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edited by
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Framing and Diagnosing Constitutional Degradation:

A Comparative Perspective

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Framing and Diagnosing Constitutional Degradation: A Comparative Perspective

Edited by Tania Groppi, Valentina Carlino and Giammaria Milani

Collana di studi di Consulta OnLine
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De-constructing and re-building Procedural Standards: New Trends in the Current Stage of the Italian Constitutional Review of Legislation[**]

ABSTRACT: ***In the present stage of Italian Constitutional justice, the Constitution's gatekeeper has developed into a highly interventionist political actor, thereby reshaping some of its traditional procedural standards. Such evolution towards a less constrained judicial review of legislation raises concerns. Part of the doctrine maintains that the foreseeable effect of this proactive decision-making method would be the deconstruction of the institutional pillars on which the constitutional state is founded. In this light, the traditional principle of separation of powers would be jeopardized. However, the paper aims to temper this negative perspective, by arguing that these disrupting changes to the institutional balances and the legal framework are only seemingly disruptive. By focusing on recent notable case-law, it will be highlighted that the Court's conduct indicates its intention to reconsider the constitutive elements of its modus operandi without relinquishing its jurisdictional approach. In this scenario of "de-constructing" and "re-building", what emerges is the Court's will to impose upon itself new procedural limitations as well as to strengthen universally adopted decisional schemes, such as the proportionality test, strongly emerges.***

SUMMARY: 1. Introduction. – 2. The new features of judicial reasoning: "proceduralization" of the Court's interventions and unheeded warnings as objective criteria. – 3. Harmonising procedural standards: the permanent dialogue between Courts and the proportionality test as a key method in global constitutionalism. – 3.1. "De-structured" proportionality in the Italian Constitutional Court's judicial reasoning. – 4. Conclusions.

1. *Introduction*

In recent times, the configuration of the judicial review of legislation in Italy has provided evidence of centralizing tendencies which have resulted in the Constitutional Court acquiring a role of unprecedented relevance. Indeed, in spite of the complexity of the perspective advocated by the legal doctrine, the academic debate agrees on defining the current stage of Italian constitutional justice as the phase characterized by self-empowerment, activism, or even "supremacy" of the Court[1]. Most notably, similarities with the *modus operandi* of its most powerful German counterpart, the *Bundesverfassungsgericht,* have been pointed out. Scholars have indeed highlighted how *la Corte* has progressively emancipated itself from its original political weakness[2].

The expressions of this widely perceived innovative course, ripping throughout the different spheres of the judicial review's architecture, are significant. In particular, sharp criticism has been provoked by the reconsideration of the *rime obbligate* standard. This is a procedural paramount rule created by the Court itself, which has traditionally represented a self-imposed limit to the Court's creativity and, at the same time, a shield for the discretionary power of the Parliament. More clearly, this canon, which literally means "mandatory verses", requires the Court, whenever it exercises its normative powers for corrective actions in the judicial review, to bring to light the

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[**] **This work has been subjected to blind peer review.**

[1] D. TEGA, *La Corte nel contesto. Percorsi di ri-accentramento della giustizia costituzionale in Italia*, Bologna, 2020; A. MORRONE, *Suprematismo giudiziario. Su sconfinamenti e legittimazione politica della Corte costituzionale*, in *Quad. cost.,* 2019, 2; T. GROPPI, *Il ri-accentramento nell'epoca della ri-centralizzazione. Recenti tendenze dei rapporti tra Corte costituzionale e giudici comuni*, in *Federalismi.it*, 2021, 3, 129; A. RUGGERI, *Rapporti interordinamentali e rapporti istituzionali in circolo (scenari, disfunzioni, rimedi)*, in *Freedom, Security & Justice: European Legal Studies*, 2019, 2.

[2] A. VON BOGDANDY, D. PARIS, *Building Judicial Authority: A Comparison Between the Italian Constitutional Court and the German Federal Constitutional Court*, Max Planck Institute for Comparative Public Law & International Law (MPIL) Research Paper, No. 1., 2019.

univocal interpretation deductible from the constitutional text, limiting its discretion to a minimum level. In this light, the judicial body is only allowed to act within well-defined parameters. Otherwise, its intervention would overlap with that of the political decision-maker. However, its binding value has been significantly softened in recent case-law. Indeed, the use of a vaguer legislative "point of reference" in the legal framework would be purportedly considered acceptable in the case where an acceptance judgement was issued when there is no univocal normative solution clearly enshrined in the Constitution[3].

