

## Supranational Courts of Justice and *judicial activism*

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### 1. Prologue: Supranational Courts as neutralization and de-politicisation factors

Although if it refers to a completely different topic, a famous page from Carl Schmitt's *Begriff des Politischen* appears to match perfectly to the more than sixty-year long parabola of the fundamental rights protection in Europe. Allow me therefore to quote it *in extenso*: European humanity is constantly migrating from a field of conflict to neutral ground, and the neutral ground, as soon as it is conquered, is immediately transformed, once again, into a battlefield, and it becomes necessary to seek new neutral contexts. During the 20<sup>th</sup> century, Europe has adopted the most qualified institutional form of neutralization of political struggle and moderation of the majority principle through the jurisdictional control of the Constitution. The review of the constitutional legitimacy of the legislation, defines indeed the methods to limit the majority principle and it represents the underlying *ratio* of the provision of fundamental rights in constitutional texts, not directly undergoing the political guidelines, and then purely legislative texts, so belonging to a context protected by law technics and at least partially determined by case-law and not politically.<sup>1</sup> After the enactment and the following complete development of Charters and international documents devoted to human rights protection, higher reference centres of this political neutralisation started to establish, first in a feeble way and then, in recent years, more thoroughly not only in the Constitutional Courts, but also, and maybe mainly, in the supranational Courts of Rights: The European Court of Justice and the European Court of Human Rights (hereinafter ECHR). If national Constitutional Courts have been conceived as bodies of moderation and "harmonization" of the majority principle and to bring political reason back to practical reason, European and Supranational Courts have increased even higher the level of ambition regarding neutralisation. They are in fact focused on limiting national sovereignty in the name of a European public order of fundamental rights, to be considered prevailing on ordinary popular sovereignty. In other

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<sup>1</sup> In G. SCACCIA, *Fundamental law and Rights in art. 117 of the Constitution*, in *Quad. cost.*, n.3/2003, 540 and following, we think it possible to state that the balance between the political determination of fundamental rights and their judicial compliance, and notably "jurisdictional regulation" between the legislator and the Constitutional Court, "hinges on the obligation of the minimum content law protection, that limits the liberty of political appreciation and selection of interests since it puts an absolute limit to legislation balances. Moreover it defines the boundaries of the judges' evaluation sphere, that cannot remove the function of rights elaboration and development from the free determination of the political processes, if not in so far as when this is essential to preserve the fundamental core of the constitutionally protected liberties.

words we could say in brief that while national Courts protect liberties from a “totalitarian democracy”,<sup>2</sup> the supranational ones protect them from the same arbitrary use of the “*Raison d’Etat*”. So defined at first, the Courts of Justice and ECHR appear to anticipate the Kantian cosmopolitan utopia of the everlasting peace in the jurisdiction of liberties that spreads to an intercontinental geographic area and claims the power to define for all member States, the fundamental requirements of the *Rechtsstaatlichkeit* or as it is meant to be for the Strasbourg case-law, the basic conditions of a “*democratic society*”. Therefore, the *jurisdictiones*<sup>3</sup> of the Court of Justice and of the ECHR, do not give birth simply to a kind of constitutional case-law of higher level, different from the national one only because the act adopted as a measure of human rights violation, is implemented in an international and supranational context. On the contrary, there are various qualitative elements that make them different from the constitutional national case-law: different discussion styles, different tools of judgement and action; different relationships among political actors and all these elements lead to the European Courts a wider discretionary power of interpretation compared to that given to the National Courts. In other words: encouraging their *judicial activism*.

In the following pages, I will analyse some of the reasons underlying this structural tendency of the European Courts towards activism and I will explain the theory that considering the European environmental framework, it appears that there are no conditions and institutional incentives to reasonably reach a balance between the political-historical dimension and the judicial-interpretative one of the fundamental rights. However, before going through the discussion of these passages it is necessary to preface this by giving the definition of judicial activism supported by an acceptable scientific degree.

## **2. *Judicial activism*. A vague or completely hollow definition?**

Most of the times we talk about judicial activism in a negative sense, depicting it as a pathology compared to the “ordinary” and “physiological” deference by the Courts for the choices related to the political deliberative process. The judicial self-restraint represents the rule, that can be explained as the logical corollary of the principle of separation of powers and, at the same time, the need of stability ensured by the strong compliance to the previous ones. Activism is instead an exception and can be defined as a violation of

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<sup>2</sup> Quoting J.L. TALMON, *The origins of Totalitarian Democracy*, Praeger, 1965.

<sup>3</sup> In the meaning of *iurisdictio*, referring to C. MCILWAIN, *Constitutionalism Ancient and Modern*, Ithaca, NY: Cornell University Press, 1947.

the rule, a deviation from it<sup>4</sup>. It has a negative connotation, because it relates to the judicial protagonism, the interference of judges with the choices of political decision makers, or anyway to the deterioration of the relationship between the textual interpretation, and therefore a case-law creativity perceived as a danger for the legal certainty. In conclusion, it is not surprising that *activism* is mainly identified as the antithesis against the *judicial self-restraint*. Exemplary is Richard Posner's position, that defines activism as the rejection of *constitutional restraint*, in other words that kind of self-restraint that judges should be "*highly reluctant to declare legislative or executive action unconstitutional*"<sup>5</sup>. The reluctance to invalidate the legislative or executive action, defining the concept further, can be expressed in terms of deference by the Courts, or of judicial modesty, as so defined by the scientific debate in English language.

In its general definition, deference has been properly described as a situation "*where a decision-making body, which we will refer to as 'A', decides a case, 'C', not on the basis of its own independent assessment, but by treating the decision of some other decision-making body, 'B', in respect of C as, in some degree, authoritative for its own (i.e. A's) decision*"<sup>6</sup>.

When it refers to the activity of the Supreme and Constitutional Courts in particular, that for their high position tend not to consider binding, or influencing for their own "*independent assessment*", any act issued by different procedural decisions, deference can be defined more precisely as "*the degree of 'leeway' that a Court will afford to*

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<sup>4</sup> There are many ingenious attempts to classify activism, giving it an independent definition, which is not obtained by mere antiphrasis compared to judicial modesty. One of the most remarkable is B. C. CANON, *A Framework for the Analysis of Judicial Activism*, in S.C. HALPERN – C.M. LAMB (EDS), *Supreme Court Activism and Restraint*, Lexington Books, MA, 1982, 385 seq., according to which it is possible to appreciate the least activist character of an intervention on the basis of a recognition grid. The dimension of activism in particular would be six: majoritarianism; interpretive stability; interpretive fidelity; substance-democratic process distinction; specificity of policy; availability of an alternate policymaker.

On judicial activism in general and on the possibilities to define it: S. A. LINDQUIST – F.B. CROSS, *Measuring judicial activism*, Oxford University Press, 2009. A story of the term, by A. SCHLESINGER Jr, who used it in 1947 in the magazine *Fortune*, in C. GREEN, *An Intellectual History of Judicial Activism*, 58 Emory L.J.1195, 2009, 1200 seq. ; VV. AA, *One hundred years of Judicial Review: The Thayer Centennial Symposium*, Northwestern University Law Review 88, vol.1, 1993; M. LEWANS, *Pragmatism and Judicial Restraint*, in *Athens Journal of Law*, vol.1, 2015, 9 seq. Sceptic about the possibility of giving a scientific plausible definition of judicial activism is F.H. EASTERBROOK, *Do Liberals and Conservatives Differ in Judicial Activism?*, in *Journal Articles*, University of Chicago Law School, 2002, 1401, according to him: "*The term 'activism' is empty, a mask for a substantive position. [...] Everyone wants to appropriate and apply the word so that his favoured approach is sound and its opposite 'activist'*".

<sup>5</sup> R. A. POSNER, *The Rise and Fall of Judicial Self-Restraint*, in *Cal. Law Review*, 533, 54.

<sup>6</sup> Così B.FOLEY, *Deference and the Presumption of Constitutionality*, Inst. of Public Admin., Dublin, 2008, 4; Cfr. A. L.YOUNG, *Deference, Dialogue and the search for Legitimacy*, Oxford Journal of Legal Studies, 4/2010, 817.

*Government's choice of policy when constitutional rights and interests are at stake*"<sup>7</sup>. In this case, deference appears to be against the representative-political decisions relying on two possible supporting grounds. Deference can be identified on the basis of a prognostic assessment of the outcomes ("*on grounds of outcome*"), when the judicial body recognizes the legislator the ability to define a moral "fairer "outcome, that is to better balance the different interests at stake, especially when there is a sharp conflict on theoretical and ideal background of the judicial decision; or "*on grounds of process*", when it derives from the assumption that the stronger legitimacy of the democratic deliberative process requires the greatest possible use of political decision in case it deals with the definition of constitutionally protected rights of controversial application<sup>8</sup>.

Considering what we have up to now analysed, it is clear that deference, and by extension *judicial activism*, are strongly influenced by the different intensity granted to the legislator's prerogative. This prerogative reaches its highest scope within the theories of those who claim that the legislative choice should be protected from unconstitutionality, unless illegitimacy proves to be evident beyond a reasonable doubt or it can be determined by any reasonable person; instead, it is limited in its lowest scope when we accept that the

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<sup>7</sup> In V. A. MACDONNELL, *The constitution as framework for governance*, in *Un. Toronto Law Review*, 2013, 643. R. ALEXU, *A Theory of Constitutional Rights*, Oxford University Press, 2010, 395-397, refers to three different kinds of discretion and –symmetrically– of deference: discretion in the definition of goals, tool and balance. A scheme that can be traced in the German *Bundesverfassungsgericht* case-law that inspired in turn the position of other Courts in Europe and elsewhere (for example the Supreme Court of Canada). Well, the *BVerfG*, that explains its thoughts in the first and second decision on pregnancy termination, takes inspiration from a "conciliatory" and deferent attitude not only towards the goal choice and definition of appropriate tools to the pursuit of goals, but it curbs further the balance, without venturing into the choice of the best way to balance the opposite active interests on the matter, but limited to denounce and clearly punish unreasonable balances, that completely cut one of the terms of dialectical relationship. A similar attitude can be traced in the Italian constitutional case-law, where there is a clear legal address by which the balancing is up to the legislator and the Courts can punish it, only when the prevalence ratio fixed in the censored discipline, is such to violate the minimum protection content of one of the terms of the relationship. The principle in the Const. Court judgement n. 85/2013 is particularly fitting: "*The balance, in that is dynamic and not previously fixed, has to be evaluated - by the legislator ruling the law, and the Const. Court during the review – according to proportionality and reasonableness criteria, not endanger the essential core.*" Elements of deference are "balance delegation", this term refers to judgements – typically principle-additive judgements- by which, having in the abstract fixed the criteria to solve disputes between constitutional conflicting interests, the Constitutional Court entrusts ordinary judges, or more rarely, the administration itself to define, in practice, this balance case by case (on the subject R. BIN, *Giudizio «in astratto» e delega di bilanciamento «in concreto»*, in *Giur.cost.*, 1992, pp. 3574 seq.; and G. SCACCIA, *Il bilanciamento degli interessi come tecnica di controllo costituzionale*, in *Giur.cost.*, 1998, 3969-3972).

