À PROPOS The Italian post-crisis case law

A review of the crucial constitutional judgments on labour rights

INTRODUCTION
FROM THE 2008 EU CRISIS TO THE ITALIAN CONSTITUTIONAL COURT

The economic and financial crisis dates back to a decade ago [1]. However, its consequences are not exhausted, yet. Besides the direct economic costs, the 2008 crisis has triggered a number of ancillary effects, some of them concerning the detriment of fundamental labour rights – understood in the widest sense, as including also retirement rights – in a number of EU countries [2].

In Italy, since the end of 2011, beginning of 2012, a number of structural reforms of the labour market have been approved, and the legislative process does not even seem to be over [3]. In addition, various provisions have provided for consistent reductions in public spending, through cuts to retirement benefits and public employees' wages, and a constitutional reform has introduced the principle of balanced budget into the Italian Constitution, which has a decisive impact on the enforcement of fundamental social rights. The constitutional law amending art. 81 Const., as well as arts. 97, 117 and 119 Const., was approved by the Italian parliament on April 2012 : Constitutional Law 1/2012 (entered into force in May 2012, but with effect starting from 2014) [4]. The result is a renewed Constitution, which obliges public administration bodies, at every level, to comply with the principle of balanced budget and the sustainability of the public debt in relation to the GDP [5].

Certain provisions adopted in the context of a series of reforms aimed at recovering from the latest crisis, which have had an impact on public employees' wages and retirement benefits, have been challenged before the Italian Constitutional Court for the violation of a number of primary norms, mainly fundamental labour rights. Since 2012, in several occasions, the Italian Court has discussed the legitimacy of these provisions. In the following pages, the attention is drawn to the crucial and most recent judgments, which are concisely reviewed, with the aim to emphasise the key arguments used by the Italian Court.

Noticeably, the constitutional jurisprudence is far more reach than the cases presented in this contribution. Therefore, the concluding paragraph does not pretend to systematise in an absolute and all-encompassing manner the Italian Constitutional jurisprudence, but it rather aims to highlight some elements common to the most recent Judgments on fundamental labour rights, in order to trace constitutional trends and identify the current status of the relationship between fundamental labour rights and budgetary needs.

(1) For a review of the Eurozone crisis from a Constitutional perspective, see Tuori Tuori 2013.
(2) For a first assessment see, inter alia, Clawert Shoemann 2012 ; Kilpatrick De Witte 2014.
(3) For a review see Carinci 2015 ; Caruso 2016 ; Biasi 2014.
(4) The Italian lawmaker opted for a reform of art. 81 Const., which entailed a proper constitutionalization of the principle at stake, albeit the Treaty did not provide for a duty to implement the principle of balanced budget by means of constitutional reform. See art. 3(2) of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (signed 1st February 2012) did not states "The rules mentioned under paragraph 1 shall take effect in the national law of the Contracting Parties at the latest one year after the entry into force of this Treaty through provisions of binding force and permanent character, preferably constitutional, or otherwise guaranteed to be fully respected and adhered to throughout the national budgetary processes".
(5) In particular, the substituted art. 81 Const. states : "The State shall balance revenue and expenditure in its budget, taking account of the adverse and favourable phases of the economic cycle. N° recourse shall be made to borrowing except for the purpose of taking account of the effects of the economic cycle or, subject to authorisation by the two Houses approved by an absolute majority vote of their Members, in exceptional circumstances. Any law involving new or increased expenditure shall provide for the resources to cover such expenditure. Each year the Houses shall pass a law approving the budget and the accounts submitted by the Government. Provisional implementation of the budget shall not be allowed except by specific legislation and only for periods not exceeding four months in total. The content of the budget law, the fundamental rules and the criteria adopted to ensure balance between revenue and expenditure and the sustainability of general government debt shall be established by legislation approved by an absolute majority of the Members of each House in compliance with the principles established with a constitutional law."

PUBLIC EMPLOYEES' WAGE REDUCTION BEFORE THE COURT

The right to collective bargaining and the necessary temporary character of its limitation: Judgment 178/2015

Judgment 178/2015 concerns measures affecting public employees' remuneration, as well as the right to collective bargaining. The Court dismissed the claims related to the violation of art. 36 Const. (right to a proportionate remuneration) [6], but concluded for the infringement of the right to collective bargaining, as protected under art. 39 Const. (trade union freedom). This ruling contains some thought-provoking points, such as the relevance of the temporal element and the use of supranational sources in the legal reasoning.

Art. 39(1) expressly guarantees the trade union freedom and the Constitutional Court has consistently interpreted this norm as providing also for the right to collective bargaining, which is "necessary complement" to the trade union freedom.

