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"Constitutional principles as higher norms? Is it possible to determine a hierarchy within the Constitution? Unamendable (eternal) provisions in Constitutions and judicial review of constitutional amendments"

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1. Introduction

Do some principles contained in the Italian Constitution rank higher than other constitutional norms? If so, from what do they derive? Do they come from norms expressed in the text of the Constitution, or are they implied by its context? Would such norms be unamendable, and, if so, to what extent? Whose role is it to identify them? And whose to enforce them? Is there a hierarchy amongst them?

With these remarks I intend to offer a preliminary answer to these questions, chiefly referring to the case law of the Constitutional Court in which I have the honor of sitting.

2. The limits of constitutional amendment: the "republican form" and other explicit limitations

The Italian Constitution establishes only one textual limitation of constitutional amendments. Article 139 provides that, "[t]he form of Republic shall not be a matter for constitutional amendment."[1] The provision is taken together with Article 1 of the Constitution, and thus the democratic character of the system fits into the "form of Republic," according to an interpretation that recalls Article IV, Section 4 of the Constitution of the United States of America: "The United States shall guarantee to every State in this Union a Republican Form of

[1] Article 139 codifies the restriction coming from the institutional referendum. The provision has a political-symbolic value that is underscored by its final positioning as the concluding article of the Constitution, and was extensively debated in the Constituent Assembly. Togliatti assuaged the monarchists' concerns with the theory of "double revision," according to which it would have been possible to go back on the choice of a republican form of government by first abrogating Article 139 and then reintroducing the monarchy.

Government," the word *republican* meaning "a government which derives all its powers directly or indirectly from the great body of the people."[2]

Thus it can be said that in Italy, too, the fundamental pillars of democracy are not subject to constitutional amendment.

Remaining at the level of textual analysis, the "fundamental principles" contained in the first twelve articles of the Constitution might also be included in the category of express constitutional limits, since they play an essential role in establishing the constitutional nature of that text. A similar reasoning might apply to the five articles of the Constitution that describe "inviolable" [3] rights like personal freedom, and to the provisions that begin with the words "[t]he Republic recognizes […]," [4] for example the one concerning the rights of the family (Article 29).

Starting from these express (or, in any case, considered to be express) limitations, the Italian constitutional discussion very quickly began to consider the existence of implicit limitations and to define the notion of "supreme constitutional principles" as principles that are distinct from other constitutional rules and mark an insurmountable border both for principles coming from outside sources and for other internal sources of constitutional rank.[5]

3. *Supreme principles as a barrier toward external sources and an insurmountable limit toward internal ones*

The topic of "supreme principles" comes from longstanding tradition, as mentioned above, but is also highly relevant today for some of the Constitutional Court's most recent, important decisions.

The notion emerged in constitutional case law in the 1970s as a limit on "external" sources envisaged by the Constitution and authorized to be exceptions to it. In particular it dealt with:

- sources that regulate relations between the Italian State and the Catholic Church, governed by special "pacts" as provided for by Article 7 of the Constitution (Judgment no. 30 of 1971); [6]
- European community sources, which have their constitutional basis in Article 11[7] of the Constitution, which allows for necessary limitations of sovereignty (Judgment no. 183 of 1973); [8]
- the customary international rules to which the Italian legal system conforms, as provided for by Article 10, section 1, of the Constitution (Judgment no. 48 of 1979).

The Court has held that the "limitations of sovereignty" (Article 11 of the Constitution) and the references to rules coming from treaties or international practices (Articles 7 and 10 of the Constitution) do not imply a renunciation on the part of the Italian legal order of the "hard nucleus" of the Constitution. European sources, agreements with the Holy See, and customary international rules may

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[2] James Madison, *The Federalist Papers: No. 39*, The Avalon Project (Yale Law School, 2008): http://avalon.law.yale.edu/18th_century/fed39.asp.

[3] The Constitutional uses the word "inviolable" in Articles 2, 13, 14, 15 and 24, and talks about "fundamental right" in Article 32.

