

THE “SOCIAL PRINCIPLE” FRACTAL: THE ITALIAN
CONSTITUTIONAL TRADITION AND THE REPRODUCTION OF
THE ECONOMIC CONSTITUTION IN THE AREAS OF FREE
SPEECH AND NATIONAL SOVEREIGNTY

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Abstract

This article investigates the Italian constitutional tradition and focuses specifically on one of its quintessential features (arguably its most peculiar and relevant one), i.e. what it proposes to refer to as “the social principle”. Such principle encompasses the principle of equality, the labour principle, and the principle of solidarity, and is also closely connected to the anti-fascist principle.

After outlining some methodological guidelines to account for the criteria followed in selecting the materials, it makes the case that the centrality of the social principle is such as to ripple and spill over neighbouring, but apparently unrelated areas. It is submitted that such degree of protection is so high that it somewhat uniquely influences all the other parts of the constitution. Arguably, the social principle, enshrined in the economic (part of the) constitution, is a pattern that reproduces itself self-similarly in all the remaining articles, similarly to the recursive repetition of a basic unit in fractals.

The article considers extensively the areas where the social principle has arguably its most distinctive impact, namely free speech (and religious freedom) and the way in which national sovereignty is conceived. The conclusion also factors in the anti-fascist birth of the Italian constitution and offers some final remarks in order to strengthen my case on the “fractal” nature of the social principle**.

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** This article was originally prepared as a pilot national report in the framework of the research project on Common Constitutional Traditions by the European Law Institute (ELI), co-funded by the ELI and Collegio Carlo Alberto of Torino. I would like to thank my colleague Giovanni Boggero very much, as well as all the participants to the kick-off conference of the project held in Turin on 14 November 2018 (where an earlier draft was presented: the aim was to try to

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1. Introduction

This article investigates the Italian constitutional tradition and focuses specifically on one of its key features, arguably its most peculiar and relevant one, i.e. what I propose to refer to as “the social principle”. This work is part of a broader study of common constitutional traditions in Europe, and particularly on the Italian tradition. Against the background of the European Law Institute’s research project on common constitutional traditions, in this report on Italian constitutionalism I try to identify what stands out in the Italian constitutional tradition, what are its defining features¹.

define the most typical feature of the selected countries’ national constitutional traditions, a first step towards a comparative effort trying to define what is actually common to Eu Member States’ national constitutional traditions). They all provided me with extremely insightful comments and suggestions. The usual disclaimer applies.

¹ In its original version, the paper also featured a quantitative analysis that was published as a self-standing piece in this Journal, and which is meant to be considered as closely connected to the present one: R. de Caria, *The Use of National and Common Constitutional Traditions in Italian Legal Scholarship and High-Level Courts*, 12 Italian Journal of Public Law 448 (2020).

Prominent Canadian scholar Patrick Glenn referred to legal tradition as information that «involve(s) the extension of the past to the present», and that needs to «hav(e) been continuously transmitted, in a particular social context». In order to convey his idea of tradition as a repository of information that flows from the past to the present, he famously used the vivid image of a conceptual bran-tub².

To a certain extent, this work attempts to capture from the Italian "bran-tub" those principles that can be identified as typical of the Italian legal tradition, and in particular of the Italian constitutional tradition³. In this effort, I always bear in mind that «what can be properly termed German, French, English or Italian law is actually only a fraction of what currently goes under that name. To a great extent, these legal systems share a common stock of rules, institutions, legal concepts and ideas. None of them is wholly and exclusively German, French, English or Italian»⁴. I will therefore cautiously provide an overview of what appears to be the backbone of the Italian tradition, through the analysis of some relevant scholarship and most of all case-law. This analysis is intended to be part of a joint comparative effort, meant to juxtapose similar analyses conducted with regard to different national traditions, in order to identify what they share, what is "common", to use the wording of Art. 6 TEU⁵.

² P.H. Glenn, *Legal Traditions of the World. Sustainable Diversity in Law* (2000), 11.

³ Some very noble antecedents might be identified in the works by T.G. Watkin, *The Italian Legal Tradition* (1997); and, previously, J.H. Merryman, *The Italian Style, I: Doctrine, II, Law, III: Interpretation*, all published in 18 *Stanford Law Review*, respectively Nos. 2 (1965), 39-65; 3 (1966), 396-437; and 4 (1966), 583-611.

⁴ M. Graziadei, *Comparative Law, Legal History and the Holistic approach to legal cultures*, 7 *Zeitschrift für Europäisches Privatrecht* 530, 539 (1999). See also the reflections by T. Duve, *Legal traditions: A dialogue between comparative law and comparative legal history*, 6 *Comparative Legal History* 15 (2018).

⁵ It is worth recalling from the outset that Italy seems to have a certain "tradition" of openness towards "common" principles and theories that were spreading in Europe (although I submit that more ambiguities have emerged in this respect: see *infra* par 3.2). Let me just mention the abolition in 1865 of the special tribunals having jurisdiction on controversies between the citizens and the public administration, that was derived from the Belgian constitution of 1831, on its turn influenced by the British model, but also the same introduction of a Constitutional court in the 1947 constitution, drawing on previous experiences by other European countries, notably Austria; cf. G. della Cananea, *Silvio Spaventa e il diritto pubblico europeo*, available on the website of Giustizia Amministrativa.

In § 2, I will first of all submit a few methodological guidelines to account for the criteria followed in selecting the materials, and to explain why some fundamental rights and principles (different from the “social principle”) can arguably be kept out of the picture, and only the social principle in its current version should be considered in my analysis.

My contention is first of all that the most distinctive character of Italian constitutionalism is what I think is best defined as the “social principle”⁶, that encompasses the principle of equality, the labour principle, and the principle of solidarity, and is also closely connected to the anti-fascist principle, on which I will come back in the final paragraph.

In fact, this is rather uncontroversial: hardly anyone would dispute that the Italian constitution is centered around what can be termed as the social principle. It is indeed commonplace to identify a very high level of protection for social rights in the Italian constitution and the resulting constitutional jurisprudence, and to consider this one of their distinguishing features (so I will consider granted to take this assumption as a given).

However, I make a further case here, namely that the centrality of the social principle is such as to ripple and spill over neighbouring, but apparently unrelated areas. What I submit is that such degree of protection is so high that it somewhat uniquely influences all the other parts of the constitution. Arguably, the social principle, enshrined in the economic (part of the) constitution⁷, is a pattern that reproduces itself self-similarly in all the remaining articles, similarly to the recursive repetition of a basic unit in fractals.

In § 3, I will turn to examine the areas where I believe the social principle has its most distinctive impact. I will focus on two in particular, in order to put my thesis to test, namely free speech (and religious freedom), on the one hand, and the way in which national sovereignty is conceived, on the other. I chose to extensively deal with the two areas identified because the analysis of the case-law,

⁶ To be sure, the expression is not per se original (for instance, it is the title of book by H. Holley, published in New York by Gomme, 1915), but it does not seem to have been used in the meaning it is used here, at least in the legal scholarship in English concerning Italy.

⁷ On which suffice it to refer to G. Bognetti, *La costituzione economica italiana* (1995²).

far beyond what can be accounted for in this article, made them stand out distinctively.

Finally, in § 4, I will build on the analysis, also considering the anti-fascist birth of the Italian constitution, and offer some conclusive remarks in order to strengthen my case on the "fractal" nature of the social principle (§ 4.).

2. The construction of the national "constitutional tradition": the social common denominator

In spite of the lack of comprehensive and thorough reflections by the top Italian courts, at least as it emerges from a textual search⁸, it is nonetheless arguably possible to identify the underpinnings that build up the Italian constitutional tradition, especially in the case-law of the Constitutional Court (on which I will focus almost exclusively).

2.1. The reasons to exclude other fundamental rights and principles

I have anticipated above that the first step of my argument is that the social principle is an essential component of the Italian constitutional tradition. As I explained *supra* par. 1, claiming its importance for Italian constitutionalism is straightforward.

It is common knowledge that equality represents the most frequently invoked parameter in the process judicial review of legislation. The Italian constitution provides for the protection of equality under Art. 3⁹, which is traditionally said to identify two forms of equality: a "formal" one, roughly corresponding to the principle of non-discrimination (first paragraph), and a "substantial" one, that entails the intervention by the public authorities in order to effectively improve the material condition of disadvantaged citizens (second paragraph).

The principle of (substantial) equality makes up a common bloc with the principle of solidarity, explicitly mentioned in Article

⁸ I am referring here to my article for this Journal: R. de Caria, *The Use of National and Common Constitutional Traditions*, cit. at 1.

⁹ «1. All citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinion, personal and social conditions. 2. It is the duty of the Republic to remove the economic and social obstacles which by limiting the freedom and equality of citizens, prevent the full development of the human person and the effective participation of all workers in the political, economic and social organisation of the country».

2 of the constitution¹⁰, and with the “labour” principle, an overarching value that runs across the whole (first part of the) constitution and compels the government to bring about the protection of workers. Finally, substantial equality is also arguably connected to the constitutional principles on taxation, that in Italy tend to be meant as a justification of this coercive power of the state, rather than as a limitation of this power¹¹. In order to encompass all these strands in one single expression, I have proposed to synthetically refer to all of them jointly by using the phrase social principle.