For this reason, commentators argue that the institutional balance underlying the relationship between the Court and the Parliament has been profoundly reshaped[4]. According to this critical view, after many years in which the CC had generally displayed a cautious *self-restraint* regarding issues of constitutionality that involved the Assembly's political discretion, the jurisdictional organ is now opting for questionable interventionism. This view holds that the CC's approach is characterized by a Machiavellian attitude, whereby legitimacy prevails over legality[5]. Therefore, the aim of enhancing the effectiveness of its guarantee function arguably overshadows the procedural rules to which the Court's must adhere.

Such evolution towards a less constrained judicial review of legislation raises concerns. Part of the doctrine maintains that the foreseeable effect of this proactive decision-making method would be the deconstruction of the institutional pillars on which the constitutional state is founded. More clearly, the prominence acquired by the judicial body and the progressive erosion of vital procedural elements limiting its action could be a symptom of "constitutional degradation". Although the connection is more difficult to detect as these adjustments are apparently internal to the decision-making procedure, this development could lead to disrupting changes in institutional balances. In other words, the traditional principle of the separation of powers would be jeopardized.

However, this paper will argue that these fractures in the legal framework are not as real as it might be claimed. By exploring recent remarkable case-law, the study aspires to emphasize that the judicial body's decision-making demonstrates its will maintain solid self-imposed limitations.

Firstly, an "internal" perspective based on the analysis of certain new argumentative key factors of the Court's reasoning will be adopted. It will be argued that the Court's conduct seems to indicate its intention to reconsider some constitutive elements of its decision-making style without relinquishing its jurisdictional *modus operandi*. Secondly, an "external" perspective focusing on the openness of the judicial organ to judiciary supranational models will be explored. It will be highlighted that *la Corte* is now part of a well-established transnational judiciary network, which has contributed to building a permanent and mutually enriching dialogue between different constitutional systems.

Hence, both the Court's willingness to readjust the old procedural framework and the existing high degree of interaction between supranational and national jurisdictional organs make it difficult to envisage a "dangerous" and unbridled monologue on the part of Court when it comes to issues related to fundamental rights.

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[3] M. RUOTOLO, *L'evoluzione delle tecniche decisorie della Corte costituzionale nel giudizio in via incidentale. Per un inquadramento dell'ord. n. 207 del 2018 in un nuovo contesto giurisprudenziale*, in *Rivista AIC*, 2019, 2, 653-654.

[4] R. PINARDI, *La Corte e il suo processo: alcune preoccupate riflessioni su un tema di rinnovato interesse*, in *Giur. cost.,* 2019, 3.

[5] D. MARTIRE, *Giurisprudenza costituzionale e rime obbligate: il fine giustifica i mezzi? Note a margine della sentenza n. 113 del 2020 della Corte costituzionale*, in *Osservatorio costituzionale*, 2020, 6, 5.

2. *The new features of judicial reasoning: "proceduralization" of the Court's interventions and unheeded warnings as objective criteria*

In the current stage of the constitutional justice the jurisdictional organ seems to have developed a more flexible approach to its procedural rules in order to safeguard the primacy and the promptness of its own intervention. In this context, ensuring effectiveness in the protection of individual rights, as well as avoiding "judicial review-free zones"[6], appear to constitute the driving forces of this change. This innovative decisional path reflects a "renewed sensitivity"[7] on the part of the CC, which can be summarized in the idea that - when a conspicuous violation of constitutional principles occurs - the Court can act to amend the *vulnus* "whatever it takes"[8].

