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Constitutional Balancing and Fundamental Labour Rights: an Analytical Approach to the Italian and Spanish Case Law on Post-Crisis Reforms

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Abstract

A number of labour and social security reforms adopted by EU countries in the aftermath of the 2008 crisis have been challenged before national Constitutional Courts, which have sought to resolve the conflict between fundamental labour rights and conflicting economic interests, through balancing exercises.

The thesis investigates the legal reasoning developed by the Italian and Spanish Constitutional Courts in crucial post-crisis judgments. The study draws on neo-constitutional theories and starts from the assumption that fundamental labour rights, understood as rights aimed at protecting workers and their dignity either during their working life or after retirement, must be fully enforced, albeit can be subject to limitations in order to protect other rights and interests constitutionally guaranteed.

In order to achieve this objective, the thesis focuses on the jurisprudential theories on balancing characteristic of the two judicial constitutional traditions addressed and designs an analytical framework that allows a comprehensive assessment of the units of analysis. Overall, the research has shed light over a number of issues, which have a general relevance as far as concerns the relationship between Constitutional Courts and fundamental labour rights. With regard to the specific cases investigated, the study suggests that both Courts tend to supervise the balancing conducted by the legislator, rather than to balance actively the conflicting constitutional interests. However, the techniques applied substantially diverge. The analysis shows that while the Spanish Judge has failed to both apply the proportionality test and guarantee a full enforcement of fundamental labour rights, the unstructured and dialectic technique traditionally used by the Italian Court has been – more – functional to this aim. On the other hand, in both cases, despite the significant differences, the Courts have uphold the limitations to the scope of fundamental labour rights, imposed by post-crisis policies.

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This modest work is dedicated to Maestro.

Table of Contents

List of Abbreviations

CAE	*Contrato de Apoyo a los Emprendedores*
D.L.	Decree Law
D.Lgs.	Legislative Decree
ECB	European Central Bank
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EFSF	European Financial Stability Mechanism
EFSM	European Financial Stabilization Mechanism
EPP	Euro Plus Pact
ESM	European Stability Mechanism
EU	European Union
GDP	Gross Domestic Product
ILO	International Labour Rights
IMF	International Monetary Fund
JA	JOBS Act
MoUs	Memoranda of Understanding
RDL	Royal Decree Law
SGP	Stability and Growth Pact
TFEU	Treaty on the Functioning of the European Union
TSCG	Treaty on Stability, Coordination and Governance
WS	Workers' Statute (*Ley del Estatuto de los Trabajadores*)

Introduction: from the EU crisis to constitutional balancing

Balancing between conflicting rights and interests has long been the subject of authoritative academic debates, under various perspectives[1]. For introductory purposes, balancing can be defined as a method used by either the legislator or the Courts (both ordinary and constitutional) to regulate or decide cases in which the enforcement of one right or interest comes into conflict with another right or interest. In what is called the constitutional balancing, the conflicting rights and interests find explicit recognition in the Constitution and their scope cannot be compressed to the point of making them void.

The 2008 crisis[2] and the European legislators' reactions have newly drew attention to the delicate equilibrium between conflicting interests and rights in pluralist legal systems. In order to tackle the effects of the recent crisis, the EU Institutions have decided to follow the *austerity way*[3]. The austerity policies adopted by the EU have imposed a number of reforms in certain Member States, *inter alia*, labour and social security reforms, which have put social and labour rights under serious pressure. Indeed, even though the flexibilisation of the labour market is not a novelty of our decade, the tendency towards increasing deregulation of the labour market was reinforced after 2008, when the bubble burst and the financial, sovereign-debt and economic crisis seriously hit a number European countries. The way in which EU institutions have reacted to the crisis and attempted to foster a recovery is highly controversial. As a general consequence, a number of labour law reforms, adopted by several euro area countries with the purported aim of overcoming the Eurozone crisis, have had a negative impact on workers and trade unions' rights[4]. Indeed, the already unstable labour law has been further impaired. In

[1] Among the legal theorists firmly supporting balancing as the most appropriate way to develop constitutional judgments, see Alexy 2003. In contrast, authoritative scholars, such as Dworkin and Habermas reject the balancing approach, for an introduction cf. Habermas 1996 and Dworkin 1977.

[2] What is generally referred to as "the latest economic crisis" is the result of a bubble burst in United States in 2007, with the collapse of the subprime loans and the subsequent Lehman Brothers bankruptcy (September 2008). These events rapidly hit financial markets worldwide, including EU countries, and, consequently, the real economy, too. For a comprehensive review of the 2008 crisis, see Shambaugh 2012.

[3] Chieco, 2015, 360, underlines how this policy option is far from being innovative. The austerity-opponents include the noble prize Joseph Stiglitz, who has advocated, several times, against the theory that public financial constraints represent a way to foster the economic development, see, amongst others, a 2014 article titled *Europe's Austerity Distaster*, available at: https://www.socialeurope.eu/europes-austerity-disaster. Tridico, 2013, on the basis of empirical analysis, argues that countries with a less flexible labour market are those that have performed relatively better during the economic crisis.

[4] Clauwaert, Schömann 2012; Bruun et al. 2014; a latest comprehensive review in Vigneau 2018. Overall, it is often highlighted that European responses to the Eurozone crisis have threatened fundamental social rights and,

short, since 2009, we have witnessed a deepening in the labour law crisis, within, and causally linked with, the economic and financial crisis.

The impact of post-crisis measures on workers' rights has been widely observed and discussed. It is often highlighted that European responses to the Eurozone crisis have threatened fundamental social rights as well as institutional balances[5], raising also constitutional issues within Member States[6]. Fundamental changes in working time regulation, an increase in atypical employment, consistent reforms of rules on redundancy and alteration of the industrial relations structures and processes, which have affected social dialogue and collective bargaining, were observed[7].

Baranard describes the EU crisis as divided in "three overlapping phases". In 2008, mainly because of a housing bubble and a credit boom, the *financial crisis* exploded and it seriously destabilized the banking system in EU countries. In 2010, the *sovereign-debt crisis* followed, because a number of EU Member States had to face large deficits, partly due to the necessity to bailing-out banks, as well as consistent debts. In order to deal with the most delicate national situations, the EU Institutions encouraged the replacement of democratically elected Governments with technical Governments, as it was the case in Italy and Greece (2011). Here it comes what the author calls the *crisis of democracy*[8].

In order to respond to the financial and sovereign debt crises' effects, the EU has focused on improving the economic governance and fostering the adoption of certain shared rules, which mainly focus on the containment of public deficit. In 2010, the first move to stabilize the economic situation of its area was the establishment of the European Financial Stabilization Mechanism (EFSM), by Council Regulation 407/2010, on the grounds of the emergency provision under Art. 122.2, Treaty on the Functioning of the European Union (TFEU). This emergency funding program was administered by the

consequently, institutional balances, raising also constitutional issues within those Member States mostly affected by the crisis, like Portugal, Greece, Ireland, Italy and Spain, See Kilpatrick, De Witte 2014; Caruso, Fontana 2015, which collects a series of contributions on the relationship between the 2008 crisis and fundamental labour rights.

[5] Sciarra 2014; Giubboni 2016 provides a wide-ranging reflection on the impact of the crisis on the European integration process; see also Kilpatrick 2015, where the author investigates on the "interaction of constitutions, sovereign debt and social rights in Europe today".

[6] Tuori, Tuori 2014. Already in 2007, Bin argued that "the decisions that impact on the enforcement of rights are taken elsewhere, in cold locations, external to the democratic circle and far from the social conflict": Bin 2007, 56 ff.

[7] Clauwaert, Schömann 2012; on Italy, Spain and Portugal, see the concise review by De Stefano 2013 and the critical analysis by Giubboni, Orlandini, 2018; Marshall 2014 talks about a proper shifting of responsibility from the financial crisis to labour.

[8] Barnard 2012, 127.

Council and the Commission, while the European Central Bank (ECB) retained a consulting role. In order for the funds to be released, or the loans to be disbursed the State had to comply with certain conditions. However, for financial capacity reasons the EFSM has played a minor role. Indeed, still in 2010, the European Financial Stability Facility (EFSF) was set up. This fund, financed by the Eurozone members, was meant to tackle the sovereign debt crisis in a temporary way, while the EU Institution were designing and working on a permanent fund. On the grounds of the EFSF, the Commission, together with the ECB and the International Monetary Fund (IMF) (a trio known as Troika), could negotiate with the beneficiary States Memoranda of Understanding (MoUs), with the aim to release financial assistance upon compliance with terms and conditions set out therein. This procedure was applied to provide financial assistance to Ireland, Portugal and Greece, as well as for the initial recapitalisation of Spanish banks in 2012. Finally, the EFSF was replaced by the – permanent – European Stability Mechanism (ESM), which entered into force in September 2012[9], after Art. 136.3 TFEU was amended in order to allow the EU Member States to establish a stability mechanism as such (however, it is noteworthy that the Treaty amendment entered into force only on 1 May 2013). The main objective of the TESM is to safeguard the financial stability of the euro area and the activation of financial assistance is connected to strict economic policy conditionality[10].

One of the preconditions for receiving financial support on the grounds of the European Stability Mechanism consists in having ratified and implemented Title III of the Treaty on Stability, Coordination and Governance (TSCG) in the Economic and Monetary Union, also known as Fiscal Compact (the TSCG is an intergovernmental Treaty signed on 2 March 2012). The Fiscal Compact, which supplements the Stability and Growth Pact (SGP) (first introduced in 1997), requires all of EU Member States to comply with the debt-level rules, that is with the principle of balanced budget, which entails that the general budget deficit cannot exceed 3.0% of the gross domestic product (GDP). Both Spain and Italy have decided to constitutionalize the deficit constraints, respectively in September 2011 and

[9] On 25 March 2011, the European Council adopted the Conclusions on the establishment of the ESM; while, the proper ESM Treaty was adopted on 2 March 2012.
[10] See, Tuori, Tuori 2014, 89 ff; Schoemann 2014, 11-24; specifically on the Troika see Fischer-Lescano 2014, 55-81.

January 2012, even though the Treaty did not require the Member States to introduce the principle of balanced budget necessarily via Constitutional revision.

In the meantime, in March 2011, the adoption of the Euro Plus Pact (EPP), from all seventeen euro zone members, was reinforcing the economic governance, by deepening fiscal coordination, with a view of complementing the Stability and Growth Pact. In particular, it has been concluded having in mind four main objectives: promoting competitiveness, which may include reviewing wage setting arrangements and fostering the decentralization of collective bargaining; supporting employment, by promoting, among others, flexicurity; assuring the sustainability of public finances, also by limiting early retirement schemes; reinforcing financial stability. Furthermore, the adoption of the six-pack in 2011 and two-pack in 2013 has reiterated, within the EU legal framework, what provided for by the Fiscal Compact[11].

Already in 2009, both Italy and Spain had been the targets of Council Recommendations exhorting national authorities to bring to an end the situation of excessive government deficit[12]. Subsequently, in August 2011, the Italian and Spanish Prime Ministers received a letter from the ECB, where the European Bank was inviting the two Governments to proceed with reforms aimed at flexibilising the labour market and wage setting procedures, favouring the decentralization of collective bargaining, as well as cutting social expenditure and public-sector wages[13].

Overall, the European institutional responses, which led to amend the Lisbon Treaty, set up the European Stability Mechanism and sign the so-called Fiscal Compact, have also influenced national labour law, which "has undergone profound reforms marked by a blatant explosion of inequalities and insecurity for workers, in many cases heedless of fundamental social rights"[14]. In Italy, the "parallel

[11] The 2011 Six-pack is composed by Regulation 1173/2011; Regulation 1174/2011; Regulation 1175/2011; Regulation 1176/2011; Regulation 1177/2011; Directive 85/2011. The 2013 Two-pack is composed by Regulation 472/2013; Regulation 473/2013 applicable to the euro area countries. On the economic governance effects on national labour systems see Barnard 2012, 127-140, and Chieco 2015.

[12] Council Recommendation 15757/09, of 30 November 2009 to Italy with a view to bringing an end to the situation of an excessive government deficit; Council Recommendation 15764/09, of 30 November 2009 to Spain with a view to bringing an end to the situation of an excessive government deficit.

[13] Tuori, Tuori 2014, 83.

[14] Bruun et al. 2014, 325; see also Kilpatrick, De Witte 2014. Similar conclusions are reached by Leschke 2012. More recently, Sciarra 2016. Tuori and Tuori suggest that the EU crisis management has confirmed "the fundamental imbalance between Treaty provisions on social and economic issues": Tuori, Tuori, 2014, 233. For a critical reflection around prospects for social rights in the EU and Social Europe following the 2008 crisis, see the

legal system", represented by the new tools and institutions of the European economic governance, has strongly influenced the labour reforms under both Monti (2012) and Renzi (2014-2015) Governments, which have attempted to shift the protection of workers from the contract to the market and have exposed the industrial relations model to a considerable pressure[15]. Likewise, in Spain, austerity measures have reduced welfare rights, led to a decentralization of collective bargaining and eased the termination of the employment relationship[16]. In the crisis context, legislators have often tried to justify threats to the rule of law and foundations of democracy under the state of emergency argument[17].

Some of the national norms implementing austerity policies and policies oriented towards the flexibilisation of the labour market have been challenged before national Constitutional Courts, which have sought to resolve the conflict between the fundamental labour rights tackled by the reforms and economic interests, through balancing exercises. Overall, the Courts have been blamed for having applied "judicial restraint and displayed far-going understanding of government defences invoking economic emergency"[18].

An assessment of the relevant Italian and Spanish constitutional case law can contribute to define the current status of the constitutional conflict of fundamental labour rights with other interests of an economic nature, in national legal systems strongly influenced by the EU policies in the aftermath of the 2008 crisis. The constitutional case law of the two southern European countries is well suited for inspiring a joint reflection, inasmuch as both Italy and Spain have adopted a centralized system of constitutional review – albeit with certain differences – and the respective Constitutions are rich in principles and programmatic norms that both the Parliament and the Constitutional Court have to

rich anthology edited by Countouris, Freedland 2013; Giubboni 2013; Garben et al. 2017; Kilpatrick 2018. While, Dorssemont 2014 adopts the social partners' point of view in the EU legal framework.

[15] Chieco, 2015, addresses the reforms of 2012 and 2015, with a view of stressing the role of the Charter of Fundamental Rights to enforce labour rights. Guarriello, 2016, assesses the changes imposed to the collective bargaining system following the economic crisis. However, there is not absolute consent over the criticisms made to these reforms, for instance Caruso, 2016, points out that the opinions over JOBS Act are various and range from a total disappointment, to an optimistic attitude that sees in this reform the trigger for a new way of regulating employment relations. See also, Tega 2014a.

[16] González Pascual 2014; Rodríguez 2014; Gil y Gil 2015; Villalón 2016. A broader analysis of the EU impact on national labour law from a Spanish perspective is provided by Casas Baamonde 2014.

[17] Sciarra 2014.

[18] Tuori, Tuori 2014, 240. A remarkable exception is represented by the Portuguese Constitutional Court case law, appreciated for having been extremely defensive of the fundamental labour rights concerned, see Cisotta, Gallo 2014; Butturini 2016. For a first and comprehensive analysis of the post-crisis constitutional case law, see the contributions published in Kilpatrick, De Witte 2014.

translate in directly applicable legal terms. Moreover, in the aftermath of 2008, the two countries have been subject to considerable pressure from EU institutions to implement austerity policies and liberalize the labour market.

In Italy and Spain, the so-called post-crisis reforms have been adopted in a political (e.g. exchange of letters, recommendations by the EU institutions), economic (economic and financial crises) and legal (overuse of urgency legislation, constitutional reforms of the public budget constraints) context, which is increasingly calling into question the content and enforcement of constitutional workers' rights.

Nevertheless, the Spanish and Italian judicial cases are not parallel in normative terms. The Spanish judgments address individual and collective labour rights in private employment, while the Italian judgments released so far deal with rights concerning workers in public employment and pension rights. However, all of these post-crisis constitutional judgments on labour and social security reforms have addressed norms that have limited the scope of fundamental labour rights. For the purpose of this research, by labour rights is meant rights aimed at protecting workers and their dignity, either during their working life or after retirement. In the Spanish and Italian legal systems, these rights are *fundamental* inasmuch as they are recognised and protected at constitutional level, thus representing – a part of – the foundation of the respective societies.

Notwithstanding the relevant similarities in both the 2008 crisis' impact and the constitutional structure – in terms of fundamental social rights and centralized system of constitutional review – the assessment of the legal reasoning in the selected judgments is conducted under the assumption that we are not in a "global age of balancing". The technique of balancing labour and social rights with other interests and rights, in order to decide upon the constitutionality of a norm, is a common feature of all Courts. However, the research is conducted bearing in mind that *balancing* can take different names and shapes depending on the Court and the legal tradition concerned.