[4] For example, Articles 2, 4, 5 and 29.

[5] The evolution of the notion is brilliantly reconstructed by P. FARAGUNA, *Ai confini della Costituzione, Principi supremi e identità costituzionale*, Milano, Franco Angeli, 2015.

[6] In addition, see Judgments no. 12 of 1972, 175 of 1973, 1 of 1977, and 18 of 1982.

[7] Following the constitutional reform of 2001 also in Article 117, section 1, of the Constitution.

[8] See also Judgment no. 170 of 1984.

amount to exceptions to constitutional rules "concerning details,"[9] but not to supreme principles, which constitute an insurmountable barrier and are true "counter-limits" to external sources. As a preliminary outline, they are identified with the fundamental and binding principles of the constitutional system and the inviolable rights of the human person.

The first concrete application of this framework, that is, the first constitutional review for violation of a supreme principle dates back to 1982. Judgment no. 18 of that year declared unconstitutional the law executing the Lateran Pacts as violating the supreme principles of the "right to action" and the "protection of the Italian public order."[10] The case involved the act by which an Italian judge gives legal validity to an Ecclesiastical Court's annulment of a marriage. The Court declared the pact rule unconstitutional in the part in which it did not provide for the power of the Italian judge to verify the absence of any provisions contrary to the public order and that the rights of defense were respected in the proceedings before the Ecclesiastical Court.

Later, in 1988, the Court applied supreme principles as a limit in the context of internal sources as well. In Judgment no. 1146 of that year, the Court held that even constitutional laws and constitutional amendments are bound to respect the supreme principles and are subject to review for violating them.

A judge had referred the case alleging that a provision of the Special Statute of the Trentino-Alto Adige Region (approved as a constitutional law), which gave Council Members of the autonomous provinces of Trent and Bolzano immunity for opinions expressed and votes cast in the exercise of their functions, violated the principle of equality and was, therefore, unconstitutional. In its defense, the State claimed that constitutional laws were not subject to review for substantive defects.[11] The Court overruled the objection, relying on its previous case law on the topic of supreme principles as a limit on external sources of constitutional rank and held that, "the Italian Constitution contains certain supreme principles that cannot be undermined or modified in their essential content even by laws amending the constitution or by other constitutional laws. These include both the principles that the Constitution explicitly establishes as absolute limits on the power to amend the constitution, such as the form of republic (Article 139), and the

[9] Judgment no. 126 of 1996: "as an exception to what has been said concerning respect for the internal constitutional framework of competences, European rules may legitimately provide, in order to meet the organizational needs of the European Union, modes for their own implementation, and, therefore, state rules that do not fit into the framework of the ordinary constitutional distribution of internal competences, except for respect for the fundamental and binding constitutional principles.'

[10] The Court declared "the unconstitutionality of Article 1 of of Law no. 810 of 27 March 1929 (Execution of the Treaty, of the four attached annexes, and of the Concordat, signed in Rome, between the Holy See and Italy, 11 February 1929), limited to the execution given in Article 34, sixth paragraph, of the Concordat, and Article 17, second paragraph, of Law no. 847 of 27 May 1929 (Provisions for the application of the Concordat between the Holy See and Italy of 11 February 1929, in the part concerning marriage), in the part in which the aforementioned rules do not provide that the Court of Appeal, in the act of rendering executive a judgment by an ecclesiastical court annulling a marriage, has the authority to verify that the parties were assured the right to act and defend themselves in proceedings before the ecclesiastical court in defense of their own rights, and that the judgment itself does not contain provisions that go contrary to the interests of the Italian public order." The Court also declared that the same rules were unconstitutional "in the part in which […] they provide that the Court of appeal may render executive and with legal effect the church provision that establishes the dispensation of marriages that are celebrated and not consummated."

[11] A different matter is constitutional review for defects of form, that is, for the failure to observe the procedure found in Article 138 of the Constitution.

principles that, although not expressly mentioned among those not subject to the procedures to amend the constitution, nevertheless belong to the essence of supreme values upon which the Italian Constitution rests."