My first contention is that not only is the social principle important, it rather is the most distinguishing feature of Italian constitutionalism. This less straightforward statement implies leaving out from this paramount position some fundamental freedoms such as freedom of the press, or freedom of association, or freedom from unlawful arrests, or right to a fair trial, and so on.

Let me now spend some time illustrating the reason for such exclusion, which is two-fold: first of all, these fundamental rights, that are typically “negative” rights according to a traditional classification (i.e. they require government to avoid interfering with these rights, without requiring a positive behaviour on its part), are part of a broader constitutional tradition, not typically Italian. Admittedly, if one looks at how most guarantees are formulated at the European level, he will be able to trace some piece of the Italian constitutional tradition, at least from the Albertine Statute era, if not from even before. In fact, such rights also do belong to the constitutional traditions common to the Member States, but they are now part of a broader consensus, and thus fall outside the scope of this analysis, that tries to identify what is typically, characteristically national in this respect¹².

¹⁰ «The Republic recognises and guarantees the inviolable rights of the person, as an individual and in the social groups within which human personality is developed. The Republic requires that the fundamental duties of political, economic and social solidarity be fulfilled».

¹¹ Broadly on the constitutional framework of taxation from a comparative angle, R. de Caria, *Taxes* (entry), in R. Grote, R. Wolfrum and F. Lachenmann (eds.) *Max Planck Encyclopedia of Comparative Constitutional Law* (2018). On the problematic relationship between the Italian constitutional framework on taxation and fundamental human rights, M. Greggi, *Human Rights and Taxation*, *Itax Papers on Taxation*, No. 6 (2017).

¹² The conceptual premise of this choice is very well captured in the following passage by B. Marquesinis and J. Fedtke, *Judicial Recourse to Foreign Law* (2007), 48,

Secondly, basically all these rights undergo a substantial exercise of balancing under the Italian constitutional system, which significantly relativizes their reach. From the analysis in the following paragraphs, I believe it will emerge why this conclusion is applicable for instance to respectively economic rights and free speech, but arguably the same holds true with regard for instance to guarantees in matters of criminal law and criminal procedure.

To make just a few examples, the fascist era code of criminal procedure was indeed replaced by a new one more respectful of individual safeguards only in 1988-89; the Constitutional Court even struck down some of the most relevant new guarantees with the so called "*svolta inquisitoria*" ("inquisitorial turnaround")¹³ of 1992¹⁴, which made it necessary for the Parliament to amend the Constitution in order to reaffirm these rights¹⁵; more recently, it was only after an important judgment of the European Court of Human Rights condemned Italy for violation of the prohibition of double jeopardy (*ne bis in idem*)¹⁶, that the Constitutional Court was persuaded to go down a similar road¹⁷, and more recently it has even paved the way for a potential, partial backtrack¹⁸, in light of a new course of the ECtHR¹⁹; or, in another very important case, concerning the confiscation of property in the absence of a criminal punishment, the Constitutional Court was even able to induce the

in the paragraph titled "How 'common' are our common values?": «[T]here can be little doubt that many of the core rules found in England, France, and Germany – to mention but three countries only – differ substantially as far as notions of democracy, judicial review, and human rights are concerned. Despite their undisputed similarities, European legal cultures are thus still far apart in many ways, and judges who have to determine (and then utilize) the common constitutional traditions of these 25 societies face a truly daunting task».

¹³ On this series of events, see P. Ferrua, *Il giusto processo* (2012³), 3 ff.

¹⁴ Constitutional Court, judgments 22-31 January 1992, No. 24; 28 May-3 June 1992, Nos. 254 and 255.

¹⁵ This happened with the introduction in Article 111 of the Constitution of 5 new paragraphs entrenching the so called 'fair trial' guarantees.

¹⁶ ECtHR, judgment 4 March 2014 (18640/10 and others), *Grande Stevens and Others v. Italy*.

¹⁷ Constitutional Court, judgment 21 July 2016, No. 200. From this point of view, the Italian Constitutional Court's order in the *Taricco* case (on which see *infra* par. 3.2), where it took a much more convinced step in favour of procedural guarantees in the criminal field, does not seem nearly enough to allow us to identify in Italy a fundamental "tradition" of protection of individual rights in the criminal sphere.

¹⁸ Judgment No. 43/2018.

¹⁹ *A. and B. v. Norway*, judgment 15 November 2016.

ECtHR to overturn a previous judgment of theirs, in the sense of finding such practice legitimate²⁰. Finally, the Constitutional Court upheld both some limitations to the fundamental principle of retroactive application of the more lenient penalty²¹, as well as the legitimacy of the criminal punishment provided for the people placed under special police supervision who did not abide by the requirement «to lead an honest and law-abiding life and not give cause for suspicion»: the Italian Court found that this requirement did not run afoul of the principle of legal certainty²², whereas more recently the Strasbourg Court went down the opposite road²³.

In summary, in spite of the fact mentioned in the previous paragraph that this is the area where the reference to common constitutional traditions is more frequent, we can observe a relatively frequent divergence between the national constitutional tradition and the European standards, that usually require higher standards: this advises me to exclude such field from the subjects considered in this paper, because the lower threshold might even be an Italian feature, but it almost certainly does not contribute to defining a European constitutional tradition, that seems instead headed in a different direction (with *Taricco* as a notable exception).

2.2. Some current trends in the evolution of the social principle

Having presented my arguments on why principles other than the social principle should be kept outside the essential ingredients that define the Italian constitutional tradition, let me now move to describe a little bit more in detail how the social principle has evolved in recent years. It goes beyond the scope of this work to outline all the details of the social principle, a laborious task that would probably require at least a full-length book to be accomplished: I will therefore focus on some particularly emblematical aspects, with particular reference to the current evolution (this topic is also part of the broader issue of the

²⁰ The relevant rulings are the following: ECtHR, Second Section, judgment 29 October 2013, Application No. 17475/09, *Varvara v. Italy*; Constitutional Court, judgment 26 March 2015, No. 49; ECtHR, Grand Chamber, judgment 28 June 2018, Applications nos. 1828/06 and 2 others, *G.I.E.M. S.R.L. and Others v. Italy*.

²¹ Constitutional Court, judgment 19 July 2011, No. 236.

²² Constitutional Court, judgment 23 July 2010, No. 282.

²³ ECtHR, Grand Chamber, judgment 23 February 2017, Application No. 43395/09, *De Tommaso v. Italy*.

relationship between the Italian legal system and the European one, to which par. 3.2 is devoted, *infra*).

The Italian model of protection of economic rights is quite original from a comparative perspective, and it involves their subordination to the social principles. As the constitutional wording puts it: «Private-sector economic initiative is freely exercised. It cannot be conducted in conflict with social usefulness or in such a manner that could damage safety, liberty and human dignity» (Art. 41, paras. 1-2); «Property is publicly or privately owned. Economic assets belong to the State, to entities or to private persons. Private property is recognised and guaranteed by the law, which prescribes the ways it is acquired and enjoyed as well as its limitations so as to ensure its social function and make it accessible to all» (Art. 42, paras. 1-2).

The key notions, closely connected to each other, are “social usefulness” and “social function”. Such expressions allowed indeed the so-called functionalization of economic rights by the legislator²⁴. According to the late prominent constitutional scholar Giovanni Bognetti, this was not in fact the model envisaged by the drafters of the constitution, nor the one promoted by the Constitutional Court; to be sure, it was almost averse to it. However, the Constitutional Court was not equipped to counteract the legislator’s push towards the highly socially-oriented interpretation of this clause²⁵, and as a result the legislator was virtually unbound in promoting its social agenda in the implementation of Article 41 and 42.

One might not share Bognetti’s thesis. For instance, a possible objection is that the Constitution itself was lacking a formal protection of the competition principle, or the explicit acknowledgement of a general principle of freedom in the economic field²⁶, and that these were already some unambiguous choices made by the constituent assembly towards a socially-oriented economic model. Nonetheless, the fact remains that property and freedom of initiative are not part of the Italian constitutional tradition, if not in their “functionalized” version: to

²⁴ R. de Caria, *Appunti sulla giurisprudenza costituzionale in materia di proprietà (con cenni di diritto comparato)*, IUSE Working Paper, 2017-1/24-ECLI (one of the latest judgments on the freedom of initiative and the right of property is the one on the ILVA case, No. 58 of 2018. Also interesting is the Court of Cassation’s ruling No. 20106 of 2009 on the abuse of right).

²⁵ G. Bognetti, *Costituzione economica e Corte Costituzionale* (1983).

²⁶ Such a principle was more recently introduced by decreto legge No. 138 of 2011.

be sure, what makes up the constitutional identity is once again the social principle, as argued in the previous paragraph, that prevails over economic freedoms, to the point of casting doubt on their configuration as *fundamental rights*²⁷.

This scenario has been subject to a partial upheaval as a result of the influence of European Union law over the Italian legal system (as well as, to a lesser extent from a quantitative point of view, but still very importantly, of the European Convention of Human Rights system²⁸). I will consider this aspect in the following paragraph. As far as the issue of economic rights is concerned, however, certainly European law has led Italy to some major openings to the market economy. Arguably, a reference to the protection of competition was eventually included in the text of the Constitution²⁹ due to the long evolution brought about by the European institutions, even though even the 2001 reform fell short of introducing an outright competitive principle.