The thesis aims to contribute to understand the status of fundamental labour rights' protection, after the 2008 crisis, at the latest (national) stage of adjudication, under the assumption that constitutional labour rights must be fully enforced, albeit can be subject to limitations in order to protect other rights

and interests constitutionally guaranteed[19]. Moreover, it intends to utilize the selected judgments to explore the relationship between fundamental labour rights and Constitutional Courts. In order to achieve these goals, a number of intermediate questions need to be addressed. Therefore, the thesis investigates upon the role of the Constitutional Courts as regards balancing conflicting rights and interests and under which arguments and techniques the different Courts have developed their legal reasoning, bearing in mind the national judicial peculiarities[20]. Moreover, it identifies which interests and rights have been – and can be – balanced against each other, also in light of the recent constitutional amendments and choices of political economy. In particular, the focus is on the economic crisis argument(s) and to what extent it may justify restrictions to fundamental labour rights.

Although Italy and Spain present consistent similarities in their constitutional organization, as well as in the structure and functioning of the Constitutional Courts, the crucial differences do not allow a rigorous comparison of the case law[21]. What makes a parallel analysis of the Spanish and Italian cases noteworthy is the common necessity to balance constitutional and consolidated labour rights with other rights and interests, in the economic crisis context. Even though the rights and principles tackled and discussed by the Courts do not perfectly coincide, the judgments stimulate the same questions: to what extent and how fundamental labour rights can be limited by the legislator? That is, under what type of arguments and by applying which legal reasoning? And, what role has the Constitutional Court in this dynamic?

[19] On the crucial role and value of constitutional social rights see, Ferrajoli 2001.

[20] In this sense, see the recent work by Bomhoff, 2013, who argues that also because of these substantial diversities it would be more appropriate to talk of a balancing *discourse*, rather than a balancing technique.

[21] Italy and Spain are characterised by the same system of centralized constitutional review of ordinary legislation, inspired by Hans Kelsen theories. Indeed, both the Italian and the Spanish systems adopted the Kelsenian model of constitutional review, which was originally implemented by the Austrian Constitution. This model provides for the establishment of a separate constitutional tribunal, which is the sole Court entitled to solve all disputes concerning the constitutionality of secondary legislation, in order to effectively grant the rigidity of the Constitution (for a review see Comella 2004). However, the Austrian model was not fully transplanted in those European legal systems, which adopted it at a later stage. Indeed, both the Italian and the Spanish Constitutions are rich in principles and programmatic norms and the Constituent Assemblies have given the role to translate in directly applicable legal terms principles and values enshrined in the Constitution to both the Parliament, entrusted with the legislative power, and the Constitutional Court, which is entitled to oversee the ordinary laws (Modugno 1982). Moreover, the Italian and Spanish systems of Constitutional review present substantial differences, one for all, while the Italian system does not envisage a procedure that allows citizens to appeal directly before the Constitutional Court, the Spanish Court can receive the so called *recurso de amparo* (appeal for constitutional protection of fundamental rights) (for an introduction to *recurso de amparo*, see Arroyo Jiménez, Ortega Carballo 2014).

Indeed, strict comparison is not the purpose of this work, which rather aims to use the two groups of judgments as bases to reflect upon the different ways in which a Constitutional Court, that grounds its decisions upon a long and written Constitution that provides for fundamental labour rights, can develop its legal arguments and guarantee the latter rights in relation to other interests constitutionally protected.

Finally, the thesis wants to represent a step towards a paramount reconciliation between constitutional and labour law in light of the necessity to guarantee a full enforcement of fundamental labour rights, independently from the economic arguments and the ever-changing labour-market policies.

Chapter 1 describes and discusses the most relevant labour law reforms approved in Italy and Spain, following the 2008 crisis. This chapter also reviews the academic literature that has addressed the relevant constitutional judgments, with a view to identify the literature gap and the arguments that have triggered the research questions that have guided the study reported in this thesis. In both Italy and Spain, labour rights have been affected by consistent reforms, approved in order to implement policies oriented towards the flexibilisation of the labour market and in compliance with austerity policies. Law 3/2012 is the Spanish labour reform that have had the most significant impact on the labour relations system of the country. The comprehensive reform has been criticized for several reasons and various provisions enshrined therein have been challenged before the Spanish Constitutional Court, which has ruled on them in two crucial judgments: Judgment 119/2014 and Judgment 28/2015. The consistent Italian amendments that have followed the 2008 crisis have concerned both social security and individual and collective employment law. The reforms at issue, on the one hand, have had a significant impact on public employees' wages and pensions; while, on the other hand, have fostered the flexibilization of the labour market at both entry and exit-level. The Italian case offers a rich case law, mostly dealing with provisions aimed at enforcing the balanced budget principle. Beyond any doubt, among the numerous issues that the Italian and Spanish judgments have raised we can find the balancing of labour rights with other constitutional principles and interests. Nevertheless, albeit some authors, mostly constitutional lawyers, have emphasised that the Courts have operated a balancing of interests and rights, an attentive and comprehensive analysis from a labour law perspective, that is bearing in mind the paramount application of fundamental labour rights, has not been conducted. On the other hand, those labour

lawyers who have approached the selected judgments have not considered the relevant constitutional categories. Overall, an attentive and systematic analysis of the balancing approach adopted by the two Courts and the effects on the fundamental labour rights concerned has not been conducted, yet.

Chapter 2 introduces the concept of pluralist constitution and reviews the neo-constitutional theories that explain the relationship between fundamental rights and principles as a relationship between founding values that have been legally positivized. These principles and rights, which are expression of values, are absolute, in abstract terms, but they may enter into conflict in the legislative practice. In simple words, the implementation of a fundamental right may violate another – conflicting – constitutional right. This conflict, according to authoritative scholars, can only be solved through the balancing exercise. The extensive – and traditional – literature on balancing, mainly provided by legal philosophy scholars is addressed. However, the chapter mostly focuses on the Italian and Spanish literature, with the aim to capture the main theoretical arguments around the key features of the legal reasoning conducted by the respective Constitutional Courts and build a solid basis, well rooted in the national judicial traditions, for the analysis of the selected judgments. The analysis of the national (Italian and Spanish) academic literature on the various profiles of balancing has been paramount in order to grasp the content of this technique as applied by the different Courts. On the one hand, the Italian system strongly relies on the principle of reasonableness as developed by the Italian Constitutional Court. On the other hand, the Spanish Court has applied – more or less consistently – the proportionality test originally framed by the German constitutional tradition. The chapter concludes by discussing the various fundamental rights theories, with a focus on the Social State theory, which provides the lenses used in the assessment of the Constitutional judgements conducted in the following chapters.

Chapters 3 analyses the Italian case law, while Chapter 4 the Spanish case law. The two chapters follow the same structure. Indeed, even though the dissertation does not attempt to compare the two cases in a rigorous way, given that the units of analysis are too complex for allowing a proper comparison, structuring the analysis by focusing on the same elements is functional to emphasis similarities and differences and develop a joint reflection. The focus of the analysis is on four main

elements: first, the role of the Court; second, the technique used; third, the constitutional interests subject to the balancing; fourth, the fundamental labour rights in the balance.

The Italian judgments assessed in Chapter 3 can be divided into two clusters. Judgment 223/2012, Judgment 178/2015 and Judgment 124/2017 concern the reduction of public employees' wages. Judgment 70/2015, Judgment 173/2016 and Judgment 250/2017 regard the reduction of the revaluation of retirement benefits[22]. In all of these cases, the Italian Court performs the role of the supervisor of the balancing conducted by the legislator. However, a considerable exception is represented by Judgment 178/2015, where the Court actively balances the right to collective bargaining against the public financial interest, in light of the reformed Art. 81 Constitution, with a ruling of supervening unconstitutionality. The technique used by the Court to develop the legal reasoning is not homogenous in all of the judgments considered. Nevertheless, some common features can be observed. The Court strongly and consistently relies on the principle of reasonableness, which is understood as a hermeneutic principle to be applied jointly with the fundamental – labour – rights at issue, while the principle of proportionality is not applied as a self-standing principle, but rather to support the reasonableness criterion. The fundamental labour rights addressed in the six judgments assessed in this chapter are: the right to collective bargaining (Art. 39.1 Italian Constitution), extensively elaborated also on the grounds of international legal sources, and the right to an adequate pension (Art. 38.2 Italian Constitution), which is read, to some extent, in connection to the right to a fair remuneration (Art. 36.1 Italian Constitution). Furthermore, in some of the cases discussed, the principle of independence of the judiciary (Art. 104 Italian Constitution) should be read as a fundamental labour right, especially as it represents the instrument to grant the right to a fair remuneration to a peculiar group of workers.

The two Spanish judgments assessed in Chapter 4 are coherent under various points of view. In both cases, the Court recognises a wide margin of freedom to the legislator and stresses its extensive discretionarily. Consistently with its recent trend, the Spanish Constitutional Court refrains from scrutinizing the norms under a rigorous proportionality test. While in Judgment 119/2014 the proportionality test criteria are not even mentioned, in Judgment 8/2015, there is an attempt to include

[22] In the finale phase of this thesis, the Italian Constitutional Court has published Judgment 194/2018, on a precise JOBS Act norm. See Annex to this thesis.

them in the legal reasoning. However, the rigour of the proportionality test, that should guarantee transparency and clarity, cannot be found in these legal reasoning, where the hermeneutic principles are mentioned without being systematically applied. The right to work (Art. 35.1 Spanish Constitution) – which has a twofold role in these rulings – and the right to collective bargaining (Art. 37.1 Spanish Constitution) are the fundamental labour rights violated by the contested norms, according to the applicants. However, none of the norms of Law 3/2012 scrutinized by the Spanish Court are found constitutionally illegitimate and the fundamental labour rights concerned are not properly valued. The Court argues that the provisions at issue are justified on the grounds of other constitutional norms, such as the freedom to conduct a business (Art. 38 Spanish Constitution) and, especially, the public authority's duty to conduct a policy aimed at full employment (Art. 40 Spanish Constitution), which are winners of the confused balancing exercise at the detriment of fundamental labour rights.

The concluding chapter develops a joint reflection about the Italian and Spanish constitutional case law on post-crisis measures that have affected fundamental labour rights. These final thoughts contribute to reason on the general relationship between Constitutional Courts and fundamental labour rights, insofar as they are partially applicable beyond the selected cases. In particular, the final section develops a comprehensive reappraisal of the most interesting elements emerged from this study, following the analytical approached developed. The two Courts have behaved towards post-crisis labour and social reforms in a remarkably different way, and, in addition, the effect on the fundamental labour rights concerned partially diverges. However, the two clusters of rulings present interesting points of convergence.

Chapter 1

Post-crisis labour reforms and constitutional case law in Italy and Spain

Introduction

Both the Spanish and the Italian legal systems have been remarkably affected by the EU approach to the post-crisis management. Especially, in both countries, the labour and social law frameworks have been marked by significant reforms, approved in order to implement policies oriented towards the flexibilisation of the labour market and in compliance with austerity policies. So far, in Spain, the Constitutional Court has been called upon to evaluate the constitutionality of reforms that were aimed at liberalizing the labour market, while the Italian Constitutional Court, up to know, has rather assessed the legitimacy of measures adopted in order to reduce public spending and implement the principle of balanced budget, at the detriment of labour rights (broadly understood as rights that relate to workers, whether active or retired). Therefore, in both cases a Constitutional Court has had to evaluate the legitimacy of norms restricting the effective enforcement of social-labour rights. Among the numerous issues that the case law at stake has raised we can include the balancing of labour rights with other constitutional principles and interests.

Albeit key differences exist, the similarities between the two cases allow to structure the sub-chapters in a parallel way. Both for Italy and Spain, a review of the main social and labour reforms, introduced by a brief reflection on the key aspects related to the 2008 economic crisis, is provided. Once the national legal framework is sketched, both sub-chapters present the relevant national post-crisis case law and discuss the respective literature. The Spanish case offers two judgments, each of them dealing with a number of significant labour market reforms. While the Italian case is multifaceted and characterized by various judgments, addressing measures tackling either retirement benefits, or public employees' wages.

In conclusion, a careful review of the extensive and reach literature that has addressed the post-crisis judgments in both countries reveals that it is worthwhile to assess further the balancing of conflicting interests and rights and the criteria used to conduct such balancing in the constitutional case law at stake,

in order to understand the impact that different judicial approaches can have on the enforcement of fundamental labour rights, in two legal systems characterized by substantial similarities in terms of constitutional labour rights and social state model. Moreover, the analysis of the scholarship raises further and broader issues that go beyond the specific cases and pertain to the protection of fundamental labour rights in a democratic legal system. In particular, the judgments addressed in this chapter, diametrically opposite under several profiles, are a stimulating subject of study in order to investigate upon the diverse approaches that the supreme judges can adopt with regard to the protection of fundamental labour rights.

1. Post-crisis labour reforms in Spain and the relevant constitutional case law

1.1 The 2008 crisis and labour law in Spain

Spain is one of the European countries mostly hit by the 2008 economic and financial crisis. It is remarkable that in 2008 the unemployment rate was at 11.3% and in 2010 it had already raised up to 19.9%. Equally striking, in 2011, the public debt was at 11%[23]. A number of elements have been considered the causes of the 21st century great recession[24]. However, what is of main interest for the purposes of this thesis is the impact that a fiscal and economic context as such has had, more or less directly, on labour rights. In 2011, an exchange of letters between the Spanish Prime Minister and President of the ECB demonstrates the clear intention of the Spanish Government to comply with the ECB requests and reform the legislation on the employment contract and on collective bargaining in order to increase the labour market flexibility. In the meantime, precisely on 27 September 2011, a Constitutional amendment has reformed Art. 135 Constitution, by introducing the principle of balanced budget has entered into force[25].

[23] Eurostat Public deficit, available at http://ec.europa.eu/eurostat/tgm/refreshTableAction.do?tab=table&plugin=1&pcode=teina200&language=en; Eurostat unemployment rates, available at http://ec.europa.eu/eurostat/statistics-explained/index.php/File:Unemployment_rate_2004-2015_(%25)_new.png. On the worrying data on unemployment see, inter alia, Ojeda Gutiérrez 2012.
[24] See Rocha 2014, 175; as well as Clasen et al. 2012, 17-19.
[25] See, Ridaura Martínez 2012 and Morrone 2014, 2-3.

The critical situation that Spain was undergoing is emphasised by the fact that on July 2012, the Spanish Government signed with the so-called Troika the "Memorandum of Understanding on Financial-Sector Policy Conditionality" (MoU), which granted Financial Assistance for the Recapitalisation of Financial Institutions. On the national side, this agreement required Spain to respect and comply with, beside bank-specific and horizontal conditionality, the recommendations intended to tackle macroeconomic imbalances, which included the need to implement the structural reforms of the labour market, which had been already adopted.

The most relevant reform of the labour market adopted by the Spanish Government in the aftermath of the crisis, in order to tackle the rising unemployment and with the aim of implementing the EU austerity policies, is Royal Decree Law (RDL) 3/2012 of February 10, converted into Law 3/2012 of July 6. The importance of this measure is proved by the extensive literature, which, since 2012, has addressed and discussed this wide reform and has highlighted, in most cases, its numerous shortcomings[26]. Therefore, the main focus of the following subchapters is Law 3/2012 and, especially, the most critical aspects addressed by the legal scholarship. However, the crisis dates back to 2008 and it would be a mistake to think that the Spanish legislature had not intervened at all on the labour market and industrial relations before 2012. For that reason, before going to discuss the literature on the latest reform, it is worthwhile to review briefly the structural reforms of the labour market and the measures aimed at containing public spending adopted in the immediate aftermath of the crisis, as part of the emergency legislation. In the last part of this sub-chapter, the academic literature assessing the two judgments of the Constitutional Court on the constitutionality of numerous norms of Law 3/2012 is critically reviewed, with the aim to identify what elements of the constitutional case law need to be assessed further.

1.2 The first post-crisis labour legislation

The first relevant post-crisis reform is RDL 8/2010, of May 20, by which the Spanish legislator has adopted urgent measures to reduce the public deficit. Inter alia, the reform provided for the suspension

[26] For a comprehensive review and assessment of RDL 3/2012, see Aa. Vv. 2013.

of the revaluation of numerous kinds of pension benefits for 2011, the reduction of public employees' wages for the whole 2010 and 2011 and the elimination of certain social security benefits.

On the same year, RDL 13/2010, of 17 September, and in a similar way the subsequent RDL 8/2011, of July 1, introduced amendments on corporate tax rates to foster employment. Still with the aim to contain public deficit, RDL 20/2011, of 30 December, on budgetary, tax and financial matters, provided for a number of measures; for instance, the extension of the public employees' salary reduction, as well as the extension of the daily working time for public employees.

