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Table of Contents

Italy

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I. INTRODUCTION

The year 2021 has been characterized as – for now – the "peak" in the judicial pandemic curve of COVID-19 related constitutional controversies before the Italian Constitutional Court (hereafter ItCC). In this report, we will summarize these crucial developments (Part II), involving a wide range of legal sectors. However, the ItCC activity in 2021 has not been limited to adjudicating emergency legislation. On the contrary, the Court reiterated its central role also outside the circle of emergency legislation in protecting fundamental rights, issuing a number of topical decisions across different sectors of the legal order (Part III).

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

In 2021, pandemic-related issues were debated in several legal disputes, but – due to the rules on access to the ItCC[1] – constitutional rulings were rendered only in some cases[2], only a few of which allowed the ItCC to address questions substantially connected to the management of this unprecedented emergency.

Firstly, a broad legislative power was affirmed for the State to manage the pandemic. According to the ItCC, on core issues such as lockdown regime, therapeutic protocols, vaccinations etc., the centralized legislative competence on «international preventive healthcare» (Article 117, para. 2, letter q, It. Const.) pre-empts all territorial attributions, which may expand only in the room specifically left for them by the relevant pieces of national legislation[3]. A broad reading of other national powers was adopted also with regard to social and economic setbacks of the pandemic: e.g., as emergency national legislation had already extended the duration of administrative authorizations particularly in urban planning, this has been considered a fundamental principle (of land-use planning, Article 117, para. 3, It. Const.) which prevents Regions from conceding further extensions, notwithstanding the alleged special problems of local construction business[4].

Secondly, the ItCC apparently endorsed the legal framework crafted for the pandemic, although such framework was mostly made up by decree-laws (issued by the Government and converted into law by the Parliament within 60 days) and administrative acts (mainly issued by the President of the Council of ministers, or single Ministers), not ordinary laws passed by the Parliament. A first challenge came from two MPs, protesting that the Government had basically appropriated the powers vested by the Constitution in the leg-

islative assembly. The complaints were easily dismissed, also because the Parliament had been involved effectively in the conversion of decree-laws[5]. A second challenge came from a justice of the peace, in proceedings concerning a violation of the prohibition to leave home during the first wave of the pandemic, established in a decree of the President of the Council of ministers. Taking position in a lively debate, the ItCC held that such administrative acts amounted to merely executive enforcement of the relevant decrees-law, which had already disciplined the lockdown regime with sufficient precision[6]. Only an early decree-law (n. 6 of 2020) was lacking in this respect, but it had been rapidly amended.

Last and assuredly not least, the ItCC gradually pushed the legislator towards more calibrated and narrowly tailored measures, whenever they infringed on constitutional rights and principles.

Moratoriums on evictions and foreclosures were challenged twice with the question of whether a fair balance had been struck between the rights of owners and creditors, and their «fundamental duties» of «economic and social solidarity»[7]. The ItCC reiterated that such measures must be temporary and exceptional, and clarified that – although the pandemic affords extraordinary discretion to the legislator – they should not be prolonged indiscriminately, but instead be tapered gradually and with reasonable differentiations according to the relevant factors, eventually calling into action the solidarity (not of owners and creditors only, but) of society at large, with different provision aimed at securing housing rights. Consequently, the extensions were in part quashed, and in part blocked from further continuation.

Furthermore, suspensions to the statute of limitations came twice before the ItCC. At a first stage, these suspensions were linked to the postponement of all judicial proceedings, enforced directly by law: this passed muster in the ItCC as a well-defined statutory application of a general principle enshrined in the Criminal code (Article 159, I para.)[8]. In a second phase, further suspensions were made conditional on the decisions, entrusted to the presidents of each criminal court, to postpone proceedings: but this prerequisite was not deemed determined, accessible and foreseeable enough, to be compatible with the principle of strict legality[9] – which, in Italian constitutional law, encompasses criminal liability also in its temporal dimension, as the well-known *Taricco* saga made abundantly clear[10].