In this vein, Italy has experienced significant economic reforms due to acts such as the *Bolkestein* directive, or in the field of state aid³⁰. However, these highly remarkable changes do not seem to have affected the fundamental principle of solidarity and equality. The Constitutional Court has recently reaffirmed that

²⁷ This thesis was famously advocated, with regard to the right of economic initiative, by M. Luciani, *La produzione economica privata nel sistema costituzionale* (1983), and with regard to the right of property, by S. Rodotà, *Il terribile diritto, Studi sulla proprietà privata* (1981). Other authors disagree; the question does not appear to be settled in either sense in the scholarship and in the case-law of the Constitutional court, but the very existence of the debate is evidence of the controversial extent of protection of economic rights in the Italian tradition.

²⁸ The most prominent example is probably the case of judgments Nos. 348 and 349 of 24 October 2007, that eventually aligned Italy with the standards required by the Strasbourg Court, the latest time in the case *Scordino*, Grand Chamber, judgment of 29 March 2006, application No. 36813/97, as regards the entity of the award of monetary compensation for the cases of expropriation. Instead, in the already mentioned case of confiscation without a criminal judgment, the Italian Court in judgment No. 49/2015 was reluctant to adhere to the standards imposed by the ECtHR in its *Varvara* judgment, by alleging its case-law in point was not enough “consolidated”, and the ECtHR has recently found itself obliged to reaffirm its precedent as far as the issue of violation of property is concerned (while departing from it, as recalled above, on the issue of violation of Article 7 ECHR).

²⁹ Art. 117, par. 2: «The State has exclusive legislative powers in the following subject matters: [...] e) competition protection [...]».

³⁰ R. de Caria, *La libertà economica in Italia? Si decide in Europa*, Agenda Liberale (2013).

social rights cannot yield to economic ones³¹, state aid is still a typical feature of Italian economic policies, with the endorsement of the Constitutional Court³², and in general this evolution does not seem too difficult to be reversed by ordinary legislative acts, thus not amounting to anything traditional³³.

Against this background, a chronic Italian problem has been the difficulty to reconcile the need to keep the state budget under control, and the political will to foster social rights. This issue has been subject to some careful consideration by the Constitutional Court, whose case-law has also evolved over time. For several years, many social rights, at the level of the "material constitution", were found to be "financially conditioned", namely their exercise was possible within the limits posed by the available resources³⁴. To be sure, this conclusion was reached not for the sake of keeping the budget under control – I would argue, in fact, that the balanced budget has never been an Italian constitutional tradition, despite its passionate advocacy by Luigi Einaudi³⁵–, but rather with the goal of safeguarding the discretionary powers of the legislator.

However, during the recent years of crisis, the question has arisen whether social rights and budgetary constraints can be played, or balanced, against each other.

For example, the Court did not shy away from deciding that a certain pension scheme, designed to improve the budget situation, was unconstitutional, even if this implied about 5 to 10 billion euros of further deficit to cope with. This declaration of unconstitutionality of the pension reform, that had suspended the adjustment for inflation of certain entitlements, was based on several of the above-mentioned parameters, combined: «the fundamental rights pertaining to the pension relationship, which are rooted in unequivocal constitutional parameters – namely the proportional nature of the pension, understood as deferred remuneration (Article 36(1) of the Constitution) and its adequacy (Article 38(2) of the Constitution) – have been violated. The pension

³¹ Judgment No. 58/2018 on the ILVA case.

³² Constitutional Court, judgment No. 270 of 2010 on the Alitalia case.

³³ Within the Italian scholarship in English on the subject, cf. above all G. de Vergottini, *The Italian economic constitution: Past and present* (2012), available at Researchgate.net.

³⁴ This was explicitly affirmed with regard to Article 38 (right to labour), and even before to Article 32 (right to health).

³⁵ Su cui v. P. Silvestri, *Il pareggio di bilancio. La testimonianza di Luigi Einaudi: tra predica e libertà*, 47 *Biblioteca della libertà*, No. 204 online (2012).

relationship must be construed as a certain, albeit not explicit, assertion of the principle of solidarity enshrined in Article 2 of the Constitution, and at the same time as a manifestation of the principle of substantive equality enshrined in Article 3(2) of the Constitution»³⁶.

So far, there have been no cases where the Court has been directly called to a balancing between the economic principles of fiscal restraint deriving from the Eu legal systems, and the social principle enshrined in its Constitution. What has come closest to such a balancing was a judgment on the constitutional legitimacy of a regional statute granting some rights to the disabled people «with regard to the phrase “, subject to the financial resources allocated within annual budgetary laws and registered under the relevant expenditure item,”»³⁷. In other words, the Court refused to allow the social principle to be balanced with the need for sound public finances³⁸, and this is probably a good indication of what it would do also whether Eu legislation came under scrutiny, in that case likely triggering also the counter-limits³⁹.

³⁶ Judgment 10 March 2015, No. 70, § 10 of the *Conclusions on points of law*. Unless otherwise specified, the translations of Constitutional Court rulings are (like in this case) the ones appearing on the website of the Constitutional Court (the rules were subsequently reapproved and this time passed the constitutional scrutiny).

³⁷ Judgment 16 December 2016, No. 275.

³⁸ The issue was considered by several judgments of the Constitutional court: for an overview before the judgment No. 275 of 2016, for instance M. Midiri, *Diritti sociali e vincoli di bilancio nella giurisprudenza costituzionale*, in AA.VV. (Eds.), *Studi in onore di Franco Modugno*, III (2011), 2235-2275. After the judgment No. 275 of 2016, for instance M.C. Paoletti, *Diritti sociali e risorse finanziarie: la giurisprudenza della Corte Costituzionale*, available at www.diritto.it (2018); see also the literature referenced therein.

³⁹ A case in this direction is made by L. Cavallaro, *I diritti sociali come controlimiti. Note preliminari*, 2 *Labor: Il lavoro nel diritto* 149 (2017). More broadly on the constitutional consequences of the financial crisis, T. Groppi, *The Impact Of The Financial Crisis On The Italian Written Constitution*, 4 *Italian Journal of Public Law* 1 (2012). On the “counter-limits” doctrine, among many contributions of the Italian scholarship in English on the subject, see one of the most recent, D. Paris, *Limiting the ‘counter limits’*. *National constitutional courts and the scope of the primacy of EU law*, 10 *Italian Journal of Public Law* 205 (2018). This doctrine was introduced by the Italian and German constitutional courts, respectively with judgments *Frontini* (18 December 1973, No. 183) and *Solange I* (29 May 1974, BVerfGE 37, 271 [1974]), as a response to ECJ’s judgment in *Internationale Handelsgesellschaft*, the ruling where the European Court first introduced the notion of CCTs.

Other judgments have offered an apparently different picture, as I will explain *infra* par. 3.2, where I will offer my proposal on how to make sense of and reconcile this seeming contrast.

3. The reproduction of the social principle in apparently unrelated areas

In the previous paragraph, I explained why I submit that some constitutional rights, in spite of their importance *per se*, should not be considered an essential element of the Italian constitutional tradition. To be sure, one could even argue that, if anything, restrictions to these rights – *i.e.*, the operation of balancing them with other constitutional principles, such as equality, which is in fact part of the Italian identity – are what constitutes a part of the Italian constitutional tradition. From this point of view, however, they arguably do not constitute a typically Italian feature, also given the ECtHR's case-law in point⁴⁰, therefore I will not investigate them further.

Let me now move to the second step of my argument, namely that the social principle has a "fractal" feature in the Italian constitutional tradition.

3.1. Freedom of expression and its restrictions in light of the social principle (plus a brief note on religious freedom and the relationship with the Catholic Church)

First of all, let me consider freedom of speech. Such right is undoubtedly an important part of the new constitutional order established in 1948, but it is not nearly as protected as for example in the United States (where I would definitely argue it is a bedrock, if not the bedrock of the American constitutional tradition⁴¹): the

⁴⁰ Cf. the factsheet on *Hate speech* prepared by the Court itself, updated in March 2020, available at www.echr.coe.int/Documents/FS_Hate_speech_ENG.pdf; I have made this point in R. de Caria, "*Le mani sulla legge*". *Il lobbying tra free speech e democrazia* (2017), 255 and 298, where I maintained that the case *Perinçek v. Switzerland* (Grand Chamber, 15 October 2015, application no. 27510/08) did not change the Court of Strasbourg's traditional stance against the protection of hate speech, which was an indication of a different level of protection of free speech in Europe, than the "absolute" one it enjoys in the Us. I believe two subsequent cases have corroborated my position: *Annen v. Germany* (nos. 2 to 5) (V, 20 September 2018, application Nos. 3682/10, 3687/10, 9765/10 and 70693/11), and *E.S. v. Austria* (V, 25 October 2018, application no. 38450/12).

⁴¹I made this point in R. de Caria, "*Le mani sulla legge*": *il lobbying tra free speech e democrazia*, cit. at 40, in particular at 54 ff. and 294 ff.