<sup>8</sup> Cfr. A. L. YOUNG, *Deference, Dialogue and the Search for Legitimacy*, *Oxford Journal of Legal Studies*, Vol. 30, No. 4, 2010, 834, where: "*When deferring on grounds of outcome, courts defer because they conclude that the legislature is more able to reach the right conclusion as to whether legislation is compatible with human rights than the courts. When deferring on grounds of process, courts defer as they believe that the legislature uses a more legitimate process to determine the compatibility of legislation with human rights when it is difficult or impossible to determine the right outcome*".

legislative choice can be annulled not only because the unconstitutionality is evident or determined *ictu oculi* through a superficial examination, but rather at any time when the law, and also regardless the specific conflict with a constitutional precept, is anyway devoid of inner consistency on a systemic level and therefore lacking consistency and proportionality for the pursued purposes.

The position according to which a law should be invalidated only when no reasonable person would be available to acknowledge its constitutional legitimacy – that has its oldest heritage in the Thayerian doctrine of *reasonableness*<sup>9</sup> – could explain the adoption of written or tacit rules of super-qualified majority for the decisions of the Constitutional Courts.

In fact, if we can declare illegitimate only the laws vitiated by common and general acknowledgement, only those laws so evaluated by a super-qualified majority of constitutional judges can be considered void, by matter of consistency.

In this way the forecast of a 2/3 or even unanimous majority would make the invalidation of the laws more difficult and consequently higher the respect of the legislative will.

However, there is a subtler kind of deference, that does not takes into account the threshold beyond which censorship or unconstitutionality assessment, but rather the nature and the intensity of the judgement tests, highlighting – in turn – the discretion of the democratic legislator in the different areas of intervention of public policy. Therefore, deference changes in intensity according to the limits given to the political decision by the constitutional reference framework.

With reference to the Italian Constitution, for example, discretion is maximum in terms of contents on criminal matters, because it is Parliament's duty to identify punishable conducts and the choice and the assessment of the relevant applicable penalties<sup>10</sup>; but it is minimum in relation to forms, because of the binding nature of the strict rule of law stated in the art.25, second paragraph, Cost<sup>11</sup>, and with regard to *suspect classifications*, that are those related to the "seven parameters" explicitly mentioned by the first paragraph of the art.3 Cost. (sex, race, language, religion, political opinion, personal and social conditions)

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<sup>9</sup> J. B. THAYER, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 Harv. Law Review 129, 144, 1893, forerunner in self-restraint doctrines.

<sup>10</sup> Recently Const. Court, judgs. nn. 33/2018; 127 and 215/2017; 5/2014.

<sup>11</sup> A cogency on which the Constitutional Court has greatly insisted – defining a limit against the primacy to the European Union law - for the case "Taricco", originated by a conflict of interpretation originated by the judgment of the EU Court of Justice on September 8th, 2015, in the lawsuit C-105/14. This fact, after the request for the interpretative preliminary ruling by the Constitutional Court (decision n. 24 of 2017), has led to the change of indications by the EU Luxembourg judges (EU Court of Justice judg. of December 5th 2017, lawsuit C-42/17), which was acknowledged by the Constitutional Court by decision n. 115 of 2018.

in terms of bans directly expressed by the Constitutional Charter, it is “essential a deep scrutiny of the cases suspected of violating or derogating from the absolute irrelevance of the “ qualities” listed by the constitutional provision for legislation differentiation purposes”<sup>12</sup>.

In these cases, and also in case of retroactive limitation of the fundamental rights, discretion is more limited and actually acts on the legislator’s negative prejudice, that requires an even greater burden of *ratio legis*<sup>13</sup> justification. In order to justify a limitation of rights that are placed at the top of the legislation for their inherence with the human dignity, it is necessary to demonstrate a “clear relationship of strict instrumentality and proportionality compared to other constitutionally relevant interests”<sup>14</sup>.

The depth and toughness of the constitutional review may vary also according to the kind of violation to the involved constitutional rights. In case of stopping the violation of protected subjective positions against an invasive behaviour, and therefore the person’s rights “of defence” against the public power acts are involved (*Abwehrrechte*)<sup>15</sup>, the review has to be strict and rigorous; on the contrary, it cannot be but soft, less uncompromising, if there are protection obligations for the Public Authorities to set up instrumental-organisational bodies or the delivery of services. While the end of an illicit behaviour or the cancellation of the violation do not entail a high-end political feature, setting up the activation of a limit that makes the liberty sphere expand again, illegitimately limited by the Government power, on the contrary the application and protection of *affirmative rights* by the legislator inevitably lead to different ways of implementation and therefore of discretionary choice, among which it is not up to the Court to decide.

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<sup>12</sup> The “mere” review of constitutionality “imposes a degree of general reason usually higher than the one which rely on the lack of arbitrariness” (Const. Court judg. n. 173/2016).

<sup>13</sup> Among the many judgements on the subject see for example Const. Court judg. n.80/2010, ruling that the legislator’s discretionary power to determine the measures to protect disabled people’s rights, “*is not absolute*” “and undergoes to an absolute limit in the “*respect of indefectible core guarantees for the involved people*” (i.e., Const. Court judg. n. 251/2008 and n. 226/2000).

<sup>14</sup> Const. Court judg. n.67/2017 where the Court, confirmed- along the judgement n.42/2017 – “*the importance of the language as ‘individual and collective identity element’, vehicle of culture dissemination and expression of the relational dimension of human personality*”, has declared the constitutional illegitimacy of a Regional law, that while regulating the Municipality site preparation for areas and properties devoted to the construction of public facilities for religious services, established that the applicant would sign an agreement with the Municipality fixing “*the commitment to use the Italian language for all the activities carried out in the common public facilities for religious services, not being strictly related to religious rituals*”. This kind of discipline - the Court ruled - “*is intended to fix large limitations to fundamental individual rights of constitutional rank, in the absence of a clear relationship of strict instrumentality and proportionality compared to other constitutional relevant interests, included in the scope of regional competences*”.

<sup>15</sup> Traditional theories that considered freedoms as mere judicial positions of defence against the Government power (*Abwehrrechte*) have soon been accompanied by the *Grundrechte* theories as reference rules to be read following a spiritual-scientific method, within the Constitution of Rights understood as material classification of values. Let me address you to G.SACCIA *Il controllo di proporzionalità della legge in Germania*, in *Annuario di diritto tedesco*, 2002, 418 seq.

In brief, and using the German *Bundesverfassungsgericht* words, deference is low concerning the punishment of an excess of the Government power (*Übermaßverbot*), whereas it cannot be but too high and give birth to an *ultra-deferential review* when the Court is faced with the perspective of imposing a positive constraint of action on the legislator in order to remove a total failure and thus grant the minimum level of rights protection (*Untermaßverbot*)<sup>16</sup>.

Finally, we have also to consider that *deferential review* may change over time. Let's use the example of the constitutional review about the suitability of a given legislative measure to achieve the aim it was foreseen, that is, in principle, characterized by a higher respect for the legislative pre-assessments. This initial degree of deference fades as time goes by, if and when the tool chosen by the legislator proves to be inadequate for the foreseen purpose, with regard to proportionality review. The Courts approach can equally vary overtime, towards transitional regulations conceived to help the passage to a regulatory regime different from the previous one. In this case temporary deviations from constitutional orthodoxy (if necessary to other public interest compliance) are generally tolerated, just on the grounds of their provisional nature, but stop being tolerated should this status become permanent, so being standard practice<sup>17</sup>.

## 2.1 Judicial activism and political process.

Regardless the different definitions of *judicial self-restraint*, the concern to protect the scope of activity of the democratic legislator is shared by all the anti-activism positions, and more generally by those spheres where public decisions are developed - that could be

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<sup>16</sup> The German *Bundesverfassungsgericht* discusses about the *Untermaßverbot* in the judgement on the voluntary termination of pregnancy of May 28, 1993 (*BVerfGE* 88, 203, 254); this important judgement has determined that the protection level to be granted to a right is a legislator duty, who therefore cannot provide "ineffective guarantee of human rights, nor can he provide inadequate, undersized measures (*Untermaß*) compared to the public purposes to be achieved". And so on: "taking into account the conflicting juridical assets (...) the actions taken by the legislator have to be sufficient for an adequate and effective protection and moreover be based on accurate studies of the facts and very thought out assessment".

<sup>17</sup>The sacrifice of legislative positions defining fundamental rights, can be easily justified when it has a temporary nature, provided that is overall reasonable and proportionate. The principle is clearly stated with reference to the limitation of "acquired" or "vested" rights (like pensions) through different models of "solidarity contributions". In order to positively pass the "strict" constitutionality review, this kind of contribution, has to be "temporary, extraordinary and time limited", *una tantum*, "in the sense that it cannot be recurring and cannot become a mechanism of fuelling to the social security system" (Const. Court, judg. n. 173 of 2016, along the judgs. n. 70 of 2015, n. 116 of 2013). Even outside the context of the fundamental rights, and in particular concerning the relationship between the central State and Local Authorities, transitional constraints of the Regional expenses in general are not considered harmful to the Regional financial autonomy provided that they keep the regional autonomy concerning the fulfilment of the planned target. (Const. Court, judg. n. 36 of 2004; judg. n. 77 of 2015).

under protection, discharged of their responsibility and “lowered”<sup>18</sup> by some Courts being elected interpreter of public morality.