It is therefore undeniable that the constituent elements of the constitutional procedural framework are indeed being called into question. However, the decisional options implemented by the Court in the current phase seem to demonstrate that the Court's decision-making is firmly based on the intent to maintain solid procedural rules. Even this more activist style of reasoning unfolds through an inherently consistent proceeding or, at least, seeks to maintain an anchorage to elements of objectivity and graduality. Accordingly, it seems appropriate to temper the idea that the Court has now embraced the spirit of "the ends justify the means".

Upon closer examination, new patterns emerge in the judicial reasoning of the judgements in which the new jurisdictional technique takes shape. Indeed, the weakening of the *rime obbligate* criterion appears to occur precisely when the following conditions are fulfilled: 1) crucially fundamental rights are at stake; 2) a similar normative solution, albeit not univocal, can be utilized by the Court as a reconstructive reference provision to adopt an "additive" judgement (*sentenza additiva*)[9]; 3) previous dismissal decision(s) on the same matter, containing a plea to the legislator to amend the statute, can be identified; 4) and most importantly of all, the judicial warning falls on deaf ears, as no corrective intervention is provided by the Parliament[10]. The expression "judicial warning" or "judicial stimulus" (*monito*) constitutes an advice or an admonition addressed to the legislator which is usually included into the grounds for a dismissal decision. With this warning the Court invites the Parliament to promptly modify the examined statute in order to bring it into compliance with constitutional principles: otherwise, it would unhesitatingly be declared illegitimate.

In view of this pattern, the Court appears to establish an explicit link between the Parliament's evasion of one or more warnings and the consequential legitimacy of its less constrained declaration of unconstitutionality[11]. Unheeded warnings can become an objective factor which turn the long-term absolute limitation into a relative obstacle. In this light, the Court seems to have brought the *doppia pronuncia* logic to maturity, by knowingly tailoring its biphasic structure to the purpose of effectively performing a judicial review of legislation. This sophisticated kind of judgement consists

[6] This expression refers to one of the most challenging matters related to judicial review: the need to make all the areas of the juridical system subject to the jurisdictional verification of the Constitutional Court, thereby avoiding the existence of issues that could not be brought before the Court. The importance of eliminating judicial review-free zones ("*zone d'ombra*") has been highlighted by the Court in judgement no. 1/2014. See, among many, R. BALDUZZI, P. COSTANZO, *Le zone d'ombra della giustizia costituzionale*. *I giudizi sulle leggi*, Torino, 2007.

[7] G. LATTANZI, *Relazione del Presidente Giorgio Lattanzi*, 21 marzo 2019, in www.cortecostituzionale.it, 14.

[8] A. RUGGERI, *Rimosso senza indugio il limite della discrezionalità del legislatore, la Consulta dà alla luce la preannunziata regolazione del suicidio assistito (a prima lettura di Corte cost. n. 242 del 2019)*, in *Giustizia insieme*, 2019.

[9] In this event, as the mere annulment cannot restore constitutional legality, the Court hereby introduces a new exhaustive set of norms by itself into the legal framework.

[10] M. RUOTOLO, *Oltre le "rime obbligate"?,* in *Federalismi.it*, 2021, 3; G. Repetto, *Recenti orientamenti della Corte costituzionale in tema di sentenze di accoglimento manipolative*, in *Consultaonline.org*, 2020, 3.

[11] M. RUOTOLO, *L' evoluzione delle tecniche decisorie della Corte costituzionale nel giudizio in via incidentale*, cit.

of an informal declaration of unconstitutionality[12]. Structurally, it is characterized by the apparent logical contradiction between the Court's reasoning and the decision to reject the question. The Court denounces the act for not complying with constitutional parameters, but then forgoes its annulment, and instead calls upon the Parliament to correct the defective law. The following threat which is made to the legislator is fairly straightforward: if the Assembly fails to heed the judicial warning in a reasonable amount of time, the Court will strike down the law in a subsequent judgement concerning the same issue. While in earlier stages the Court was extremely reluctant to intervene, it is now undertaking a less cautious strategy.