Constitutional Court is comfortable with the enduring existence not only of crimes of criminal solicitation, directed towards both ordinary citizens (art. 414 of the penal code)⁴² and members of the military (art. 266 of the penal code)⁴³, but even of outright crimes of opinion, such as the defamation of the Republic, of the constitutional bodies, and of the Armed Forces (art. 290 of the penal code)⁴⁴, or the defamation of a religion by way of offence to a person

⁴² See judgment 4 May 1970, No. 65: «freedom of speech, guaranteed by art. 21, first paragraph of the Constitution, finds its limits not only in the protection of morality, but also in the need to protect other important constitutional assets, and in the need to prevent and stop disturbances of public safety, the protection of which constitutes an immanent purpose of the system (judgments No. 19 of 8 March 1962, No. 87 of 6 July 1966, No. 84 of 2 April 1969)».

⁴³ See judgment 27 February 1973, No. 16: «A coarse manifestation of thought, meant as a protest against the social order, propaganda for more free customs, etc., can be found in any crime, and the materiality of some crimes, such as defamation, insult, contempt of a public official, offence, always presupposes a summary judgment of value and is constituted, typically, by a rough expression of thought. In the final analysis, the crimes of instigation or apology always result from an act of thought. But this does not mean at all that, only for this, the respective incriminating norms are unconstitutional, because they are contrary to art. 21 of the Constitution. Freedom of thought cannot be invoked when the expression of thought is implemented through an offense to goods and rights that deserve protection. The instigation of a military to infidelity, or to betrayal, in all the forms provided for by art. 266 of the penal code (disobeying laws, violating the oath given or the duties of military discipline, or other duties inherent to one's own status), offends and threatens an asset to which the Constitution recognizes a supreme value and grants privileged protection, in accordance with all modern constitutions, whatever the ideology that inspires them, and whatever political-social regime expresses them. [...] Compared to the incriminating provision of art. 266 of the penal code, the freedom guaranteed by art. 21 of the Constitution can allow modes of manifestation and propaganda for universal peace, non-violence, the reduction of the draft, the admissibility of conscientious objection, the reform of discipline regulation or others, which never materialize in an instigation to desert (as in one of the cases for which a question was raised), to commit other crimes, to generally violate the duties imposed on the military by the law. In fact, instigation is not a mere manifestation of thought, but is action and direct incitement to action, so that it is not protected by art. 21 of the Constitution».

⁴⁴ See in particular judgment 30 January 1974, No. 20: «Concerning the complaint of unconstitutionality relating to Article 21, first paragraph of the Constitution, this Court has repeatedly stated that the protection of morality is not the only limit to freedom of expression of thought, since there are instead other - implicit - limits dependent on the need to protect different assets, which are also guaranteed by the Constitution (judgments Nos. 19 of 1962, 25 of 1965, 87 and 100 of 1966, 199 of 1972, 15, 16 and 133 of 1973), thus in this case, the investigation must be aimed at identifying the asset protected by the contested provision and

ascertaining whether or not it is considered by the Constitution capable of justifying a discipline that to some extent may appear to be limiting the fundamental freedom at issue. So, the Court considers that it must be affirmed that, among the constitutionally relevant assets, the prestige of the Government, of the Judicial Order and of the Armed Forces should be included, in view of the essentiality of the tasks entrusted to them. The need arises for these legal institutions to be guaranteed the general respect, also in order for the accomplishment of the aforementioned tasks not be jeopardized. In reference to the particular complaint outlined in the order of the Venice Corte d'Assise, it certainly cannot be denied a constitutional foundation for the protection of the Armed Forces. Suffice it to note that, due to a series of explicit precepts, their organization is preordained, outside of political qualifications, to the defense of the Fatherland, through the participation of the citizens, called to fulfill a duty that the Constitution, significantly, qualifies as sacred (art. 52). Moreover, it is not excluded that, in a democratic regime, criticisms are allowed, with even severe forms and expressions, to the institutions in force, and both from the structural point of view and from the functional one [...]. This freedom of criticism is not trampled by the provision, as a crime, of the offensive conduct subsumed in art. 290 of the penal code, in one or more of the various forms that it may take. According to the common meaning of the term, the offence [*vilipendio*] consists in considering vile, in denying any ethical or social or political value to the entity against which the manifestation is directed, so as to deny any prestige, respect, trust, in a way suitable to induce the recipients of the communication [...] to the contempt of the institutions or even to unjustified disobedience. And this with evident and unacceptable disruption of the political-social system, as it is provided for and regulated by the current Constitution. Which, for the aforementioned reasons, does not exclude that we can, but with very different manifestations of thought, advocate for the changes that are deemed necessary». This approach was recently confirmed by Cass., judgment No. 28730/2013.

(art. 403 of the penal code)⁴⁵, as well as of the criminalization of hate speech⁴⁶, in spite of the “declamation” that freedom of speech

⁴⁵ See judgment 8 July 1975, No. 188: «the religious sentiment, as it lives in the intimate of the individual conscience and also extends to more or less numerous groups of people bound together by the bond of the profession of a common faith, is to be considered among the constitutionally relevant assets, as is shown by coordinating the arts. 2, 8 and 19 of the Constitution, and is also indirectly confirmed by the first paragraph of art. 3 and by art. 20. Therefore the offence [*vilipendio*] to a religion, especially if brought into being through the offence to those who profess it or a respective minister, as in the hypothesis of art. 403 of the penal code, which is of interest here, can legitimately limit the scope of operation of art. 21: as long as, of course, the offensive conduct is circumscribed within the right boundaries, marked, on the one hand, by the very etymological meaning of the word (which means “to hold to vile”, and therefore to point out to the public contempt or derision), and on the other hand, by the need – mentioned above – to make the penal protection accorded to the asset protected by the norm in question compatible with the widest freedom of expression of one’s thought in religious matters, with specific reference to which, not by coincidence art. 19 anticipates, in very explicit terms, the more general principle of art. 21. [...] Instead, it is an offence, and therefore excluded from the guarantee of art. 21 (and of article 19), the contumely, the mockery, the offense, so to speak, as an end in itself, which at the same time constitutes an insult to the believer (and therefore an injury of his personality), and offence to the ethical values which substantiate and nurture the religious phenomenon, objectively observed».

⁴⁶ Usually, reference is made to judgments 16 January 1957, No. 1, and 25 November 1958, No. 74, that in some way circumscribed the constitutional legitimacy of the criminalization of the fascist manifestations of speech, however these rulings did not rule out this criminalization as such; similar conclusions can be reached with regard to judgments 3 July 1957, No. 120, and 14 February 1973, No. 15, that similarly limited the punishment of seditious speech; again in the same vein is judgment 5 April 1974, No. 108, that rewrote article 415 of the penal code in the part prohibiting the incitement to class hatred, by providing that such crime was compatible with the freedom of speech only as long as it only punished behaviours that brought a threat to public safety and peace. According to these rulings, hate speech prohibitions must be carefully crafted in order not to infringe on the freedom of speech, but as long as this requirement is met, they are constitutionally permissible.

enjoys the inviolability status⁴⁷, or is the "cornerstone of the democratic order"⁴⁸.

Recently, an interesting case has been the *Taormina* case (*NH v Associazione Avvocatura per i diritti LGBTI – Rete Lenford*), involving an Italian lawyer – who was also a famous politician – who declared in a radio interview that he was not willing to hire homosexuals in his law firm. He was found guilty of discrimination – a civil offence punished by Decreto Legislativo 9 July 2003, No. 216, that transposed Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation – by both the Tribunale di Bergamo⁴⁹ and the Corte d'Appello di Brescia⁵⁰: the judges rejected the lawyer's contention that his conviction violated his freedom of speech, in line with the "constitutional tradition" that I have (not) identified above. Currently, the lawyer has challenged his conviction before the Court of Cassation, again alleging a violation of his freedom of speech; the Court referred the question for a preliminary ruling to the Court of Justice of the EU⁵¹, but the CJEU did not find a conflict between a Directive, on the one hand, and freedom of expression, on the other, protected by both the EU Charter of Fundamental Rights and the Italian constitution⁵². To date, no question of constitutionality has been raised in front of the

⁴⁷ See for instance judgment 26 March 1993, No. 112: «This Court has consistently affirmed that the Constitution, in art. 21, recognizes and guarantees everyone the freedom to express their thoughts by any means of dissemination and that this freedom includes both the right to inform and the right to be informed (see, for example, judgments Nos. 202 of 1976, 148 of 1981, 826 of 1988). Article 21, as the Court has been able to clarify, places the aforementioned freedom among the primary values, assisted by the clause of inviolability (Article 2 of the Constitution), which, by reason of their content, in general are translated directly and immediately in the subjective rights of the individual, of an absolute nature». In fact, the judgment goes on, immediately after this passage: «However, the implementation of these fundamental values in the relationships of life involves a series of relativizations, some of which derive from precise constitutional constraints, others from particular appearances of the reality in which those values are called to be implemented».

⁴⁸ Judgment 2 April 1969, No. 84, § 5 of the *Conclusions on points of law*.

⁴⁹ Trib. Bergamo, order 6 August 2014, No. 791.

⁵⁰ C. App. Brescia, judgment 11 December 2014-23 January 2015, No. 529/2014.