This constitutional aim inspires two lines of analysis and research.

The first relates activism to the judicial position in regard to the form of Government and the separation of powers principle. To the same extent, it can be considered activist, the Court that pushes the systematic limits imposed on judicial power and affects the spheres of the political choice given to the democratic legislator.

The second considers hermeneutics activity marked by high creativity as *judicial activism*. To the same extent, it is considered activist those who do not adopt strict interpretation criteria of the legislative texts, in the specific sense that:

a) do not limit itself to the reconstruction of legislative meaning only when this is fundamental for case solving, but it spreads over a more general reconstruction of those profiles not necessary for discussion purposes (therefore abounding of *obiter* and using Treaty- judgements).

b) defines the law contents in a more innovative and original way compared to the prevailing interpretation readings;

c) it is not placed in the legislator’s perspective (enhancing the preparatory works and the historical *voluntas* investigation) to dispel interpretation doubts resulting from the text and then does not consider how the legislator would have dispelled them, if they had been proposed to him.

The first theoretical orientation recognises the unavoidable political nature of the Constitutional Courts and measures their limits of action in the relationship with other political actors, that compete with them to gain increasing quotas of influence. It places the debate on justice and constitutional process within the framework of Government form and the resulting constraints, according to a line of thinking that has one of the highest form of expression in the Alexander Bickel’s monograph *The Least dangerous Branch*, that in Italy influences the whole theoretical debate of the great jurist and Master that today we recall<sup>19</sup>. In this perspective, *judicial self-restraint* becomes a tool of institutional-political strategy: the necessary approach to avoid the Court conflicts with Government and

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<sup>18</sup> See R.A.POSNER, *The rise and Fall*, op. cit., 535, a comment on position of JAMES B. THAYER, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144, 1893, forerunner of self-restraint doctrines.

<sup>19</sup> C. MEZZANOTTE, *Corte costituzionale e legittimazione politica*, Printer La Veneziana, Roma, 1984, now in the reprinted version edited by F. MODUGNO, *Corte costituzionale e legittimazione politica*, Editoriale Scientifica, Naples, 2014.



Parliament, triggering its “punishing” reaction. The *restrainers* point of view is that of regular and gradual changes, that - within the longer times typical of constitutional justice- have better performances in the conflicting- activist logic because they allow the political process to acknowledge the changes imposed by the Courts without iconoclast and palingenetic tones, but with slow and continuous progress.

The second side of the *judicial activism* investigation takes its place at the theories level of the judicial interpretation aiming at reducing the gap of discretionary choice, and in this way the “political nature” of the decisions, here considered as creativity synonym. These theoretical proposals do not dwell on the Courts’ role as political actors, but they rather try to limit the political nature by a Decalogue of hermeneutic rules, that granting faithfulness to the text, would be in line with the judicial self-restraint.

In the first case the rejection of activism comes from a political balance between intervention opportunities and role obligations carried out by the Courts case by case, accurately measuring the scope of the judgement following the investigation of the limitations deriving from the form of Government<sup>20</sup>. In the second case, an attempt to cut the link of the judicial activism with its source is carried out, by identifying the causes in the interpretation creativity and therefore promoting rules of strict texts hermeneutics<sup>21</sup>.

For the first solution supporters, the constitutional judge preserves legitimacy and position balance in the power system, by virtue of its political caution; for the others, the judge finds role legitimacy in the loyal compliance to interpretation criteria oriented towards a moderate positivism<sup>22</sup>.

The first position prefers the implementation of trial procedures and flexible decision techniques, not as strict as the balance and controls of reasonableness and proportionality; it emphasises “the passive virtues” that allow case selection, deny the

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<sup>20</sup> A preliminary “*conflict topography*” (as defined by R.BIN, *Diritti e argomenti. Il bilanciamento degli interessi nella giurisprudenza costituzionale*, Giuffrè, Milano, 1992, 62 seq.) is carried out in this phase, acting as a premise to the implementation of substantive and even procedural rules (as taught by C. MEZZANOTTE, *Il contenimento della retroattività degli effetti delle sentenze come questione di diritto costituzionale sostanziale*, in Vv.Aa., *Effetti temporali delle sentenze della Corte costituzionale anche con riferimento alle esperienze straniere*, Giuffrè, Milano, 1989, 361 seq., as well as *Processo costituzionale e forma di governo*, in Vv.AA., *Giudizio “a quo” a promovimento del processo costituzionale*, Giuffrè, Milano, 1990, 63 seq. who thought that the Court ended up by submitting to an implicit balance all the rules, even procedural ones, to ensure the most reasonable connection of the constitutional judgement with the balance of the Government form).

<sup>21</sup> Well stated by J. CLIFFORD WALLACE, *The Jurisprudence of Judicial Restraint: A Return to the Moorings*, 50 GEO. WASH. L. REV. 1 (1981), 10 seq.

<sup>22</sup> About moderate positivism is A. PACE, *Metodi interpretativi e costituzionalismo*, in *Quaderni costituzionali*, 1/2001, 60; a commenting the thesis v. M. DOGLIANI, *Il doppio “temperamento” del giuspositivismo nell’opera di Alessandro Pace*, in *Diritto pubblico*, 2/2012, 723-732.

jurisdiction, e more generally, reduce the interference potentiality of the judicial decision on legislative discretion spaces<sup>23</sup>.

The second seeks remedy to the temptations of political nature in the implementation rigidity and judgement stability tests and finds grounds in the Constitution doctrines that enhance the historical will of the Constituents, as textualism and originalism. But none of the two options above described proves to be satisfactory.

On the one hand, it appears that there are no general theories of the Constitution suitable to guide with certainty the judge in solving all the constitutional disputes (overwhelming majority) that need a kind of creative contribution from the interpreter because they imply important choices affected by cultural moods and ethical and moral preunderstanding<sup>24</sup>. As taught by Nicolai Hartmann, the activity of “weighing” the values “*is neither a ‘knowledge’ in the proper sense, nor an objective grasping where the grasped object remains far-away from the grasper. It is more like to be grasped. The approach is not contemplative, it is emotional, and what comes from the contact has an emotional explanation. It is to take a stand on something through an emotional move*”.

In this respect, the general doctrines “Constitution of values” are all unsatisfactory, with their assumption to reduce to a mathematics synthesis a judgement activity that cannot be structured according to Euclidean schemes, but that on the contrary, is carried out in pluralistic western societies, having the premise of a reasonable disagreement also on substantial high values that we would like to consider unanimously accepted<sup>25</sup>.

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<sup>23</sup> We refer to case selection techniques such as ripeness or to the doctrine of political questions; see the latest comprehensive and detailed monograph C. DRIGO, *Giustizia costituzionale e political question doctrine. Paradigma statunitense e spunti comparastici*, Bonomo, Bologna, 2012; or, referring to the Italian constitutional judgements, think about the flexible use of the relevance requirement (examples in judg. nn. 10 and 119/2015), or to the hypothesis of inadmissibility stated “*in the absence of a single constitutionally obliged remedy, to a detected fault*” and therefore avoiding, with the choice among many possible solutions, the invasion of political discretionary sphere of legislator’s jurisdiction (*ex multis*: Const. Court judg. n. 223/2015; Const. Court judg. n. 81/2014 ), aiming at adding principles. It deals with judgements by which the constitutional illegitimacy is stated, on the failed setting up of a mechanism suitable to enforce those rights, leaving instead to the legislator the power to detect this mechanism in abstract thus enabling the judge to find the rule for the concrete case in the principle expressed by the Court (the definition belongs to the President of the Constitutional Court Renato Granata, that stated this concept in introducing to the press his report on the Constitutional judgements of 1999). This is a recent example of a judgement adding a principle in Cont. Court judg. n. 105/2018.

<sup>24</sup> N. HARTMANN, *Introduzione all’ontologia critica*, italian translation from R. CANTONI, Napoli, 1972, 149, that collects all the works appeared in the *Neue Wege der Ontologie*, Stuttgart, 1943.

<sup>25</sup> About *reasonable disagreement* are R.H. FALLON, JR., *Implementing the Constitution*, in *111 Harvard Law Review*, 1997, 56 seq. and J. WALDRON, *The Core of the Case Against Judicial Review*, *115 Yale Law Journal*, 1346, 2006, 1364 seq.

On the other hand, the equation that identifies activism with interpretation creativity is misleading if we do not clarify the aim for which “aggressive” hermeneutic strategies are applied<sup>26</sup>.

Even remarkably innovative behaviours on the interpretation level, along the above-mentioned lines, could be also functional to the extension of the political choice area, and thus helping to make the constitutional review over the law more deferent.

Let us think -limiting to the Italian case- to the Constitutional Court judgment n.10/2015, by which the Court self-assigned the power to define, and where appropriate to paralyze completely, the natural retroactivity of the judgement of unconstitutionality<sup>27</sup>. In so far as this judgment has transferred to the Court a power void of constitutional basis, and on the contrary, it appears to be in contrast with the interpretation generally established by the combined articles 136 Const., 1 of the Constitutional law n. 1/1948 and 30, law n. 87/1953, it could be considered with good reason hyper-activist, if activism is compared to the creativity level of the interpretation provided. Or, when real effects are taken into account, the same judgment appears to be compliant with a strategy of *modesty*. In fact, stretching the interpretation, the Court places itself in the position to rule in a flexible way according to the cases, the typical effect of an invalid judgment justifying the non-retroactivity principle with the need not to undermine the public finance balance.

The faculty that the Court self-assigns to limit the retroactive effects of a law invalidation when imperative public interests so require, widens in the end, the legislative discretion sphere in the financial sector, tipping the balance between budgetary needs and individual rights in favour of the Government. And if it appears to match with the boldest activism, it overall reveals to be a choice inspired by the deference to the legislator.