A peculiarity of Judgment 178/2015 is the extensive use of international and regional sources to elaborate upon this established interpretation [7]. The Court points out that the meaning of art. 39(1) Const. is "synchronically linked" to a number of supranational sources, which support the "functional link" between "collective exercisable rights, such as collective bargaining and trade union freedom". In particular, three ratified ILO Conventions were mentioned: ILO Convention n°. 151, on the right to organize and negotiate conditions of employment in the public sector; ILO Convention n°. 98, on the right to organize and to collective bargaining; ILO Convention n°. 87, concerning freedom of association and the right to organize. Second, the Judgment referred to Article 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, as interpreted by the European Court of Human Rights, in the Demir and Baykara judgment [8]. As is well known, according to this case-law the trade union freedom, ex art. 11, also includes the right to conclude collective agreements for public workers [9]. In addition, the Italian Court referred to art. 28 of the Charter of Fundamental Rights of the European Union and art. 152(1) TFEU, which promotes the dialogue between social partners in accordance with their autonomy.

Albeit these arguments have not been used to ground the legal reasoning, they have been functional to support the interpretation of art. 39(1) Const. [10], as covering also the right to collective bargaining in the public sector [11], on the other hand, the Court has seized the opportunity to emphasize the value of the international sources protecting labour rights and the consistency of the Italian primary source with the international charters of human rights. As rightly pointed out by Orlandini, this interpretative choice, strongly oriented towards the international sources, represents a remarkable new element in the Italian constitutional case-law [12].

However, as mentioned above, this Judgment reiterates that a partial infringement of the said right to collective bargaining, albeit fully protected by the Constitution, may be accepted if reasonably justified and temporary. Indeed, the constitutional judges concluded that, although a partial suspension of the collective negotiation in the public sector may be justified by the contingent economic context, such a prolonged block is to be interpreted as an evidence of the intention of the lawmaker to give structural effect to the constraint, which is unreasonable, since it causes an unbearable sacrifice of the right to collective bargaining [13].

The temporal element is crucial in the judicial reasoning of the Court [14]. Next to it, the right protected under art. 39(1) has to be balanced against "the collective interest of containing public spending" (Para. 10.2 official translation). It is expressly stated that, at the time the Court was discussing case N. 178, this element was even more significant, because of the revision of art. 81 Const. and the constitutionalization of the principle of balanced budget (Para. 10.3).

(6) In fact, the Court has taken the chance to underline that, notwithstanding that collective bargaining is beyond any doubt a key instrument to guarantee the proportionate and sufficient remuneration protected under art. 36, the causal relation between the violation of art. 39 and the infringement of art. 36 does not always occur, as in the case at stake. On this issue see Orlandini 2018 and Fiorillo 2015.
(7) As noticed, for instance, by Fiorillo 2015 and Occhino 2017, 9.
(8) European Court of Human Rights, Grand Chamber, judgment of 12 november 2008, *Demir and Baykara v. Turkey.*
(9) Further reference to the ECtHR case law is made in paragraph 17 of Judgment 178/2015.
(10) See Zoppoli 2017, 184.
(11) On the strong analogies between public and private sectors in terms of collective negotiations, in light of Judgment 178/2015 see Orlandini 2018.
(12) Orlandini 2018.
(13) The same conclusions was reached as far as the block of the non-renewal indemnity is concerned. For a commentary *Cf.* Fiorillo 2015.
(14) See also Sciarra 2017, 363.

Consistently, the Court deems the suspension of the collective negotiations in the public sector for the years 2011-2013, and its effects on the public employees' wages, reasonable, precisely because it stemmed from an economic and financial situation particularly severe, it has a general character, inasmuch as it applies to the public sector as a whole, and it is based upon a spirit of solidarity (Para. 12.2). To the contrary, the block of collective bargaining is illegitimate because it does not satisfy the requirements of temporariness and exceptionality, because of the reiterations of the measure and the extension of the suspension beyond the year 2013.

The Court has given a key role to the excessive nature – in temporal terms – of the extension of the block, which is not justified even in times of economic crisis. Indeed, it is not the act of suspending collective bargaining in the public sector per se to be judged unconstitutional, but the "unreasonable" prolongation of such a block [15].

A brief, but comprehensive legal reasoning : Judgment 124/2017

In 2017, the reduction of public employees' wages has been discussed again by the Constitutional Court [16]. Albeit the concrete effects of this Judgment are relatively limited, the way in which the Court develops its legal reasoning, especially in relation to the certain elements such as the use of the principle of reasonableness and the relevance of the economic context, helps to draw a picture of the recent trend of the case-law on labour rights.