⁵¹ Cass., order 20 July 2018, No. 19443.

⁵² CJEU, judgment 23 April 2020, C-507/18, *NH v Associazione Avvocatura per i diritti LGBTI – Rete Lenford*.

Italian Constitutional Court concerning the legitimacy of the Italian law transposing the EU Directive.

The point I would like to make is that this overview, however brief, indicates first of all that the Italian tradition on free speech is in harmony with the European tradition of protecting it as far as it is instrumental to the fostering of democracy; most of all, it shows that the Italian tradition seems to go even further, by reconstructing free speech as a right worthy of protection inasmuch as it does not collide with the superior social dimension of democracy.

Moving on with the analysis, a case like *NH v Associazione Avvocatura per i diritti LGBTI – Rete Lenford* is relevant also as an indication of the Italian constitutional “climate” in the field of civil rights, and in the connected one of the so-called ethical issues. Here, I believe some conflicting indications come from both the normative and the judicial formant. For instance, after many years of debate, and the intervention of the Constitutional Court⁵³, Italy has recently passed a law recognizing civil unions for gay people (although falling short of introducing gay marriage)⁵⁴; the case-law, especially of the Court of Cassation, has gone as far as to recognize the so-called stepchild adoption⁵⁵; abortion has been legal for 40 years, after the Constitutional Court had partially paved the way for its legalization⁵⁶; the Constitutional Court has also declared that the Constitution requires the law to let parents transmit also the mother’s family name to a child⁵⁷; however, the same Court has recently found that it is not unconstitutional to prevent gay people from requesting their last name to be changed into their partner’s when they enter into a civil union⁵⁸; also, the issue of the display of the crucifix has been mostly handled by the

⁵³ Constitutional Court, judgment 11 June 2014, No. 170.

⁵⁴ Legge 20 May 2016, No. 76.

⁵⁵ See in particular judgment 22 June 2016, No. 12962, and order 31 May 2018, No. 14007.

⁵⁶ Constitutional Court, judgment 18 February 1975, No. 27, declaring article 546 of the criminal code unconstitutional «in the part in which it does not provide that the pregnancy may be interrupted when the further gestation implies damage, or danger, of a serious nature, and medically established in the terms explained in the reasons for the judgment, and not otherwise avoidable, for the health of the mother»: the court affirmed that «there is no equivalence between the right not only to life but also to health of someone who is already a person, like the mother, and the protection of the embryo that has yet to become a person».

⁵⁷ Constitutional Court, judgment 21 December 2016, No. 286.

⁵⁸ Constitutional Court, judgment No. 212/2018.

government⁵⁹ and the courts⁶⁰ in the sense of not finding the laws mandating such display unconstitutional.

These partially contradictory elements offer me the chance to briefly reflect on another potential strand of the Italian constitutional tradition, i.e. the special relationship with the Catholic Church. In summary, the above line of cases leads me to conclude that Italy is long past the "constitutional" influence of the Catholic Church, but that some important traces of this constitutional tradition still have a hold on the Italian constitutional framework.

As is well known, the Italian constitution explicitly regulates the relationship between the State and (only) the Catholic Church⁶¹, that has traditionally enjoyed a special place in the Italian legal order, as witnessed by several elements: from some of the above-mentioned cases, to other judicial rulings, also from the Constitutional Court⁶², from also some legislative choices⁶³, to some other constitutional ones: for instance, the constitutional definition of the family as «a natural society founded on marriage» (Art. 29), and the structuring of "ethical and social relations" (Title II of Part I) on the basis of the family (thus defined), as the foremost "social group" (Article 2), is certainly a tribute to the Catholic tradition.

However, there are many other indications that instead point in the direction of a robust secularization of the Italian constitutional tradition: besides the cases on free speech, some constitutional judgments, such as the 2014 one on gay unions⁶⁴, or the simultaneous one on the IVF⁶⁵, or the recent ruling on

⁵⁹ See the briefs in the famous *Lautsi* case of the ECtHR, judgment 18 March 2011.

⁶⁰ Council of State, Section II, Opinion 27 April 1988, No. 63; Council of State, Opinion 15 February 2006, No. 556; TAR Veneto, Section I, Order 14 January 2004, No. 56, and Council of State, judgment of 13 February 2006 (judgments in the *Lautsi* case); Cass, SS.UU. (*Tosti* case) 14 March 2011, No. 5924.

⁶¹ Article 7: «The State and the Catholic Church are independent and sovereign, each within its own sphere. Their relations are governed by the Lateran Pacts. Changes to the Pacts that are accepted by both parties shall not require a constitutional amendment».

⁶² For instance, judgment 15 April 2010, No. 138, on the gay wedding (in spite of its recognition of "homosexual unions" as a "social group" under Article 2).

⁶³ Typically, on the so-called ethical issues, such as euthanasia, gay rights, divorce, abortion, IVF, scientific research involving the use of human embryos.

⁶⁴ Judgment 11 June 2014, No. 170.

⁶⁵ Judgment 10 June 2014, No. 162.

euthanasia⁶⁶, are all cases in point⁶⁷. Moreover, one could argue that the secularization of family law has its roots in a different Italian tradition, the secular one dating back to the Risorgimento and the republicanism. This tradition has coexisted for a long time with the somewhat opposed Catholic one, thus leading me to find confirmation for my contention that we are dealing with something that lies in itself outside the core of the Italian constitutional tradition, and most importantly that also religious freedom is reconstructed from a “social” perspective: rather than framing it as an individualistic liberty, the Constitution tends to protect the social dimension of religion.

3.2. National sovereignty towards the inside (territorial indivisibility) and the outside (international law and the European legal system)

The other area where I have identified a spillover of the social Leitmotif is the one of national sovereignty. I will consider it both towards the inside and the outside.

As for the former, what comes into question is the principle of territorial indivisibility, and the constitutional prohibition of secession. Article 5 of the Constitution stipulates that Italy is “one and indivisible”, and a fairly recent judgment by the Court derived from this rule a prohibition to hold a consultative referendum on the prospect of a secession of a Region (Veneto) from the rest of the country.

The key aspect of my contention is what the Court wrote in 2015 (in a judgment written by Marta Cartabia): «The consultative referendum provided for under Article 1 does not concern solely *fundamental choices on constitutional level*, which are as such precluded from the scope of regional referendums according to the case law of the Constitutional Court cited above, but seeks to subvert the institutions in a manner that is inherently incompatible with the *founding principles of the unity and indivisibility of the Republic* laid down in Article 5 of the Constitution. *The unity of the Republic is*

⁶⁶ Judgment 22 November 2019, No. 242.

⁶⁷ To a certain extent, also the judgments finding illegitimate the privilege granted to the Catholic religion in relation to the crimes of offence, go in the same direction: see judgments 13-20 November 2000, No. 508, on Art. 402 of the penal code; 1-9 July 2002, No. 327, on Art. 405; 29 April 2005, No. 168, on Art. 403. It is worth underlining that offence to religion *per se* were not found to be against free speech.

an aspect of constitutional law that is so essential as to be protected even against the power of constitutional amendment (see Judgment no. 1146 of 1988). There is no doubt – as this Court has also recognised – that the republican order is also based on principles including social and institutional pluralism and territorial autonomy, in addition to an openness to supranational integration and international law; however, these principles must be developed within the framework of the Republic alone: “The Republic, which is one and indivisible, shall recognise and promote local government” (Article 5 of the Constitution). According to the settled case law of this Court, pluralism and autonomy do not permit the regions to classify themselves as sovereign bodies and do not permit their governmental organs to be treated as equivalent to the representative bodies of a nation (see Judgments no. 365 of 2007, no. 306 and no. 106 of 2002). *A fortiori*, the same principles cannot be taken to extremes so as to result in the fragmentation of the legal order and cannot be invoked as justification for initiatives involving the consultation of the electorate – albeit only for consultative purposes – concerning prospective secession with a view to the creation of a new sovereign body. Such a referendum initiative [that, like the one at issue, contradicts] the unity of the Republic could never involve the legitimate exercise of power by the regional institutions and would thus lie *extra ordinem*»⁶⁸.

It appears to me that this is quintessential discourse on what constitutes an Italian constitutional tradition. The judgment even goes as far as to say that such a policy initiative would be precluded even if brought about with a constitutional law, which would be on its turn unconstitutional, thus defining a non-negotiable aspect of the Italian constitutional identity. To some extent, this approach was indirectly reaffirmed, more recently, in two other cases concerning different questions, but again involving the Region Veneto, the one where the centrifugal forces are the strongest: one concerned a decree-law issued by the national government to impose some new nation-wide vaccination obligations, that was

⁶⁸ Constitutional Court, judgment 25 June 2015, No. 118, § 7.2 of the *Conclusions on points of law* (emphasis added) (only the part within brackets is mine). It is interesting to note that the law at issue was struck down on the grounds that it violated four different articles: 5 (on the indivisibility of the Republic), 114 (on the territorial subdivision of the Republic), 138 (on the constitutional amendment procedure), and 139 (on the limits to the amendment power).

unsuccessfully challenged by the Region Veneto⁶⁹, and the other a law by the same Region «classifying the “Veneto people” as a national minority under the international Framework Convention for the Protection of National Minorities», that was struck down by the Constitutional Court⁷⁰.