On the other hand, we consider the interpretation compliant with the Constitution, that is the rule according to which the law is not declared unconstitutional when it is possible to give an unconstitutional interpretation, but only when a reading consistent with the Charter’s rules is impossible.<sup>28</sup>

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<sup>26</sup> According to the analysis carried out so far, revealing elements of activism could be found: in the implementation of deep and strict review, in a wide legislative discretion sphere, traditionally considered “*deferential*”; in the reduced trend to use selective filters to constitutional review, creating or interpreting new procedural eligibility requirements of the cases; in a number of over rulings, that is the frequency the Court overturns its previous judgements. A Court will be then as much activist as it expands its control over spheres dominated by discretion; It gives way to the judgment through the extended interpretation of the procedural eligibility requirements; it comes back to its previous judgements overcoming them. The roughest activism element is the quantitative one, that counts the number of declarations of unconstitutionality.

<sup>27</sup> Const. Court, judg. n. 10/2015.

<sup>28</sup> Starting from the judgement n. 356 of 1996, last, ord. 58 of 2017.

This interpretation method, that on the one hand increases the legislator's privilege, as it reduces the number of unconstitutionality declarations solving the conflicts with the Constitution hermeneutically, on the other hand reducing the range of constitutionally possible interpretations, thus indirectly reducing the area of political decisions that are legitimately taken<sup>29</sup>.

The same remedy to sharp declarations of constitutional illegitimacy, that could appear to be an easier and objectively measurable rate of activism, loses this characteristic if the unconstitutionality declaration is founded on the past interpretations, that is unanimously considered as an expression of *judicial modesty*<sup>30</sup>.

The simplifications we dwelled on, show that the really crucial element to place the Courts on the deference-activism level compared to political actors (and therefore in the Government form structure) is not the type or discussion form of the decision, but the policy of right where that *dictum* is instrumental.

At this point, we could define activist, the Courts that aim to expand the judicial role compared to the legislative-political one, in implementing and developing the constitutional principles and particularly the judicial compliance of the fundamental rights; furthermore, the Courts that emphasise "*positive*" political obligations of the Constitution, redrafting it not only as an external limit to granting power rules, but as a "*framework for governance*", that imposes strict performance and protection obligations on the legislator, together with obligations to abstain or terminate violations<sup>31</sup>.

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<sup>29</sup> The ambiguity of the texts of constitutional policy of the interpretation of conformity is highlighted by F.H. EASTERBROOK, *Do Liberals and Conservatives Differ*, in *Judicial Activism?*, 73 *Colorado Law Review*, 2002, 1405 seq.; e R. A. POSNER, *The Rise and Fall of Judicial Self-Restraint*, in 100 *California Law Review*, 2012, 519. Both seem to identify them among the instruments of activism rather than deference.

<sup>30</sup> F.H. EASTERBROOK, *op. cit.*, 1401 seq. Qualified as activist a) declaration of unconstitutionality; b) the use of interpretation of compliance so as to solve a doubt of constitutionality pending on the rule; c) the creative interpretation of the text, functional to the overcome of the link to literal drafting ; and applying these reference index to the judgements of the Supreme Court of the United States, concludes that all the judges of the Supreme Court, with no exceptions, prove to be activists, without any significant difference between Conservatives and Liberals. Taking the research data, it is easy at this stage, for the Author, to conclude that the term activism is "value-free", can host ambiguous and contradictory meanings and, in the final analysis is "empty, a mask for a substantive position", because referring to those who use it for any judicial action deemed in contrast with the political and planning guidelines, regardless if conservative or progressive, if inspired to the strict compliance to the texts or the most stressed hermeneutical constructivism behaviour. Then, the provocative proposal to cancel definitely this term. (1410). It seems to the writer that the sharp solution envisaged by Easterbrook has a basic limit: the indexes of activism that the Author choose as a base for his survey are not indeed certain and objective as the Author claims, but, following the political aim inspiring them, may prove to be evidences of deference, instead of activism, as the exemplifications in the text can easily demonstrate.

<sup>31</sup> On this second form of activism, we can quote V.A. MACDONNEL, *op. cit.*, who warns about a very difficult realization, because of the objective difficult of the Courts to have reference information necessary to assess the different actions potentially able to integrate the level of the "affirmative obligations" of the legislator. In these cases the Courts will and shall limit to say which are the interest that have been ignored and must be taken into account in the framework that the legislator intends to carry out.

In the end, and simplifying as much as possible, the true crucial element to measure activism is the relationship with political guidance, the ability of the judicial decision to exercise an active interference or a prohibitive ban compared to the choices of the parliamentary-political representatives<sup>32</sup>.

The assessment carried out so far, to the defined purposes of these pages, discourage from insisting further on the different forms of activism in the effort to find an objective and indisputable definition but they rather lead to investigate the underlying causes.

In fact, it appears correct starting from a disenchanted premise that all the Courts tend to prefer interpretations which lead to strengthen their institutional position and role, and because of that they tend to be activist, both in the law application that rules their institutional and procedural functions, and the expansion and strength of the substantive control entrusted to them<sup>33</sup>.

There is no historical evidence of voluntary detachment of the Courts from the stratified process of public decision making and in any case this would be unrealistic; it is vain to expect them to self-impose *self-restraint* doctrines without any institutional-political incentive to act in this way.

That is why, in these pages, we consider fundamental the detection of political and regulation constraints that defines the framework in which the function of protection entrusted to national Constitutional Courts and European Courts is placed<sup>34</sup>.

It is no difficult indeed, to acknowledge the fact that, following this research method, the supranational Courts act in a political institutional framework, that is structurally void of strong disincentives to *judicial activism*.

### 3 The basic reasons of judicial activism in the supranational Courts

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<sup>32</sup> In simple and transparent words of D. FORTE, *The Supreme Court: Judicial Activism versus Judicial Restraint*, Lexington, Mass., 1972, 17: “the Court is activist when its decision conflict with those of other political policy-makers”.

<sup>33</sup> A review – clearly *per incidens* – that in the recent Constitutional experience proves to cover some areas traditionally belonging totally to policy decision-makers, i.e. electoral rules (starting by the judgement n. 1/2014, followed by the judgement. n. 35/ 2017) and, in the very recent statements on exclusive cognisance (Const. Court judg. nn. 213 and 262 / 2017), the same regulatory power of the High Constitutional Bodies: Parliament, President of the Italian Republic, Constitutional Court.

<sup>34</sup> The reasons why the Constitutional Court may be considered as political actor in a strict sense, acting in competition with other decision-making bodies are illustrated in an excellent way by R. A. DAHL, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, in *Journal of Public Law*, 1957, 277 seq. For a recent and accurate consideration on the thought of Dahl, O. CHESSA, *I giudici del diritto. Problemi teorici della giustizia costituzionale*, Franco Angeli, Milano, 2014, 25 seq.

The underlying reasons of the natural attitude of supranational Courts towards judicial activism lay on: a. the availability of procedural instruments that are more flexible but nevertheless incisive if compared to those of the national Courts; b. the structure of the parameter rules; c. the weakness of the dialogue with the institutional and political actors and the following absence of the systemic limits featuring the relationship.

a. The use of judicial activism is promoted mainly by the abundance of procedural instruments available to the Courts of Luxembourg and Strasbourg.

Their jurisdiction extends on acts which are diverted in a broad sense to the competence of national Constitutional Courts. It deals with all the acts, under any form or juridical effectiveness entailing violations of all fundamental rights, not only those which are to a certain degree acts of force of law (In Italy, according to the art. 134 of Constitution, laws and other law-enforceable acts). Moreover, the ECHR, as well as the European Court of Justice, have the power to sanction the complete omission actions of national Authorities, violations of rights deriving from an ineffective performance of the Government function; then actions that often cannot fall under the Constitutional Court scope, but, in the national juridical framework, fall under the political responsibility.

We can just think, on the one hand, to the so-called *pilot judgments*, introduced in the case-law of the ECHR, starting from the case *Broniowski*<sup>35</sup>; and on the other hand, as regards the Court of Luxembourg, to the appeal for infringement (articles 258 and following articles of TFEU). These type of judgements, ruling structural or systemic violations or complete noncompliance to European binding rules, impose to sovereign States obligations for fulfilment, both as regards actions to be taken and existing law amendments.

Just to mention some examples, we can refer to the judgements of ECHR in the cases *Torreggiani vs Italy*<sup>36</sup> and *Budayeva vs Russia*<sup>37</sup>. In the first case, stating the decision that the overcrowded situation in prisons facilities represents “a traditional problem deriving from an historical bad functioning of the Italian penitentiary system”, and that the absence of a minimum life space for prisoners entailed a degrading and inhuman treatment, the

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<sup>35</sup> ECHR., 22 June 2004, ap. 31443/96, *Broniowski vs Poland*. It is to be noted, in this footnote, the strategic importance of the pilot-judgements, that have changed the horizontal relations between institutions: on the one hand, indeed, they end up to overlap the competence of the ECHR to that of the Ministers Committee, responsible only to the implementation measures of the decisions and- as a consequence – the provisions to correct structural violations; on the other hand, they change the vertical relations between the States and the ECHR system, overcoming the limits of individual justice, belonging to ECHR jurisdiction, as stated by the Italian judge Vladimiro Zagrebelsky in the judgements of ECHR of 19.6.2006 and 28.4.2008.

<sup>36</sup> Court EHR 8 January 2013, app. 43517/09, 46882/09, 55400/09, 57875/09, 61535/09, 35315/10, 37818/10.

<sup>37</sup> Court EHR, 20 March 2008, app. 15339/02, 21166/02, 11673/02, 15343/02.

Italian Government had to batten down the hatches by adopting four law-decrees, between 2013 and 2014<sup>38</sup>. In the second, the Strasbourg judges have considered the violation of the provisions of the European Convention on HR to the failure of the Russian Government to adopt suitable measures to avoid landslides causing many victims, by also denouncing the insufficient maintenance of anti-landslides facilities.

These examples clearly show, in this scenario, some behaviours may lead to the application of judicial sanctions, and these behaviours, in the national framework, could have been subject, in the best option, to parliamentary inspection activity and also political criticism and then limited to the responsibility of the Government towards the Parliament. The same can be applied to the judgements of the ECJ confirming the violation of the “European Laws”, by making the uncompliant States to change their domestic law and even, in some cases, to modify the laws of Constitutional rank. One for all, the reference to the famous case of *Tanja Kreil*, following which Germany had to change art.12 of the German Constitution, by removing the ban for women to be employees in the Armed Forces<sup>39</sup>.