Such an innovative approach, while aiming at legitimizing less procedurally constrained interventions, has paradoxically found again its pivotal element in procedural rules. In fact, the aforementioned "recurring" features are likely to rise upward into reference standards, if steadily applied. These steps suggest a determined intention to re-build a new processual path. By accurately reporting its previous attempts to encourage law-making, along with the description of the negative impact of legislative unresponsiveness on the fundamental rights involved, the CC has established a substantially new decisional method. This innovative decisional approach has been defined by scholars with the evocative expressions "*rime possibili*" or "*rime adeguate*" (*appropriate* or *adequate verses*), both indicating the less limited configuration of the Court's reasoning if compared with the stricter "*rime obbligate*" standard. In the CC's strategy, legislative omissions evolve into the justifying basis for a more proactive judicial review technique[13].

In this scenario, the delicate balance between the principle of separation of powers and the aim of "making constitutional justice" would achieve a new level of functional equilibrium[14]. On the other hand, drawing upon previous warnings represents a crucial benchmark to legitimize the Court's interventionism while, at the same time, it can also be seen as the backbone of this new procedural pattern. Hence, the Court's decision-style appears to be anything but free of institutional limitations. Interestingly, the connection between the missed opportunity of the legislator and the less-constrained decision of the CC evinces a tendency to revaluate ordinary instruments without dismantling the graduality of the intervention. In this case, even the extension of the discretionary power of the Constitution's gatekeeper would not be unlimited, since it would be directly related to the legislator's unresponsiveness.

The inner logic of this *modus operandi* has become easily visible in the sophisticated "wait and see" approach adopted in the new cooperative type of decision named "foreseen unconstitutionality"[15] (*incostituzionalità prospettata*) judgement (orders nos. 207/2018; 132/2020; 97/2021)[16]. However, this method has been also discernible in some recent landmark decisions of

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[12] R. PINARDI, *La Corte, i giudici ed il legislatore*, Milano, 1993, 80 ff.; A. CERVATI, *Tipi di sentenze e tipi di motivazioni nel giudizio incidentale di costituzionalità delle leggi,* in AA. VV. (eds.), *Strumenti e tecniche di giudizio della Corte costituzionale,* Atti del Convegno svoltosi a Trieste, 26-28 maggio 1986, Milano, 1988, 127; A. PISANESCHI, *Le sentenze di costituzionalità provvisoria e di incostituzionalità non dichiarata: la transitorietà nel giudizio costituzionale*, in *Giur. cost.*, 1989, 631.

[13] S. LEONE, *La Corte costituzionale censura la pena accessoria fissa per il reato di bancarotta fraudolenta. Una decisione "a rime possibili"*, in *Quad. cost.*, 2019, 1, 184; D. MARTIRE, *Dalle "rime obbligate" alle soluzioni costituzionalmente "adeguate", benché non "obbligate"*, in *Giur. cost*., 2019, 2, 696.

[14] See G. SILVESTRI, *Del rendere giustizia costituzionale*, in *Questione giustizia*, 2020, 4.

[15] With this innovative kind of judgement, the CC decides to delay its declaration of unconstitutionality and to approve a suspensive decision. By delivering a procedural order, it grants a determined amount of time to the Parliament to discuss the issue and correct the legislative framework.

[16] M. BIGNAMI, *Il caso Cappato alla Corte costituzionale: un'ordinanza ad incostituzionalità differita*, in F.S. MARINI, C. CUPELLI (eds.), *Il caso Cappato. Riflessioni a margine dell'ordinanza della Corte costituzionale n. 207 del 2018*, Napoli, 2019; P. CARNEVALE, *Incappare in... Cappato. Considerazioni di tecnica decisoria sull'ordinanza n. 207 del 2018 della Corte costituzionale*, in *ConsultaOnline*, 2019, 2; E. GROSSO, *Il rinvio a data fissa nell'ordinanza n. 207/2018. Originale condotta processuale, nuova regola processuale o innovativa tecnica di giudizio?,* in *Quad. cost.*, 2019, 3; A. RUGGERI*, Replicato,*

unconstitutionality concerning penal matters, in which the argumentation of the sufficiency of the aforementioned "normative point of reference" (*punto di riferimento normativo*) was brought to light for the first time (judgements nos. 236/2016; 222/2018; 233/2018; 40/2019; 242/2019)[17].