I believe one point is crucial in this regard. The principle of territorial indivisibility is important *per se*, but should arguably be read in light of the social principle. The above-mentioned 2015 judgment did not take a position on this point, because a violation had already been bound in relation to article 5 of the Constitution, and the other potential violation of Article 3 was thus absorbed and not examined.

However, the point that a state breakup runs against the core principles of the republic because was raised in the complaint of the Italian government: the law of the Region Veneto was allegedly unconstitutional because it would have likely led to the strengthening of «movements that, instead of fostering social solidarity, can give rise to centrifugal tendencies or selfish claims in economic policy»⁷¹. Although this claim was not picked up in the Court’s ruling, this is actually the very aspect that makes territorial indivisibility so undisputable: going against it threatens the social solidarity, and therefore it partakes its fundamental character within the Italian constitutional tradition.

Finally, one could still inquire into “how Italian” is the principle of territorial indivisibility. First of all, it is worth mentioning that this is one case where Italy has certainly contributed directly to the creation of a Europe-wide constitutional tradition: Article 5 of the Italian constitution was indeed explicitly taken as a model for Article 3 of the European Charter of Local Self-Government⁷².

Moreover, from the opposite point of view, one could argue that this principle indivisibility is shared with several other constitutional traditions. Admittedly, a right to secede is explicitly provided only in very limited circumstances: the most typical example is Art. 4, § 2 of the Constitution of Liechtenstein; and only a minority of others seem to admit it (the United Kingdom, and

⁶⁹ Constitutional Court, judgment 18 January 2018, No. 5.

⁷⁰ Constitutional Court, judgment 20 April 2018, No. 81.

⁷¹ § 1 of the *Facts of the case*.

⁷² On which see G. Boggero, *Constitutional Principles of Local Self-Government in Europe* (2017).

some ex-socialist republics): the right to self-determination tends to be constructed under international law as being triggered only by situations of physical threat to a population within a territory perceived as foreigner. Italy thus seems to share indivisibility with countries such as France, or Spain, and in fact be part of a broader tradition. However, I maintain that the prohibition of secession is a distinctive Italian feature for at least two reasons: firstly, because indivisibility is affirmed in the part on the fundamental principles of the Italian constitution, and not in its organizational part, something that underlines its core importance in the Italian constitutional order; secondly, the above-mentioned connection to the principle of equality makes it enjoy a position that is not comparable to the one this principle has in other traditions, except maybe for the Spanish one. Taken in this perspective, it seems to meet very well my criterion of selecting the distinctive features of the Italian order that are potentially common to a large extent with most other Member States, but where the Italian tradition has something particularly original to contribute.

Moving on to the external side of national sovereignty, and particularly to the relationship between national law and Eu law, this issue has been subject to particularly intense debate between the Italian Constitutional Court and the (now called) Court of Justice of the EU, a story so important that it has partly contributed to reshape the Italian constitutional tradition. The openness to the international order has indeed been a very distinctive feature of the Italian constitution since the beginning⁷³, that eventually, after an initial stance in the opposite direction⁷⁴, the Constitutional Court has fully embraced⁷⁵, and that was reaffirmed in the 2001 major reform, with the already evoked rewording of Article 117 in order to explicitly recognize the supremacy of the Eu and of the international legal order⁷⁶.

⁷³ Articles 10, par. 1 («The Italian legal system conforms to the generally recognised rules of international law»), and 11 («Italy [...] agrees, on conditions of equality with other States, to the limitations of sovereignty that may be necessary to a world order ensuring peace and justice among the Nations. Italy shall promote and encourage international organisations furthering such ends»).

⁷⁴ The very well-known *Costa v. Enel* judgment, No. 14 of 1964.

⁷⁵ The famous *Granital* judgment, No. 170 of 1984.

⁷⁶ Article 117, par. 1: «Legislative powers shall be vested in the State and the Regions in compliance with the Constitution and with the constraints deriving from EU-legislation and international obligations». On its turn, the landmark judgments, already mentioned, Nos. 348 and 349 of 2007 affirmed that, under the

However, in several other crucial instances, the Italian Constitutional Court seems to have maintained the ultimate bulwark of national sovereignty, refusing to give the Eu, or the international legal order for that matter, complete leeway. This case-law is at a certain level connected to the one on the territorial indivisibility: the “gray area” we find in the field of international relations is due to the fact that openness to the international organizations, including the Eu, seems always balanced with a principle that the Constitutional Court has never seemed ready to sacrifice, i.e. national sovereignty. This reading of national sovereignty, on its turn, is coherent with a constitutional interpretation of Article 5 as prohibiting any legitimate form of secession, or any other peaceful form of state break-up.

Some of the most significant backlashes to the “traditional” Italian approach have occurred in recent years, in response to the push towards more integration, arguably as an attempt to defuse more radical reactions by the growing nationalist movements.

The first judgment I would like to mention is the ‘historical’ ruling on the issue of state immunity⁷⁷, where the Court for the first time actually activated the so-called counter-limits⁷⁸. The case concerned the claims brought forward by some victims of Nazi crimes. After the Italian Court of Cassation had awarded these claimants an indemnification, sentencing the Republic of Germany liable for the crimes committed during the Third Reich and thus disregarding the principle of state immunity, Germany had challenged this judgment in front of the International Court of Justice, that had upheld this action. Italy had complied with this ruling by passing a new law that mandated the Italian judges to

new wording of Article 117, violations of the European Convention, as interpreted by the Strasbourg Court (a specification only partially restricted by judgment 49/2015), amounted to an indirect violation of the Italian constitution. On the adaptation of Italian law to international human rights law, see the annual publication by Padova University Press, *Annuario italiano dei diritto umani*; on the relationship between fundamental European rights and Italian constitutional rights, U. De Siervo, *I diritti fondamentali europei e i diritti costituzionali italiani (a proposito della «Carta dei diritti fondamentali»)*, in G. Zagrebelsky (Ed.), *Diritti e Costituzione nell'Unione Europea* (2003), 258 ff.

⁷⁷ Constitutional Court, judgment 22 October 2014, No. 238. It was immediately defined ‘historical’ by L. Gradoni, *Corte costituzionale e Corte internazionale di giustizia in rotta di collisione sull'immunità dello Stato straniero dalla giurisdizione civile* (2014), available at www.sidiblog.org.

⁷⁸ See *supra* footnote 39.

always abide by the principle of state immunity, but this law was challenged before the Constitutional Court. And the Court agreed that such law was unconstitutional, because no principle of international law can ever lead to sacrificing the fundamental principles of the Italian constitutional order⁷⁹.

Moreover, this judgment deserves attention also because of its passage on the role of the Italian (and Belgian) courts in redefining the contents of the international custom on State immunity from civil jurisdiction, limiting it to the acts committed *iure imperii* and excluding the ones committed *iure gestionis*: this is an example of Italian tradition that has contributed to (re)shaping a common one, that goes even further the European borders.

Other two rulings concern the so called *Taricco* saga, another case where the Italian Constitutional Court threatened to activate the "counter-limits" (even without explicitly mentioning them)⁸⁰.

⁷⁹ § 3.2. of the *Conclusions in Point of Law*: «As was upheld several times by this Court, there is no doubt that the fundamental principles of the constitutional order and inalienable human rights constitute a "limit to the introduction (...) of generally recognized norms of international law, to which the Italian legal order conforms under Article 10, par. 1 of the Constitution" (judgment No. 48/1979 and No. 73/2011) and serve as "counter-limits" [controlimiti] to the entry of European Union law (*ex plurimis*: judgments No. 183/1973, No. 170/1984, No. 232/1989, No. 168/1991, No. 284/2007), as well as limits to the entry of the Law of Execution of the Lateran Pacts and the Concordat (judgments No. 18/1982, No. 32, No. 31 and No. 30/1971). In other words, they stand for the qualifying fundamental elements of the constitutional order. As such, they fall outside the scope of constitutional review (Articles 138 and 139 Constitution, as was held in judgment No. 1146/1988). [...] Moreover this Court has reaffirmed, even recently, that it has exclusive competence over the review of compatibility with the fundamental principles of the constitutional order and principles of human rights protection (Judgment No. 284/2007). Further, precisely with regard to the right of access to justice (Article 24 Constitution), this Court stated that the respect of fundamental human rights, as well as the implementation of non-derogable principles are safeguarded by the guaranteeing function assigned to the Constitutional Court (Judgment No. 120/2014)»; see G. Boggero, *Without (State) Immunity, No (Individual) Responsibility*, 5 *Goettingen Journal of International Law* 375 (2013).