The Court introduces its reasoning by reminding that the limited resources available have to be allocated in a proper and transparent way. Therefore, the lawmaker has "to balance numerous values of a constitutional status". Probably with the aim to provide guidance to the lawmaker, the Court makes some examples of the constitutional values, which may be subjected to the balancing process to this purpose, i.e. art. 3 (equal treatment), 36(1) (proportionate remuneration), 38(2) (adequacy of the retirement benefits) and 97 Const. on the smooth running of the public administration. Quoting from its case-law the Court adds, already at this stage of its judicial reasoning, that also the establishment of a maximum limit to the combination of remunerations and pensions affects various constitutional values, again it makes what seems to be a non-exhaustive list, by mentioning art. 4 on the right to work, art. 38(2) and art. 2 on the "solidarity between the different generations that interacts in the labour market" [17] (para. 8.2). However, this interference is allowed if the values concerned are balanced and the measure is not manifestly unreasonable and the conflicting interests must be guaranteed in an adequate and proportionate way, which means, in the case at stake, to consider, on the one hand, the "resources concretely available" and, on the other hand, the constitutionally protected value of highly professional jobs (para. 8.3).

As far as concerns the norm providing for a maximum limit to the public remunerations, the unreasonableness of the norm has to be disregarded given the long-term perspective that frames the measure and the general interest that it strives for (para. 8.4).

It is stressed that, since 2007, the reduction of public spending through remuneration limits has never been pursued as an aim in itself, but in order to improve the proper management of public resources. Indeed, these norms have to be read in the framework of numerous reforms aimed at reducing public spending. Hence, not only the economic context is taken into account, but also the overall legislative context, which validates a reform affecting the higher earners.

"The provision at stake pursues the aim of containing and rationalizing the public spending, in order to guarantee the other constitutional interests concerned, given the limited resources". Therefore, with a telling sentence the Court states that what makes the remuneration limit reasonable is the objective pursued, that is the rationalization of public spending (para. 8.4), and the maximum limit set at the remuneration of the Supreme Court's President, excludes the violation of the independency of the judiciary (art. 104 Const.) (para. 8.5).

On the grounds of analogous arguments, the norm that sets the limit on the combination of remunerations and pensions at the remuneration of the Supreme Court's President is judged reasonable, as well. The assumption behind such a

(15) See, inter alia, Fiorillo 2015; Zoppoli 2017, who argues that the temporal element is a decisive factor in the evaluation of the unconstitutional nature of the block, which cannot assume a structural character (184).

(16) First post-crisis judgments on public employees' wages are Judgments 223/2012, 304/2013 and 310/2013, for an assessment see, inter alia, Lo Faro 2014, Fontana 2015 and Faraguna 2016.

(17) Albeit we have to be cautious on applying the so-called inter-generational solidarity, see further in this essay.

conclusion is that also in this case "the lawmaker is called upon to ensure a systematic, and not fragmented, protection of the constitutional values at stake", in particular the Court refers to the principle of proportionality between the remuneration and work performed (art. 36). The fact that the resources are limited plays again a crucial role and justifies the comprehensive predetermination of the payments the public administration can guarantee, as provided for by the norm under scrutiny. All in all, the Court has declared the provision reasonable and proportionate, in the sense that a reasonable balancing of the constitutional principles has been carried out (see especially para 9.2). The concluding points made by the Court emphasises the discretionality of the lawmaker, which is allowed to reconsider such limits in light of the public spending trend and the economic and social context. However, in this forward-looking statement the Court does not forget to point out that the lawmaker can exercise its discretional power only if an attentive assessment of the long term effects of further restrictive measures is conducted (para. 9.4).

THE RETIREMENT BENEFITS' REVALUATION AND THE MODULATION OF THE COURT

The controversial Judgment 70/2015

At the end of May 2015, the Constitutional Court has released a judgment destined to become one of the most controversial of the latest years. The referring courts had questioned the constitutionality of a measure, which limited the automatic revaluation of pensions by 100 % for the years 2012 and 2013, exclusively for pensions worth an overall amount of up to three times the minimum INPS [18] pension. Eventually, the block of revaluation of pensions has been declared in violation of three constitutional norms: articles 36(1) (providing for the right to a fair remuneration) and 38(2) (on the *adequacy* of social security benefits), read in light of articles 3(2) (providing for the principle of substantial equality and reasonableness).