It is not therefore unreasonable that, after what observed, to conclude that before the Courts of Supranational Rights, the political responsibility may take a jurisdictional shape; it is then subject to judgement.

The condition of national Constitutional Courts appears very different; in a general sense – this is the case of the Italian Court - they may correct some partial law omissions through the various typology additive judgements (normally, judgements of principle, procedural judgements), but the Courts are more or less powerless towards total omissions, that is voluntary decisions of endangering the Constitution principles by High Political Bodies. For instance, the Constitutional Court may assure the application of rights through the annulment of an invalid law or the integration of the said law with a law content (by declaring it illegitimate “in the part that does not provide for” what it should provide for) but it cannot ensue *facere* obligations, aimed at overcoming an absolute lack of constitutional

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<sup>38</sup> We refer to the “emergency” measures aimed at correct, by acting on the so-called early release, the “serial” violations of the art 3 of the ECHR: the law decree n. 69 (converted into law n. 98 of 2013), n. 78 (converted into law n. 94 of 2013) and n. 146 of 2013 (converted into law n. 10 of 2014) and also the law-decree n. 92 of 2014 (converted into law n. 117 of 2014).

<sup>39</sup> ECJ, 11 January 2000, case-law C-285/98, *Tanja Kreil c. Federal Republic of Germany*. Following the judgement, the revision law of December 19, 2000 has modified art 12 of the German Constitution, ruling the binding military and civil service. In particular, paragraph 4, that, referring to women, stated: “*Sie dürfen auf keinen Fall Dienst mit der Waffe leisten*” has been amended as follows: “*Sie dürfen auf keinen Fall zum Dienst mit der Waffe verpflichtet werden*”.

safeguard, deriving from “majority obstructionism”<sup>40</sup>. It is then clearly demonstrated the difference in terms of effectiveness and convincing strength between the monetary sanctions imposed by the European Courts, effective and immediate, and the warning-judgements, by which the Italian Court uses to highlight the need of a legislative intervention, recovering the constitutional law application, assuring the basic level of protection to the fundamental rights, without instead benefit from any very binding instrument to impose the prompt adaption to it by the legislator, that indeed does not follow the warnings of the Court<sup>41</sup>.

In brief, summing up: the risk of inefficacy of the judgement<sup>42</sup>, representing one of the most effective institutional incentive to the procedural deference, is clearly present to the national Courts and to the Italian Constitutional Court in particular, while is well low or absent in the supranational Courts.

b. The structure of parameter laws, if compared with national constitutional laws, seems to be more suitable to promote the discretionality of the interpretation of the Courts.

The provisions of the Convention (and also of the European Charter of Fundamental Rights) show some literal drafting *open-textured*, of generic needs, since they should balance cultural and juridical traditions differentiated in the wording and grammar types. Moreover, they are featured by their strong “content neutrality”<sup>43</sup>, an open regulation

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<sup>40</sup> In the years immediately following the entry into force of the Republic Constitution, this was the definition of the choice of the major political forces to postpone or totally paralyze the application of the most innovative principles and bodies: the Constitutional Court, entered into force in 1956; the Higher Council of the Judiciary, whose setting up law dates back to 1958; the Regions, enabled to perform their powers only in 1971, a good 23 years after the entry into force of the Charter. Reference C. MORTATI, *Appunti per uno studio sui rimedi giurisdizionali contro comportamenti omissivi del legislatore*, in *Foro it.*, 1970, 9, V, 154, was among the first who assessed the “damages caused to the fundamental freedoms to the omissions of the legislative bodies” and to identify the necessary procedural remedies.

<sup>41</sup> The most evident example of the incomppliance of the legislator to the requests of the Court is shown in the issue of the political electoral law n. 270/ 2005 (known in the press debate as *Porcellum*), annulled by the Const. Court judgement n. 1/2014, but whose constitutional illegitimacy was already hinted by the Court, incidentally, by Const. Court judgments n. 15 and n. 16/2008 and n. 13/ 2012. While this position was agreed to be sent to the press, the Constitutional Court has issued the order n. 207/ 2018, by which, after announcing it by a press statement, has suspended the judgement of compliance to Constitution of art. 580 of the criminal code concerning the issue of aid to suicide carried out by a political member towards a person affected by an irreversible illness forcing him to remain almost totally motionless. The Court, in fact, after declared that the present law framework regarding life ending “ended up by limiting the self-determination freedom in the choice of treatments [...] without stating that this limitation can be considered preliminarily devoted to the protection of another interest foreseen by the Constitution”, postpones the judgement to a fixed date (24th September 2019), “stating a new discussion could be assessed by which the eventual adoption of a new law regulating the issue according to the said protection needs”. This order anticipates the entry of a new kind of judgement in the already variety of Court statements: the judgement of incomppliance conditioned by suspensive clause, based on the German model of *Unvereinbarkeit*. This was remarked first by A. RUGGERI, *Pilato alla Consulta: decide di non decidere, perlomeno per ora... (A margine di un comunicato sul caso Cappato)*, on *Consulta Online*, 26 ottobre 2018.

<sup>42</sup> This item will be further explained in the following, item c) of this paragraph.

<sup>43</sup> F. BILANCIA, *I diritti fondamentali come conquiste sovrastatali di civiltà*, Giappichelli, Torino, 2002, 96.



structure in which it is more difficult to detect, with respect to national constitutional laws, the compromise point between the different ideal and historical positions converged in that neutrality. For this reason, the historical-genetic issue, not less important than national constitutional laws, is instead totally neglected in relation to Convention provisions and it is unable to limit the margin of the freedom of interpretation of the Strasbourg Court<sup>44</sup>.

Towards the untighten of links with the text, we can quote the positive attitude devoted to the evolutive interpretation. Thank to this attitude, the ECHR case-law step away from the internationalist approach, that would impose as interpretation method some laconic statements of the Convention with reference to the original will of the contracting States; this method has shared the values of the Convention as “optimization obligations”<sup>45</sup>, to be realized in the strongest form referring to the law and factual conditions of the said scenario. Thus being so shaped, the evolutive interpretation proved to be the main tool for judicial activism, thus leading sometimes the ECHR to elaborate the basic and procedural rules in a creative manner, with no foundation in the Convention text<sup>46</sup>.

The same tendency towards activism can be found in the use of juridical comparison, that is not statically devoted to detect the minimum common denominator in the different juridical-constitutional traditions; and neither to find a list of the significant varieties between the different contracting States, but it is featured by an intense assessment value. Within the logic of *wertende Rechtsvergleichung* (value or value-oriented juridical comparison), the Court issues a clear guidance at theoretical and interpretation level in order to expand in an evolutive way the contents of guarantee given by the Convention, even when not reflected in juridical-constitutional traditions common to other member States; on the contrary, the Court voluntary ignores orientations widespread in the majority of States when they are not on line with the development of the fundamental rights heartedly promoted by the Court.<sup>47</sup>

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<sup>44</sup> As testimony of the importance attached to the preliminary works related to explain the meanings of the Constitutional Charter, we can refer to, between other things, the judgement n. 429 of 1992, by which the Court states that : the identification of the Constituent Legislator, in a framework of rigid Constitution, is essential to measure the compliance between law provisions and constitutional principles” and , more clearly, so follows “The Constitutional hermeneutics cannot in any case fail to acknowledge the inspiration ensuing the setting up process of the constitutional law, since the historical and political concept are so important in the said process”.

<sup>45</sup> *Optimierungsgebote*, referring to a quotation by R. ALEXY, *Theorie der Grundrechte*, Frankfurt a. M., 1986, 581 seq.

<sup>46</sup> This is the shared opinion by P. MAHONEY, *Judicial Activism and Judicial Self-Restraint in the European Court of Human Rights: Two Sides of the Same Coin*, in *Human Rights Law Journal*, 1990, 62 seq.

<sup>47</sup> So stated G. REPETTO, *Argomenti comparativi e diritti fondamentali in Europa. Teorie dell'interpretazione e giurisprudenza sovranazionale*, Jovene, Naples, 2011, 122, that a little further, p. 128, efficiently mentioning : “The comparative law, becomes then, in the hands of the Courts a comparative reasoning, to be intended as mediation rule able to convey to the judges one of the criteria upon which it is possible to identify the conflict

Summing up: evolutive interpretation, comparative issue, but also the doctrine of effective remedies and appreciation margin, in their joint function, contribute to relativize the binding nature of the Convention. Truly, we have supported the idea that the provisions contained in the Convention have almost totally lost “the function of judgement parameters, in their proper sense of the constitutional procedural law, to gain the feature of debating contexts open“ to the continuous interaction with protection principles and expectations ensuing from the different application contexts<sup>48</sup>. They are principles and expectations different from time to time, based on the comparison exercise, developed under the evolutive method of left in the cone of shadow of the State interest and appreciation margin, also in the adaptation to the national context. Under those conditions, the *rules* of the Convention, in the concrete cases of procedural application, have taken the form a “previous procedural case to evaluate”<sup>49</sup>, and that can thus be changed if the real circumstances change, in the application context of reference or, more prosaically, following the simple change of the composition of the judging bench<sup>50</sup>.

All this cannot but promote activist behaviours.

Another aspect deserves to be mentioned. In view of the value-oriented juridical comparison (acknowledged in the Convention or in ECFHR), the construction of a *jus publicum europaeum* of fundamental rights is done through the continuous balance, by case method, between the need of uniformity which the European and Convention law tend to and the diversity of national juridical-constitutional traditions. This method – that is crucial in the procedural motivations of the ECHR – is totally discretionary, sometimes by moving towards the social consciousness of majority in the member State (for example in some judgements on the offense to the religious sentiment<sup>51</sup>); some other times by acknowledging the existence of *consensus standard*, of common constitutional traditions even if this consensus appears to be *ictu oculi* or elusive, by indicating it as a model of the different national rules, in order to be compliant to the higher degree of rights protection

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*non only between the claim of the individual against the Reason of State, but also between unitary and pluralist dimension of the European identity in the context of fundamental rights”.*

<sup>48</sup> G. REPETTO, *op. cit.*, 125-126.

<sup>49</sup> Again G. REPETTO, *op. cit.*, 201.