III. CONSTITUTIONAL CASES

1. *Judgment No. 32 of 2021*: Same sex-parents and adoption in special cases

In this case, the Court decided on the constitutionality of legislative provisions impeding a child, born via heterologous medically assisted procreation undertaken by a same-sex couple, to be granted the status of child recognized also by the intentional mother. In the case at hand, conditions for ''adoption in special cases'' were not fulfilled even though the competent court had established that such recognition would be in the interests of the child. The Court acknowledged serious shortcomings in the legal system with regards to protecting the best interests of the child under circumstances such as the ones of the cases from which the constitutional question originated. However, it ruled the question inadmissible on the basis that it is primarily for the legislator to take action to provide systemic protection to children's rights thereby avoiding inconsistencies in the legal system that would arise from fragmented intervention by the Court.

2. *Judgment No. 33 of 2021*: Recognition of same sex parenthood as acknowledged in a foreign country

In this case, the Court stated that, in the balancing between the need to discourage the practice of surrogate motherhood and the need to ensure minors' rights, the possibility of the "adoption in special cases" (see below) by the intentional parent is not an adequate remedy to protect the interest of the child. Adoption in special cases has been held as a legal arrangement that was designed to regulate exceptional situations, where there is also the need to preserve the legal link between the minor and his family of origin, need that is entirely missing in the medically assisted procreation.

The Court firmly reiterated that the prohibition on surrogate pregnancy pursues the objective of protecting the dignity of women. However, the Court observed that the main perspective to be adopted in the case at hand was the protection of the "best interests" of the child. This includes the child interest to "to obtain legal recognition of the ties which already exist in respect of both of them, without prejudice to the possible establishment of a legal relationship with the surrogate mother". Within this framework, the Court also considered the child interest in obtaining recognition for the legal duties of both partners towards his or her by virtue of their parental responsibility. However, the Court considered that the legislator is entitled to strike a balance between these interests and the legitimate aim of discouraging recourse to surrogate pregnancy. It also stressed that the European Court of Human Rights does not require States to give effect within their legal orders to foreign birth certificates presented by a couple (hetero- or homosexual) who have had recourse to surrogate pregnancy abroad. As a consequence, the Court ruled the question inadmissible. However, the Court once again reiterated its appeal to the legislator for urgent legislation to ensure due protection of the child's best interests, including recognition of the legal relationship with the non-biological parent. The Court underlined that recourse to "adoption under special circumstances" offers the only available legal option nowadays, but that the standard of protection is not entirely consistent with constitutional and supranational principles. E.g. this form of adoption is conditional upon the consent of the "biological" parent, which may potentially be denied in the event of a break-up of the couple, with unilateral consequences possibly detrimental to the best interest of the child.

3. *Judgment no. 59 of 2021*: Protection of workers against their dismissal

The Court ruled on the constitutionality of one of the key provisions of the "workers' charter" stating that, in case of a dismissal of a worker enacted on allegedly "good grounds", the competent Court – where these good grounds are not acknowledged – must order the reinstatement of the dismissed worker. This regulation was allegedly found

to be discriminatory against the case of dismissals justified on "business grounds". In these cases, no legal remedy of compulsory reinstatement is provided. While the ItCC found that it is for the legislator to decide whether to rule out reinstatement as a remedy for dismissal, once it has chosen to provide protection in that form, the legislator might not treat identical situations differently. This was the case in the contested case, and therefore the Court declared the provision unconstitutional as far as it provided that, in the given circumstances, a court "may" rather than "shall" order reinstatement.

4. *Judgment no. 41 of 2021*: Role of honorary judges and temporal effects of the decisions of the ItCC

In this case, the Court decided on the constitutionality of two pieces of legislation (Articles 62 to 72 of Decree-Law No. 69 of 21 June 2013) insofar as they provide that a certain category of honorary (i.e.d non-professional) judges are to be permanent auxiliary members of Court of appeal panels. In the view of the referring Court, this circumstance violated Articles 102 and 106 of the Constitution limiting the role of honorary judges to the exercise of judicial functions vested in single-member (lower) courts as opposed to multi-member courts (also of appeals).
From a substantive point of view, the decision of the Court illustrated widely the history of this segment of legislation, illustrating how a temporary provision was turned into a permanent regulation. The Court found that the challenged provisions had gone too far in expanding functions excercised by honorary judges.
The decision is possibly even more crucial because of the innovative procedural aspects. In fact, the ItCC, taking into account the devastating impact that the decision of unconstitutionality would have on the administration of justice in light of the key contribution of auxiliary judges in tackling backlogs at appeal level, limited the temporary effects of its decision. In short, the Court decided to postpone these effects starting from 31 October 2025 (when a comprehensive reform of the regulation of honorary judges should come into effect), thus allowing enough time for the legislator to legislate accordingly.