The Court makes clear that the discretionality of the lawmaker as regards the modulation of the revaluation of retirement benefits is restricted by the principle of reasonableness as developed by the Constitutional Court in relation to articles 36(1) and 38(2). Indeed, the lawmaker has to comply with the principles of proportionality [19] and adequacy of the retirement benefits and avoid reiterating the block of revaluation, as to avoid damaging the legitimate expectations and the purchasing power of pensioners. In addition, the simple reference to a "contingent financial situation" is not enough to justify such a restrictive provision, which provides for a two-year block and concerns pension brackets much lower than in previous reforms. Moreover, the Court observes that the provision under scrutiny is inconsistent with previous conclusions of the same Court, which had issued a warning to the lawmaker not to reiterate the suspension of revaluation because it would create "tensions with the paramount principles of reasonableness and proportionality" (see judgment 316/2010 [20]) [21].

In Judgment 70/2015, the Court refers to the economic argument by quoting its case-law, where it makes clear that the lawmaker has to regulate the retirement system on the grounds of a "reasonable balancing" of constitutional values. In particular, quoting Judgment 316/2010, it states that the adequate regulation of retirement benefits has to be elaborated "on a par with the obtainable financial resources" and "without prejudice to the inalienable guarantee of the basic needs in protection of the person" (Para. 8, italics added). The circumstance that the financial resources available have to be considered by the lawmaker does not seem enough to put this element on the same level as the basic rights of people, which have to be anyway guaranteed. Indeed, the sentence quoted from the 2010 judgment cannot be misunderstood: the "minimum protection" shall be guaranteed, and in order to do so the lawmaker considers the available financial resources.

Interestingly, in this Judgment, the Court never mentions article 81 Const., nor it expressly refers to

(18) Istituto Nazionale Previdenza Sociale (National Institute for Welfare).
(19) The concept of "proportionality" is used here only in terms of proportionality of the remuneration/retirement benefit that stems from art. 36 read as "strictly related" to art. 38, and not as a tool to apply the balancing technique in the judicial reasoning.
(20) Overall, the judicial reasoning is strongly grounded upon Judgment 316/210, which seems to be taken as reference point. However, the use of this precedent has been criticised by a number of scholars, see Lieto 2015; Azon Demmig 2015. Of the opposite view are D'Onghia 2015 and Giubboni 2015.
(21) For a commentary *Cf.* Cinelli 2015; For a summary in English of the judgment see Bergonzini 2016; On follow-up to the judgment *Cf.* Giubboni 2015; 532-535; Morelli 2015, 709-710; D'Onghia 2015, 349-352.

the economic crisis, which has triggered the norm under scrutiny. From a fundamental social rights perspective, it can be argued that the intrinsic value of this judgment is the "reaffirmation of the constitutional value of social rights", against the tendency to push for their deconstitutionalization [22]. On this view, the Court has done nothing but fulfilling its role as guardian of the constitutional fundamental rights, which is also its source of legitimacy [23].

Under this view art. 81 and the respective principle of balanced budget cannot be considered a kind of "super constitutional value", as to make sure that all rights and principles are guaranteed, particularly in light of the "homogeneous" character of the Constitution [24]. The Constitutional Court, which acts as a custodian of the core content of fundamental rights, it is called upon to determine how far the economic reasons can go to the detriment of constitutionally protected rights [25].

In fact, the Court does address the budgetary needs in relation to the case at stake, but it does so in order to point out that the norm under scrutiny only mentions in general terms the "contingent financial situation", without elaborating on the reasons, which would support the prevalence of such element over the fundamental rights concerned. Indeed, in its conclusions, the Court considerably weights the lack of extensive justification on budgetary grounds when it states that "the right to an adequate retirement benefit […] is unreasonably sacrificed in the name of budgetary needs not explained in detail" (Para. 10).

This is indeed a further element, which supports the unconstitutionality of the norm. Not only the norm was infringing upon the principles of adequacy and proportionality of the retirement benefits, inasmuch as the purchasing power of low retirement benefits was not protected, but also because the lack of justification, or better the vague mention to the "contingent financial situation", had prevented the Court from assessing the balancing of the lawmaker.

Under this view, this judgment can be considered a call upon the legislator to exercise a "fair balancing". Indeed, the Court does not enter into the merit of the legislative choices, but it just controls whether these choices are in compliance with the criteria of reasonableness and proportionality, and it does not invade the lawmaker's discretionality [26]. Translating these considerations in the proportionality test language, it can be argued that the Court was not even able to conduct the first sub-test, that is to evaluate upon the suitability of the norm to achieve the aim, because the aim itself had not been properly framed and explained.