<sup>50</sup> G. REPETTO, *op. cit.*, 202; the rule, in this case, acts as a previous case not strictly in a sense that the definition of its contents changes only to the change of the interpretation of the judges but in a sense that its scope, not being uniquely verified, receives continuously new meanings following the change of the reference scenarios.

<sup>51</sup> Ref. Judgements 7 December 1976, *Handyside c. Regno Unito*; 20 September 1994, *Otto-Preminger c. Austria*; 25 November 1996, *Wingrove c. Regno Unito*.

welcomed at supranational level<sup>52</sup>. If it is true then that the margin of appreciation of the member State is inversely proportional to the level of consensus gained under the comparative scenario on a certain content of rights guarantee, it is understandable that research, truly free, of the common constitutional traditions offers to the European Courts the possibility to detect selectively the constraint to which be linked in their interpretative activity.

### c. The dialogue political actors- jurisdictional actors

The most important factor in the definition of a favourable environment to *judicial activism* is perhaps the relation between supranational Courts and political actors.

From this point of view, the ECHR - and, to a lesser extent the Court of Justice - seem to truly represent, in its pure form, the ideal archetype of a neutral jurisdiction, emancipated from any conditioning of systemic and political order because born outside a State structure and properly a form of Government.

A jurisdiction without a State, indeed, that can be - and I say it by referring to a happy definition of Franco Modugno - "*isle of the juridical reasoning*" because it is not limited to any "political reason"<sup>53</sup>. The Courts of Justice and of Strasbourg do not act then "*under political constraints*" to the same extent of national Courts, because in the European and Convention context the necessary dialogue between political actors and jurisdictional actors is totally absent or anyway less intense with respect to the national level dialogue<sup>54</sup>.

This lack can be seen first in the absence of a continuous and not episodic democratic dialogue<sup>55</sup> with the political institutions, with a legislator, a Governor, to gain a political guideline to reach a dialogue aiming at harmonizing the subjective protection of rights and the systemic request to protect the general institutional balances.

It is nevertheless weak the dialogue with the national political institutions carried out through the comparative method, i.e. under two aspects.

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<sup>52</sup> Let's think to the famous judgement ECJ big ses., 22 November 2005, n. 144/04, that states as belonging to the common constitutional tradition of member States the ban to discriminate upon the age, that nevertheless is not expressly foreseen by any of the Constitution of the European States, with the exception of Finland and Portugal. On the Constitutional traditions, last E. DI SALVATORE, *La tradizione costituzionale. Cultura giuridica e giurisprudenza*, Rubbettino editions, Catanzaro, 2017.

<sup>53</sup> Quotation F. MODUGNO, *L'invalidità della legge*, Giuffrè, Milano, 1970, 11.

<sup>54</sup> M. DAWSON - M. DE VISSER, *Judicial*, op. cit., 44 seq.

<sup>55</sup> On which there has been the recent assessment of A. YOUNG, *Deference, Dialogue and the Search for legitimacy*, in *Oxford Journal of Legal Studies*, Vol. 30, 4/2010, 815 seq. Per M. DAWSON, *Judicial*, op. cit., 28, the difficulty of a fruitful dialogue with political actors is negative even because "*it disallows another important legitimacy advantage that the sharing of governmental power is supposed to safeguard: the ability to share the blame when things go wrong. Rather than anchor its execution of misplaced laws in the legitimacy of the legislature, and ultimately, the popular will itself, a court relying on 'autonomous concepts' rather than legislation must itself shoulder the burden in the case of politically unpopular decisions*".

First, the supranational Courts, through a strategic use of the comparison method by selecting the political actor to address; sometimes by individuate the interlocutor in the member State, to which a wide margin of adaptation and appreciation is conferred, may be by enhancing – against the uniformity of the European rules - the sentiment of a social consciousness; in other cases by identifying as a model a certain “*common tradition*” that is very difficult to find in the majority of member States and appears to be the result of an activity creating law principles, rather than a declaratory activity. It can be said that the European Courts are in the position of choosing, almost freely, the “*contradiction actor*” more suitable to their interpretative orientations or their cultural pre-understandings.

Second, and by a more precise reference to the ECHR, in the use of the comparative method, it acknowledges a method of sociological analysis that considers the national societies as fixed ontological structures, able to give to the supranational judge contents, elements and objective cultural orientations, basically considered as unchangeable but mainly deprived of the juridical-law mediation and for that reason identified according to value choices marked by the widest discretionality<sup>56</sup>.

This marks a deep difference with respect to national Constitutional Courts, starting from, instead, by law documents, and assess them by updating their *rationes* according to an “*internal*” analysis<sup>57</sup> deriving definitions, lexicon, interpretative instruments, in a logic based on a *duplex interpretatio*, in which the interpretation of the Constitution *by law* and the true interpretation *of the law* to the Constitution represent the dialectical moments of a circular hermeneutic process. This continuous assessment of the law, that, on the one hand contributes to naturally detect the scope of possible interpretations, on the other hand, limits the very possibilities to solve the issue of legitimacy, that is then moved to constitutional forced solutions, in which there are no margins for options that are politically affected by Court judgements.

Then, the judgements of the Court of Strasbourg do not ensue from *rationes legislative*, but rather from comparative reasoning, evolutive-teleological interpretation and sociological analysis sharply oriented as regards their outcome by a “favourable *milieu* to the progressive and basically unlimited extension of rights”<sup>58</sup>. The key concept is that of democratic society, in this dynamic process of searching a uniform level of rights protection taking duly into account the pluralism of juridical-constitutional traditions, then leaving to the member States a certain margin of appreciation and adaptation. A complex

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<sup>56</sup> Quotation G. REPETTO, *Argomenti*, op. cit., 185.

<sup>57</sup> As defined by G. ZAGREBELSKY, *La giustizia costituzionale*, Il Mulino, Bologna, 1988, 147 seq.

<sup>58</sup> G. REPETTO, *Argomenti*, op. cit., 119.

concept in which the heritage of the tradition of liberal constitutionalism is valued by the assessments and elaborates referred to the republican constitutionalism aimed at the rights protection<sup>59</sup>. There are many factors contributing to form this concept, that is always open to new and original contributions; appeal applicants and Governments disputing before the Courts, mainly, but also national judges of the most different levels, non-governmental organizations, stakeholders that do not manage to find their space, to find advertising and communication resources to impose their issues to the political agenda and that instead, with a very low allocation, are able to reach the supranational jurisdictional structures and to contribute to the building of the contents of rights. This strategy of political mobilization not aimed at the electoral consensus but to the appeal (*mobilization-litigation*) introduces a new change in the national political procedural activities. This enables isolated and vulnerable minorities<sup>60</sup>, whose voice does not reach the institutional bodies of decision-making and parliamentary democracy, to widen their action ability through the access to supranational Courts endowed with tools producing *facere* obligations for the national political institutions, to impose to the legislator law and sometimes constitutional modifications<sup>61</sup>, and to censor the illegitimacy of International

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<sup>59</sup> The comparative method, marginal in the national law, and thus applied mainly *ad colorandum*, represents a systemic and arguing key message in ECHR ruling. And, nevertheless, the use of this message contains a wide margin of discretionality in the choice of the terms of comparison. When it is based on very general principles and pre-judicial values as moral, it is difficult to point out a concrete linking feature between juridical experiences that are so different in the member States of the ECHR; and we have the general impression that the end precedes the mean and that the choice to put the analysis in higher or lower terms as regards the level of consensus reached in the different juridical-cultural traditions is pre-oriented to the solution - then by the political vision that the Court intends to support regarding the issue. The concept of democratic society in the comparative reasoning of the ECHR is crucial. It is a complex formula that we state here, agreeing on the elaboration of G. REPETTO, *op. cit.*, 195: "*the statement of a complex of rules and founding principles of a kind of essential content (Wesensgehalt) of the rights and freedoms in the European area a ius publicum europaeum that has been gradually appeared starting from the elaboration of those contents of value common to the liberal democracies of the second post-war period, and that remains open to the developments and enrichments happened in the different social milieu, both national than non-national*". In this analysis method, the accurate use of the evolutive interpretation, far from being a choice of self-limitation, could be justified by the difficulties to indicate the direction of the wished evolution for a certain right, in the light of the contrasts present in the theoretical-judicial framework of reference of the uncertain results of the comparative analysis. The evolutive interpretation is then used to move away from the national contexts, without a clear development target, a clear direction. So, it is useful to refer not of *self-restraint*, but rather of very non defined attempts of *judicial activism*.

<sup>60</sup> Quoting for all prisoners; Cfr. S. CARRERA - B.PETKOVA, *The potential of civil society and human rights organisations through third-party interventions before the European Courts: the EU's area of freedom, security and justice*, in *Judicial activism*, 233 seq.

<sup>61</sup> It has been already mentioned, quoting the case Tanja Kreil. We can add to that famous judgement, the judgements of ECHR 11 April 1997, Rekvényi c. Hungary; 13 February 2003, Refa Partisi c. Turkey ; 11 October 2016, Barcsza e altri c. Hungary; 28 October 1999, Wille c. Liechtenstein; 24 April 2003, V. E. di Savoia c. Italia.

Treaties signed by the States <sup>62</sup>. The judgements of the Court of Justice and even more the *pilot judgments* of the Court of Strasbourg foresee political constraints in jurisdictional forms. <sup>63</sup>. The use of the Courts is then an alternative to the traditional political mobilization, often more useful and immediate as for the outcome. The simultaneous presence of public and private actors mainly deprived of political representativeness in the juridical area of the European Union and the ECHR ends up to act as a partial surrogate to the lack of efficient think-thanks of political training of the European public opinion, that instead – greatly simplifying reality – tends to be reduced to the individual dimension of the *claimant*.

We must add that in the supranational context, the main institutional disincentive to the protagonism of judges in the elaboration of rights and law is completely lacking: we refer to the power of overcoming the judicial decision by law or to refuse or hinder its application.

As affirmed by the most accurate doctrine, the judges “*have an incentive to anticipate legislative and executive reactions when making their rulings*”<sup>64</sup>. The process of elaborating the judgement is conditioned by envisaging the risk that the legislator may annul the practical effects of the judgement through a contrary ruling or indeed by denying its application and thus its effectiveness. The national Courts then, are usually careful to avoid an “overruling” or a complete non application of their *dicta*, both to assure a greater durability and stability to their decisions, and not to endanger their political legitimacy to maintain the future possibility to affect public policies <sup>65</sup>.