Among the legislative reforms preceding RDL 3/2012, Law 35/2010, which aimed at reforming the labour market as well as the industrial relations system in order to tackle rising unemployment, is the legislative act mostly commented by the scholarship, and also the one that has attracted the most intense criticism[27]. This reform has intervened to facilitate the conclusion of fixed-term contracts and the dismissals for organizational reasons and to foster the so-called companies' internal flexibility, thus undermining the role of social partners and collective bargaining. The Law at stake had an identical content to RDL 10/2010, which was adopted without taking into due account the dialogue with social partners that, until then, had been a distinctive element of the legislation on industrial relations[28]. However, as highlighted by Ojeda, Law 35/2010 has failed to provide a comprehensive and consistent reform of the labour market and has resulted in a solely partial revision of the Spanish employment policies[29].

The collective actors were even more tackled by the subsequent Law 7/2011 on urgent measures to reform the collective bargaining system. Overall, Law 7/2011 aims at supporting company level negotiation and, therefore, at decentralizing the collective bargaining system as a whole. In particular, among its various provisions, the amendments on the legitimacy to conduct collective bargaining stands out[30].

[27] On the overall reaction of the Spanish labour law scholarship to RDL 3/2012 , see Baylos Grau 2012a.
[28] De Val Tena 2014, 438.
[29] Ojeda Gutiérrez 2012, 96. For an assessment of Law 35/2010 see Ortega, Manuel 2010; of the same view, Morón Prieto 2010.
[30] On Law 7/2011 and the decentralization wave see Alfonso Mellado 2012 and Cruz Villalón 2012b; for a comprehensive review of the reforms adopted between 2010 and 2011, even beyond those mentioned here, see the report for the European Economic and Social Committee by Baylos Grau, Trillo Párraga 2013; while Clauwaert, Schoemann 2012.

Furthermore, it is paramount to mention another legislative action that has followed the letter from the ECB President and that we can still classify as belonging to what we have broadly identified as the first reforming phase. In 2011, Art. 135 Spanish Constitution was amended to include stringent public budget constraints upon the State, the Public Administrations and the Autonomous Communities. Given that the norm is formally considered a technical constitutional norm, it does not require, to be amended, a public referendum, notwithstanding its potential, but consistent, consequences upon social security and public employment. The renovated text states that public bodies must remain within a structural deficit as established by the European Union (the reference is to the TFEU, which provides for a maximum of 3% of the GDP). Consequently, Public Administrations shall give "absolute priority" to the payment of the public debt (Art. 135.3 Spanish Constitution)[31].

1.3 Royal Decree Law 8/2012: an introduction

The emergency legislation of 2010 and 2011 has not been as emphasised and discussed by the scholarship as Law 3/2012, nor their provisions have been the object of a resonant constitutional case law, as for the 2012 reform. Notwithstanding the sensitive aspects regulated by these reforms, in matters of public expenditures and labour market, and the already clear tendency to maintain that labour rights constitute an obstacle to the creation on employment[32].

As stressed by Baylos Grau, the most striking common feature of the labour reforms adopted in the aftermath of the crisis is the strong *deconstitutionalizing* effect they have had upon Spanish labour law. According to the author, the amendments adopted between 2010 and 2012 have strongly undermined the value and content of the fundamental rights enshrined in the "democratic Constitution"[33], not only because of the content of the legislative measures, but also due to the process that has led to their adoption. From a comparative perspective, the author points out that the Spanish Government, differently from what has occurred in Greece and Portugal, has failed to consult the civil society and to

[31] The reformed Art. 135 Spanish Constitution gave mandate to the ordinary law to develop further its content, the outcome was: *Ley Orgánica de Estabilidad Presupuestaria y Sostenibilidad Financiera* (*Ley Orgánica* 2/2012, 17 April). For a critical assessment, see Aparicio Wilhelmi 2016.
[32] Valdés Dal-Ré 2013.
[33] Baylos Grau 2012a, 19, my translation.

involve the popular power. Indeed, the citizens had no chance to express their opinion in a regular election, over the policy line to be followed in the post-crisis management[34]. The scarce, not to say null, relevance given to the social partners in the process of approving all of the above mentioned labour reforms has often been underlined, as well[35]. Moreover, Law 3/2012 has been presented as complete and locked. Indeed, it does not envisage the possibility for collective bargaining to intervene in order to clarify or regulate any aspect, nor to derogate from the law, differently from what had occurred until then[36].

Again from a comparative perspective, although in different terms and with the aim to understand the reasons why the Spanish Government has failed to achieve its objectives with the 2010 and 2012 labour reforms, Horwitz Myant compares the German case, where strong cooperation with the social partners preceded the labour legislation, with the Spanish one, where the new and crucial norms were imposed with a rigid top-down approach[37].

In Spain, the 2008 crisis has been managed avoiding any kind of confrontation with the civil society. On the other hand, the structural reforms demanded by the EU austerity policies were adopted under the emergency argument and, as often emphasised by labour law scholars, by means of urgent legislative procedures[38]. Casas Baamonde et al. discuss the main features of Royal Decree Law 3/2012, as listed by the Law itself, which is allegedly "extensive", "complete and balanced", "coherent" and "immediate". In particular, the authors argue that the immediate character of the reform has nothing to do with the urgency requirement, which allows the adoption through Royal Decree Law. Indeed, they exclude that there was a case of "urgent and extraordinary necessity", which would have justified, according to Art. 86.1 Spanish Constitution, the use of a legislative decree. The authors suggest not mistake the desire of the Government to apply immediately the law with the "extraordinary and urgent necessity" requirements provided for by the Constitution. According to Paragraph VII of the preamble, the extraordinary and urgent necessity, justifying the Decree Law, lies on the serious situation of the

[34] Baylos Grau 2012a.
[35] Baylos Grau 2012a; Merino Segovia 2012a; Suarez Corujo 2015, 421.
[36] Cruz Villalón 2016; Palomeque Lopez , Alvarez de la Rosa 2014, 198.
[37] Horwitz, Myant 2012, 30.
[38] Baylos Grau 2012a; de Val Tena 2014, 438.

labour market, characterized by a high level of unemployment, and the need to comply with the requests of the EU to tackle the structural problems of the Spanish labour market, as to initiate the recovery of the Spanish economy[39]. However, the authors point out that, according to the Constitutional Judgment 68/2007, Art. 86.1 Spanish Constitution must be understood in the sense that the situation shall meet the characters of exceptionality, seriousness, relevance and unpredictability, in order to justify the use of a reduced legislative process. The authors underline that given the constant need to adapt labour law to the changing economic context, if Art. 86.1 Spanish Constitution would be interpreted less strictly, every labour reform could be adopted circumventing the parliamentary legislative procedure. A scenario as such would mean a structural weakening of the constitutional division of powers[40].

Moreover, according to the preamble of Law 3/2012, the measure is "balanced", inasmuch as it meets the needs of those who are seeking employment, those who are already employed and, finally, the employers. The primary objective, which lies behind the norm and is presented as the cornerstone of the balanced character of this reform, is *flexsecurity*. This alleged aim of Law 3/2012 has been addressed by the scholarship, which has unanimously supported that the 2012 reform is far from providing any kind of security to workers, mainly due to the consistent cut in public spending. To the contrary, flexibility has certainly been achieved, at least on the employer side, given both the reduction of trade union power triggered by the decentralization of collective bargaining and the so-called internal flexibility that allows the employer to adapt place of work, working time, as well as the employees' remuneration according to the market's needs[41].

It has been argued that the uniqueness and echo of Law 3/2012, compared with the previous reforms, is due to the remarkable increase in the employer's power this measure has allowed and triggered[42].

[39] For a reflection over the manipulatory content of the preamble to Law 3/2012 see Urrutikoetxea Barrutia 2012.
[40] Casas Baamonde et al. 2012 and Rodríguez-Piñero y Bravo-Ferrer et al. 2013. See also García Murcia, 2015, 286, who also questions the use of the Royal Decree Law under these circumstances, given the extensive scope of the reform, which affects numerous and generalized elements of the of labour relations.
[41] On this view Escudero Rodríguez 2013, 12; Baylos Grau, Trillo Párraga 2012, 6; Casas Baamonde et al. 2012; Vicente Palacio, 2012, 31, who discusses the neoliberal concept of "employability" with regard RDL 3/2012; Baz Rodríguez 2012.
[42] Vicente Palacio 2012; Valdés Dal-Ré, 2013, who reflects on the mismatch between the aims declared and the aims pursued; see also, Baylos Grau 2012b, in an essay eloquently titled "El sentido general de la reforma: la ruptura de los equilibrios organizativos y colectivos y la exalatcion del poder privado del empresario en la Ley 3/2012"; similarly arguing that the reform has deeply affected the industrial relations' equilibrium Palomeque López, Álvarez de la Rosa 2014, 199 ff; on the rise in the employer's power see also Escudero Rodríguez 2013 and Vicente Palacio 2012.

Furthermore, the fact that a number of norms adopted by Law 35/2010 have been reiterated in Law 3/2012 – for instance the support to the company's internal flexibility – places the latest at the forefront of the academic debate[43].

Law 3/2012 has had a transversal impact, that is on both collective and individual labour rights. Therefore, the following section reviews the main academic debates around the collective and individual labour law reforms of Law 3/2012.

1.3.1 Collective labour law in RDL 3/2012

In Spain, the autonomy of social partners in designing the national industrial relations system is limited and, traditionally, the law plays a key role. Therefore, the legislator has the possibility to promote and support collective negotiation, through legislative acts. However, the same legislator, who retains the power to modify the system, can also affect the power relationship equilibrium weakening workers' organizations[44]. The scholarship is quite unanimous in arguing that the main amendments enshrined in Law 3/2012 have concerned collective bargaining[45]. Ojeda emphasizes the importance of the 2012 reform of collective bargaining by labelling it a "conceptual revolution", inasmuch as, for the first time in Spain, it has assigned more relevance at the company level by amending Art. 84.2 Workers' Statute (WS)[46].

A study from 2016 has highlighted that, unsurprisingly, since 2012, there has been an increase in the conclusion of collective agreements at firm level, especially for the years 2013 and 2014. This tendency has slowed down in 2015, maybe due to the number of trials, triggered by workers' organisations, which have declared those company level agreements null[47]. Cruz Villalón, in an essay published in 2016, assesses the effects of the reform over the practice of the collective negotiation, going beyond a superficial evaluation, which would suggest that the general normative framework has remained

[43] Gómez-Millán Herencia 2012 carries out an attentive analysis of both legislative measures and highlights the common elements; see also Valdés Dal-Ré 2013.
[44] For a review of the relationship between collective bargaining and law in Spain, see the handbook by Palomeque López, Álvarez de la Rosa 2014.
[45] Cruz Villalón 2016, 35-36; Valdés Dal-Ré 2013; Merino Segovia 2012a.
[46] Ojeda Avilés 2013, 1.
[47] Cruces Aguilera et al. 2016, 42.

substantially unaltered. Overall, the author argues that the weight of the reform has been extremely consistent. In short, "it has caused a loss in the centrality of collective bargaining, which has lost strength and capacity to manage and influence the evolution of the labour market"[48]. The qualitative changes in the contractual system have been decisive in overturning the power relationship between the negotiation parties, a condition that affects especially those workers employed in small and medium firms not organized[49].

Considering the norms that have remained unchanged, it may seem that the reform has not affected workers' representation. In particular, the rules on the social partners' legitimation have not been touched. Therefore, a strong presence of workers' organisations during collective negotiations is granted. Moreover, the *erga omnes* effect of – *estatutarios* – collective agreements, which guarantees a wide coverage, has not been cancelled, the freedom to determine the collective bargaining sectors is still recognized and the extensive content of collective agreements, which allows them to cover a wide range of working terms and conditions has remained unaltered. The main amendments have concerned matters, which are only apparently ancillary, but in fact consists of "qualitative changes"[50] in the collective bargaining system. The main legislative novelties can be summarized in, first, less room for collective agreements' *ultractividad*, second, a more elastic – sort of – *descuelgue* process in favour of the employer. Let us now see how these two elements have been regulated and what the main legal implications are.

1.3.1.1 The limited *ultractividad* of collective agreements

In the Spanish legal system, the collective agreement's effect is automatically extended from year to year, unless one of the parties, at the end of the first year or during the extension year, expressly declares (*denuncia*) the agreement's termination. With Law 3/2012 and the renovated Art. 86. 3 Workers' Statute, one year after the termination of the agreement has passed[51] and no other contract has been negotiated

[48] Cruz Villalón 2016, 36, my translation; in a similar way, Valdés Dal-Ré, 2012, argues that the reforms of Articles 82.3, 84.1 and 86.3 of the Workers' Statute have changed the industrial relations system in a structural way.
[49] Alfonso Mellado, 2012, 66, defines RDL 3/2012 as a "deep attack to the right to collective bargaining"; of the same view Merino Segovia 2012a, 377-380.
[50] Cruz Villalón 2016, 37.
[51] One year is considered a short period by Cruz Villalón 2016.

or the arbitration process has not been initiated, the agreement expires, unless differently agreed upon. The article adds that, in a situation as such, the collective agreement of a more general level – if any – applies[52].

Alfonso Mellado highlights a series of legal problems arising from this provision. First, the norm does not seem to consider that there are collective agreements that provide for the automatic denunciation and others that allow the denunciation before the agreed termination. Second, the author emphasises that a hierarchically superior collective agreement does not always exist, and, even where it exists, it is not sure whether it is sufficient to regulate the employment relationship that has remained uncovered. Therefore, this measure triggers a decrease in the coverage rate of collective bargaining and, consequently, a legal vacuum. Third, the norm has not foreseen the possibility that, once a collective agreement is not any longer applicable, several collective agreements may be potentially applicable. Last, Law 3/2012 has a retroactive effect and it imposes the disapplication of collective agreements already denounced before the adoption of the reform, thus strongly weighting on the social partners' autonomy[53].

Although the *Tribunale Supremo* has clarified that if the ultra-effect of a collective agreement has expired, its content remains applicable unless there is an applicable higher-level agreement, Villalon points out that trade unions face a constant threat and because of this norm they negotiate in a weaker position. In practice, while, previously, workers used to take advantage of the termination of a collective agreement to renegotiate a new one and increase their working standards, now it is normally the employers' side to uphold the termination of the contract. Albeit there are no clear data, which allow assessing the changes in collective bargaining coverage, the new framework has surely tackled the continuity between collective agreements of the same level[54].

Other authors have pointed out that while in a context of economic crisis a norm that imposes the disapplication of an expired collective agreement may trigger the contractual renewal, in a future and – hopefully – less tense economic context the temporal limitation of the ultra-effect can cause a contractual

[52] With RDL 7/2011m the legislator has attempted to give impulse to the negotiations, in order to overcome the negotiation-blocks, but, as ultima ratio, the *ultractividad* would have applied anyway. See Sepulveda Gomez 2013.
[53] Alfonso Mellado 2012, 70-71.
[54] Cruz Villalón 2012a, 39-40.

immobility at the lower bargaining level, with the consequent application of the higher-level collective agreements, generally providing for minimum standards[55].

1.3.1.2 The impact on the *descuelgue*[56] procedure

The *descueluge*, or legal opt-out, regime for *estatuarios*[57] collective agreements, set out in article 82.3 of the Workers' Statute has been amended by Art. 14, Law 3/2012. It now establishes that if no agreement is reached between social partners at company level – that is trade unions or other types of workers' representatives at company level and the employer – during the consultation period and the dispute is not solved in any other way, each of the parties can submit the dispute to a binding arbitration procedure before the National Consultative Commission on Collective Bargaining Agreements (*Comisión Consultiva Nacional de Convenios Colectivos*) or similar bodies of the autonomous communities (*Comunidades Autónomas*). The result of the arbitration is binding upon workers and employers, however, it may concern only the conditions listed at Art. 82 WS. Moreover, paragraph 1 of Art. 12, Law 3/2012, has amended Art. 41 WS, on the possibility to modify terms and conditions set by *extraestatuarios* collective agreements. What has been mainly criticised by the scholarship is the impact that norms as such can have over the autonomy of social partners and their contractual strength.

As a result, terms and conditions of collective agreements with *erga omnes* effect can be partially disapplied according to Art. 82.3 WS, which envisages a specific procedure[58], while collective agreements not regulated under Title III WS are subject to the procedures of Art. 41 WS, which allows the employer to modify, substantially and unilaterally, working conditions if economic, technical, organizational and productive reasons exist. The conditions that may be unilaterally modified under the procedure provided for by Art. 41 WS include working time and its distribution, shifts, remuneration,

[55] Sepulveda Gomez 2013, 23; Merino Segovia 2012b, 260.
[56] A sort of "legal opt-out".
[57] The Spanish industrial relations system envisages two types of collective agreements: the so-called *estatutarios* collective agreements are concluded within the framework of Title III Workers' Statute, they are negotiated and concluded by the most representatives social partners and have *erga omnes* effect. Differently, the so-called *extraestatutarios* collective agreements are not covered by Title III WS and, therefore, they do not have generally binding effect in the relevant sector, but their content is fully binding for workers and employers who are members of the negotiating organizations.
[58] For a reflection over the arbitration process provided for by Art. 82.3 WS, see Navarro Nieto 2013 and Meilán Delgado 2016.

working system and productivity. It has been observed that, while for the process of *descuelge* (Art. 82.3 WS) the terms and conditions that can be modified are strictly listed, as to the substantial changes (Art. 41.1 WS) the article provides for an open list, envisaging the possibility to impose modifications on other matters[59].