In view of all this, the theory of the irreversible decline of the *rime obbligate* standard should be reconsidered. This procedural limitation still stands, while at the same time its inherent logic is translated into the less restrictive *rime possibili* method. Furthermore, there is a direct connection between the "importance" of the constitutional value at stake and the willingness of the Court to increasingly move away from its traditional procedural setting. This perspective would corroborate the idea that graduality is still essential to the Court.

3. *Harmonising procedural standards: the permanent dialogue between Courts and the proportionality test as a key method in global constitutionalism*

Constitutional reasoning is also positively affected by the long-established dialectic between Courts. Far from being mere institutional interaction, judicial dialogue has been progressively creating a horizontal connection, which has become a vital forum of cross-fertilization among the constitutional systems involved.

Thanks to this mutual influence, a shared "plural sensitivity" has been interiorized in the Court's decision-making[18]. Indeed, the adoption of a comparative perspective often plays a crucial role in the Court's judgements[19]. Such rhetorical strategy is now frequently used not only with the aim of homogenizing and enhancing the protection of fundamental rights, but also for the purpose of supporting the utilization of sophisticated judicial solutions implemented by the Court's European counterparts. In this context, this increasingly solid interconnection between jurisdictional models can be seen as an additional "reassuring" element that should be taken into consideration in order to mitigate the widespread concern over the Court's alleged activism.

The ongoing "osmosis" between constitutional experiences can further expand the consistency and the transparency in this transitioning judicial reasoning. Indeed, it constitutes a valuable source to absorb new procedural standards as well as to improve pre-existing standards which are still are in an embryonic stage in la Corte's judicial reasoning.

Behind such perspective lies the general theory that courts' reasoning represents a crucial instrument to ensure transparency in judicial review[20]. Actually, the aim of the constitutional reasoning is not to convince the audience with persuasive argumentations. Rather, it is to provide clear, serious and plausible motivations in order to rationally legitimize courts' decisions. According to this view, the reasoning of the Court's decision should not consist of a "justification theory", a

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seppur in modo più cauto e accorto, alla Consulta lo schema della doppia pronuncia inaugurato in Cappato (nota minima a margine di Corte cost. n. 132 del 2020), in *ConsultaOnline*, 2020, 3;

[17] See V. BARSOTTI, P. CARROZZA, M. CARTABIA, A. SIMONICINI, *Introduction. Dialogue as a method*, in V. BARSOTTI, P. CARROZZA, M. CARTABIA, A. SIMONICINI (eds.), *Dialogues on Italian Constitutional Justice: a comparative perspective*, Torino – London – New York, 2020, 5-6; see also F. VIGANÒ, *Un'importante pronuncia della Consulta sulla proporzionalità della pena*, in *Diritto penale contemporaneo*, 2017, 2, 66; A. GALLUCCIO, *La sentenza della Consulta su pene fisse e 'rime obbligate': costituzionalmente illegittime le pene accessorie dei delitti di bancarotta fraudolenta*, in *Diritto penale contemporaneo*, 2018, par. 6.2; R. BARTOLI, *La Corte costituzionale al bivio tra "rime obbligate" e discrezionalità? Prospettabile una terza via*, in *Diritto penale contemporaneo*, 2019, 2, 151.

[18] T. GROPPI, *Il ri-accentramento nell'epoca della ri-centralizzazione*, cit., 141.

[19] D. DE LUNGO, *Comparazione e legittimazione. Considerazioni sull'uso dell'argomento comparatistico nella giurisprudenza costituzionale recente, a partire dal caso Cappato*, in F.S. MARINI, C. CUPELLI (eds.), *Il caso Cappato,* cit., 97.

[20] F. FALORNI, *Giudice costituzionale e trasparenza: un binomio sempre più ricorrente*, in *Federalismi.it*, 2020, 30, 84 ff.

rhetorical argumentation or a mere demonstration of the collegium's will[21]. The judicial reasoning should aim to deliver «information on the substance of the decision and of the facts and reasons on which it was based», by ensuring the so-called «transparency in rationale»[22].