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62 Let's think to the judgements of ECHR of 18 February 1999, in case *Matthews vs. Great Britain*, by which the British Government has been convicted to having allowed an extension of the powers of the European Parliament, at the ratification of Maastricht Treaty, lacking the acknowledgement of the right to vote to the European elections to Gibraltar people.

<sup>63</sup> This is underlined by E. MUIR - M. DAWSON - B. DE WITTE, *op. cit.*, 9: “Whether it is the increasing presence of EU law in sensitive areas of policy, the development of new fundamental rights policies or the limited capacity of other actors (legislatures or vulnerable groups) to politically mobilize around Court decisions, judicial activism is more than a thesis about the European Courts alone, but a thesis about the broader structure of the European Union”.

<sup>64</sup> C.J. CARRUBBA - M. GABEL - C. HANKLA, *Judicial Behavior under Political Constraints: Evidence from the European Court of Justice*, in *102 American Political Science Review*, 4/2008, 435; C. CARRUBBA, *Courts and Compliance in International Regulatory Regimes*, in *Journal of Politics*, 67, 2005, 669 ss.; ID., *A Model of the Endogenous Development of Judicial Institutions in Federal and International Systems*, in *Journal of Politics*, 71, 2001, 55 seq.

<sup>65</sup> Meaning that the anticipation of the political reactions may guarantee “*better results*” to the judicial decision v. J. R. ROGERS, *Information and Judicial Review: a Signaling Game of Legislative-Judicial Interaction*, in *American Journal of Political Science Review*, 91/2001, 84 seq; ; J. BEDNAR - W. N. ERSKRIDGE JR. - J. FERREJOHN, *A Political Theory of Federalism*, in J. FERREJOHN - J. N. RAKOVE - J. RILEY, *Constitutional Culture and Democratic Rule*, Cambridge University Press, New York, 2001, 223 seq.; R. GELY - P. T. SPILLER, *A Rational Choice Theory of Supreme Court Statutory Decisions with Applications to the State Farm and Grove City Cases*, in *Journal of Law, Economics, and Organization*, 6/1990, 263 seq.

This is an interpretation by consequence, we would say, if it were not for the fact that, this kind of interpretation, in Italian literature, is mainly devoted to a mere acknowledgement of the consequences of the decision on the law-making process, while in the basic logic that is stressed here, the judge is called to verify the consequences of the *legal reasoning* on the political system. Concerning the judgements of the Constitutional Court, it is the power of constitutional review to perform this function of moderation of decisions with regard to the outcome that will ensue by the abstract juridical reasoning. It is this power that, in the final analysis, defines the political legitimacy concerning the constitutional justice, leaving to the “*Politician*” the possibility to sanction evolutive interpretations considered not to be in line with the social consciousness or at least with the interpretation given by the hegemon political forces in two different ways, equally effective as they are very sharp: changing the Constitution or changing the Court, as the *Court packing plan* elaborated by Franklin D. Roosevelt warns from afar, a position that was the direct cause of the changing of the Supreme Court judgement in *Lochner* era<sup>66</sup>.

As the legislator, through the authentic interpretation, reaffirms the primacy of *voluntas legislatoris* on the existing law, of the political guidance on the judicial activity, at the same time the Constitutional review marks the external and extreme limit to the interpretation constructivism of the constitutional judges. It does not matter that the “nuclear” weapon of the Constitutional review is in fact carried out<sup>67</sup>. Its deterrent effect is always present to the constitutional judges, as well as the limits of compliance of their decisions with the general balance and the balance between Institutions<sup>68</sup>.

Thus, in concrete terms, this limit is not applied towards the Strasbourg Court as in the European Court of Justice, by virtue of the complex procedures to the modification of the European Convention on Human Rights<sup>69</sup> and the European Treaties<sup>70</sup>.

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<sup>66</sup> The Federal Supreme Court, loyal to an absolutist interpretation of a contract freedom, declared the illegitimacy of law initiatives aimed at the economic planning and the safeguard of workers (for one of this cases, consult *Carter v. Carter Coal Co.* - 298 U.S. 238, 1936). Reacting to this jurisprudential guidelines, President Roosevelt, just after being re-elected, stated a modification of the composition of the Court, by adding a judge for any of its member that was, at the moment of the decision, over 70 years old. Thanks to the *Court packing proposal* the President could appoint six new judges, by benefiting of the agreement of the Constitutional Court to the New Deal. The ceasing of the dispute was caused by the change of the decision of judge Owen Roberts, that gave the fifth and final vote supporting the presidential New Deal. The manifest-judgement of this new orientation is *United States v. Darby* - 312 U.S. 100 (1941).

<sup>67</sup> As it has been, for example, in Italy with the judgement n. 361/1998, by which the Constitutional Court has declared the unconstitutionality of art. 513 code of criminal procedure that contained provisions contents widely similar to those included in the review text of art. 111 Cost.

<sup>68</sup> For a more detailed knowledge on the modes of carrying out of the test of proportionality in the judgements of the European Courts, allow the reference to G. SCACCIA, *Proporzionalità e tecniche di bilanciamento tra diritti nella giurisprudenza delle Corti europee*, in *Rivista AIC*, 3/2017.

<sup>69</sup> The involvement is required of all member States of the Council of Europe in the signature of the relevant Protocols modifying or amending the original text of the Convention.

The rule of unanimity, together with the need of a ratification by member States, make unrealistic the possibility to sanction politically the activism of the European Courts, leaving member States in the uncomfortable and politically unfair position to react only threatening to leave the system, by revoking their membership to the Convention or the Treaties.

The same *overruling* of the judgements of the Court of Justice, through the modification of the secondary legislation is extremely difficult and then almost unlikely to happen. The Governments of member States, represented in the Council of Ministers, are not indeed the sole actors involved in the procedure, actively supported also by the action of the Commission and the European Parliament, that are usually interested to support the interpretation of the European Law as ruled by the Court of Luxembourg, rather than counteract it following the national interests of member States<sup>71</sup>.

In brief, and summing up: in the absence of a credible threat to be censored by political Institutions, the supranational Courts, as it has been observed by Mark Dawson, have no real incentive to be "*politically responsive*"<sup>72</sup>.

It is the following basic absence of *responsiveness* that entailed the ease by which procedural instruments with no textual foundation have been stated through judgements<sup>73</sup>.

It is useless to reply that even the Constitutional Courts have often lingered in creative interpretations. Actually, the feature of this creativity is far different in two cases, if not opposite. Unlike European *judicial activism*, devoted to the expansion of the powers of Courts, aiming at the widest and effective protection of rights *against* member States and national legislators, the activity of producing law principles of national Courts has always been aimed at increasing and not reducing the privilege of the legislator. This has

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<sup>70</sup> See for reference art. 48 of EU Treaty.

<sup>71</sup> It is well explained by F. SCHARPF, *The joint Decision Trap: Lessons from German Federalism and European Integration*, in *Public Administration*, 3/1988, 239 seq.; G. TSEBELIS - G. GARRETT, *The Institutional Foundations of Intergovernmentalism and Supranationalism in the European Union*, in *International Organization*, 55/2001, 357 seq. Less detailed is the analysis by C. J. CARRUBBA - M. GABEL - C. HANKLA, *Judicial Behavior*, op. cit., 435 seq., who highlights the modes of affecting the decision making of ECJ, different from those assessed above. The Author affirms in particular that the simple threat of a modification of the European Union law in the Council of Ministers pushes the Court to judge favourably for the most favourable position for member States; and that the greater opposition is provided towards a claimant by the other member States the stronger is the possibility of an opposite judgement against the claimant member State. Cf. G. GARRET -B. R. WEINGAST, *Ideas, Interests, and Institutions: Constructing the EC's Internal Market*, in *Ideas and Foreign Policy*, Cornell University Press, New York, 1993, 178.

<sup>72</sup> M. DAWSON, "...courts, lacking a credible threat of being censured by political institutions, have no real incentive to be politically responsive". Hints and Details on the issue by C. CARRUBBA - M.GABEL - C.HANKLA, *Judicial Behaviour*, op. cit., 438 seq.

<sup>73</sup> Let's think, in relation to the Strasbourg Court, to the widening of the scope of effectiveness of the judgements (from *inter partes* to *erga omnes*); to the self- taking upon of caution powers with no written textual base, to the "invention" of pilot-judgments, whose foundation is very uncertain, if we consider that the same ECHR, just before introducing those powers, with the mentioned Broniowski judgement, supported an ad-hoc modification of the Convention to be endowed of this decision mode, that did not deem it to be included in the scope of the current legislation.



happened, for example, in the most ancient experience of the *judicial review of legislation*, as regards the doctrine of *standing*, of *ripeness*, of the *advisory opinions*<sup>74</sup> and heavily with the theory of *political questions*<sup>75</sup>. This has been in the experience of European-continental *Verfassungsgerichtsbarkeit* for the interpretative judgements, the declarations of in compliance (*Unvereinbarkeit*), the decisions of deferred unconstitutionality, the doctrine of interpretation of conformity, the limitation of retroactive effects to the declaration of annulment. In all those mentioned hypothesis, decision instruments and methods deprived of a firm law foundation have been set up through judgements with the aim of include the judgement in the regulatory system, in a more reasonable and “smooth” way, without any systemic division. The activism of interpretation – if so it can be said – has been functional to political deference.

It is not by chance then, that the most creative judgement (and for this reason criticized by many people) by which the Italian Constitutional Court has took upon the power to manage the “timing” of the declaration of unconstitutionality, has led to, actually, to neglect the rights of credit of applicants in favour of the need to assure the balance of budget<sup>76</sup>. This is a choice of activism, but only at first glance, actually oriented to the acknowledgement of the widest deference towards the legislator of budget.

### **Epilogue: the supranational Courts as factors of neutralization and de-politicization: problems and perspectives**

In the light of what pointed out so far, the European Courts perform totally and consistently the model of a jurisdiction depriving decision policies with the power of elaborating and

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<sup>74</sup> The doctrines mentioned in the text refer to *Fairchild vs. Hughes*, 258 U.S. 126 (1922).