In brief, the reform has allowed the disapplication of terms and conditions agreed in sectoral collective agreements, and hence the unilateral lowering of labour standards, when economic, technical, organizational and productive causes occur. Again, the social partners' role has been seriously hit. For the first time substantial changes, *in pejus*, do not need to be agreed by the parties and they are not the result of a compromise, but it is simply in the freedom and power of the employer to provide in this sense, while workers may exclusively take the judicial way to question the employer's decision. The amended Art. 41 WS and Art. 82.3 WS introduce a clear exception to both the *pacta sunt servanda* principle and the binding effect of collective agreements of various nature that the Spanish Constitution recognizes and protects[60].

Overall, the purpose of the norm of giving more flexibility to companies to boost employment is criticised by the scholarship because it rather has the sole effect of wakening social partners' power. As emphasised by Merino Segovia, Law 3/2012 with its decentralization prospects wanted collective bargaining to be a tool to adapt the working conditions to the concrete scenario and not an obstacle. The reform clearly aims to foster the decentralization of collective bargaining as a tool to boost internal flexibility (an objective already pursued by Law 7/2011), as proved by the renovated Art. 84.2 WS, which allows collective negotiation at company level to be initiated at any time, on various matters, even though the higher-level collective agreements are still effective and do not provide in that sense[61].

A purpose as such may be understood as a declaration of discredit towards collective bargaining, which would cause negative effects to the economic development, damaging, in particular,

[59] See Cruz Villalón 2012a, 411; for a review of the crucial amendments of the mentioned articles see Sepulveda Gomez 2013.
[60] Sanguineti Raymond 2012, 226.
[61] Merino Segovia 2012a, 35-36; Herencia 2012, 115. For a detailed assessment of the amendments to Art. 84 Workers' Statute, also as regards the relationship between collective agreements at different levels, see Muñoz Ruíz 2015.

competitiveness[62]. Sever criticism is advanced by Alfonso Mellado, who lists a number of objectives, that, he believes, lie behind the reform. For instance, according to the author, the norms aim to modify the rules on structure and articulation of collective bargaining, in order to deprive the social partners of the power to build an appropriate structure. Moreover, he supports that the reform has a precise intention to boost the flexibility of industrial relations by increasing the possibility for the employer to disapply terms and conditions of the collective agreement (*descuelge*) and to create the conditions for the public administration to unilaterally refuse to apply the collective agreements[63].

1.3.2 Individual labour law in RDL 3/2012

As to individual labour law, RDL 3/2012 has amended a number of relevant norms with regard to the initial phase of the employment relationship, its development and termination. Beyond any doubt, the individual labour law reform most extensively assessed and commented by the scholarship is the so-called *contrato de apoyo*, which has been questioned before the Constitutional Court, thus raising further academic debates. However, before going to review the literature on this new type of contract, in order to have a clearer picture of the overall impact of Law 3/2012, it is worthwhile to briefly point out some of the reforms that have concerned individual labour law in the various phases mentioned above. At this stage of the normative review, it is unsurprising that all of them have aimed at increasing the internal flexibility and the decisional power of the employer.

As far as concerns the individual employment relationship, Law 3/2012 has modified the apprenticeship framework, by moving the age limit, for being employed in apprenticeship, from 25 years-old to 30 years-old; it has increased from two to three years the maximum length of this contract and it has left very limited possibilities of intervention to collective bargaining on the apprenticeship duration. Moreover, it has increased the effective working time of 10% and it has reformed the possibility to conclude several apprenticeship contracts between the same parties. Therefore, since 2012, the entrepreneur can sign a further contract of apprenticeship with the same person as long as it concerns different tasks. All that is coupled with consistent economic incentives to the companies to foster the

[62] Cruz Villalón 2016. 37; Sepulveda Gomez 2013, 8.
[63] Alfonso Mellado 2012a, 66.

use of these types of contracts[64]. Moreover, the reform has opened to the possibility for part-time employees to make extraordinary working hours. Indeed, before 2012 workers employed with this contract could only make the so-called *complementary hours* that were previously agreed with the employer and were taxed as regular working time. Overtime is now accessible to part-time workers too and, although the fiscal regime is comparable to the normal working time, the employer is free to demand extra hours at any time, without previous agreement[65]. Furthermore, the reform has facilitated the use of temporary agency work and reduced the severance pay in given contexts[66].

Last, substantial amendments have concerned the termination phase of the employment contract, further shifting the power imbalance in favour of the employer. First, Law 3/2012 has reformed the procedure for collective redundancy. Second, it has amended the termination for objective causes, in particular the termination for unsuitability and for absenteeism. Third, the 2012 reform has deeply restructured the legal framework for disciplinary dismissal, by providing for a substantial reduction of the indemnity for unfair dismissal and the suppression of the so-called "express dismissal"[67].

In particular, as far as concerns collective redundancy the 2012 legislator has remarkably amended the normative framework at the detriment of workers, by suppressing the need for the administrative authorization, thus degrading the public authority role, by extending the economic reasons that may justify collective redundancies and by deleting the employer's duty to justify the reasonableness of the collective dismissals[68].

Together with these, and other, substantial reforms of individual employment law, Law 3/2012 has introduced the highly criticised open-ended employment contract in support of entrepreneurs, known as *contrato de apoyo al los emprendedores* (CAE). This norm is considered the "star" provision of the reform[69]. In short, this new type of contract, which may be used by companies employing less than 50

[64] For an assessment of the apprenticeship reform, see Garcia Blasco 2012.
[65] Moreno Vida, 2013, 34, who also discusses the reform on Telework.
[66] Vicente Palacio 2012; for a comprehensive review of the recent reforms see the handbook by Palomque Lopez Alvarez de la Rosa 2014.
[67] On the latest dismissal law reforms see, inter alia, Gil y Gil 2014 who stresses the neoliberal logic behind these norms and reflects upon the limits that the executive has to respect when reconciling economic freedoms with workers' rights, before analysing the 2012 Law; Of a similar view Suarez Corujo 2015, 420; Vicente Palacio 2012, 28 ff.
[68] Aparicio Tovar 2012 provides a comprehensive analysis of the amended legal framework for dismissal.
[69] Ironically so defined by Moreno Vida 2012, 194; the same expression is also used by Pérez Rey 2012.

workers and until the Spanish unemployment rate falls below 15%, consists in a new type of full-time contract that carries a trial period of one year, during which unjustified dismissal is allowed[70]. Under the CAE, if, once the trial period is over, the employer hires the worker, incentives are provided. The alleged goal is to foster employment, whilst the business initiative should grow[71]. Indeed, as pointed out by Moreno Vida, the measure is part of Chapter II on the promotion of long-term employment contracts and the creation of employment[72].

One of the key criticisms moved to the one-year probationary period relates to the compatibility of such a long duration with the whole Spanish legal framework, including the case law. In particular, the Tribunal Superior, in a crucial judgment from 12 November 2007, had stated that the length of the trial period has to reflect the rationale behind this legal institute that is to allow the entrepreneur to evaluate the worker's attitudes and the suitability of that contract of employment. Moreover, in further rulings, the judges have pointed out the need for the trial period to be rational and compatible with its purpose and function[73].

Certain scholars argue that this measure, similarly to those concerning industrial relations, strongly upsets the balance of power between workers and the employer, in drastic favour of the employer, by loosening the protection for unjustified dismissal[74]. Garcia Blasco also highlights that the legitimacy of a norm as such is even more questionable given that it does not leave any door open to the intervention of collective bargaining[75]. In conclusion, it is argued, the risk is that the CAE results in a legal fraud, becoming a *de facto* and unjustified (a-causal) fixed-term employment contract, with *ad nutum* termination, which is in violation of Art. 35.1 Spanish Constitution[76].

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[70] Indeed, in the Spanish labour law framework, the trail period is regulated and the probationary period agreement (*pacto del period de prueba*) allows unjustified dismissal; the reasons for dismissal cannot be judicially questioned, unless there is a violation of fundamental rights, or the causes are alien to the object of trial period agreement.
[71] Article 4, Law 3/2012; for a clear legal assessment see Garcia Blasco 2012 and Pérez Rey 2012, who analyse in depth a number of element of the present contract, including the economic incentives.
[72] Moreno Vida 2012, 94.
[73] Garcia Blasco 2012, 15; Moreno Vida 2012, 199; Vicente Palacio 2012.
[74] Inter alia, Moreno Vida 2012; in a similar way Vicente Palacio 2012; Diaz Aznarte 2015 expressly argues that the contrato de apoyo favours only the employer (on the grounds of Valdés Dal-Ré conclusions).
[75] Garcia Blasco 2012, 15.
[76] Garcia Blasco 2012; Vicente Palacio 2012. On the effective conclusion of this type contract the first months after the reform was approved see Arévalo Quijada et al. 2012. While, Salcedo Beltrán, 2014, 144, observes that up to October 2014, 246.121 of *contrato de apoyo* had been concluded. See, also, http://www.eduardorojotorrecilla.es/2015/08/reforma-laboral-y-periodo-de-prueba-de.html.

A number of labour law scholars have analysed the new contract of employment from the perspective of international norms and standards, as well. In particular, Salcedo Beltrán and Hernández Bejarano discuss the conclusions of the European Committee of Social Rights (ECSR), published on 23 May 2012, with regard to the extension of the trial period from two months to one year, introduced by the Greek executive with Law 3899/2010, which, according to the authors, would be applicable to the Spanish case, too. The Committee concludes that one year constitutes an unreasonable and disproportionate length for a probationary period[77]. Salcedo Beltrán hoped for a clear declaration of violation of Art. 4.4 European Social Charter from the one-year probationary period, core element of the new *contrato de apoyo*. Indeed, before the Constitutional Court Judgments on the legitimacy of the one-year trail period, the courts of Barcelona (19 November 2013, No. 412/13), Tarragona (2 April 2014, No. 179/14) and Matarò (29 April 2014, No. 144/14) had already ruled on this norm. All of the three courts have declared that a probationary period as the one at issue is excessive and unjustified. Interestingly, the tribunals have grounded their ruling upon the ECSR's conclusions regarding the Greek – similar – case[78].

1.4 The crisis-case law in Spain: two crucial cases and their interpretation

The Spanish Constitutional Court had two main occasions to discuss the merit of Law 3/2012 and evaluate its compliance with the Spanish Constitution: Judgment 119/2014 and Judgment 8/2015[79]. On 12 February 2014, the Constitutional Court had released *Auto* 43/2014, dismissing the appeal against a number of norms enshrined in Law 3/2012 as manifestly unfounded, with two dissenting opinions. This peculiar type of decision, which does not have the same value as a proper Constitutional Court's judgment (rather, it is a sort of warrant), is not addressed here, as it is not relevant for the purpose of

[77] Salcedo Beltrán 2014; Hernández Bejarano 2014; Garcia Blasco, 2012, 16, points out the risk that this norm may infringe upon ILO Convention No. 158.
[78] Salcedo Beltrán 2014, 68. In an article from 2015, Vallecillo Gámez, 2015, also emphasises the Conclusions XX-3 released by the ECSR on Spain in 2014, where the Spanish labour reform is found in breach of numerous articles of the European Social Charter. For a detailed study of the ILO norms with respect to Law 3/2012 see, inter alia, Lopéz Lopéz 2012; Aa. Vv. 2014.
[79] Other attempts, eventually dismissed, to challenge the constitutionality of Law 3/2012 were made, starting from October 2012, see Gómez Garrido 2015, 108-113.

this thesis, even though it is mentioned in Judgment 8/2015, as regards the measure on *salario de tramitacion*[80].

The two constitutional judgments addressed and the counter-arguments raised by Valdés Dal-Ré allow a joint assessment. Indeed, many authors have analysed and discussed the rulings together[81]. The second judgment (8/2015) is strongly in line with the first one (119/2014) and it refers to it extensively, reiterating core arguments, to the point that it has been considered an "extended confirmation" of Judgment 119/2014[82]. Given the considerable similarities, also the literature is consistent and mostly critical on the same aspects.

Overall, the authors have focused on the relevance of the economic crisis and unemployment as crucial arguments to justify the norms of Law 3/2012. Second, they have emphasised and criticised the high discretionality recognised to the legislator, which seems to undermine not only the role of constitutional labour rights and collective actors, but also that of the Spanish Constitutional Court itself. Third, the use in the Court's legal reasoning of articles traditionally not pertaining at all to the interpretation of labour rights has been highlighted.

An overview of the two judgments is necessary in order to comprehend the issues dealt with by the academic literature. Therefore, first, Judgment 119/2014 and 8/2015 are concisely presented. Second, the existing literature around the two rulings is discussed with the aim to identify which elements have not been addressed enough, yet.

1.4.1 Judgment 119/2014

In October 2012, the Parliament of Navarra appealed to the Constitutional Court to challenge the constitutionality of various articles of Law 3/2012, of 6 July, on urgent measures to reform the labour market, claiming the violation of a number of constitutional rights.

In particular, the applicants argued that the contract of employment introduced by Art. 4.3 of Law 3/2012, which provides for one-year probationary period, infringes upon the right to work, granted by

[80] For an assessment of *Auto* 43/2014, see de Val Tena 2014.
[81] García Murcia 2015; Cruz Villalón 2015; Diaz Aznarte 2015; Fernández López 2015.
[82] See García Murcia 2015, 284.

Art. 35.1 Spanish Constitution. Under their view, a norm as such, which does not foresee any possibility for the social partners to intervene, has the effect of undermining collective bargaining autonomy. Second, it creates a different regime for companies with less or more than 50 employees. Third, the possibility to dismiss the worker during the first year of employment, without indemnity and excluding the judicial review of the dismissal, infringes upon the right to equal treatment (Art. 14 Spanish Constitution), the right to work (Art. 35 Spanish Constitution) and the right to collective bargaining (Art. 37 Spanish Constitution).

The Court ruled in favour of the constitutionality of Art. 4.3, Law 3/2012. In particular, the norm is found in compliance with Art. 35.1 Spanish Constitution. Most of the Spanish labour lawyers seem to agree on the fact that the Court has applied the principles of reasonableness and proportionality to decide over the violation of Art. 35 Spanish Constitution. First of all, the Court states that the norm, and hence the partial infringement of the right to work, is justified by the economic and employment context. Indeed, it is recognized that Art. 35 Spanish Constitution is affected by a significant restriction, but, first, the right to work is not absolute, second, Art. 4, Law 3/2012, represents a solution to the situation of sever economic and employment crisis. Therefore, the reform is justified by, first of all, reasons of employment policy, constitutionally protected under Art. 38 Spanish Constitution, that is the freedom to conduct a business and especially the mandate given to the public authorities to guarantee and protect its exercise and the defence of productivity. Second, the restriction to Art. 35 Spanish Constitution is justified by Art. 40.1 Spanish Constitution, according to which the public power has to conduct a policy of full employment.

Furthermore, the norm is judged proportionate, since the sacrifice of the constitutional right to employment stability is compensated by individual and collective advantages deriving from the boost of employment. Moreover, according to the Court, the new type of contract provides for enough guarantees to the worker, which consist, for instance, in subjective limits, both on the side of the company and that of the worker, and the expectation to have a long-term contract at the end of the probationary period[83].

[83] Suarez Corujo 2015, 425.

As to the reasonableness of the norm, the Court begins by referring to ILO Convention No. 158. The norm is found in line with ILO Convention No. 158, which, in the interpretation of the Spanish Court, recognizes discretionality to the legislator as to the length of the probationary period. The latest – according to this interpretation of the international norm – must have a reasonable duration, which, exceptionally, can be "relatively long", if this is justified by a low employment rate. The Court argues that, also in light of the discretionality left to the legislator, the one-year probationary period is reasonable, and therefore in compliance with ILO Convention No. 158[84].

Salcedo Beltrán highlights that no reference is made to the European Social Charter and the conclusions of the European Social Committee, which were relevant for the case at stake and were clearly arguing that the economic crisis cannot justify restrictions to social rights. Also with regard to international norms, Valdés Dal-Ré dissenting opinion differs consistently[85].

Last, the Court dismisses the unconstitutionality under Article 14 Spanish Constitution, given that the aim of the norm, which consists in giving time to the employer to understand the suitability of the job, justifies its indiscriminate application, under Art. 37.1 Spanish Constitution, on the grounds of its non-absolute character and under Art. 24.1 Spanish Constitution, since the possibility to challenge unlawful acts has remained untouched.

