the Court struck down provisions that had an inferior impact or that could affect less deeply the public accounts (i.e. decc. nn. 310 of 2013 or 304 of 2013 or 316 of 2010).

There is a relevant inconsistency also with regard to the abovementioned decision 10 of 2015 (about the so called *tobin tax* in which the Court has provided an interpretation of the principle of a balanced budget here totally ignored). In the decision n. 70 it seems that the constitutional judges would have decided to establish a hierarchical order of values and constitutional rights. It is a hierarchical order in which the social security rights seems

to prevail over the demands of solidarity and substantial equality underlying the contested legislation.

In face of this situation one should ask:

- how much a decision as the one in comment, apparently right oriented, concretely protects the core of the rights provided for articles 36 and 38 of the Constitution?
- How much are protected the principle of equality and reasonableness? This decision considers in a uniform way a category, the one of retired people, that is not uniform, because the impact of certain fiscal measures does not affect equally all retired people. Some fiscal measures do not burden heavily on the higher pensions, while they could burden on a relevant manner on inferior pensions.
- Lastly, is this decision really respondent to the constitutional principles of solidarity, equality and human dignity? Or, in terms of practical effects (on the financial resources of the State) does it not lend itself to achieve the opposite effect, such as the reduction of financial resources for the protection of other fundamental social rights (as health, education, social security ...)?
- How much, hence, the Constitutional Court has manipulated the referral to the principles reasonableness, adequacy and proportionality? (to achieve a political goal?)

What is sure is that this decision has created several political and financial problems, still debated in the political arena<sup>42</sup>.

### **Some conclusive reflections**

To sum up and conclude, one can observe that the analysis of constitutional case law, Italian and European, is an example of the difficult role that the constitutional judges are playing in this challenging period of crisis.

They are having to recalibrate the legal and interpretative techniques at their disposal in order to operate a delicate balance

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<sup>42</sup> For a brief comment of this decision, in English, see, G. Monti, *Judgment 70/2015 of the Italian Constitutional Court: Pension Cuts*, 6 May 2015, available in <http://eurocrisislaw.eu.eu/news/judgment-702015-of-the-italian-constitutional-court-pension-cuts/>.

not only between financial needs and the protection of principles and fundamental rights (as equality, reasonableness, proportionality and, more in general, the protection of social rights) – but also a difficult balancing between political choices and financial needs (that are expression of national sovereignty) and compliance with obligations arising from decisions taken at the supranational level and, sometimes, in fact “imposed” to a State<sup>43</sup>.

In the management of the “practical” and dystonic effects of the economic crisis that hit Europe a reacquisition of space for politics is, perhaps, more than desirable.

It is appropriate to conceive a new model of protection of social rights, inscribed in a process of constitutionalization of the EU (multidimensional and multi-temporal) that endorses, both the role of human dignity in the determination of the core intangible of rights, and a conception of social rights that does not respond to a vision merely egalitarian but that could take into account the specificities of each situation in order not to aggravate (if not solve) problems regarding the sustainability of the welfare state<sup>44</sup>.

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43 More deeply on this: D. Caterina, *La protezione dei diritti sociali attraverso il prisma della crisi. Riflessioni sul caso portoghese e spunti di comparazione con quello italiano*, cit. above, footnote 2. See also A. Morrone, *Crisi economica e integrazione politica*, cit., 1 ff.; W. Sadursky, *Democratic Legitimacy of the European Union: A diagnosis and some Modest Proposals*, in *Polish Yearbook of International Law*, 2013, 9 ff.; T. Groppi, I. Spigno, N. Vizioli, *The Constitutional Consequences of the Financial Crisis in Italy*, in X. Contiades (ed.), *Constitutions in the Global Financial Crisis. A Comparative Analysis*, Farnham, Ashgate, 2013, 109 ff. ; A. Ciccarelli, P. Gargiulo, *La dimensione sociale dell'Unione Europea alla prova della crisi globale*, Franco Angeli, Rome, 2012; F. Donati, *Crisi dell'Euro, governance economica e democrazia dell'Unione europea*, in *Il diritto dell'unione europea*, 2012, 337 ff.; G. Grasso, *Il costituzionalismo della crisi. Uno studio sui limiti del potere e sulla sua legittimazione al tempo della globalizzazione*, Editoriale scientifica, Naples, 2012; M. Luciani, *Unità nazionale e struttura economica. La prospettiva della Costituzione repubblicana*, in <http://www.associazionedeicostituzionalisti.it/relazione-luciani.html>, 2011.

44 It seems proper to quote Holmes, “*taking rights seriously means taking scarcity seriously*”, to remember that in these areas is the politics, more than the courts, to decide on the concrete allocation of economic

Decisions apparently right oriented, in fact may have the opposite effect. And this is a profile which one should always bear in mind.

Moreover, constitutional judges, from time to time, are called upon to guarantee the constitutional unity by attributing to supreme values or to principles the most concrete *reasonable* meaning. This decisional process always implies a certain degree of “creativity”: so judges happen to act “creatively” and what prevents that their action may trespass into arbitrariness is the weighted application of the principle of reasonableness. Thus, this principle, with its strong connection with the principle of human dignity, may be considered the more effective way to order the Weberian “polytheism of constitutional values”<sup>45</sup> that, as said above, characterizes modern pluralistic democracies. Probably it can be considered the most important bridge that allows the interpreter to combine the logical legitimacy of values (and constitutional principles) with the “*means-ends*” logic of the formal law<sup>46</sup>.

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resources: S. Holmes, C.R. Sustain, *The Cost of Rights: Why Liberty Depends on Taxes*, W.W. Norton & co, NY-London, 1999, 94.

45 As said by M. Weber [*La scienza come professione (1918)* in Id., *Il lavoro intellettuale come professione*, ed. 1980, Einaudi, Turin] we are witnessing the era of the “polytheism of constitutional values”, that characterizes the constitution of modern democracies.

46 a. baldassarre, *Costituzione e teoria dei valori*, in *Politica del Diritto*, 1991, 639 ff.