⁸⁰ Constitutional Court, order No. 24/2017. Among the vast amount of Italian scholarship on it, see the following works in English on this case: before the order, see G. Repetto, *Pouring New Wine into New Bottles? The Preliminary Reference to the CJEU by the Italian Constitutional Court*, 16 *German Law Journal* 1449 (2015); after the order, M. Bassini and O. Pollicino, *When Cooperation Means Request for Clarification, or Better for "Revisitation". The Italian Constitutional Court request for a preliminary ruling in the Taricco case*, 7 *Diritto Penale Contemporaneo* 206 (2017); the symposium on 4 *Questions of International Law Journal* (2017), with articles

The issue involved the punishment of tax fraud against the financial interest of the Eu: in a previous judgment, the CJEU had mandated the Italian authorities to disregard the statute of limitations when such interests were involved, but the Italian Court reacted to this imposition, by resubmitting a reference to a preliminary ruling to the CJEU, in which it practically urged it to reconsider its previous ruling, because it run afoul of the fundamental principle of legality, of which the statute of limitations was expression⁸¹. Order No. 24/2017 is rich of references to common constitutional traditions, that in the Court's perspective should be constructed as coherent with the national constitutional tradition protecting the principle of legality; more importantly, the decision reaffirms the specificity of the core principles of the national constitutional tradition, even above and against Eu law⁸².

by A. Tancredi, *Of direct effect, primacy and constitutional identities: Rome and Luxembourg enmeshed in the Taricco case*, 1 ff., D. Paris, *Carrot and Stick. The Italian Constitutional Court's Preliminary Reference in the Case Taricco*, 5 ff., and G. Rügge, *The Italian Constitutional Court on Taricco: Unleashing the normative potential of 'national identity'?*, 21 ff. After the judgment 115/18 that followed the new ruling by the CJEU, see also G. Piccirilli, *The 'Taricco Saga': the Italian Constitutional Court continues its European Journey*, 14 *European Constitutional Law Review* 814 (2018). See also the following blog posts: D. Tega, *Narrowing the Dialogue: The Italian Constitutional Court and the Court of Justice on the Prosecution of VAT Frauds*, in [L-COONnect Blog](#), 2017; and the following entries on [Verfassungsblog: On Matters Constitutional](#), all between January and April 2017: M. Bassini and O. Pollicino, *The Taricco Decision: A Last Attempt to Avoid a Clash between EU Law and the Italian Constitution*; D. Sarmiento, *An Instruction Manual to Stop a Judicial Rebellion (before it is too late, of course)*; P. Faraguna, *The Italian Constitutional Court in re Taricco: "Gauweiler in the Roman Campagna"*; L.S. Rossi, *How Could the ECJ Escape from the Taricco Quagmire?*.

⁸¹ The CJEU eventually backed out with judgment *M.A.S. and M.B.*, C-42/17, which was followed by a new judgment by the Constitutional Court, No. 115/2018, in this case with no reference to CCTs or national constitutional traditions.

⁸² The key passage from our perspective is the following, concerning the underlying crucial issue of the interpretation of the statute of limitation as a substantial or procedural rule: «It is well known that certain Member States by contrast embrace a procedural conception of limitation, to which the judgment given in the Taricco case is closer, based also on the case law of the European Court of Human Rights; however, there are others, including Spain (STC 63/2005 of 14 March), which adopt a substantive concept of limitation that does not differ from that applied in Italy. It is useful to note that, in the European legal context, there is no requirement whatsoever for uniformity across European legal systems regarding this aspect, which does not directly affect either the competences of the Union or the provisions of EU law. Each Member State is therefore free to

In my opinion, this ambiguity in the relationship with Eu law was indirectly confirmed also by a peculiar judgment declaring that a law authorizing Italian universities to activate courses taught only in English should be interpreted as constitutionally admissible only if the courses activated were not wholly and exclusively given in English, but provided for at least some courses to be offered both in Italian and in English⁸³. Even though, declamation-wise, the Court professes its unwillingness to limit the internationalization of Italian universities, this judgment is in fact a setback for this process. And it is based on a reaffirmation of the Italian constitutional tradition, of which the Italian language is declared to be an essential component⁸⁴.

conceptualise the limitation of criminal offences in either substantive or procedural terms, in accordance with its own constitutional tradition. This conclusion was not placed in doubt by the judgment given in the Taricco case, which limited itself to excluding limitation from the scope of Article 49 of the Nice Charter, but did not assert that the Member States must disregard any of their own constitutional rules and traditions that prove to be more beneficial for the accused compared to Article 49 of the Nice Charter and Article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), signed in Rome on 4 November 1950, ratified and implemented by Law no. 848 of 4 August 1955. Moreover, this would not be permitted within the Italian legal system where these assert a supreme principle of the constitutional order, as is the case for the principle of legality in criminal matters throughout the substantive area of law to which it applies» (§ 4 of *The facts of the case and conclusions on points of law*).

⁸³ Constitutional Court, judgment No. 42/2017.

⁸⁴ § 3.1. of the *Conclusions on points of law*: «Given its official status, and thus its primacy, the Italian language is a vehicle for conveying the culture and traditions inherent within the national community, which are also protected by Article 9 of the Constitution. The progressive supranational integration of legal systems and the erosion of national boundaries as a result of globalisation may undoubtedly undermine that function of the Italian language in various ways: multilingualism within contemporary society, the use of a particular language in specific areas of human knowledge and the dissemination on a global level of one or more languages are all phenomena which have now permeated into the constitutional order and coexist alongside the national language in a variety of areas. However, such phenomena must not relegate the Italian language to a marginal status: on the contrary, and in fact precisely by virtue of their emergence, the primacy of the Italian language is not only constitutionally unavoidable but indeed – far from operating as a formal defence of a relic from the past, which is incapable of appreciating the changes brought by modernity – has become even more crucial for the continuing transmission of the historical heritage and identity of the Republic, in addition to safeguarding and enhancing the value of Italian as a cultural asset in itself».

Finally, another extremely important case in point is another 2017 judgment, again written by Marta Cartabia, that needs to be mentioned not because of its conclusion, but because of already classical *obiter dictum* that has given way to an incredible amount of speculation⁸⁵. In § 5.2 of the *Conclusions on points of law*, the Court reconsidered the relationship between national law and Eu law, especially from the point of view of the choice of the judicial remedies to be activated in case of a violation of both a national constitutional principle, and a European fundamental right. In a partial reversal from its past openness, the Court established that: «where a law is the object of doubts concerning the rights enshrined in the Italian Constitution or those guaranteed by the Charter of Fundamental Rights of the European Union in those contexts where EU law applies, the question of constitutionality must be raised, leaving in place the possibility of making a referral for a preliminary ruling for matters of interpretation or of invalidity of Union law, under Article 267 TFUE». I believe this *obiter dictum*, reaffirming the subsidiarity in the enforcement of fundamental rights, proves my point that this openness to the Eu legal order is an area of ambiguity, and not part of the Italian constitutional tradition, meant in the way I explained above. This conclusion does not seem to be contradicted by the more recent judgment No. 20 of 21 February 2019, and even more recent order No. 117 of 10 May 2019: both rulings make significant references to common constitutional traditions, signaling a trend towards a renewed popularity of this notion within the Court, but aside from not contributing particularly to a deeper understanding of this notion, they also fall short of “overruling” judgment No. 269/2017. Admittedly, they partially mitigated its potential effects, but without substantially departing from the holding of that *obiter dictum*, that remains therefore an inevitable reference in the shaping of the relationship with the European legal order.

Because of the mixed picture that one can draw in this area, the spillover of the social common denominator is less immediately clear here, but it is arguably present as well. I believe indeed that the case-law of the Constitutional Court can be read in the sense

⁸⁵ Constitutional Court, judgment 14 December 2017, No. 269. In a recent judgment (No. 12108/2018), the Court of Cassation has played down the relevance of this *obiter dictum* (see F. Ferrari, *Giudici (di Cassazione) renitenti alla Corte costituzionale* (2018), in www.lacostituzione.info), but it remains to be seen what its impact will be.

that openings towards the Eu, and particularly Eu-mandated budgetary restraints, are coherent with a (maybe just implicit) assumption that the Eu will promote social rights, or anyway that responsible budgetary policies will create the best conditions for their implementation⁸⁶, whereas backlashes indicate a concern that market integration might prevail over them⁸⁷.

In other words, I believe that even the ambiguities shown by the Constitutional Court in this domain, that I already underlined *supra* par. 2.2⁸⁸, can be explained and reconciled in light of the existence of an overarching social principle, that might drive to apparently diverging conclusions (in favour or against budgetary concerns, from case to case), but that is very coherent at its core: even when budgetary constraints prevail, this is still made in order to prevent a fiscal crisis that would affect the enforcement of social rights even worse, thus confirming the underlying assumption of this work about the "fractal" nature of the social principle.

4. A tentative conclusion: trying to capture the Italian constitutional tradition through the "fractal" nature of its social principle

In my analysis, I have tried to wade through the bran-tub of the Italian constitutional tradition, and catch the distinctive, constitutive elements of the Italian constitutional identity, its 'genotypical' components, to use the terminology introduced into the legal studies by Rodolfo Sacco⁸⁹.

The well-known story of the Italian constitution is the story of the so-called constitutional compromise between the different ideological and political forces that were present in the constituent assembly⁹⁰. The constitutional compromise produced a distinctive

⁸⁶ Some judgments in this direction are Nos. 325/2010 (written by Gallo), 10/2015 (written by Cartabia), 127/2015 (written by Sciarra).

⁸⁷ Some judgments in this direction are the already mentioned Nos. 70/2015 (written by Sciarra) and 275/2016 (written by Prosperetti).

⁸⁸ And that I believe emerge very clearly in judgment No. 178/2015 (written by Sciarra).