5. *Judgment No. 84 of 2021*: Right to remain silent

In this case, the Court decided that Article 187-quinquiesdecies of Legislative Decree no. 58 of 24 February 1998 was unconstitutional. The decision followed a reference for a preliminary ruling submitted by the ItCC itself (order no. 117 of 2019) to the Court of Justice, which decided on the case in February 2021 (case C-481/19). In its decision, the ItCC, thus adhering to the point of view of the European Court, ruled that the right to remain silent also applies to administrative investigations carried out by supervisory authorities, such as the one involved in the case at hand. Therefore, a natural person (as opposed to "legal persons") may not be penalised if he or she has refused to answer questions put by those authorities at a hearing or in writing, which could have revealed their liability for an administrative offence punishable with punitive measures, or even their criminal liability.
However, the Court stated that the right to remain silent does not justify obstructive behaviors that may cause undue delays in exercise of supervisory activities, such as refusal to attend a hearing, or delaying tactics aimed at postponing the hearing itself, or refusal to hand over data, documents or records existing prior to the authority's request.

6. *Judgment No. 137 of 2021*: Social benefits for convicts of terrorism and organized crime

In this case, the Court reviewed the constitutionality of a 2012 provision revoking social welfare benefits (such as unemployment benefit, income support, etc.) to offenders convicted of organized crime and terrorism offences. The referring court did not question the revocation of social benefits to those convicts as such. It rather challenged the provision only as far as it applies to offenders serving their sentence outside prison, in particular to those who benefit of house arrest. In this specific case, the convict is neither in the prison's care, nor can enjoy social benefits. Thus, absent other incomes, he or she might lack the means to survive.
In the Court's view, the challenged provision establishes an "unworthiness regime" with respect to social benefits for those convicted of particularly serious crimes. However, according to Art. 38, para. 1 of the Constitution, the Republic is under a solidarity duty requiring to provide all citizens in need and unable to work with the minimum means to lead a decent life. Since the social benefits mentioned in the challenged provision are expression of this duty, their revocation to offenders serving their sentence outside prison entails the risk of depriving them of the means for a decent survival. Although it is true that such convicts have gravely violated the foundations of social coexistence, it is also part of the same social coexistence – so the Court – that the means to survive are guaranteed to them.

7. *Judgment No. 150 of 2021*: Jail for libel aggravated by the use of the press (Part II)

The criminal code and law No. 47 of 1948 on the press punish defamation with both a pecuniary fine and imprisonment for one to six years, when this crime is committed through the press and consists of attributing a specific fact to the victim. In Order 132/2020 the ItCC held that the mandatory application of imprisonment in such cases was incompatible with the freedom of expression, as protected both by the Italian Constitution and by the ECHR, for their chilling effect. However, on that occasion, the Court did not invalidate the contested provisions. While making clear their incompatibility with the Constitution, it postponed its final decision for one year to give the legislature time to pass new legislation[11].
Since in the following year no legislative amendment was passed, the Court held unconstitutional the mandatory application of imprisonment in the abovementioned circumstances. However, the ItCC did not go as far as to consider punishing defamation with imprisonment as such unconstitutional. In the Court's view, imprisonment might be justified in exceptional circumstances such as hate speech and mass disinformation through the press, internet and social media. While freedom of expression is the cornerstone of democracy, those involved in such activities – be they journalists or not – do not act as "democracy's watchdogs" but rather undermine it through lies and jeopardize the freedom of elections. Thus, it will be for the

ordinary judge to consider on a case-by-case basis whether the exceptional circumstances justifying the sanction of imprisonment exist or not. The present decision, however, does not rule out the need of a comprehensive reform by the legislature, which is not prevented from giving up completely the penalty of imprisonment.
This judgment embodies the second application of the new technique of declaring the law's incompatibility with the Constitution while postponing the final decision to allow the legislature to take action (for it first application see Order No. 207 of 2018 and Judgment No. 242 of 2019). So far, however, in both cases the legislature has turned a deft ear to the ItCC's appeals to redress the ascertained unconstitutionality. Thus the Court was obliged to correct the unconstitutionality itself after having uselessly awaited for the legislature's action.