Notwithstanding the duty of the Court not to infringe upon the discretionality of the lawmaker, it is widely recognised that this discretionality is not unlimited. What emerges from this judgment is that the *reasonableness criterion* is entrusted with the role to frame the lawmaker's boundaries with respect to retirement benefits. In particular, the Court applies the reasonableness criterion with regard to art. 36 and 38 Cost, as defined by the case-law [27]. Understood in that sense, the *reasonableness* "circumscribes the discretionality of the lawmaker and constraints its choices to the adoption of solutions coherent with the constitutional parameters" (Para. 8).

The reiteration of crucial legal arguments in Judgment 173/2016

In Judgment 173/2016 the Court evaluates the legitimacy of two norms of the Stability Law for 2014 (Law 27 december 2013, n°. 147). The first norm provides for a new modulation of the retirement benefits' revaluation, which concernes *all pensions*, for the years 2014-2018, and proper block is envisaged only for pensions higher than six times the minimum INPS benefit, while the

(22) Giubboni 2015, 529.

(23) *Cf.* Cinelli 2015, 443; D'Onghia 2015, 330, The author briefly reviews the approaches of the court towards the "spending judgments" since the 1980s, and notes that while in the 1980s the Court adopted conducted a proper judicial activim in favour of fundamental rights, in the 1990s its approach shifted towards a self-restraint more keen to support economic arguments (D'Onghia 2015, 328-329). Also Giubboni sees very positively the fact that the Court, while balancing the conflicting interests, has gone against the tendency to assign "a sort of prejudicial hierarchical prevalence to the principle of balanced budget", enshrined in the renovated art. 81 Const., thus effectively protecting welfare social rights, anchored to the principles of substantial equality and solidarity, that is arts. 2 and 3(2) Const. (Giubboni 2015, 528).

(24) Cinelli 2015, 444.

(25) D'Onghia 2015, 326-328.

(26) In this way see D'Onghia 2015, 340; *Cf.* also Cinelli 2015 442; Giubboni 2015, 529, according to Giubboni, the Court has anyway conducted the scrutiny of reasonableness in a way in which is somehow close to the structured proportionality test.

(27) The application of art. 36(1), which provides for "the right to a remuneration commensurate to the quantity and quality of their work and in any case such as to ensure them and their families a free and dignified existence", to retirement benefits has triggered a sharp academic debate, also as concerns the other Judgments discussed in this contribution. Against this approach, see a very critical contribution by Persiani (Persiani 2015) and a more soft criticism by Giubboni, who anyway argues that the sole application of art. 38 Const. would have led to the same conclusions (Giubboni 2015, 331). Of a different view see, D'Onghia 2015.

second provides for a *solidarity contribution* to be detracted from the highest retirement benefits (14-30 times higher than the minimum), for a three year period (2014-2016). Both norms have passed the test and have been declared consistent with the constitutional sources.

As to the first norm, the argument of the Court strongly rests on a crucial distinction, already underlined in Judgment 70/2015, between a block and a modulation in the revaluation of pensions [28]. The criterion of graduation followed fulfils the principles of proportionality and adequacy of retirement benefits [29].

As to the second measure, the Court concludes for the reasonableness of the solidarity contribution, because it was adopted in order to handle the economic crisis and was aimed to finance the welfare system – thus it was consistent with the economic and social context – in a spirit of "strong" solidarity, not only among generations, as well as because of its temporary character [30] and the fact that it had tackled only the highest retirement benefits, which ensures compliance with art. 38 Const., as linked to art. 36 Const. [31]. Last, this solidarity contribution is also deemed sustainable, inasmuch as it is inspired by the criterion of progressivity and it imposes an affordable sacrifice to the pensioners concerned [32].

According to the Court, the coherence of the norm with the social and economic context is also dismissing the claim that the legitimate expectation of pensioners was infringed upon, considering that a provision as the one at issue could not be considered unpredictable [33].

It is noteworthy that, albeit the Court did not only refer to the solidarity between generations, but also with the weak part of the population (Para 11.1), for the first time, it has explicitly established a principle of solidarity and responsibility between generations, thus adopting an approach that understands rights and duties in a circular way and is constitutionally founded, according to Pepe, upon art. 2 and art. 38 Const. [34]. Nevertheless, if this principle is not properly read in light of the constitutional principle of adequacy of the retirement benefits (art. 38 Const.) – as linked to the proportionality principle of art. 36 Const. – risks becoming a double-edged sword. In fact, it shall be borne in mind that the principle of solidarity between generations has been recently elaborated by the scholarship, as a principle that should guide the attempts of the lawmaker to overcome the welfare state and labour market crises. Indeed, a right of future generations does not seem to find any legal basis in the Italian Constitution. Moreover, applying such a principle to justify restrictions to social rights would require an adequate monitoring system, to make sure that the resources collected would be concretely used to favour the future generations, which is hardly feasible [35]. Albeit the Court has begun to bashfully mentioning this argument (see also Judgment 124/2017, Para. 8.2), a cautious application of this principle is recommended – as the Court did in the Judgment under discussion -, which shall not justify in any case the infringement of constitutional rights that constitute the roots of our social system.