However - as authoritatively pointed out – transparency in constitutional reasoning can also have an "internal" effect[23]. More precisely, a rational and solid judicial itinerary can have an impact on the jurisdictional organ itself, since it could act as a binding precedent for future judgements[24]. In this light, the Court's discretion itself would be self-limited.

Starting from these assumptions, it should be emphasized that the proportionality test is an important standard which arises from the multilevel system. It consists of a key argumentative model that constitutional judges have at their disposal to make decisions through a systematic evaluation process. In this way, the delicate balance between fundamental rights is solidly based on well-defined logical steps arranged in progression[25]. Only by following this sequential procedure can the compression of a certain fundamental right be admissible. To highlight the rigorousness of the proportionality scheme, scholars use the definition "structured analysis"[26].The test was originally drawn up by the German constitutional Court but, thanks to the wide reputation of the BVG, it has been thereafter incorporated into the international juridical culture[27]. At present, it unequivocally constitutes a primary tool for the ECtHR and the CJEU[28].

Furthermore, the "constitutionalism of rights" aims to create universal constitutional justice rooted in the meaning of human dignity. However, this aspiration has always had to deal with the highly fragmented and conflictual essence of contemporary pluralistic states[29]. In this context of structural and ideological disputes involving the highest values of the legal system, the proportionality test, thanks to its inherently procedural essence, provides an approach that would soften their widespread impact. With a rational method, which pulls apart a certain issue by dividing it into different features, the judicial review would rely on a particularly well-suited solution in this diversified environment. Behind the 3 or 4 step analysis lies the assumption that dichotomic answers are inadequate when it comes to the balancing of constitutional rights. Especially with regard to the third stage of evaluation (the proportionality test in a narrow sense), the aim of the judicial analysis is not the establishment of a hierarchical scale of values[30].

3.1. *"De-structured" proportionality in the Italian Constitutional Court's judicial reasoning*

As a paramount element within Europe's common legal heritage, proportionality plays an important role in the Italian constitutional court's reasoning. However, despite its influence, it is still

[21] See M. TARUFFO, *La motivazione della sentenza civile*, Padova, 1975, 118-126.

[22] J. DE FINE LICHT, D. NAURIN, P. ESAIASSON, M. GILLJAM, *When Does Transparency Generate Legitimacy? Experimenting on a Context-Bound Relationship*, in *Governance: An International Journal of Policy, Administration, and Institution*, 2014, 27, 1, 113.

[23] R. ROMBOLI, *La mancanza o l'insufficienza della motivazione come criterio di selezione dei giudizi*, in A. RUGGERI (ed.), *La motivazione delle decisioni della Corte costituzionale*, Torino, 1994, 339 ff.

[24] F. FALORNI, *Giudice costituzionale e trasparenza*, cit., 96 ff.

[25] R. ALEXY, *Constitutional Rights, Balancing, and Rationality*, in *Ratio Juris*, 2003, 16, 2, 133-134.

[26] See A. BARAK, *Proportionality. Constitutional Rights and their Limitations*, Cambridge, 2012, 460-462; V.C. JACKSON, *Constitutional Law in an Age of Proportionality*, in *Yale Law J.*, 2015, 124, 8, 3098.

[27] See A. STONE SWEET, J. MATHEWS, *Proportionality Balancing and Global Constitutionalism*, in *Colum. J. Transnat'l. Law*, 2008, 47, 73.

[28] A.L. BANDOR, T. SELA, *How proportional is proportionality?* in *Int. J. Const. Law*, 2015, 13, 2, 530 ff.

[29] See R. NANIA, *Sui diritti fondamentali nella vicenda evolutiva del costituzionalismo*, in *Nomos. Le attualità nel diritto*, 2020, 1, 3.

[30] G. SCACCIA, *Proportionality and the Balancing of Rights in the Case-law of European Courts*, in *Federalism.it*, 2019, 4, 4.

implicitly mentioned and it is far from being in line with the level of sophistication typical of the European model. For that reason, with regard to the Italian judicial review, scholars claim the existence of a "de-structured" proportionality[31].