Secondly, the claimants challenged the compliance of Art. 14.1 of RDL 3/2012, with both the effectiveness of rights and the effective judicial protection (Art. 24.1 Spanish Constitution), the trade union freedom (Art. 28.1 Spanish Constitution) and the binding effect of collective agreements (Art. 37.1 Spanish Constitution), inasmuch as it reforms Art. 82.3 Workers' Statute and introduces a binding arbitration, which assigns to the *Comisión Consultiva Nacional de Convenios Colectivos*, and corresponding bodies, the authority to decide upon the disapplication of terms and conditions established in a collective agreement, following a unilateral request. In practice, it is argued by the applicants, this norm gives to the employer the power to unilaterally modify the working conditions established in a collective agreement if a further agreement is not reached.

[84] As pointed out, inter alia, by Suarez Corujo 2015; Salcedo Beltrán 2014; García Murcia 2015, 301-303.
[85] Salcedo Beltrán 2014, 151, 157.

The constitutionality of Art. 14.1, Law 3/2012, and the amended Art. 82.3 Workers' Statute, is based upon the argument that, albeit collective agreements in Spain have a binding effect, this does not mean that terms and conditions of collective agreements are "petrified" and, hence, cannot be modified, even if technical or productive fluctuations arise, under the conditions established by law. Although the measure enshrined in Art. 14.1, Law 3/2012, represents an exception to the binding character of collective agreements, it pursues a legitimate aim – internal flexibility – and it carries enough limits to its application – as the rigid list of terms that can be modified – to be considered protected under Art. 35.1 Spanish Constitution, Art. 38 Spanish Constitution and Art. 40.1 Spanish Constitution and, therefore, justified. Moreover, the challenged norm is found in compliance with Art. 24.1 Spanish Constitution as well.

Again the situation of serious economic crisis and the necessity for the entrepreneur of adapting terms and conditions of employment to the needs of its company has led the Court to put Art. 37.1 Spanish Constitution, thus the right to collective bargaining, in relation with Art. 38.1 and 40.1 Spanish Constitution and, eventually, the right to collective bargaining has lost the balancing.

Last, according to the claimants, Art. 14.3, Law 3/2012, which amends Art. 84.2 Workers' Statute, and establishes the supremacy of company level agreements infringes upon both the trade union freedom (Art. 28.1 Spanish Constitution) and the right to collective bargaining (Art. 37.1 Spanish Constitution)[86]. As to this provision, which introduces the priority of company level agreements and amends Art. 84 Workers' Statute, the Court reiterates that in the Spanish legal system a "predetermined constitutional model of collective negotiation does not exist"[87], nor the Constitution provides for a centralized or decentralized system of collective bargaining. Again, the Court stresses the legislator discretionality over the articulation of collective bargaining and its levels, as well as over the margin of intervention of collective actors. In this case, the power of determining the structure of collective bargaining confers and absolute supremacy to the law, over the social partners' autonomy. In addition, according to the Court, the norm aims at fostering productivity and sustainability of the companies, which are objectives

[86] The claimant also suggests that the norms at stake violate ILO Convention No. 158 and No. 98. For a reflection over the measures challenged before the Constitutional Court in the case at stake, see Senra Biedma 2014.
[87] As pointed out by de Val Tena 2014, 462, my translation.

protected under Art. 35.1 Spanish Constitution, Art. 38 Spanish Constitution and Art. 40.1 Spanish Constitution, and it does not hamper the social partners from negotiating at sectorial level[88].

1.4.2 Judgment 8/2015

In October 2012, a number of national deputies from various political parties lodged a constitutional complaint against various norms enshrined in RDL 3/2012, converted into Law 3/2012, on urgent measures to reform the labour market. Eventually, in Judgment 8/2015, the Court concluded, once again, for the constitutional legitimacy of the provisions challenged.

As anticipated, this latest ruling is strictly connected to Judgment 119/2014, not only for the overall conclusions which are alike, but also because the norms challenged by the plaintiffs partially correspond and the Constitutional Court extensively refers to its ruling from 2014.

As to the norms already discussed in Judgment 119/2014, on Art 4.3, Law 3/2012 (one-year probationary period in the CAE), the Court reiterates the arguments of its previous Judgment, thus, in brief, it stresses that the norm is justified, reasonable and proportionate, since it aims at supporting the creation of stable employment in a context of economic crisis. Therefore, it states that Articles 35.1, 37.1, 24.1 Spanish Constitution (which infringement is not claimed in Judgment 119/2014) and Art. 14 Spanish Constitution are not violated.

In Judgment 8/2015, the Court establishes a close link between the new type of contract and the novel – and justified – approach towards collective bargaining, which restricts collective autonomy. In particular, it argues that the legislator's purpose to avoid that autonomous collective actors may hamper the achievement of the aim of the norm, that is boosting employment, is fully legitimate[89].

Issues are raised again also in relation to Art. 14.1, which amends Art. 82.3 Workers' Statute and confers to a specific Commission the power to grant the disapplication of working conditions established in a collective agreement. Mostly, the questions were already discussed and solved by Judgment

[88] For an attentive review of Judgment 119/2014 see, inter alia, de Val Tena and Senra Biedma 2014; in a similar way Suarez Corujo 2015, 434.
[89] Para. 3, also emphasised by Fernández López 2015, 262.

119/2014. However, in its second judgment the Court adds that the norm is reasonable and proportionate, since the Commission has only a residual role and "it does not substitute collective bargaining or the exercise of trade union freedom". Moreover, its decision is subject to "causal, material and temporal restrictions"[90]. Finally, the challenge of unconstitutionality concerning Articles 37.1, 28.1 35.1, 40.1, 38, 24.1 Spanish Constitution was newly rejected.

Also Art. 14.3, which prioritizes collective negotiation at company level, was newly challenged in October 2014, for breaching Art. 37.1 Spanish Constitution, that is the binding effect of collective agreements, and the freedom of association protected by Art. 28.1 Spanish Constitution. Apparently, the new issues raised by the claimants on this norm were not persuasive enough to induce the Court to rule for the unconstitutionality of the reform of Art. 84.2 Workers' Statute. Indeed, in order to strengthen its point, the Court puts forward more arguments on the legitimate aim of the reform and it stresses that no restriction to negotiate for any trade union has been imposed. However, on this issue, the Court had elaborated more extensive arguments in Judgment 119/2014.

Six norms of Law 3/2012 and the overall structural reform of the Spanish labour law system were exclusively object of the second constitutional complaint.

The first new claim relates to the general effect of Law 3/2012. The applicants support that the new legal framework provided for by the reform at issue implies a deep transformation of the Spanish Labour Law system, in contrast with the social and democratic state and the Constitutional values and principles. It is stressed that the Constitution does not empower the legislator with such an extensive discretionality, to the point of allowing amendments in contrast with the constitutional model of labour relations.

The Court addresses the claims on the disrespect of the constitutional labour framework as a whole by elaborating an argumentation that seems to be aimed at constructing the legal basis for the further points in law concerning the single norms[91]. The Court clearly sets the supremacy of the law over social partners as to the regulation of various "aspects" of collective bargaining. Indeed, it reiterates, also with regard to the one-year probationary period, that the legislator has a wide margin of discretion as to the structure, content and limits of collective negotiation. This statement must be read together with the

[90] As underlined by Gómez Garrido 2015, 116, my translation.
[91] García Murcia 2015, 287.

assumption that the Spanish Constitution does not provide for a rigid model of industrial relations and collective bargaining, nor it has provided for a trade union monopoly over collective rights and their application. To the contrary, in this respect it has left a wide margin of appreciation to the legislator. In conclusion, it is up to the legislator to regulate the industrial relations system, within the constitutional limits[92].

The claimants challenge the constitutionality of Art. 12.1 Law 3/2012, which amends Art. 41 Workers' Statute, paragraphs 4 and 5, and allows the employer to impose unilateral changes to working terms and conditions established in *extraestatutarios* collective agreements, on the grounds of Art. 37.1 Spanish Constitution, Art. 28.1 Spanish Constitution, Art. 24.1 Spanish Constitution. This norm, according to the claimants, violates the constitutional provisions even more seriously than the reform providing for a "compulsory arbitration" (Art. 14.1, Law 3/2012), since, in this case, the unilateral power of the employer does not have any boundary. The claimants underline that every party to a collective agreement is bound by the *pacta sunt servanda* principle, which is guaranteed by Art. 37 – and indirectly by Art. 28.1 Spanish Constitution – and cannot be at the mercy of the legislator. Furthermore, it is observed that, in practice, the extensiveness of the reasons justifying such modifications makes the unilateral amendments always possible. Consequently, the broad liberty granted to the employer does not guarantee the effective judicial protection, either (Art. 24.1 Spanish Constitution).

The Court admits that the mechanism introduced by Art. 12.1, Law 3/2012, affects the content of collective agreements, but it justifies this interference by first arguing that a system as such is not new to the Spanish legal system and the purposes of the norm are in compliance with the right to work (Art. 35.1 Spanish Constitution), the full employment policy (Art. 40.1 Spanish Constitution) as well as the business freedom and defence of productivity (Art. 38 Spanish Constitution). Second, it – apparently – applies the test of constitutional proportionality, which is eventually passed by the norms. The Court expressly mentions the three criteria: suitability (*idoneidad*), necessity (*necessidad*) and proportionality in the strict sense (*proprtionalidad en sentido estricto*). However, the element emphasised to conclude

[92] In particular, the choice of such a vague word as "aspects" is highly criticised and this argument, according to Fernández López, was unnecessary and even dangerous: Fernández López 2015, 262; of a way less critical view see Gómez Garrido 2015, 114; for a deep reflection of the Court's legal reasoning in this respect, see García Murcia 2015, 287-290.

that the reform is proportionate is the aim of the norm, i.e. to tackle unemployment. Also in this case, the challenge of unconstitutionality on the grounds of Art. 24.1 Spanish Constitution is dismissed. As emphasised by Wilfredo Sanguineti, the Court asserts that given that the exercise of the entrepreneur's power is subject to conditions, it does not prejudice in an unnecessary way the constitutional rights. However, no assessment is done as to other alternative and less harmful measures, that may equally achieve the aim[93].

Art. 14.2, Law 3/2012, amending Art. 84.2 Workers' Statute, is deemed unconstitutional by the claimants on the grounds of Articles 37.1 and 28.1 Spanish Constitution. The norm, by referring to the third paragraph of Art. 14, establishes an absolute priority of company level agreements and the complete exclusion of social partners from any decision over the hierarchy of collective bargaining levels. This entails the possibility to disapply the sector level agreement at any time, also in favour of company agreements concluded by workers' representatives not belonging to any union, as well as the ineffectiveness of the agreements reached by the social partners on the collective bargaining structure. According to the claimants the violation of Art. 37.1 Spanish Constitution and Art. 28.1 Spanish Constitution is plain, given the exorbitant intervention by the legislator and the lack of objectivity, proportionality and necessity, inasmuch as in order to allow the establishment of terms and conditions of employment closely to the entrepreneurs' needs a different, and less detrimental, norm could have been adopted.

Given the substantial identity of effects between this norm and the subsequent paragraph already decided in the previous ruling, the Court reiterates its reasoning and the conclusions reached in Judgment 119/2014. Moreover, it adds that the new claims do not constitute solid grounds for concluding in favour of the violation of Articles 37.1 and 28.1 Spanish Constitution.

The claimants raise the unconstitutional legitimacy of the second paragraph of the final dispositions of Law 3/2012, which amends the 10th additional provision of the Workers' Statute. Once again, it is argued that the norm violates Art. 37.1 Spanish Constitution and Art. 28.1 Spanish Constitution, since it substantially restricts the trade union autonomy in an unjustified and disproportionate way by

[93] Wilfredo Sanguineti 2015.

declaring null the collective agreement's clause that provides for the termination of the employment contract once the retirement age is reached. The claimants also deny the existence of objective reasons of labour public order, which would justify this reform. Furthermore, the different treatment caused by the norm between public servants and the other workers violates Art. 14 Spanish Constitution and the right to equal treatment, as well as the right to access public employment (Articles 23.2. and 103.3 Spanish Constitution). The Court is clear in reminding that the right to collective bargaining has a legal characterization, therefore nothing in the Constitution excludes the possibility for the law to establish what issues can be dealt with by collective agreements. Moreover, even though in its case law the Court had recognized the legitimacy of an intervention as such from collective bargaining, it points out the different current context, due to the fact that the legislator has now changed its retirement policy, and it argues that it is legitimate not to allow the social partners to upset the new policy choices. In particular, this retirement policy, which is justified by both the right to work and the protection of the general interest[94].

Furthermore, two paragraphs of Article 18, Law 3/2012 were challenged. Art. 18.3, Law 3/2012, which reforms Art. 51 Workers' Statute named "collective redundancy", is considered disrespectful of the relevance of the causal element of dismissal and of the role of the judicial review. As a consequence, it is deemed in violation of the right to work (Art. 35.1 Spanish Constitution) and the right to effective judicial protection (24.1 Spanish Constitution). In particular, the claimants contest the new definitions of economic, technical, organization and productive causes, and the emptying of their meaning, especially for the economic cause, and the suppression of the employer's duty to prove the concurrence of causes and, hence, to justify the dismissal[95]. The Court bases its ruling on this norm upon a comparative evaluation of the definitions before and after the 2012 reform. In its opinion, Law 3/2012 does not make significant changes to the definition of technical, organization and productive causes, while it does affect substantially the meaning of economic causes. However, the Court denies that the

[94] As emphasised by Gómez Garrido 2015, 123.
[95] For further thoughts, see Diaz Aznarte 2015, 198.

norm has created an *ad nutum* and a-causal dismissal and, also, that the effective judicial protection is not guaranteed. Therefore, neither Art. 35.1, nor Art. 24.1 Spanish Constitution are infringed upon[96].

Art. 18.8, Law 3/2012, (and consequently Art. 23.1) amends Art. 56.2 WS and limits, in case of judicial declaration of illegitimate dismissal and reintegration of the worker, the payment of the *salario de tramitacion*, that is the amount of salary the worker would have received if he/she had not been dismissed. This provision, according to the claimants, violates both the right to work (Art. 35.1 Spanish Constitution) and the right to equal treatment (Art. 14 Spanish Constitution). In this case, the Court extensively refers to *Auto* 43/2014, which had previously dismissed the unconstitutionality of the provision under certain conditions. However, it adds that it is not the Court's role to evaluate the choice made by the legislator and judge upon whether it is the more appropriate or the best possible option, but it only has to evaluate whether that choice respects the limits imposed by Art. 35 Spanish Constitution.

Last, the claimants challenge the constitutional legitimacy of the 3rd additional disposition of Law 3/2012, on the basis of Articles 14, 23 and 103.3 Spanish Constitution, in connection with Art. 35.1 Spanish Constitution. The reasons attached to this claim are, first, the inconsistency with the objectives of the reform, that is to grant the internal flexibility, and, second, the indirect support to collective redundancy, which remains the only procedure for the Public Administration to operate staff reduction, inasmuch as the latest is excluded from the application of Art. 47 Workers' Statute, and therefore from the possibility to reduce working hours and suspend employment contracts for economic, technical, organizational and productive reasons. The judges dismiss the claim of unconstitutionality on the grounds of violation of the principle of equal treatment, since different situations cannot be treated equally. In a similarly offhandedly way, the Court dismisses the unconstitutionality on grounds of Articles 23 and 103.3 Spanish Constitution.

1.5 Two unexpected judgments: the economic crisis argument, the primacy of the Law and the redistribution of constitutional values

[96] According to Gómez Garrido 2015, 121, the new definition of economic causes is "more objective and eliminates uncertainties […] in agreement with the constitutional principles and values".

According to Wilfredo Sanguineti, the economic crisis has been a crucial trigger of the change in the constitutional case law approach: Judgment 119/2014 and Judgment 8/2015 are a clear evidence of this tendency, as well as *Auto* 43/2014[97]. In a similar way, Baylos Grau points out that the economic crisis, and its consequences in terms of unemployment have been the core argument of this case law[98]. Salcedo Beltrán observes that the arguments used by the Court to uphold the *contrato de apoyo* are irrespectful of the basic social rights and inconsistent with the labour law system. The most part of these arguments, indeed, suggest that an economic crisis is enough to adopt whatever measure independently of the labour rights constitutionally protected, which are not "rights" in the strict sense anymore, but just prerogatives subject to the will of the legislator and the economic context[99].

This repeated use of the economic crisis as a key argument is in stark contrast to the ESCR, which has sharply rejected the economic crisis argument to justify the lowering of labour standards[100]. Moreover, it has been underlined, the labour market problems that Spain is facing are not due to the labour law system – as it was before the latest reforms – but to the Spanish productive system, which means that the axiom *rigid labour rights entail unemployment* does not hold true[101].