The last episode of a case law in search of some coherence: Judgment 250/2017

Two provisions adopted with the explicit aim of implementing Judgment 70/2015 and amend the regulation on the automatic revaluation of pensions, in compliance with the principle of balanced budget and the public finance targets, were judged legitimate by the Constitutional Court in December 2017. The norms at issue reconsider the modulation of the automatic revaluation of pensions for the years 2012-2013 (the automatic revaluation for retirement benefits six times as

(28) The continuity with Judgment 70/2015 is also stressed by Guiglia 2016, 18; see also Pedullà 2016, 4

(29) See also, Sandulli 2016, 688.

(30) Albeit the temporary character of the norm, as an element to be evaluated to decide upon the constitutionality of a norm restricting retirements' rights, had been used already in Judgment 70/2015, this application gave rise to some criticism. In this respect, it has been argued that it is up to the lawmaker to decide, considering the developments of the financial crisis, whether to consolidate this measure or not and what other reforms of the social security system may be necessary, given that "it seems ingenuous to think that the social security financial crisis is a temporary phenomenon" (Sandulli 2016, 691).

(31) The judgment raises the issue of the relationship between art. 36 and art. 38, once again. In this occasion, the Court seems more cautious and it opts for not referring to Judgment 70/2015, and the case-law quoted therein. Indeed, it rather mentions Judgment 116/2010 where it is stated that the connection between the two constitutional norms is "not unfailing and strictly proportional". However, the constitutional judges do not take a chance to elaborate upon a potential combined reading of these provisions. According to Persiani, the Court has confirmed the functional link between art. 36 and art. 38 Const. set in judgment nº. 70/2015, but, in theory, it has a mitigated the scope of this connection. While insisting upon the inappropriate connection between art. 36 and art. 38, the author points out that in this case argues that the sole application of art. 38 Const. would have led to the same conclusion (See Persiani 2017).

(32) For a commentary of the judgment read Pedullà 2016.

(33) An argument strongly criticized by Persiani 2017, 284-285.

(34) Pepe 2016.

(35) In this way Cinelli 2017 352-353, also refering to Luciani 2008.

high as the minimum INPS benefit is ruled out and for retirement benefits between three and six times the INPS minimum the revaluation is based upon decreasing percentages) and its weight in the determination of the automatic revaluation for the years 2014-2016 (so called *trascinamento*).

Various claims of unconstitutionality were discussed by the Court, without going into detail of every argument put forward by the constitutional judges, let us see the crucial points.

According to the Court, the norms at stake, in their new formulation, do not represent a "mere reproduction" of the provisions declared unconstitutional in 2015, to the contrary they are characterized by "relevant novelties", in that sense the reform from 2015 "has introduced a new and *not unreasonable* modulation of the mechanism for the revaluation of pensions" (italics added).

The revaluation of retirement benefits serves the purpose to preserve the purchasing power of pensions over the years, in compliance with the adequacy of retirement benefits (see art. 38 Const.), "indirectly linked" to the principle of proportionality (art. 36), which gives a more concrete meaning to the adequacy criterion [36]. The pensioners' interest in preserving the purchasing power, says the Court, shall be balanced against the financial and budget needs of the State, without circumventing the reasonableness principle, that is the cornerstone of the pensions' legislation.

For the reasonableness criterion to be respected the measures providing for expenditure savings have to be properly justified. Indeed, in this case the possibility to accede to explanatory and technical documents seems crucial for the Court to rule for the constitutional legitimacy of the norms at issue, inasmuch as they "represent an instrument for the verification of the lawmaker' s choices" (para. 6.5.1). In particular, the Court denies the unreasonableness of the norms by insisting on the fact that the reformed paragraphs were aimed at complying with Judgment 70/2015 and by adding that a "Report" a "Technical Report" and an "Examination of the quantifications" provide for accounting data. Without going into detail, nor presenting any of the mentioned data, the Court concludes that the documents provide a comprehensive understanding of the amended paragraphs and a highlight the "financial needs taken into account by the lawmaker in the exercise of its discretionality".