Firstly, one can observe uncertainty on terminological level. Rationality, proportionality and reasonableness are often fungible in *la Corte*'s judicial reasoning, along with the principles of adequacy, consistency, appropriateness and non-arbitrariness. In one case, the CC explicitly stated that proportionality is a direct expression of the more general principle of reasonableness[32]. Moreover, these two landmark criteria are often invoked as hendiadys, unlike other jurisdictional systems, in which the nature and the intensity of their meaning are significantly different[33].

In contrast, according to the Anglo-American juridical heritage, reasonableness represents a "minimal" judicial criterion, commonly applied when the provision under scrutiny appears blatantly absurd at first sight[34]. According to the well-known Wednesbury test[35], the reasonableness test consists of the mildest examination and it usually reflects judicial deference to legislative power. Moreover, since the reasonableness analysis is residual, it constitutes a freeform standard, which works on an intuitive level: judges do not need to rely on a logical itinerary when the irrationality of the statute is fairly incontrovertible[36].

Therefore, well-structured European proportionality, characterized by an increasingly pervasive control, is alien to the Italian judicial review[37]. Anyway, it can be argued that every single phase of the proportionality test is nevertheless widely employed by the Court on regular basis. In particular, focusing on the adequacy of the relation between means and goals is a recurring assessing model. Also, the fact that legislative interventions must be strictly necessary to safeguard the constitutional interests involved is often evaluated by the collegium. Above all, the balancing of rights, which shares the same core features with the proportionality test "in strict sense", has been likewise included in the Italian constitutional Court's toolkit.

It may be argued that there is no need to transpose naturally enforced standards into a more structured scheme, since the various steps have already been sedimented into constitutional reasoning. Meanwhile, it should be mentioned that, since the last decade, the Court itself has been demonstrating its intention to overcome the de-structured approach to proportionality. It is, not surprisingly, with decision no. 1/2014 - which also marks the starting point of the current phase of the Italian constitutional justice - that the various stages of the test have been spelled out with more precision by the CC[38]. Although it was timidly mentioned in other previous judgements, in this decision on electoral matters the three essential steps of proportionality - suitability, necessity and proportionality (in the narrow sense) – are fulfilled. But, on close examination, also legitimacy is

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[31] M. CARTABIA, *I principi di ragionevolezza e proporzionalità nella giurisprudenza costituzionale italiana. Intervento presentato a Incontro trilaterale tra la Corte costituzionale italiana, la Corte costituzionale spagnola e il Tribunale costituzionale portoghese*, Roma, Palazzo della Consulta, 2013, available at www.cortecostituzionale.it (accessed 22 May 2021), 4.

[32] See Judgement no. 220/1995.

[33] For example, as M. CARTABIA, *I principi di ragionevolezza e proporzionalità*, cit., 2 has pointed out, in judgement no. 2/1999 the Court states that the automatism in the disciplinary measure under examination was «irreasonable, since it does not comply with proportionality, which is the foundation of rationality that informs the principle of equality».

[34] M. CARTABIA, *I principi di ragionevolezza e proporzionalità*, cit., 3.

[35] See J. LAW, E. MARTIN, *A Dictionary of Law*, 7 ed., Oxford, 2014.

[36] See G. BOGNETTI, *Il principio di ragionevolezza e la giurisprudenza della Corte suprema americana* in *Il principio di ragionevolezza nella giurisprudenza della Corte costituzionale*, Atti del seminario svoltosi in Roma, Palazzo della Consulta, 13-14 ottobre 1992, Milano, 1994, 43 ff.

[37] F. FALORNI, *Verso una compiuta elaborazione del "test di proporzionalità"? La Corte Costituzionale italiana al passo con le altre esperienze di giustizia costituzionale*, in *DPCE online*, 2020, 4, 5308 ff.

[38] G. SCACCIA, *Proportionality and the Balancing of Rights*, cit., 5-6.

included, as the Court stated that the legislative provision aimed at encouraging the creation of a stable majority in Parliament.