In particular, it has been observed that Art. 38 Spanish Constitution, which protects productivity, is nothing but a "rhetoric cover", since the business freedom does not create any valid ground to associate the creation of employment with the lessening of labour rights[102]. In Suarez Corujo's view, the most worrying result of the Court's reasoning is the depletion of the meaning of the right to work and the right to collective bargaining protected under Articles 35 and 37 Spanish Constitution. Indeed, the author argues that the Court seems to establish as a cornerstone of the Spanish industrial relations system Art. 38 Spanish Constitution, the freedom to conduct a business and the defence of productivity. Thus, clearly converting labour law in the law that protects the business interests[103].

[97] Wilfredo Sanguineti 2015, 325.
[98] Baylos Grau 2015, 28-29.
[99] Salcedo Beltrán 2014, 152**.**
[100] Vallecillo Gámez 2015, 102.
[101] Diaz Aznarte 2015, 203.
[102] Baylos Grau 2015, 29.
[103] Suarez Corujo 2015, 434-5.

According to Judge Valdés Dal-Ré, such an extensive use of Art. 38 Spanish Constitution is inappropriate in a social and democratic state. Indeed, the effect is the creation of a new criterion to judge upon the constitutionality of a norm: the economic context, while the constitutional limits must be independent from the economic scenario[104]. For instance, as to the *contarto de apoyo*, given that Art. 40.1 Spanish Constitution and Art. 38 Spanish Constitution prevail over Art. 35 Spanish Constitution, the entrepreneur's interest in assessing the sustainability of the contract prevails over the right to work. An approach as such breaks with the past case law, which had declared the interest of the worker to keep its employment as a fundamental interest. While, as to the right to collective bargaining, it has been argued that the Court ignores "the virtual character of the right to collective bargaining, which, paradoxically, does not seem to be well assessed, except for a comparison made with a hyper-realistic Art. 38 Spanish Constitution, combined with Art. 40 Spanish Constitution"[105].

Considering the numerous shortcomings identified in the post-crisis case law, Wilfredo Sanguineti wonders whether the Constitutional Court is renouncing to its role of supreme warrantor of the Constitution and it is rather welcoming an understanding of fundamental rights, which considers them enforceable as long as they are not in conflict with the economic policy. The authoritative scholar also envisages the possibility that behind the choice to favour the employment unilateral power to the detriment of labour rights lies an ideological choice[106]. In a similar way, Baylos Grau argues that this case law puts into question both the idea that the Constitutional Court should be a warrantor of fundamental rights and the legitimacy of the Court itself, which vacillates because of an approach keen to legitimize any legal choice, even if affecting labour rights, because of the supremacy of the macroeconomic policy[107].

Garcia Murcia and Gómez Garrido offer a different view. The first author argues that an appropriate economic structure is necessary for the enjoyment of fundamental social rights and labour legislation cannot protect groups' interests, but the general interest of the whole society. Therefore, according to the author, it is not surprising that the Constitutional Court has balanced labour rights against the

[104] Dissenting opinion by Judge Valdés Dal-Ré.
[105] Fernández López 2015, 260-261, my translation; Suarez Corujo 2015, 424, 434.
[106] Wilfredo Sanguineti 2015, 327, 329.
[107] Baylos Grau 2015, 29-30.

necessities of the "economic constitution", that is against Art. 38 Spanish Constitution[108]. Gómez Garrido, after having pointed out the complexity of the issues dealt with and discussed the strategy of the claimants – defined "maximalista" and mostly based upon unfounded arguments and the misunderstanding of the constitutional model – upholds the conclusions of the Court and also the principles expressed therein, such as that the right to collective bargaining has a legal characterization[109].

Throughout its legal reasoning the Court stresses the discretionality of the legislator and its authority in, for instance, justifying the one-year duration of the probationary period on the ground of the entrepreneur interest in understanding also the economic sustainability of that employment contract. This approach has been widely criticised by Spanish labour lawyers, who have argued that the Court has simplistically recognized to the legislator an almost unlimited discretionality in regulating the content of the rights provided for by the constitutional norms, failing to provide any guideline to the legislator to define and enforce the essential content of any right. The judgment has resulted in a hymn to the law and its capacity to affect collective bargaining[110].

Also with regard to collective labour law, the primacy of fundamental rights does not seem to be the focus of the case law anymore, instead elements like the freedom of the legislator to rule upon and design the industrial relations are emphasised[111]. To the point that the Court comes to the conclusion that the law has an absolute priority over social partners autonomy to establish a framework for collective bargaining by distorting the meaning of Art. 37.1 Spanish Constitution. According to Fernández López, the most affected right is beyond any doubt the right to collective bargaining and the collective autonomy, which, as highlighted by Valdés Dal-Ré, has been repeatedly and worrying labelled "rights with legal characterization". Although the dissenting judge recognises that a closed model of labour relations does not exist, he points out that the legislator does not have absolute freedom as to its regulation, especially because Art. 37.1 Spanish Constitution implies the promotion of collective

[108] García Murcia 2015, 301.
[109] Gomez Garrido 2015, 124; of a similar view is Martín Valverde 2014.
[110] Fernández López 2015, 261; Suarez Corujo 2015, 434; Salcedo Beltrán 2014, 151. More recently, Giubboni Orlandini, 2018, have argued that the role of the collective autonomy has been "mortified" in favour of the discretionality of the legislator.
[111] Wilfredo Sanguineti 2015, 325.

negotiation[112]. Among the serious breaches of this core collective right the judge identifies the absolute priority of the company level agreements, introduced with the amended Art. 84.2 Workers' Statute, since it deprives the social partners of the possibility to come to an agreement as to the structure of collective bargaining, as well as the amendment of Art. 41 WS, which undermines the binding effect of collective agreements, as recognised by Art. 37.1 Spanish Constitution.

1.5.1 Around the principle of proportionality and labour rights in the post-crisis constitutional case law: a marginal focus for labour lawyers

A number of authors in assessing Judgment 119/2014 and discussing the most controversial elements, underline the explicit reference made by the Court to the application of proportionality and reasonableness, especially with regard to Art. 41 WS[113]. However, the way in which these criteria have been applied and justified has not been assessed in depth and the vast majority of studies only mention the two criteria, or the application of the proportionality test. A large part of the labour law literature published after the release of the second judgment, i.e. Judgment 8/2015, and, hence, mostly analysing the two rulings together, also undermines, although to a lesser extent, the misuse of the principle of proportionality by the Constitutional Court.

For instance, Salcedo Beltrán observes that the Court makes use of the "always complex judgment of proportionality", but she does not address at all the way in which this complex judgment has been applied and she only mentions the principles of reasonableness and proportionality, without questioning the consistency of the reasoning developed under these labels[114]. Also Fernández López does not adopt a critical perspective on these principles. The author only points out that the restriction of Art. 35 Spanish Constitution is justified, according to the Court, by the judgments of rationality and proportionality, almost as if she was suggesting that the application of such principles would inevitably lead to such a conclusion[115].

[112] As pointed out by Diaz Aznarte 2015, 200; as to Fernández López 2015, see 260-263.
[113] See, inter alia, Gómez Garrido 2015, 118 and, in a different way, Baylos Grau 2015, 29; Fernández López 2015, 262.
[114] Salcedo Beltrán 2015, 151, my translation.
[115] Fernández López 2015, 260.

Suarez Corujo, after having reviewed the judgment, addresses what he considers a new argumentative logic used by the Constitutional Court and states that it will have serious consequences for the model of industrial relations. However, while looking at the legal reasoning, he does not address at all the issue of the application of the principle of reasonableness and proportionality by the Court. What the author, in his analysis, considers the "new constitutional approach" is characterized by two main elements. First, the use of Art. 40 Spanish Constitution, which is found surprising, since, beforehand, the Court had never used the argument of a "policy oriented to a full employment" to overcome the enforcement of labour rights, as if the goal of full employment may justify any elusion of labour rights. Second, the use of the economic crisis and the high unemployment as a justification for the reduction of both individual and collective labour rights. The Court does not take into account its role of democratic counterweight, which should make sure that the essential content of fundamental rights is preserved, while respecting the legislator discretionality[116]. However interesting and meaningful the assessment and conclusions by Suarez Corujo are, he fails to analyse the legal reasoning in full. Indeed, the strong focus on the merit of the constitutional rights tackled by the judgment does not leave any space to the evaluation of the argumentative path followed by the Court, the structure of the legal reasoning that allows the Court to come to such stunning conclusions. The fact that the author expressly mentions the test of constitutionality, as conducted with regard to the *contrato de apoyo*, which, in his view, implies an assessment of whether the norm purses a legitimate aim, and, if it is reasonable and proportionate, although the Court – differently from the dissenting opinion – never expressly refers to the test, demonstrates the mis-consideration given to this aspect[117].

Fernández López only mentions that in Judgment 8/2015, about the *contrato de apoyo*, the Court has elaborated more on the principle of proportionality, compared with judgment 119/2014, while in the points in law on the amendments to Art. 41 Workers' Statute, the Court has stressed more on the proportionality of the norm, but in a very superficial way. However, in none of these cases the author

[116] Suarez Corujo 2015, 435.
[117] Suarez Corujo 2015, 423.

goes beyond a simple reference to this issue and is not interested in providing a proper analysis of these arguments[118].

Gómez Garrido highlights the decision of the Court not to evaluate the choice made by the legislator and judge upon whether it is the more appropriate or the best possible option, but he does not reflect at all upon the approach of the Court on whether it is consistent with the proportionality principle or not[119]. Garcia Murcia, who seems to adopt an acritical attitude towards the judgments as well, mentions the use of the proportionality test, especially with regard to Art. 41 WS and stresses the necessity of applying such a principle and, also, that it constitutes a consolidated technique of the constitutional case law. However defensive of the balancing approach he is, he completely fails to address in detail the use that the Court has made in these occasions of such a legal technique[120].

Only Wilfredo Sanguineti has raised the issue of the misuse of the proportionality test in a brief commentary, generally addressing the three judgments on the post-crisis reform. Although the reflection is general and concise and it does not develop a deep analysis of the judgments, it points out remarkable elements and offers food for thought. The authoritative author criticizes the crisis-case law of the Spanish Constitutional Court because of its misuse of the principle of proportionality, which is not, in his words "a mere judgment of rationality or arbitrarieness, that can be satisfied by the simple reference to the legitimate character of the aims". First, the suitability of the norm to achieve the aim is only based upon the fact that it pursues legitimate aims, no further assessment is made. The reference to "economic crisis", "creation of stable employment", etc. seems enough to find the norm suitable. Similarly, about the necessity criteria, which should lead the judge to assess whether the challenged norm imposes a sacrifice upon fundamental rights which is not necessary, since alternative and less harmful means exist, the Court remains vague and solely focus on the legitimate purpose of the norm[121].

Last, the author points out that the key criterion of proportionality in a strict sense aims at understanding whether the constitutional sacrifices caused by a provision are justified by its beneficial effects. Obviously, the greater is the sacrifice, the more relevant needs to be the justification. According

[118] Fernández López 2015, 262.
[119] Gómez Garrido 2015, 121.
[120] García Murcia 2015, 300.
[121] Wilfredo Sanguineti 2015, 326-327.

to the scholar, the Court does not elaborate enough on this crucial aspect. Overall, this judgment has given the impression that the proportionality test is, in this case, only a "technical expedient used to elaborate a decision taken in advance"[122].

Moreover, it is highlighted that no reference at all is made to the essential content of fundamental rights and the fact that it represents a limit for the legislator, even though this concept constitutes a key element strictly connected to the principle of proportionality in the Spanish constitutional judicial tradition. The more the right is limited, the more the essential content resists, and the more the ordinary law needs to be well justified. The proportionality judgment intervenes to assess this dynamic and decide over the constitutionality of the norm challenged, from a "*garantista*" perspective[123].

The Court's understanding of the essential content of labour rights, in the post-crisis case law, is defined "elastic" by Baylos Grau, since it is restricted when facing business freedom and the protection of productivity. He considers the collapse of the concept of essential content as one of the key elements of the latest jurisprudential approach[124]. Also Diaz Aznarte refers to an erosion of the essential content of fundamental labour rights caused by the reform. Especially, the author underlines that the judge Valdés Dal-Ré had argued that the reform concerning the *salario de tramitacion* empties the right to work (Art. 35.1 Spanish Constitution) of its essential content, that is of the main consequence connected to a wrongful and unjustified dismissal[125].

Overall, the labour lawyers who have discussed the ruling do not seem interested in questioning the misuse of the criteria or reasonableness and proportionality, as well as the absence of the necessity criteria, cornerstone of the proportionality test, but for few exceptions. Even though it seems an aspect worth to be investigated, since their misapplication and the choice of rights to be balanced may have been the basis for such stunning conclusions and the undermining of fundamental labour rights. Interestingly, this aspect has triggered the attention of constitutional lawyers, who have argued that,

[122] Wilfredo Sanguineti 2015, 327-328.
[123] Wilfredo Sanguineti 326.
[124] Baylos Grau 2015, 29.
[125] Diaz Aznarte 2015, 202

even though the repeated reference made to reasonableness and proportionality may lead to think that the Court has actually applied these principles, a more attentive assessment demonstrates the contrary[126].

The relevance of the argumentative path followed by the Court is confirmed by the deep reflections developed in this sense by Valdés Dal-Ré. The dissenting opinions by Valdés Dal-Ré in both judgments have represented a crucial track for the academic reflections elaborated by the scholars[127]. Nevertheless, only few authors, and exclusively in relation to Judgment 8/2015, have emphasised, although not discussed in depth, that the dissenting opinion has also carefully addressed the misapplication of the interpretative criteria and that the norms of Law 3/2012 would have not passed the proportionality test[128].

2. Post-crisis labour reforms in Italy and the relevant constitutional case law

2.1 The 2008 crisis and labour in Italy

Beyond any doubt, Italy is one of the European countries mostly hit by the 2008 economic and financial crises. The unemployment rate has been constantly increasing since 2008, when it was at 6.7%, up until 2014, when it reached the pick of 12.7%[129]. Even though the unemployment trend does not seem as serious as the Spanish one, the public debt rates are quite telling about the impact of the crisis on Italy. Indeed, the public debt rate raised from 99.8%, in 2007, up to 132.6%, in 2016[130].

Although the Italian Government has not entered into any Memorandum of Understanding with the Troika, the Italian post-crisis management has been strongly influenced by the EU institutions. EU

[126] González Beilfuss 2015.

[127] Indeed, a large body of literature besides reviewing the judgment, has focused on the dissenting opinion by Valdés Dal-Ré. This is due to the level of argumentation of the dissenting opinion, which, for that reason, has been compared to a proper and alternative judgment, albeit with no decisional power, see Senra Biedman, 2014, 1, the author also conducts an accurate comparison between the Court's decision and the dissenting opinion; Diaz Aznarte, 2015, mostly focuses on the dissenting opinion by Valdés Dal-Ré, which she also openly agrees with. The dissenting opinion, in her view, "expertly question, from the technical-juridical perspective the suitability, necessity and proportionality of the measures of Law 3/2012 challenged". However, the author's reflections are directed to the contents of the dissenting judgment, rather than on the reasoning of the judge on the three-prong test (Diaz Aznarte 2015, 203). Of a completely different view, Gómez Garrido 2015, mostly supportive towards the judgment, points out that Valdes Dal Re in his dissenting opinion has argued that the Court has applied a new canon of constitutionality and she argues that, instead, the Court has applied the traditional principle of proportionality with its three-prong test: Gómez Garrido, 2015, 125. Salcedo Beltrán 2014, 152-154; de Val Tena 2014, 466-478.

[128] De Val Tena 2014, 476-477.

[129] http://ec.europa.eu/eurostat/statistics-explained/index.php/File:Unemployment_rate_2004-2015_(%25)_new.png.

[130] http://ec.europa.eu/eurostat/tgm/table.do?tab=table&init=1&language=en&pcode=teina225&plugin=1.

unelected bodies have attempted, and then succeeded, to influence the adoption of structural reforms of the labour market and the implementation of austerity policies regardless of the negative impact that the social security system may have suffered.

At the time I am writing this thesis, it is publicly known that in August 2011 the ECB sent a "secret" letter, drafted by Mario Draghi and Jean-Claud Trichet, to the Italian Government. The main suggestions proposed, as ways out from the critical situation of the country, concerned the modernization of the industrial relations system, including the reform of the collective bargaining system, in order to boost company level negotiation; an increase in the flexibility of dismissals, balanced by an effective unemployment protection and professional qualifications; and the creation of tax incentives to support the efficiency of the firms.

The EU pressure did not only strongly influence the subsequent reforms, which were anyway already oriented towards the liberalization of the labour market, but it also triggered a political crisis, which led to the resignation of Berlusconi's Government and the appointment of a technical Government led by Mario Monti, which approved the first reform aimed at implementing the ECB guidelines[131].