In the same context the Court also affirmed its own authority "to judge the constitutionality of laws amending the constitution and other constitutional laws, including with regard to the supreme principles of the constitutional system." Otherwise, it said "it would come to the absurd point of considering the system of legal guarantees in the Constitution defective and ineffective precisely in relation to its most important norms."

Which principles reach this rank?

Later case law revealed various principles that the Court defined as supreme. These include the principles of popular sovereignty and constitutional rigidity, defined as pillars of the constitutional system, secularity (Judgment n. 203 of 1989 concerning religious education in schools), unity (Judgment no. 118 of 2015 on the admissibility of a regional referendum that placed unity at risk), and equality. The inviolable rights are naturally also included. With regard to these the Court has specified that what is unamendable is not the entire way in which a right contained in the Constitution is regulated, but only the right's essential nucleus (consider the terms established by Article 13 of the Constitution concerning personal freedom and how they do not necessarily belong to the essential nucleus of that right that cannot be undermined).

4. Cases reviewing challenges of constitutional laws

The cases in which the Court has pronounced on constitutional sources are exceedingly rare and, upon examination, prove to be of little or no significance on their merits.

The only case in which it upheld a question challenging a constitutional source is Judgment no. 6 of 1970, which involved a rule contained in the special Statute of Sicily.[12] This was, however, only an "apparent" case because the Court had rejected the formal constitutional character of the provision under its review and held that a correct interpretation of the constitutional law approving the Sicilian Statute led to the conclusion that the norms of the Statute that, "[w]hile they did not fall among those intended to realize 'forms and conditions specific to independence,' were in radical contradiction with the Constitution of the Republic," did not have that character.

The Court also reviewed a constitutional source in the aforementioned Judgment no. 1146 of 1988, but it ultimately concluded that the question raised was inadmissible.

Finally, in a judgment in which the Court was directly seized to rule on the Statute of Calabria, the Region asked the Court to consider the question of the constitutionality concerning Article 126, section three, of the Constitution, alleging that the institutional structure violated the "principle of parliamentarism". In Judgment no. 2 of 2004, however, the Court declared the question to be manifestly unfounded "given that not only does the parliamentary type structure of government not appear to constitute, as such, an inalterable organizational principle of the constitutional state system, but Title V of the Constitution itself

[12] Judgment no. 6 of 1970 gave a judgment on interlocutory appeal on Articles 26-27 of the special Statute, which provided for the jurisdiction of the *Alta Corte* [High Court] for crimes committed by members of the Sicilian government. The pending proceedings involved the criminal trial of a former *assessore* of Sicily. The rules on the criminal jurisdiction of the High Court and its inoperative status effected a de facto immunity for all *assessori*.

explicitly provides for the possibility of different forms of government at the regional level."

5. Recent applications of the counter-limits

More interesting is the topic of supreme principles as counter-limits against the introduction of external rules into the Italian legal order on a constitutional basis. In recent years it has played a role in two important cases, one concerning international law and the other European law.

In a decision of 2014 (Judgment no. 238), the Constitutional Court declared that in a specific case – where actions for reparations of damages caused by war crimes and crimes against humanity were concerned – the reference contained in Article 10 of the Constitution must be considered inapplicable to the customary international rule of immunity of States to civil jurisdiction.[13] In this

[13] "3.2. – Indeed there is no doubt, as this Court has confirmed many times, that the fundamental principles of the constitutional system and the inalienable rights of the person constitute a "restriction on the entrance […] of the generally recognized international rules to which the Italian legal system conforms under Article 10, section one, of the Constitution" (Judgments no. 48 del 1979 and 73 del 2001) and function as "counter-limits" on the introduction of European Union rules (see, among many, Judgments no. 183 of 1973, 170 of 1984, 232 of 1989, 168 of 1991, and 284 of 2007), as well asl limits on the introduction of laws executing the Lateran Pacts and Concordat with the Holy See (Judgments no. 18 of 1982 and 32, 31, and 30 of 1971). They represent, in other words, the identificatory and irrefutable elements of the constitutional system, and, for this reason, are unalterable even by Constitutional amendment (Articles 138 and 139 of the Constitution; see Judgment no. 1146 of 1988).