Furthermore, proportionality has been invoked in decision no. 10/2015 as criterion of reference with regard to the modulation of temporal effects[39]. More specifically, the proportionality analysis *stricto sensu* has been employed to justify the decision to derogate from the ordinary retroactive effectiveness of its judgement, by ruling that it would only have just *pro futuro* effects[40]. In that decision, the CC stated that a sophisticated jurisdictional intervention must comply with the following requirements: 1) the urgent need to guarantee one or more constitutional principles, which would otherwise suffer irreparable damage; 2) the modification of the normal retroactive effect shall be limited to what is strictly necessary. In this light, it appears more evident that proportionality acts, above all, as a binding standard for *la Corte* itself.

As a matter of fact, the intention to move towards a more structured and complex application of proportionality has been demonstrated by the Court and thereafter implemented in the following decisions (sentt. 275/2015; 20/2019; 170/2019; 119/2020)[41]. Hence, this would indicate a partial success which deserves to be positively welcomed and is likely to be further fulfilled.

4. *Conclusions*

In recent times the Italian Constitutional Court's judicial reasoning has undergone significant changes. Crucial standards of the constitutional review have been thrown into question. A relevant process of "rewriting" the legal framework, inspired by the aim of increasing the guarantee function's effectiveness, is underway.

Although this process might represent *prima facie* evidence of the more general pathways leading to the degradation of the Constitutional State's grounds, this hypothesis should be rejected.

On one hand, the Court's activism appears to be firmly based on a jurisdictional *modus operandi*. Even this more proactive style of reasoning is developed through an inherently consistent procedural scheme, in which legislative unresponsiveness plays a key role. In the stage of the Court's self-empowerment, the judicial reasoning would aim to combine that "renewed sensitivity" of the Court with the purpose of maintaining procedural limitations. This original approach, even if characterized by less constrained interventions, still finds its paramount rules and the main source of its legitimization in the adherence to institutional limitations and in the principles of graduality and loyal cooperation.

On the other hand, in this ongoing process of de-constructing and re-building procedural standards, the transnational dialogue between Courts offers valuable inspiration and reassuring guarantees. The propulsive and homogenizing thrust coming from supranational and European models positively affects the fairness and the transparency of constitutional reasoning. In particular, the utilization of the proportionality test, which is the mainstay of the protection of constitutionally protected rights in global neo-constitutionalism, can play a significant role within this enriching endeavor. Since it consists of a set of rules determining the requirements for a limitation of fundamental rights, it constitutes an essential procedural standard that should be further implemented by the Italian Court.

Furthermore, both the "internal" and "external" perspectives examined appear to jointly find fertile ground in the current phase of Italian constitutional justice. This seems to be related to the

[39] See F. FALORNI, *Verso una compiuta elaborazione del "test di proporzionalità"?,* cit., 5317 ff.

[40] C. MAINARDIS, *Limiti agli effetti retroattivi delle sentenze costituzionali e principio di proporzionalità (un'osservazione a C. cost. n. 10/2015*), in *Forum di Quad. cost.,* 2015, 9, 4 ff.

[41] F. FALORNI, *Verso una compiuta elaborazione del "test di proporzionalità"?,* cit., 5320 ff.

renewed approach of the Constitution's gatekeeper to the indirect ("*incidenter*") proceeding's essence. Indeed, the impact of the protection of individual rights on the transformation of the Constitutional Court's functional limitations has been highlighted. But, upon deeper examination, the importance of this factor seems to be more articulated than it would appear. It cannot be reduced to the general need to increase the weight of the individual instances within the hybrid system of judicial review. More specifically, it assumes an "individualizing" meaning, as it seems to be oriented to the aim of preserving and enhancing the individual demands as they occur in the original judgement[42]. The enhancement of the concreteness of the judicial review would result in the idea that the restoration of the constitutional values cannot be *sine die* postponed.

In this context, whereby the judicial review of legislation is increasingly permeable to the powerful influence of factuality, the proportionality test can also flourish. Factuality, indeed, plays a pivotal role within the reasoning structure of proportionality. This method «offers rulings of prevalence, based on specific circumstances and therefore mutable and inherently precarious»[43]. Principles, rights and values become entwined with reality, in its changing circumstances and its conditioning factors and limitations.

[42] G. REPETTO, *Recenti orientamenti,* cit., 5 ff.
[43] G. SCACCIA, *Proportionality and the Balancing of Rights*, cit., 4.

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