Alongside the "private" exchange of letters regarding labour market regulation and industrial relations, the Italian legal system was strongly influenced as regards public budget management. The most glaring act is a Treaty known as Fiscal Compact[132]. The international treaty, signed in March 2012, provides for the duty of the 25 signatory EU Member States to incorporate the principle of balanced budget into national law. The Italian lawmaker opted for a reform of Art. 81 Italian Constitution, which entailed a proper constitutionalization of the principle at stake. The constitutional law was approved by the Italian Parliament in April 2012: Constitutional Law 1/2012 (entered into force in May 2012, but with effect starting from 2014). However, the legislative procedure had started way before the conclusion of the fiscal compact. Indeed, already in September 2011 the draft constitutional reform of Art. 81, as well as of Articles 97, 117 and 119 Italian Constitution, was approved. Such a zeal was due to the fact that even before the conclusion of the 2012 international treaty the EU had given clear impulse

[131] Biasi 2014; cf. also Pizzoferrato 2015. To be precise, on 13 August 2011 (8 days after the ECB letter was received) the Berlusconi Government approves a norm in support of decentralized collective bargaining (Art. 8, Decree Law 138/2011).
[132] For a review of the European and international post-crisis instruments, see the Introduction to this thesis.

to Member States to uniform the rules on balanced budget[133]. In order to implement the constitutional reform and the fiscal compact, Law 243/2012 ("Norms on the application of the principle of balanced budget in compliance with Art. 81.6 Italian Constitution") was subsequently approved. The result is a renewed Constitution, which obliges public administration bodies, at every level, to comply with the principle of balanced budget and the sustainability of public debt in relation to GDP[134].

In addition to the constitutional reforms of economic policy, the Italian legal system has witnessed deep amendments of individual employment contract law and social security law, which have affected the enforcement of fundamental social rights[135]. Given that the Italian industrial relations system has been traditionally designed and governed by the social partners, in full autonomy, the reforms of the latest years have tackled industrial relations only to a minor extent and mostly indirectly. However, it is worthwhile to mention that a research published on the *European Journal of Industrial Relations* has showed that, albeit social partners have mostly maintained their traditional role and organizational strength, the recent reforms, especially the JOBS Act, have indirectly concerned the industrial relations system, due to the faculty recognised to the most representative trade unions, thus excluding grass root trade unions, to negotiate collective agreements and specify a number of statutory norms[136].

A comprehensive review of the wide reform packages adopted since 2009 is beyond the scope of this research, which focuses on the constitutional case law. Therefore, only the key labour and social reforms are presented, by taking into account the main academic debates, in order to contextualize the analysis of the Italian post-crisis case law[137].

2.1.2 The first post-crisis reforms and the Monti Government's legislation

[133] Pirozzoli 2011.
[134] On the constitutional law introducing the principle of balanced budget into the Italian Constitution, see the Issue edited by Carbas 2013.
[135] In this respect, see the analysis by Ciolli 2012.
[136] Colombo Regalia 2016; see also Clawert, Schoeman 2012, and, from a more legal perspective over the Italian industrial relations, Leccese 2012.
[137] For a general, but precise, introduction to the post-crisis reforms see Pizzoferrato 2015 and Carinici 2015. For a wide-ranging reflection on the current status of Italian labour law, see, among others, Lassandari 2015; Caruso 2016 and the academic dialogue between Mariucci 2015 and Caruso Del Punta 2016. For a focus on the first measures adopted on self-employment and para-subordinate labour, Perulli 2012. For an in-depth look at one of the most controversial aspects of the Italian labour legal framework, cf. Nogler 2015, who offers a careful assessment of the concept of *subordinazione* in D.Lgs. 81/2015. The Social Security perspective is provided by Cinelli 2015a.

From a labour law perspective, the first relevant reform triggered by the EU Institutions' pressure is Art. 8 of D.L. 138/2011, enacted as Law 148/2011 (the so-called Mid-August Financial Act). The reform was – and still is – highly controversial, due to the fact that it strongly questions one of the cornerstones of the Italian labour law system: the principle of *inderogablità*, which entails that "all individual pacts between the worker and the employer aimed to change *in pejus* law or collective agreements are void"[138]. Art. 8 assigns to decentralized collective bargaining the power to derogate from labour conditions established by law or by higher level collective agreements. Albeit constitutional and international labour norms cannot be infringed upon, the power to derogate is substantially wide and it has been contested inasmuch as it can undermine even consolidated labour rights. On the other hand, those who support this reform point out that the derogation is left to the responsibility of the social partners at decentralized level, who have now the possibility to exchange some protections with other occupational advantages[139].

One of the first legislative initiatives of the technical Government, guided by Mario Monti, concerns the pension system: Decree Law 201/2011 (Decree *Salva Italia*) converted into Law 214/2011[140]. The economic policy manoeuvre at stake is the result of few intense days of drafting and a complete exclusion of social partners. Social dialogue would have been a feasible option with regard to this reform, inasmuch as its core pillar is a consistent amendment of retirement rules. The aim was to strengthen the long-term sustainability of the pension system and grant intergenerational solidarity. The reform is extensive, but three main elements can be identified: the unification of social security institutions, the increase in contributions and the modification of the systems of access and calculation[141].

Law 92/2012, known as *Fornero* or *Monti-Fornero*, after the Minister of Labour and Prime Minister's name at the time, aimed at fostering the flexibility of the labour market at both entry and exit-

[138] Sciarra, Chiaromonte 2014, 119.
[139] Carinci et al. 2016, 267, 268; see, also, Pizzoferrato 2015, 194.
[140] However, already the Berlusconi Government, which preceded had implemented a number of measures to reform the retirement rules, especially with the aim to harmonize eligibility: see, inter alia, Jessoula 2012.
[141] Fedele Morrone 2012, 131.

level[142]. The reform intervened in the regulation of temporary employment contracts and allowed the conclusion of an initial fixed-term contract without the need to specify the cause that justifies the signature of such a contract, notwithstanding that the centrality of the open-ended contract in the Italian labour law system was reiterated by the reform. On the other hand, the reform provided for an increase in social security costs for the employer who wanted to conclude temporary employment contracts (Aspi). Second, Law 92/2012 aimed at promoting the use of apprenticeship to enter the labour market (subsequently, D.L. 76/2013, "Letta Reform", confirmed the support to the apprenticeship system and expanded the incentives to employers). However, the increased flexibilities were combined with some crucial rigidities, such as a stricter proportion between workers in apprenticeship and workers in service.

Last, let us briefly see the most controversial reform of Law 92/2012: the amendment of protection against dismissal as provided for by Art. 18 of the Labour Statute (Law 300/1970). The Monti Government reform on dismissal was strongly influenced by the already mentioned ECB letter, which was extremely critical towards what was considered the excessive rigidity of the dismissal procedures, due to both the employee's right to be reinstated and to receive monetary compensation in case of unfair dismissal[143]. The result was an amended Art. 18, Law 300/1970, which undermines the reinstatement remedy, in favour of the indemnity protection[144]. Overall, the Monit-Fornero Reform has been criticised for showing the increasing subordination of law to economics. In the context of policies of labour flexibilisation, labour law has become exclusively a way to define the core concepts and it is loosening its role of conflict regulator[145].

2.1.3 The second phase of post-crisis labour and social reforms: the JOBS Act

By JOBS Act (JA) – which name was inspired by the Obama reforms and stands for Jumpstart Our Business Startups Act – is meant a series of reforms approved in 2014 and 2015 by the Renzi

[142] The result of a "political compromise" according to Perulli 2012, 542; While Guazzarotti, 2016, 1032, emphasises the advertisement tone of the first article, which is a declaration of intents without nay normative content.
[143] For a more attentive assessment of the rigidities of the dismissal rules under a European perspective see Biasi 2014, 375 ff.
[144] In general, on the Fornero Reform confront Biasi 2014 and Pizzoferrato 2015; For an authoritative assessment of the reformed rules on dismissal see Speziale 2013.
[145] Guazzarotti 2016.

Government. The first measure of the wide reform known as JOBS Act is the so-called *Decreto Poletti*, Decree Law 34/2014, converted into Law 78/2014, which has addressed certain matters already tackled by the Monti Government, such as fixed-term contracts and apprenticeship. However, the first comprehensive piece of legislation is to be found in Law 183/2014, which outlined the main purposes of the reform, concerning a number of aspects of employment law, and delegated extensive powers to the Government to regulate given matters in detail, through Legislative Decrees, that is urgency legislation. Overall, the JOBS Act mainly aims at increasing the job flexibility to foster employment, by intervening on both fixed-term and open ended contracts, as well as on the power of the employer to derogate from collective agreements' terms and conditions; in addition, unemployment benefits are reformed[146].

Caruso has identified four academic approaches to the JA: a) the position of constitutional and statutarian traditionalism identifies in the JA the end of the labour law history of the 20 century; b) a soften variation of the first theory understands the Renzi's reform as the misapplication of the European flexicurity; c) what the author names the "celebrative approach" praises the JA for being the concretization of the law and economics theories, which finally breaks with the statutarian positions; d) last, a branch of literature positively looks at the JOBS Act as a first step towards an innovation of the labour law paradigm[147].

The most relevant and controversial norm concerned the introduction of the *Contratto di Lavoro a Tempo Indeterminato a Tutele Crescenti*, literally an "indefinite contract with increasing protection". However, also other aspects were considered, *inter alia*, the reorganization of tasks, the use of cameras to conduct remote controls, the reform of social safety nets (and many others). In what follows an excursus on those which are considered the most relevant Legislative Decrees is provided.

The first, and likely the most controversial, Government Act implementing Law 183/2014 was Legislative Decree 23/2015, which introduced the so-called *Contratto a tutele crescenti.* Despite the name used to identify this reform, whether an "increasing protection" effectively exists is disputed. Among the scholars mostly critical towards this provision, Carinci bluntly argues that the Decree at

[146] For a general reflection, see Pizzoferrato 2015, 197 ff.
[147] Caruso 2016, 266.

issue "does not foresee any new type of contract having special and 'increasing protection' at all. As regards the employees hired after its entering into force (7 March 2015), it just worsen the prior rules on dismissal of indefinite contracts under section 2094 of the Civil Code"[148]. From the most critical perspective, this measure strongly undermines workers' protection, for those hired after 7 March 2015, inasmuch as, albeit it is allegedly an open-ended contract the possibility to be reinstated in case of unfair dismissal is now limited to the hardly provable case of discrimination, while in the other cases a – pre-established – economic compensation is the sole protection granted to the worker[149]. The reform has also been criticized from a procedural point of view. In this respect, it has been argued that the delegation to the Government is way too extensive and vague to be considered in compliance with Art. 76 Italian Constitution[150], which limits the extent of the legislative power to be legitimately delegated to the executive[151].

A positive view over the new type of contract is offered by, *inter alia*, Pietro Ichino, who argues that the reform has simply substituted what he calls – using the English expression – the *property rule*, enshrined in Art. 18 of the Workers' Statute – anyway already amended by the Fornero reform – with the so called *liability rule*, which envisages the payment of a predetermined indemnity. According to the labour lawyer, a legal framework as such is to be praised also as it is completely in line with the other OCSE countries[152].

Decree 23/2015 is often read together with Legislative Decree 22/2015, which has extended the unemployment benefits, in line with the tendency to widen the scope of beneficiaries, by creating new Institutes and new forms of benefits[153].

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[148] Carinci 2015, 4.

[149] See an interview with Luigi Mariucci, available at https://www.internazionale.it/opinione/cesare-buquicchio/2015/02/23/luigi-mariucci-jobs-act-licenziamenti; Giubboni 2015b, 12, who talks of a "spectacular backing down of guarantees in case of unjustified dismissal", my translation; Carinci 2015; a number of criticisms have also been raised by Perulli 2015a. For an attentive assessment of the unjustified dismissal, also from a case law perspective, see Bolego, 2016; Nogler, 2015.

[150] Of this view, one for all, Giubboni 2015b.

[151] Art. 76 Italian Constitution states "The exercise of the legislative function may not be delegated to the Government unless principles and criteria have been established and then only for a limited time and for specified purposes.", official translation.

[152] See, for all, Ichino 2015; while Caruso Del Punta 2016 encourage to assess carefully every aspect of the new type of contract together with the Fornero reform of Art. 18 of Law 300/1970.

[153] Ravelli 2015; for a comprehensive analysis see Fiorillo, Perulli 2015.

Moreover, albeit the Fornero Reform had already loosen the conditions to conclude fixed-term contracts, with the Renzi Government, by means of Legislative Decree 81/2015**,** there has been an "effective liberalization"[154] of this type of labour contract. The reform has completely delated the causal requirement and it has only provided for a simple temporal limit – in line with the previous Poletti Decree 34/2014. With the same Act, the Executive has attempted to overcome the so-called *contratto di lavoro a progetto*[155]. Indeed, the delegated Act has repealed the norms that provided for the *lavoro a progetto*, while it has left untouched Art. 409.3 of the Civil Procedural Code (c.p.c.) on the para-subordinate employment. However, the issue is controversial, especially as far as concerns the effective abrogation of this hybrid form of employment contract, created by the Biagi reform (D.Lgs. 276/2003), precisely because of the missed-intervention on Art. 409 c.p.c.[156].

It is again Legislative Decree 81/2015, Art. 3, which reformulates the provisions under Art. 2103 of the Civil Code, by loosening the restrictions on the employer's power to exercise the *ius variandi*, in case the organizational framework is modified. Carinci, again very critical, argues that "the prohibition of any amendments is strongly softened, which […] could lead to the assignment of tasks belonging to statutory categories or to lower classification levels and also, if necessary, to a salary reduction"[157]. In the same vein, Article 23 of Legislative Decree 151/2015 reforms Article 4 of the Workers' Statute and allows the employer's direct remote control, as it represents a fair expression of the supervisory power, carried out through "instruments used by the employee to do his/her work and the instruments for recording accesses and attendance"[158].

Moreover, on the wave of the tight fiscal rules reiterated at EU level and implemented in the Italian legal system, the Stability Laws for 2013 and 2014 imposed financial constraints, affecting, among others, public employees' wages and the whole pension system.

[154] Mazzotta 2016, 339.
[155] For a comprehensive assessment of this peculiar Italian forms of employment contracts, see Borzaga 2012.
[156] Perulli, 2015b, provides a critical and careful analysis, which aims to demonstrate that the *lavoro a progetto* has substantially survived the Jobs Act.
[157] Carinci 2015, 6, my translation.
[158] Article 4, Law 300/1970, my translation. For further reflections see, inter alia, Alvino 2015; Carinci 2016.

2.2 The Italian post-crisis case law: a review of the most controversial cases

In this section, the most relevant decisions of the Constitutional Court on measures aimed at implementing EU austerity policies are summarized and the relevant literature is reviewed. Each of these cases, to borrow an expression used by Lo Faro, relates to a "particular category of workers"[159]. Judgment 223/2012 is the first case of interest when addressing this topic and, given the strong factual similarities, it allows a joint assessment with the following Judgments 304/2013, and, especially, 310/2013. While, Judgment 70/2015 represents the decision which have been likely mostly commented and discussed by the Italian academic scholarship, from several profiles. The relevant academic literature discussing this case offers remarkable inputs especially with regard to the technique used by the Court to develop the legal reasoning. The crucial role of the balancing between conflicting interests and rights emerges clearly also in Judgment 178/2015. Finally, the latest judgments from 2016 (Judgment 173/2016) and 2017 (Judgment 124/2017), read in light of the previous ones, testify how complex it is to develop a consistent case law and fully satisfy the citizens' legal expectations.

Other judgments have concerned reforms implementing austerity policies. However, given that they have had less resonance in the literature or a minor impact in the legal system, they are not directly addressed here. Moreover, this chapter refers only marginally to Judgment 10/2015, which is often included in the reflections around the post-crisis case law, provided that it does not concern fundamental labour rights[160].

2.2.1 Striking the balance between fiscal constraints and public employees' remuneration

2.2.1.1 The first wave of post-crisis case law and an ambiguous judicial approach: Judgments 223/2012, 304/2013 and 310/2013

The first case was initiated by various Regional Administrative Tribunals (TAR), which have presented a total of 15 referral requests. The ordinary courts have challenged the constitutionality of four norms of Decree Law 78/2010, approved on 31 May 2012, on "Urgent measures for the financial

[159] Lo Faro 2014, 66.
[160] For a brief review of the constitutional judgments on social rights, which can be included in the post-crisis case law see Fontana 2015, 151-159; Faraguna 2016; for analysis and comments on Judgment 10/2015 cf., inter alia, the commentaries by Romboli 2015; Pugiotto 2015; Ruggeri 2015. In a different way, Anzon Demming 2015b.

stabilisation and the economic competitiveness", converted into Law 122/210, of 30 July 2012, for breaching various Constitutional articles[161]. Three out of four norms challenged were deemed unconstitutional. Of particular interest are subsections 21 and 22 of Art. 9, D.L. 78/2012, on the rise of magistrates' salary cap. The referrals deemed these norms to be in contrast with four Constitutional provisions. First, Art. 104 Italian Constitution, on the independence of the judiciary, which, according to the plaintiff, is enforced also by the automatic system of salary increase that the channelled measures were affecting and is reinforced by Art. 6 of the ECHR. Second, Art. 36 Italian Constitution on the right to a fair remuneration, since the relationship between the work provided and the due retribution was upset. Third, Art. 3 (principle of equality) and Art. 53 Italian Constitution (on the fiscal solidarity and the fiscal capacity to pay) for the infringement of the principle of equality on fiscal matters.