In a centralized system of constitutional oversight, it is clear that constitutional review falls only to the Constitutional Court, to the exclusion of all other judges, including in reference to international customary international rules. Indeed, this Court's competence to hear a matter is dictated by the existence of a conflict between a Constitutional rule and another kind of rule and, obviously, with a fundamental principle of the constitutional structure of the State or a principle that protects the inviolable rights of the person, the evaluation of a conflict cannot fall to any court other than the Constitutional one. Any alternative solution, in a centralized system of oversight, runs up against the competence reserved by the Constitution to this Court, it being established in its case law since its inception, that "The declaration of a law's unconstitutionality cannot be made by any court other than the Constitutional Court according to Article 136 of the Constitution" (Judgment no. 1 of 1956). Also, recently, this Court reiterated that the review of compatibility with the fundamental principles of the constitutional structure and of the protection of human rights falls under its exclusive competence (Judgment no. 284 of 2007), and also that, precisely with regard to the right of access to justice (Article 24 of the Constitution), respect for fundamental rights, as well as the implementation of binding principles, is assured by the guarantor function assigned to the Constitutional Court (Judgment no. 120 of 2014).

[…]

3.5. – In this case, the non-existence of a possibility for fundamental rights to be effectively protected by a judge revealed, as mentioned above, by the ICJ, and confirmed, before the Court, by the FRG, makes clear that the alleged conflict exists between the international rule, as defined by the ICJ, and Articles 2 and 24 of the Constitution. This conflict, in the part in which the international rule on the immunity of States from the civil jurisdiction of the other States includes acts considered to be *iure imperii* [sovereign acts] in violation of international law and the fundamental rights of the person, forces this Court to declare that compliance with this rule, limited to the part in which it extends this immunity to actions for damages caused by acts that correspond to such grave violations, the reference found in the first section of Article 10 of the Constitution does not apply. It follows that the part of the rule on immunity from State jurisdiction that conflicts with the aforementioned fundamental principles was not introduced into the Italian legal order and has no effect within it.

same context the Court declared the law executing the United Nations Charter unconstitutional (limiting this ruling only to Article 94 of the U.N. Charter) "in the part in which it obliges Italian judges to comply with the Judgment of the International Court of Justice (ICJ) of 3 February 2012, which requires that Italian courts deny their jurisdiction in case of acts of a foreign State constituting war crimes and crimes against humanity, in breach of inviolable human rights".

Early this year, with Order no. 24 of 2017, the Constitutional Court addressed a question that invoked the principle of legality in the area of criminal law as a "counter-limit" to European Law (Article 25 of the Constitution).

The matter is sufficiently well-known that it can be summarized in a few lines. In 2015, in its Taricco decision, the European Court of Justice (ECJ) held that Article 325 of the TFEU requires national judges not to apply the rules of the Italian Criminal Code concerning limitation periods (Articles 160, last section, and 161, second section) when this prevents them from inflicting effective and dissuasive sanctions in a significant number of serious fraud cases which compromise the financial interests of the Union. [14]

Two Italian courts referred questions to the Constitutional Court concerning the law executing Article 325 of the TFEU, as interpreted by the ECJ, alleging that it violated the principle of legality in the area of criminal law and, in particular, the principles of non-retroactivity and of the precision of punishments. [15]

The Constitutional Court responded by bringing a preliminary question before the ECJ on the interpretation of Article 325 TFEU.

The Order says that, "having clarified the specific grounds for incompatibility between the rule which the judgment in the *Taricco* case has inferred from Article 325 TFEU and the principles and rights enshrined in the Constitution, it is necessary to ask whether the Court of Justice took the view that the national courts should apply the rule even where it conflicts with a supreme principle of the Italian legal system. This Court thinks that it did not, but considers that it is in any case appropriate to bring the doubt to the attention of the Court of Justice."