8. *Judgment No. 157 of 2021*: legal aid for non-EU nationals

The case that led to judgment No. 157 of 2021 concerned the denial of legal aid to two Indian nationals in a civil proceeding. Non-EU nationals can have access to legal aid, which is granted to the needy by Art. 24, para. 3 of the Constitution, only if they prove that they have no foreign income. In the case at stake, however, the Indian Embassy and Consulate in Italy never replied to the applicants' request to certify their lack of foreign income, so that their application for legal aid was denied. When they filed an appeal against the denial, the court referred the matter to the ItCC, bringing to the latter's attention the following inconsistency: While in criminal proceedings non-EU nationals can replace the certification of the consular authority with a self-declaration when the consular authority does not process their request, the same possibility does not exist in civil and administrative proceedings.
The ItCC held that the current regulation violates the rights to an effective remedy and to defense before a court enshrined in Art. 24 of the Constitution because it charges the applicant with the inefficiency of the consular authority. So, it held the challenged provision unconstitutional insofar as it does not allow non-EU nationals to overcome the inertia of the consular authority by means of a self-declaration. Following the Court's judgment non-EU nationals are now requested only to prove that they have acted in good faith and with due diligence to obtain the requested documentation.

9. *Orders Nos. 216 and 217 of 2021*: two preliminary references to the Court of Justice concerning the European Arrest Warrant

In recent years, the number of preliminary references to the Court of Justice of the EU (CJEU) by the ItCC has significantly increased, especially following Judgment No. 269 of 2017, which marked a turning point in the interaction between the two courts[12].
In 2021, the ItCC referred to the CJEU two requests for preliminary rulings, both concerning the European Arrest Warrant (EAW). In both Orders, the ItCC firmly stated that it is for the CJEU, and not for domestic authorities, to define exceptions to the duty to surrender an individual other than those expressly envisaged in the Framework Decision on the EAW.
Order No. 216 deals with the possibility to refuse surrendering an individual who suffers from a chronic health disease when surrendering might have severe consequences for him or her, even though the Framework Decision does not provide for an exception in such circumstances. By raising a preliminary reference, the ItCC also suggests the CJEU the answer to its own question. In the ItCC's view, the CJEU should extend to this specific case its jurisprudence that requires the requesting judicial authority to interact with the receiving judicial authority to secure that the individual's fundamental rights are not violated in case of surrender.
Order No. 217 concerns the possibility to not surrender a non-EU national for the purpose of executing a custodial sentence or detention order, when the individual has established deep personal and family ties in the country of residence, so that the surrender might amount to a violation of his or her right to private and family life.
The Framework Decision enables the Member States to provide for such an exception. However, the Italian legislation implementing the Framework Decision only provides such an exception for Italian and EU nationals but not for non-EU nationals. In the ItCC's view, before examining whether this is permitted under domestic constitutional law, it is necessary to make clear whether this is permitted under EU law. Therefore, the ItCC referred the matter to the CJEU asking whether the Framework Decision prevents domestic legislation from excluding at all the refusal to surrender a non-EU national, even when he or she has solid family and personal ties in the country. Should the answer be in the affirmative, the CJEU is further requested to define the criteria to assess whether the family and personal ties are so deep as to justify the refusal. Unlike Order No. 216, in this case, the ItCC does not clearly suggest the CJEU a specific answer but confines itself to showing the novelty of its question and to raise some observations on the right to private and family life.

IV. LOOKING AHEAD

In 2022, the ItCC will be called to decide on many issues. Some of them will still relate to the COVID-19 emergency regulation. However, the guidelines emerging from the case law reported above seem to track a very clear course in the Court's jurisprudence, and it is hard to believe that the Court will deviate its navigation.
The Court will be dealing with the admissibility of eight popular referenda. In fact, the Court is given the authority to decide on the admissibility of a referendum, based on limits imposed by the Constitution and fine-tuned in a complex stream of case law. Among these, five requests for popular referenda have been filed in matter of organization of the judiciary, one concerns the removal of a wide range of legal impediments to candidacies in electoral legislation, one concerns end of life choices and the last one regards cannabis and other drugs regulation. Moreover, old questions will be on the Court's table again, such as the regulation of the father's and mother's surname transmission to their children in family law.