Also the principles of adequacy and proportionality are deemed preserved because the interest of the pensioners is sacrificed only in a partial and temporary way, given that the revaluation of pensions is modulated according to a decreasing percentage in favour of the lower benefits (para. 6.5.2). Indeed, the Court stresses that the negative impact of these provisions on the higher retirement benefits is not sufficient to affect their adequacy, which is safeguarded even if the automatic revaluation is temporary suspended because they enjoy a higher margin of resistance to the erosion of the purchasing power caused by the inflation (para 6.5.3.1). Similarly, the automatic revaluation, which decreases with the increase of retirement benefits, for pensions between three and six times higher than the INPS minimum for the years 2012 and 2013, does not affect the adequacy of the retirement benefits, precisely because of the application of the progressivity criterion, which ensures the conservation of the purchasing power and resistance to the erosion.

SOME FINAL THOUGHTS ON THE RECENT ITALIAN CONSTITUTIONAL COURT'S APPROACH

This brief analysis conducted in the previous paragraphs highlights some crucial features of legal reasoning the latest constitutional judgments, which have addressed norms implementing the austerity policies. Namely, the role of the economic crisis argument, the relevance of art. 81 Const., the requirements that may justify a provision affecting labour rights, such as the temporal element and a proper justification and the conflict between labour rights and public interests in the post-crisis context, which, inevitably, triggers a reflection on the role of the Constitutional Court as guardian of fundamental labour rights, especially in light of the constitutionalization of the principle of balanced budget. A remarkable example is provided by Judgment 178/2015, where the Court expressly refers to the amended art. 81 Const., in relation to a provision

(36) Also in this Judgment, the Court elaborates on the role of art. 36 as regards retirement benefits. The Court refers to Judgment 173/2016, where the link between art.38 and art. 36 Const. was interpreted as not strictly proportional and absolute. However, the Court reminds that the retirement benefits take into account also the quantity and quality of the work previously performed.

affecting the public employees' wages. The discursive balancing [37] conducted by the Court between conflicting interests has apparently placed labour rights and budgetary needs on the same level. In fact, the right to a proportionate remuneration (art. 36(1)) and the right to collective bargaining (art. 39(1)), have been weighed up with the "collective interest of containing public spending", as declined in the constitutional principle of balanced budget. Albeit, on the wave of authoritative Italian scholars, it may be argued that balancing consolidated fundamental rights with a principle that is expression of a specific choice of economic policy gives rise to an "unequal balancing" [38], the constitutional character of the principle of balanced budged hardly supports such a conclusion. Considering the political context, which has forced the introduction of this principle in the Italian Constitution and the current constitutional framework, the effort of the Court to guarantee full enforcement of labour rights, by identifying key requirements that allow a partial infringement of these rights, such as the temporary character and a proper justification (as in Judgments 178/2015 or 250/2017), is consistent with the consolidated role of the Constitutional Court as guardian of fundamental rights [39]. Indeed, the time limit requisite is a recurring element in the constitutional case-law discussed in this essay, which concurs to support the legitimacy of a norm under scrutiny. Also where the time limited character is not considered per se, the temporary element still plays a role, for instance when the Court emphasises the duty of the lawmaker to conduct an attentive assessment of the long term effects of the restrictive measures (see Judgments 124/2017 and 250/2017).

The second requirement, that is an extensive justification, which explains the constitutional reasons that shall legitimize a partial infringement of labour rights is also a recurrent argument. By way of example, in Judgment 70/2015, the Court complains about the generic reference to the "contingent financial situation" and the absence of both a detailed explanation of the necessity to give prevalence to the budgetary needs at the detriment of the fundamental rights at stake and a technical documentation on the expected revenues (para 10).