Moreover, "[t]his Court also observes that the judgment given in the *Taricco* case held that there was no incompatibility between the rule asserted therein concerning Article 49 of the Nice Charter and the sole prohibition on retroactivity, but did not examine the other aspect inherent to the principle of legality, namely the requirement that the provision concerning the regime of punishment must be sufficiently precise. This is a requirement common to the constitutional traditions of the Member States, which also features within the ECHR system of protection and as such encapsulates a general principle of EU law (see the judgment of 12 December 1996, cited above, in Joined Cases C-74/95 and C-129/95)."

The question formulated by the referring judge with regard to the rule "produced in our legal system by means of its reception, under Article 10(1) of the Constitution," concerning the customary international rule of international law on the immunity of States from the civil jurisdiction of other states is, therefore, not founded, considering that the international rule to which our legal system has conformed under Article 10(1) of the Constitution does not include the immunity of the States from civil jurisdiction in relation to actions for damages caused by war crimes and crimes against humanity, which compromised the inviolable rights of the person, which are not, for that reason, deprived of the necessary effective judicial protection."

[14] 8 September 2015, case C-105/14 (Taricco).

[15] Corte d'appello di Milano [Milan Court of Appeals], order of 18 September 2015, and Supreme Court of Cassation, third criminal section, order of 8 July 2016.

6. Are some principles "more supreme" than others?

At times the Constitutional Court has underscored the primary value of certain rights or the particular importance of certain principles. For example, in its judgment on a law that provided for the suspension of legal proceedings against the five highest offices of the State (no. 24 of 2004), the Court held that, "at the origin of the formation of the rule of law lies the principle of equality of treatment before the law." And in a previous Judgment (no. 84 of 1969), the Constitutional Court called the free expression of thought "a cornerstone of the democratic order."

Can this lead to the idea that certain rights count more than others, *a priori*, such that the balancing operation performed by the Court would be affected by the differing "specific weights" of supreme principles or rights? The answer is no.

The Constitutional Court has expressly denied the existence of a hierarchy of rights. One particularly important case on this topic is Judgment no. 85 of 2013, the so-called "Ilva case," a complicated and delicate matter which dealt with a conflict between the right to health and the right to work.

After a judge-ordered halt in operations at the Ilva steelworks in Taranto in order to protect worker and public health, a law was passed and was then brought before the Constitutional Court for review. The law was intended to address the crisis of industrial facilities of strategic national interest by making the protection of health and the environment compatible with maintenance of high employment rates. The needs to protect public health and the environment were countered by the need to keep alive an economic activity that was extraordinarily important for the nation, and to vouchsafe an enormous number of jobs, which would have been lost if the blast furnace had indeed been closed as the judicial order provided.

The referring judge had called into question the constitutionality of the law, assuming the primary character (and, therefore, in the judge's view, the necessarily prevalent one) of the workers' and the public's right to health.

The Constitutional Court began with the affirmation that all the fundamental rights enshrined in the Constitution are integrated with one another in a reciprocal relationship and rejected the notion that any of them could be identified as having prevalence over the others. The Constitution, the Judgment holds, "requires that an ongoing reciprocal balance be struck between fundamental principles and rights, and that none of them may claim absolute status." This is in order to prevent the "unlimited expansion of one of the rights, which would 'tyrannise' other legal interests recognised and protected under constitutional law, which constitute as a whole an expression of human dignity."

Thus, once the category of supreme principles, including inviolable rights, is identified as containing the constituent and representative elements of the constitutional system, within that category there is no hierarchy of either principles or rights since, on the contrary, all of them, both singly and taken together, act as rules that characterize the constitutional system precisely because they coexist on equal footing and denote, in a reciprocal relationship, the system of supreme values upon which the Constitution is founded.