V. FURTHER READING

Marta Cartabia and Nicola Lupo, 'The Constitution of Italy: A Contextual Analysis' (Bloomsbury 2022)

Giacomo Delledonne and Carlo Padula, 'The Impact of the Pandemic Crisis on the Relations between the State and the Regions in Italy', in Ewoud Hondius and Marta Santos et al (eds), *Coronavirus and the Law in Europe* (Intersentia 2021), p. 301

Stefano Civitarese Matteucci, Alessandra Pioggia, Giorgio Repetto, Diletta Tega, Micol Pignataro, Mirush Celepija, 'Italy: Legal Response to Covid-19', in Jeff King and Octávio L.M. Ferraz et al (eds), *The Oxford Compendium of National Legal Responses to Covid-19* (OUP 2021). doi: 10.1093/law-occ19/e11.013.11

Michele Massa, 'A General and Constitutional Outline of Italy's Efforts against COVID-19', in Ewoud Hondius and Marta Santos et al (eds), *Coronavirus and the Law in Europe* (Intersentia 2021), p. 25

Giorgio Repetto, 'Changing me softly? Actors, tools and techniques of international human rights compliance in Italy' in Rainer Grote, Mariela Morales Antoniazzi and Davide Paris (eds), *Research Handbook on Compliance in International Human Rights Law* (Edward Elgar 2021), p. 121

1 See the 2016 report by Pietro Faraguna, Michele Massa, Diletta Tega, Marta Cartabia, 'Italy', in Richard Albert, David Landau, Ŝimon Drugda (eds.), The I·CONnect- Clough Center 2016 Global Review of Constitutional Law, 2017, p 109. See also Vittoria Barsotti and Paolo G. Carozza et al, Italian Constitutional Justice in Global Context (OUP 2015), p 52.

2 Corte costituzionale, ordinanza 19 novembre-11 dicembre 2020, n. 269, sentenza 15 aprile-11 maggio 2021, n. 96 (on remote hearings in civil and criminal proceedings); ordinanza 28 gennaio-11 febbraio 2021, n. 19 (on the management by presidents of tribunals of the organization of justices of the peace); sentenza 24 marzo-27 maggio 2021, n. 108 (on the selection of Municipalities hit hard by the first pandemic wave as recipients of extraordinary resources).

3 Corte costituzionale, sentenza 24 febbraio – 12 marzo 2021, n. 37 (available in English). The case is noteworthy also because, before the final judgment, the ItCC unusually stayed the enforcement of the challenged regional law (issued by Valle d'Aosta/Vallée d'Aoste, an autonomous Region with its own special statute): Corte costituzionale, ordinanza 14 gennaio 2021, n. 4.

4 Corte costituzionale, sentenza 30 novembre – 21 dicembre 2021, n. 245.

5 Ordinanze 10 marzo-13 aprile 2021, nn. 66-67. A different group of complaints – concerning the of a Covid-19 vaccine certification to participate in parliamentary business – was dismissed with ordinanze 15-23 dicembre 2021, nn. 255-256, and with a further order announced on 19 January 2022 (press release available in English).

6 Corte costituzionale, sentenza 23 settembre-22 ottobre 2021, n. 198 (press release available in English).

7 Corte costituzionale, sentenza 9-22 giugno 2021, n. 128; 19 ottobre-11 novembre 2021, n. 213 (press release available in English).

8 Corte costituzionale, sentenza 18 novembre-23 dicembre 2020, n. 278.

9 Corte costituzionale, sentenza 25 maggio-6 luglio 2021, n. 140.

10 See the 2016 and 2018 reports by Pietro Faraguna, Michele Massa, Diletta Tega, Marta Cartabia, 'Italy', in Richard Albert, David Landau, Ŝimon Drugda (eds.), The I·CONnect- Clough Center 2016 Global Review of Constitutional Law, 2017, p 110, and in The I·CONnect- Clough Center 2018 Global Review of Constitutional Law, 2019, p 169.

11 See the 2020 report by Pietro Faraguna, Michele Massa, Diletta Tega, Marta Cartabia, 'Italy', in Richard Albert, David Landau, Ŝimon Drugda (eds.), The I·CONnect-Clough Center 2020 Global Review of Constitutional Law, 2021, p 159.

12 See the 2017 report by Pietro Faraguna, Michele Massa, Diletta Tega, Marta Cartabia, 'Italy', in Richard Albert, David Landau, Pietro Faraguna, Ŝimon Drugda (eds.), The I·CONnect-Clough Center 2018 Global Review of Constitutional Law, 2017, p 160.