<sup>75</sup> The doctrine of the political questions, stated by *West Virginia vs. Barnette* case, 319 U.S. 624, 646 (1943), has been clearly defined as concept in the assessments of judge Felix Frankfurter in *Baker vs. Carr* case, 369 U.S. 186, 266-330 (1962).

<sup>76</sup> We refer to the judgement n. 10 of 2015, already mentioned above. Among the many critical comments to the judgement, refer to R. BIN, *Quando i precedenti degradano a citazioni e le regole evaporano in principi*, in *Forum di quaderni costituzionali*, 2015; R. ROMBOLI, *L'“obbligo” per il giudice di applicare nel processo a quo la norma dichiarata incostituzionale ab origine: natura incidentale del giudizio costituzionale e tutela dei diritti*, in *Forum di quaderni costituzionali*, 2015; A. PUGIOTTO, *Un inedito epitaffio per la pregiudizialità costituzionale*, in *Forum di quaderni costituzionali*, 2015; I. MASSA PINTO, *La sentenza della Corte costituzionale n. 10 del 2015 tra irragionevolezza come conflitto logico interno alla legge e irragionevolezza come eccessivo sacrificio di un principio costituzionale: ancora un caso di ipergiusdizionalismo costituzionale*, in *Costituzionalismo.it*, 2015; I. CIOLLI, *L'art.81 della Costituzione: da limite esterno al bilanciamento a super principio*, in *Forum di Quaderni Costituzionali*, 2015 and, if we care, G. SCACCIA, *Equilibrio di bilancio, irretroattività assoluta della dichiarazione di incostituzionalità e principio di effettività della tutela giurisdizionale nella sentenza della Corte costituzionale n. 10 del 2015*, in *Rassegna tributaria*, 5/2015, 545 seq. Adesivamente A. ANZON DEMMIG, *La corte costituzionale “esce allo scoperto” e limita l'efficacia retroattiva delle proprie pronunzie di accoglimento*, in *Giur. Cost.*, 2015, 67 ss., and *Elogio della sentenza n. 10 del 2015*, in *Forum di Quaderni Costituzionali*, 2015.

protecting rights, to give this power to the highest juridical technique, performed by enlightened intellectual élites.

A very attractive and fascinating perspective on a wide range of scholars, who welcome any judgement of the ECHR as a moving forward attitude of the European Union from a barbarism to civilization. This is the case also of many judges, that in crucial moments have tried to overcome the limits clearly stated by the Constitutional Court – starting from the famous “twin” judgements n. 348 and 349 of 2007 – thus applying indiscriminately all the European and Convention provisions as prevailing law on the internal uncompliant law, without any mediation of the national Court<sup>77</sup> .

In conclusion, in order to refer, in a circular sense, to Schmitt statement quoted at the beginning, we should wonder if we can talk now of a true and higher degree of neutralization, through the juridical technique, of the exuberant partiality of the “Policy maker” and which will be the consequences on the legal system of the placement of the rights protection in a multinational framework, leaving them in a purely abstract dimension. We have the impression that this placement does not entail a technical neutralization factor, but rather a sharp philosophical and moral concept of human rights, linked to a post-state model of republican constitutionalism with a cosmopolitan vocation, in which a far heritage of Immanuel Kant thought can be found<sup>78</sup>. *A Government without Statehood* founded on the assumption that the political sovereignty can be more effectively limited if

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<sup>77</sup> I refer in particular to the administrative case-law that has interpreted art. 6 of EU Lisbon Treaty as a mechanism to make the Conventional law adhering to EU community principles (Cons. St, section. IV, jdg . n. 1220 of 2010 and TAR Lazio, section II bis, jdg. n. 11984 of 2010) and the preliminary reference of Bozen in case Kamberaj (C-571/2010), in which, among other things, the ECJ was called to give an opinion on «the reference to [ECJ] done in article 6[, paragraph 3] EU Treaty impose to the national judge to implement concretely the provisions of this Convention (..), thus not applying the provision of conflicting national law, without previously raising a question of legitimacy before the Constitutional Court» (par. 59 of the order n. 666 del 24 November 2010); to the surprising obiter dicta of the Court of Cassation (Cass. Civ. section n. 8108 of the 23 May 2012; Cass. civ. section , jdg n. 23418 of 19 November 2010, n. 26286 of 29 December 2010, nn. 7659, 7660, 7661 e 7663 of 16 May 2012, nn. 8817 and 8818 of 1st June 2012), that ended the theoretic of limits against, by considering it a relic of the past, sign of immature forms of integrations, when it claimed that “The (same) theory of limits against, that also found reasonable justifications in the years 70-80 of the last Century, when the process of integration was really starting, seems to be today in sharp contradiction with the same concept of integration as it is the case today, even by virtue of the development of the Court of Justice judgments – that has given enough evidence of protection of fundamental rights – and the reference to the Charter of the European Union Fundamental Rights, binding also for European institutions, so as to think of the conflict between European Union law and national law as impossible in a complete integrated European law framework”. A reaction to this tendency can also be detected in the judgement n. 269 of 2017, by which the Court has inverted the order of the preliminary references, both constitutional and European, in presence of an hypothesis of violation of the Constitution and of the Charter of European Union Fundamental Rights.

<sup>78</sup> I. KANT, *Zum ewigen Frieden*, 1795, Italian translation it. *Per la pace perpetua*, Feltrinelli, Milano, 1991, 54 seq.

“shared”, or imposing to it external constraints whose application is entrusted to supranational bodies composed mainly by technocrats<sup>79</sup>.

This is a concept that places the rights within a virtual and not real political community<sup>80</sup>, something by reducing it to the punctual dimension of the applicant, referring the right to the individual placed out of his social context, his belonging dimension, his responsibility towards an active participation to a political community. These are elements that define system limits to the subjective position of interest enabling a more reasonable balance between individual rights and social duties.

A vision then that seems irreparably to entail some sort of emancipation of rights from the decision and conversational processes of formation of the opinion, a separation from their historical and concrete dimension. Even in the context of the national constitutional experiences, the dialectic polarity between *legal constitutionalism* and *political constitutionalism*<sup>81</sup> is very well known; they contend indeed the theoretical field from the very institution of the Constitutional justice systems. Then, in the national juridical context – unlike the European and Convention contexts – there are better conditions to reach a practical agreement between these two theoretical positions.

From the one hand, indeed, the Constitutional Courts are instruments of progress and implementation of the *political constitution* when they ease the democratic circuits reducing their bottlenecks, by widening the right of participation, ensuring transparency and controlling public decisions, reacting to position of oligopoly or block in the free *marketplace of ideas*. In this perspective, even the activism does not mark the judicial passing in the field devoted to the democratic legislator, but it is rather functional to the more balanced and conscious formation of the political will<sup>82</sup>.

On the other hand, the steady discussion between the Constitutional Courts and political institutions triggers a *democratic dialogue* producing the natural alternation between

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<sup>79</sup> Cfr. W. WALLACE, *Government Without Statehood. The Unstable Equilibrium*, in H. WALLACE - W. WALLACE (EDS), *Policy making in the European Union*, Oxford University Press (Oxford), 1996, 439 seq.

<sup>80</sup> On this issue, critically, L. AZOULAI, *Judicial activism at the European Court of Justice*, in M. DAWSON – B. DE WITTE – E. MUIR by Elgar, Cheltenham, UK, Northampton, MA, 2013, 167 seq.

<sup>81</sup> We intend, more precisely, *political constitutionalism* as that affecting the central position of discussion processes of formation of public opinion, Parliaments and political institutions aimed at the implementation of the Constitution provisions; and *legal constitutionalism* that relying mainly on juridical *accountability* (instead of political one), of Government institutions and the procedural prevailing feature of fundamental rights. The first form of constitutionalism rely on the transparency of decision processes, democratic participation, social control and media as instruments able to develop the democratic traits of the system, and thus implementing the Constitution provisions; the second form highlights the greater attitude of the Courts to protect minorities, to extend the degree of protection of fundamental rights, to make public opinion in line with reason principles through an heavy use of reasoning tests, even at the price of a reduction of the action and choice scope of the democratic legislation.

<sup>82</sup> This is the thought of J.H. ELY, *Democracy and Distrust*, Cambridge, Ma, 1980.

deference and activism but, it allows, in both phases, to avoid two results equally extreme: the degradation of the respect for the legislator undergoing the judicial power and, on the contrary, the turning of the judge protagonism into malfeasance. In the European legal field, the basic conditions able to contain the alternation between *activism* and *deference* within reasonable limits are not easy to be detected and all remains in the hands of the voluntary *self-restraint* of the Courts, that it is unrealistic to expect.

The absence of a real dialogue with the political actors cannot be replaced by the integration, even the widest integration, of the contradictory before the Court. We can agree on the fact that, the legislative will, marked by “the struggle” of political and ideological conflicts, in the judicial review, can be assessed, in a more suitable *milieu* for reasoning and timing, and return to reasonableness; and it is not risky to claim that the political reason, under the fruitful dialogue with the unavoidable law-cases, will return to the practical reason. It is indeed clear that the judicial case cannot replace the democratic process; it can indeed reproduce a fragment or a portion, but it cannot manage to replace its systemic function and it does not allow, by virtue of its rigidity and the forms of implementation, the cultural and interest mediations carried out in the discussion scenarios of the democratic policy.

The only concrete and possible *democratic dialogue* of supranational Courts is, in real terms, the dialogue with national Constitutional Courts. In the changed context of the supranational jurisdiction of rights, the national Courts shall be promoters and advocates of the expectations and prerogatives of the national political process. They are in fact entrusted to perform the requests of a re-politicization of a *jurisprudential law*, elaborated by the supranational Courts without the constraints given by policy makers, in a context almost void of dialogue with the political actors.

The constitutional judges, keepers of the rights linked to territories in which they are placed and thus their specific historic and cultural identity, are not featured by any *political dimension*<sup>83</sup> by definition and by virtue of their theoretical status, end up by acting then, by a paradoxical cunning of history, as the authentic, extreme defenders of the *political feature* of fundamental rights.

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<sup>83</sup> As defined by G. ZAGREBELSKY, *Principi e voti. La Corte costituzionale e la politica*, Einaudi, Torino, 2005.