The choice of the Court to demand for and refer to an appropriate justification, or better to technical documents is extremely interesting. At first, the Court's request appears uncontroversial, since it seems obvious that the weaker is the justification, the harder is for the Court to conduct a supervision of the lawmaker's balancing. However, the paragraph in judgment 250/2017 that refers to the "Report", a "Technical Report" and an "Examination of the quantifications" raises some further questions. Indeed, this formulation leaves the impression that it is sufficient that these data are provided for the justification to be proper. It is not clear whether those documents were accurately analysed by the Court itself or they were just read and accepted. A further elaboration on the reasons why these data can be considered a sufficient justification, which goes beyond the mere mentioning of the documents' names and the fact that they provide for accounting data, would have clarified which features a technical document needs to have in order to serve its justification purpose. In this sense, the reference to the technical documents seems just a first attempt to consider the financial reasons of the lawmaker. Moreover, if the Court decides to build its legal reasoning not only on the grounds of a proper enforcement of fundamental rights, but also on the basis of the financial justifications – still an open question for whom is writing -, it is legitimate to wonder whether it should also make a step further and enter into the merit of the whole State expenditure, considering whether the resources taken at the detriment of labour rights could have been found somewhere else, for instance by cutting on expenditures which do not serve the purpose to implement a fundamental right [40]. In other words, by applying what in a number of foreign legal orders would be called the necessity test. Nevertheless, beyond any doubt this Court has had the merit to construct a consistent case law, which provides guidelines to the lawmaker and, in the subsequent judgments, coherently proceeding in its legal reasoning, recognises the lawmaker's improvements in a constructive spirit.

The development of clear requirements that justify provisions restricting labour rights is also functional to the Court, in order to strike the right balance between its role, guardian of fundamental rights, and the discretionality of the lawmaker, which is not questioned at all by the constitutional judges, as often reiterated. In addi-

(37) The Italian Constitutional Court has rarely attempted to use the structured proportionality test (and its sub-tests of suitability, necessity and balancing in the strict sense) as a tool to conduct the balancing. A theme of the Italian constitutional case law is rather the application of the reasonableness criterion. For a critical reflection see Cartabia 2013. On the reasonableness criterion read, inter alia, Cheli 2011.

(38) See, inter alia, D'Onghia on Judgment 70/2015 (D'Onghia 2015, 338), and Luciani 1995, who elaborates upon the concept of "unequal balancing".

(39) Along these lines, see Cinelli 2015, 443 on Judgment 70/2015.

(40) On the difficulties linked to the evaluation of the available resources and the respective documents see Sciarra 2017.

tion, the Court, especially in the legal reasoning on the revaluation of retirement benefits, frames the discretionality of the lawmaker within the boundaries of the principle of reasonableness and, coherently with the Italian constitutional jurisprudence, is used as a tool to balance conflicting interests, or better supervise the balancing conducted by the lawmaker.

It is noteworthy, that in the latest judgments the Court has upheld the legitimacy of the norms under scrutiny, also with the argument of the legislative context, in the sense that it has contextualized the measures under scrutiny in a scenario characterized by numerous reforms that have affected labour rights, with the aim to cut public spending (inter alia, 173/2016 and 250/2017). A detail that seems to strengthen the justifications provided by the lawmaker and provides evidence of the necessity to impose a general and proportionate sacrifice to the society, without burdening only restricted categories, in a spirit of solidarity (see art. 2 Const.).

Going back to reflect on the constitutional character of the principle of balanced budget and the legitimacy of a balancing between the latest and fundamental rights, in Judgment 124/2017 the Court provides some food for thought also in relation to the weight of art. 81 Const., albeit in this case it refers only to art. 97 Const. In this ruling, the Court briefly mentions a key factor of the constitutional order, namely that the constitutional principles are expression of constitutional values, which have to coexist in the legal system. It shall be emphasised that, next to the social principles mentioned, when the Court refers to art. 97 Const., it does not refer to the first paragraph of the renovated art. 97 Const., which provides for the duty of the public administrations to ensure the balanced budget and the sustainability of the public debt, coherently with the EU legal order, but it rather includes among the norms expression of constitutional values the general principle of buon andamento (smooth running) of the public administration. The Court seems to take a clear stand in including among the values, which are founding the Italian constitutional order, this principle that belongs to the Italian constitution since its enforcement in 1948, and not that of balanced budget recently and offhandedly included following the international institutions' pressure, because of a contingent economic situation. Next to this, in Judgment 124/2017 the Court never refers to art. 81 Const., but it only mentions the need to consider the "resources concretely available", which is not exactly as referring to the constitutional principle of balanced budget. This passage is remarkable, insofar as the Court seems to lean towards a less incisive strength of the economic principles constitutionalized by Constitutional Law 1/2012.

The case law addressed in this contribution confirms the dual role of the Constitutional Court as supervisor of the balancing conducted by the lawmaker between conflicting interests and guardian of fundamental labour rights. However, it also raises a major issue, that is the extent to which this role can be properly and consistently played in a context in which the supreme source of law can be easily amended, in order to give constitutional status to principles of economic policy, which should pertain to the domain of the government choices, and not to legislative foundation of the Italian legal order, insofar as they do not reflect founding constitutional values [41].

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(41) On the fundamental constitutional principles as expression of the founding values see, one for all, Zagrebelsy 1992.

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