⁸⁹ R. Sacco, *Introduzione al diritto comparato*, in R. Sacco (Ed.), *Trattato di diritto comparato* (1992⁵), 27 ff.

⁹⁰ See, among many, L. Pegoraro and J.O. Frosini, *The Italian Constitution: text and notes* (2007), 7 ff. More broadly, for scholar works in English on Italian constitutionalism, see, for example: M. Einaudi, *The Constitution of the Italian Republic*, 42 *American Political Science Review* 661 (1948); J.C. Adams and P. Barile, *The Implementation of the Italian Constitution*, 47 *American Political Science*

document, that is grafted in the Western constitutionalism, but with some characteristic features.

I have argued that, among the features of such tradition, one stands out in particular, *i.e.* the social principle (encompassing substantial equality, solidarity, and the labour principle). Such principle is so important in the Italian constitutional tradition, that, even though it was apparently dictated in order to regulate economic relationships, it permeates all parts of the Constitution, and reproduces itself like a fractal in such parts too. This reproduction is particularly manifest in the realms of the free speech jurisprudence and in the construction of national sovereignty.

Let me now make an additional point. Coherently with the historical background that I have just briefly recalled, the social principle also encompasses another principle underpinning the Italian constitution, *i.e.* the anti-fascist principle⁹¹. The repudiation of the infamous twenty-year fascist rule is an important premise of the current constitution, and is formally expressed in the prohibition to reorganize the Fascist Party⁹². However, such fundamental choice was declined not much in favour of the classical liberal approach, expressed by Liberal Party that only won a minority of the seats in the constituent assembly, but rather in favour of a combination of the Catholic and socialist-communist doctrines. The centrality of the social principle is arguably coherent with the Marxist focus on the economic relationships within a

Review 61 (1953); G. Bognetti, *Political Role of the Italian Constitutional Court*, 49 *Notre Dame Law Review* 981 (1974); Id., *The American Constitution and Italian Constitutionalism: an Essay in Comparative Constitutional History* (2008); G. Amato, *The Constitution*, in E. Jones and G. Pasquino (Eds.), *The Oxford Handbook of Italian Politics* (2015), 71 ff.; S. Ilari, *About the Genesis of the Italian Republican Constitution*, 69 *Il Politico* 28 (2018).

⁹¹ On the issue, see among many J.C. Adams and P. Barile, *The Italian Constitutional Court in Its First Two Years of Activity*, 7 *Buffalo Law Review* 250 (1958); M. Luciani, *Anti-fascismo e nascita della costituzione*, 22 *Politica del Diritto* 191 (1991); C. Pinelli, *The 1948 Italian Constitution and the 2006 Referendum: Food for Thought*, 2 *European Constitutional Law Review* 329 (2006); G. Martinico, B. Guastaferrero and O. Pollicino, *The Constitution of Italy: Axiological Continuity Between the Domestic and International Levels of Governance?*, in A. Albi and S. Bardutzky, *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law* (2019) 493 ff., 495.

⁹² XII transitory and final provision, par. 1: «It shall be forbidden to reorganise, under any form whatsoever, the dissolved Fascist party».

society, a decisive element to address in order to overturn the current balance of power.

The anti-fascist strand of the social principle contributes to making it an overarching principle, and to be sure the quintessence of the Italian constitution. A case in point, among the most recent, is the one decided with order 8 February 2018 by the Tribunale Amministrativo Regionale of Brescia⁹³, later confirmed by the Council of State⁹⁴, where the administrative judges declared that it was legitimate to ask an openly neo-fascist movement to repudiate fascism, in order to be assigned some public spaces granted to other groups⁹⁵.

Moreover, the anti-fascist matrix properly explains and encompasses other constitutional features that might be considered to amount to an actual tradition, such as the role of political parties (under Articles 1 and 49), its connection to the right to vote (Article 48), the granting of the latter also to "Italians abroad" (for whom an ad hoc «constituency [...] shall be established»), and maybe even the provision of "life senators" (Article 59), whose role can be construed as a repository of wisdom also against all the potential attempts to reinstate the fascist regime.

Ideally, the next steps of the analysis would involve connecting the research conducted here on the Italian constitutional tradition with other national traditions, and investigating whether and to what extent the Italian constitutional tradition influenced the emergence of Eu-wide traditions. This has in fact happened on some notable cases of fundamental rights.

If, for example, one could argue that the Italian principle of the "fair proceedings" (*giusto procedimento*) developed belatedly⁹⁶,

⁹³ T.A.R. Lombardia, Brescia, Section II, order 8 February 2018, No. 68.

⁹⁴ Council of State, Judgment 9 May 2018.

⁹⁵ See the comments by F. Paruzzo, *Il Tar Brescia rigetta il ricorso di CasaPound: l'anti-fascismo come matrice e fondamento della Costituzione*, 6 *Osservatorio AIC* 475 (2018).

⁹⁶ Along the lines of Vezio Crisafulli's famous case note to the judgment of the Italian Constitutional court 2 March 1962, No. 13, that denied constitutional relevance to this principle: V. Crisafulli, *Principio di legalità e «giusto procedimento»*, 7 *Giur. cost.* 130 (1962). Cf also, among many, P. Lombardi, *Le parti del procedimento amministrativo. Tra procedimento e processo* (2018), especially Chapter I, *Giusto procedimento e giusto processo tra ordinamento europeo e nazionale: "Il punto logico di partenza"*, 1 ff.; L. Buffoni, *The constitutional level of "due process" and the archetype of "court proceeding"*, 29 *Quad. Cost.* 277 (2009); G. Colavitti, *Il "giusto procedimento" come principio di rango costituzionale* (2005), in www.associazionedeicostituzionalisti.it.

the tradition on the interim legal protection (*tutela cautelare*) towards administrative acts is on the same foot as other legal systems, as made clear in Tesauro's opinion in *Factortame I*⁹⁷. As far as the topics here discussed are concerned, the mentioned ELI project's national reports on freedom of expression seem to show that the Italian tradition is mostly in line with the majority of other national traditions: no distinctively Italian influence emerges, but there is certainly a commonality (while freedom of religion offers a more nuanced picture)⁹⁸.

As for territorial indivisibility, it seems to be common enough⁹⁹, while the approach towards the Eu and international legal orders has certainly had an impact on other European jurisdictions¹⁰⁰.

My final point is a reminder that even traditions change over (a long) time. They are by definition something stable, but nonetheless in continuous, slow, but steady movement¹⁰¹. Fifteen years ago, Glenn expressed some optimistic remarks on the openness of national legal traditions¹⁰²: the world seemed destined to progressively remove barriers and borders, and national legal traditions appeared like harmless repositories of "local" wisdom, good to water down the otherwise unstoppable convergence towards supranational legal standards. The past years, though, have painted a considerably different picture: nationalist tendencies are on the rise again¹⁰³.

⁹⁷ Opinion of Mr Advocate General Tesauro delivered on 17 May 1990, *The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others*, Case C-213/89.

⁹⁸ See now ELI, *Freedom of Expression as a Common Constitutional Tradition in Europe* (2022).

⁹⁹ Cf. R. de Caria, *I referendum indipendentisti*, 16 *Diritto Pubblico Comparato ed Europeo* 1611 (2014).

¹⁰⁰ Cf. broadly M. Cartabia, *The Legacy of Sovereignty in Italian Constitutional Debate*, in N. Walker (Ed.), *Sovereignty in Transition* (2003), 305 ff.

¹⁰¹ One cannot but cite C. Mortati, *La costituzione in senso materiale* (1940).

¹⁰² P.H. Glenn, *La tradition juridique nationale*, 55 *Revue Internationale de Droit Comparé* (2003), 263, 278: «En s'ouvrant la tradition juridique nationale augmente ses ressources et augmente sa normativité. Il y a donc lieu d'être optimiste quant à l'avenir des traditions juridiques nationales».

¹⁰³ To put it Martin Belov's words, we could say that the Westphalian Constitutional Law has not given in to the challenges posed to it by global constitutionalism: M. Belov (Ed.), *Global Constitutionalism and Its Challenges to Westphalian Constitutional Law* (2018).

From this point of view, national constitutional traditions might be construed as a counterpoint to CCTs¹⁰⁴, as a tool to wield¹⁰⁵ when something in the international relations, and particularly in the Eu order, no longer resonates with us, an identity defense to allow us to somehow cherry-pick what we decide to accept and what we do not, with potentially disruptive consequences¹⁰⁶. In hindsight, probably Glenn would no longer be so optimistic today about national legal traditions!

¹⁰⁴ See on this point the reflections by M.E. Comba, *Common Constitutional Traditions and National Identity*, 67 *Rivista Trimestrale di Diritto Pubblico* 973 (2017); see also O. Pollicino, *Metaphors and Identity Based Narrative in Constitutional Adjudication: When Judicial Dominance Matters*, *IACL-AIDC Blog* (2019); and, more broadly, E. Cloots, *National Identity in EU Law* (2015).

¹⁰⁵ See the expression used by P. Faraguna, *Constitutional Identity in the EU-A Shield or a Sword?*, 18 *German Law Journal* 1617 (2017).

¹⁰⁶ See the study by H. Hofmeister (Ed.), *The End of the Ever Closer Union* (2018).