Eventually the claimants succeeded, since the Court ruled that the blocking of wage rises for magistrates was unconstitutional given that it was infringing upon the domestic and international principle of independence of the judiciary. The Court reiterates its previous case law on the essential character of the automatic remuneration system for magistrates, which is necessary to grant independence of a peculiar group of public employees, which cannot enjoy trade union protection. Moreover, it underlines that the provision causes an unreasonable reduction of the remuneration, going beyond a "chilling" of the salary dynamic, which had been justified in previous phases of economic restraint by the Constitutional Court itself. Consequently, it concludes for the unconstitutionality of the norm on the grounds of Articles 3 and 104, but also 100, 101 and 108, Italian Constitution.

In addition, the salary deduction in question has the nature of a tax, given that it is not directed to the social security system, and it does not have a universal character. Therefore, the norms at stake are found in violation of Articles 3 and 53 Italian Constitution. The Court has confirmed its understanding of Art. 53, read in conjunction with Art. 3, as immediately mandatory, an approach that contributes to grant

[161] Overall, the constitutional norms that were considered by the claimants are Articles 2, 3, 23, 24, 36, 42, 53, 97, 100, 101, 104, 108, 111, 113 e 117.1 Italian Constitution, the latest in connection with Art. 6 ECHR.

effective application of the principles of substantial equality and political, economic and social solidarity[162].

According to Tega, the norm at stake was subject to a very strict scrutiny, which has led the Court to apply the equality and reasonableness principle[163]. In an Anthology published in 2015, which addresses labour and social rights in Italy after the 2008 crisis, Fontana argues that Judgement 223/2012 constitutes the leading case of the Italian crisis-case law[164]. However, this ruling has mostly been commented jointly with other subsequent judgments, in particular Judgments 310/2013 and 304/2013. Furthermore, it is underlined, what makes this case substantially different from the following judgments is the relevance that the principle of autonomy and independence of the judiciary (Art. 101 ff.) has had in the Court's legal reasoning[165]. Let us know see the core aspects of Judgments 310/2013 and 304/2013.

In 2013, the Italian Constitutional Court released two judgments, at a short distance, both concerning the economic treatment of public employees, coming to similar conclusions. Indeed, the second judgment, which concerns university professors (Judgment 310/2013), strongly reiterates the conclusions elaborated in the first ruling, which deals with wage suspension of the diplomatic staff (Judgment 304/2013).

In Judgment 310/2013, the Court had to assess the constitutionality of Art. 9, subsections 2 and 21 of D.L. 78/2010, which had blocked wage rises and deactivated service seniority for university lecturers and professors for the years 2011, 2012 and 2013[166]. The Court ruled in favour of the constitutional legitimacy of the norms challenged. It made use of a number of arguments to support its decision and dismiss the claims of unconstitutionality relating to, inter alia, the inappropriate balancing between the necessities of spending restraint and the numerous constitutional interests tackled, the lack of reasonableness of the norm, the unequal treatment between public and private employees and the violation of the principle of the proportionality of the salary.

[162] Bonardi 2012, 6-7; the author discusses and assesses the judgment with a focus on the relevant judicial precedents and reflects on the possible effects of this judgment on the legal system as a whole; in this respect, see also Mancini 2013.
[163] Tega 2014b, 56.
[164] Fontana 2015, 151.
[165] Fontana 2015.
[166] Considering the referral requests presented by various regional courts the constitutionality of the measure has been challenged on the grounds of Articles 2, 3, 9, 33, 34, 36, 37, 42, 53, 77 and 97 Italian Constitution.

In a short judgment, the Court recognises that the block represents a sacrifice for the employees concerned. However, given its limited period and the necessity to contain public spending, it cannot be considered unreasonable, not even for the employees subjected to the heaviest sacrifice, such as the researchers. Interestingly, the Court, in order to justify the length of the block and its reasonableness argues on the need to respect the principle of balanced budget ad enforce the reformed Art. 81 Italian Constitution, as well as Directive 2011/85/UE, which has imposed a medium term approach to economic policies (sources not mentioned at all in Judgment 223/2012)[167]. Moreover, the Court asserts that the norms at stake do not have a tax nature, therefore the social security principles, which are allegedly violated, do not apply here. As to the claim that the situation addressed by the norm is the same as the one dealt with in Judgment 223/2012, the Court stresses the peculiarity of the judiciary sector and the need to grant full independence, which does not apply to the university professors, who can fully profit of the collective negotiation procedures. Also the principle of equal treatment is respected, according to the Court, since public and private sectors are not comparable in this case.

As argued by Ferrante, the legal reasoning appears excessively hurried for the status of the subjective rights under discussion. A more careful and attentive evaluation of the norm would have been required, as well as a deeper argumentation on the reasons leading to the conclusions[168].

Fontana critically confronts Judgment 223/2012 (where the independency of the judiciary is at stake) with Judgment 219/2014 (where the enforcement of the right to collective bargaining is at peril) and reflects on whether the different conclusions in the two rulings are mirroring the Court's understanding that the independency and autonomy of the judiciary has more weight than the right to collective bargaining. On the grounds of leading Italian constitutional scholars, the author argues that the principle of reasonableness in the Italian case law, when used to balance conflicting interests, becomes a tool to exercise a control over the merit of the norm, which is characterized by wide margins of discretionality;

[167] See Miriello 2014, 2, the author, in a commentary to the judgment, expresses disappointment for the new approach of the Court, which does not seem willing anymore to be the warrantor of the interests undermined by the legislator.
[168] Ferrante 2014, 1.

differently, as the author underlines, from the rigorous German proportionality test based upon the three requirements of suitability, necessity and proportionality in the strict sense[169].

Even more critical is Ricci, who compares Judgment 223/2012 with Judgment 7/2014 (on a norm affecting the *Banca d'Italia* employees' remuneration) and observes that the Court creates an unreasonable differentiation, which implies that "certain categories are not subject to the general duty of solidarity, on the grounds of the doubtful link established between retribution and the principles of independency and autonomy of certain State 'bodies'"[170].

Lo Faro, discussing the first three crisis-judgments (Judgments 223/2012, 304/2013, 310/2013), points out that this case law "has given rise to an irrational inequality among public employees, some of them having been 'saved' from the pay cuts and some of them not" and it highlights the incoherency of the 2013 rulings, by stating that "in the very same judgment proclaiming the unconstitutionality of the wage cuts the Court relied much more on the specific nature of the job performed by public employees at stake in that particular case, rather than on what I would call the general principles of the economic constitution seen in a fundamental social rights perspective"[171]. In particular, the labour lawyer emphasises that the conclusions have been reached without following a fundamental social rights logic. In addition, he does not find reasonable that one type of public employees, the magistrates, will not suffer any wage loss only on the grounds of their independency, while the rest of public employees will[172].

Also Tega points out the sharp difference between Judgment 223/2012 and Judgment 310/2013. In particular, the author underlines that in the crisis case law the Court refers to its jurisprudence, which allows sacrifices if reasonable, "exceptional, temporary, not arbitrary […] and consistent with the stated aims"[173]. For that reason, in the first judgment, it develops a complex legal reasoning, in order to assess the constitutionality of the norm under scrutiny in light of the principles of equality and reasonableness. While in Judgment 310/2013 not only the ruling, but also the argumentative structure are opposite.

[169] Fontana 2014, 159.
[170] Ricci 2014 216-217, my translation.
[171] Lo Faro 2014, 61, my translation.
[172] Lo Faro 2014, 62.
[173] Tega 2014b, 55, my translation.

Indeed, according to the author "the judicial review of reasonableness was strongly conditioned by the specific features of the single issue at stake", that is the limited sacrifice imposed and the peculiar context of the economic crisis and the wide scope of the measure[174]. Also according to Fontana, the scope of the norm has had a central role in the Court's argumentation, as well as the peculiar constitutional parameter of independence, which belongs to the specific judiciary sector. Moreover, Fontana emphasises the use of Art. 81 Italian Constitution, and therefore the Fiscal Compact and the commitments taken therein, by the Court in what he calls the "reasonableness test", that is a balancing between, in this case, the affected fundamental right and the public interest to spending restraints. It is underlined that the European economic commitments are used by the Court not as *obiter dictum*, but as proper legal grounds for the final decision[175].

Also Faraguna, with regard to Judgments 223/2012 and 310/2013, explicitly refers to the "balancing test" allegedly used by the Court in both cases, but with different outcomes. While in the judgment from 2012 the Court does not consider the economic crisis a sufficient justification to affect the magistrates' right, in the second ruling the new budget rules, consequence of the Euro-crisis, constituted a crucial element to justify such a long sacrifice[176]. While, Piera Loi points out that "the proportionality" is left aside in the legal reasoning of the Court, which does not make clear what are the argumentative steps that lead to conclude that the challenged norms are reasonable[177].

The first post-crisis case law has been approached by scholars in a more careful way, compared to the literature addressing the following judgments, and, maybe due to the relatively scarce objects of study, the various arguments are not extensively elaborated. However, already at that stage, the crucial issues had been raised: the economic crisis argument, the relevance of Art. 81 Italian Constitution, the need to protect fundamental labour rights in an extensive way and the balancing conducted by the Court, which has been mentioned by a couple of authors, but has not been assessed in depth.

[174] Tega 2014b, 56, my translation.
[175] Fontana 2015; cf. Abbiate 2014.
[176] Faraguna 2016, 259.
[177] Loi 2016, 90.

2.2.1.2 The right to collective bargaining and the necessary temporary character of its limitation: Judgment 178/2015

The *Tribunale di Roma* and the *Tribunale di Ravenna* contested the constitutional legitimacy of various norms providing for the suspension of the regular dynamic of wages and collective negotiation in the public sector. In particular, the following measures were challenged: the freezing of salary elements for the years 2011, 2012, 2013, the limitations on the remuneration of public sector workers, extended to 31 December 2014, the suspension of collective bargaining procedures involving the financial aspects for the three year period 2010-2012, then deferred until 31 December 2014, and the freezing of the non-renewal indemnity[178].

The referring courts claimed the violation of a number of constitutional provisions: the duty of solidarity and right to a fair taxation (Articles 2 and 53 Italian Constitution), the principle of equality between public sector and private sector workers (Art. 3.1 Italian Constitution), the protection of work (Article 35.1 Italian Constitution), the proportionality of remuneration (Article 36.1 Italian Constitution), and trade union freedom (Art. 39.1 Italian Constitution).

The Constitutional Court rejected most of the claims of unconstitutionality for being unfounded (as to Articles 2, 3.1, 36.1, 39.1, 53.1, 53.2 Italian Constitution) or inadmissible (as to Articles 35.1, 36.1, 53.1, 53.2 Italian Constitution), but it did recognize that there was an infringement of the right to collective bargaining, as protected by Article 39.1 Italian Constitution. The claims related to the violation of Art. 3 Italian Constitution were dismissed on the grounds of a consistent case law according to which, independently from certain similarities, the legal framework for public and private employment does not coincide. Also the violation of Art. 36 Italian Constitution was dismissed under various arguments, which were based upon an investigation of "the entire body of items comprising the overall remuneration of workers over a period of time of some significant length" (para. 14.1). For different reasons and on the grounds of a legal reasoning considering both Art. 81 Italian Constitution and the new Art. 97.1 Italian Constitution (on the duty of public administrations to comply with the balanced budget) and their multiyear dimension, as well as the programmatic character of collective

[178] These norms were enshrined in Decree Law 78/2010 and Decree Law 98/2011, as specified by Presidential Royal Decree 122/2013.

bargaining, the violation of Art. 39 Italian Constitution, as far as it concerns the suspension of the negotiating procedures for the years 2011-2013, was dismissed as well[179].

The infringement of Art. 39.1 Italian Constitution, which protects trade unions' freedom and consequently the right to collective bargaining, was caused by Art. 16.1.b) of Decree Law 98/2011 (Urgent measures for financial stabilization) converted by Art. 1.1 of Law 111/2011, as specified of by Article 1.1.c) of Presidential Decree 122/2013, together with both the Stability Law for 2014 and the Stability Law for 2015. The measures enshrined in the Stability Laws for 2014 and 2015 were not challenged by the referring tribunals, but the Court deemed these provisions inextricably linked to the challenged norms, inasmuch as they provided for the prolongation of the "block" on collective bargaining for all of 2015. The constitutional judges concluded that, although a partial suspension of collective negotiation in the public sector may be justified by the contingent economic context, such a prolonged block – interpreted as an evidence of the intention of the legislator to give structural effect to the constraint – is unreasonable, since it causes an unbearable sacrifice of the right to collective bargaining. The same conclusions were reached as far as the block of the non-renewal indemnity is concerned[180]. Indeed, the cause of the illegitimate character of the suspension of collective bargaining is to be identified in the fact that the temporary and exceptional characters, features of the first legislative provision, faded away with the reiterations of the measure. The ruling of supervening unconstitutionality means that the judgment is effective from the day after its publication, which implies that the public spending is not tackled at all by the ruling, since the legislator does not have to reimburse the public employees deprived from their right to negotiate.

In other words, the various ordinary norms discussed in this judgment provided for a double block. On the one hand, the public spending for public employees, which entailed the suspension of any wage increase, was limited for the three year period 2011-2013, then extended up to December 2015; on the other hand, collective bargaining procedures were suspended. In brief, the Court only identified an infringement of Art. 39 Italian Constitution, caused by the extension of the suspension of collective

[179] The Italian Constitutional Court had already judged legitimate the suspension of collective bargaining for a three year period, aimed at complying with Art. 81 Italian Constitution in Judgments 310/213 and 219/2014.
[180] For a commentary, cf. Fiorillo 2015.

bargaining up to all of 2015, thus confirming that Art. 39.1 Italian Constitution entirely covers the freedom to collective bargaining in the public sector[181].

In a recent publication, Orlandini emphasises that, even though the challenged norms have been partially declared unconstitutional, in Judgment 178/2015 it is manifest that public budget constraints carry more weight than in the rest of the post-crisis judgments on labour rights. In particular, what strikes here is that the financial constraints do not concern *diritti di prestazione* (social rights that require a financial disbursement from the State), but a crucial collective labour right: the right to collective bargaining. The author is aware that this is not the first time in which the trade union freedom is balanced against "superior general interests", however, particularly this judicial case clearly demonstrates that these financial interests have acquired a different status following the 2012 constitutional reforms[182].

Several elements of the Judgment are of legal interest and have been addressed by the literature. Among others, the remarkable use of supranational sources[183] and the arguments that have led the Court to support that, notwithstanding the connection between Art. 39 and Art. 36, Italian Constitution, the latter has not been infringed upon. Even though collective bargaining is beyond any doubt a key instrument to guarantee the proportionate and sufficient remuneration protected under Art. 36 Italian Constitution, the causal relation between the violation of Art. 39 Italian Constitution and the infringement of Art. 36 Italian Constitution does not always occur, as in the case at stake[184]. Noticeably, the lack of violation of Art. 36 Italian Constitution implies the exclusion of compensation, as also specified by the Court[185]. Albeit the issue is beyond the scope of this thesis and it will not be discussed further, it is worthwhile to point out that certain scholarship has criticized the Court. One for all, Mocchegiani argues that the choice not to include Art. 36 Italian Constitution in the balancing is the

[181] As noted by Zoppoli 2017, 184.
[182] Orlandini 2018, 25-27.
[183] The Court uses the international sources as interpretative parameters of Art. 39.1 Italian Constitution, which is considered "synchronically linked" to a number of supranational sources that strengthen the "functional link" between "collective exercisable rights, such as collective bargaining and trade union freedom". In particular, the Court refers to ILO Convention No. 151; ILO Convention No. 98; ILO Convention No. 87; Article 11 (ECHR) of the European Convention. Moreover, the Court referred to Art. 28 of the Charter of Fundamental Rights of the European Union and art. 152.1 TFEU. As rightly pointed out by Orlandini, 2018, this interpretative choice, strongly oriented towards the international sources, represents a remarkable new element in the Italian constitutional case law. The use of supranational sources has been emphasised also by Fiorillo 2015 and Occhino 2017, 9. For an early evaluation of this element of the legal reasoning, see Frosecchi 2016.
[184] See, Fiorillo 2015, who strongly agrees with the conclusions of the Court in this respect – and not only.
[185] Dalfino 2017, 178.

result of a cautious approach that has induced the Court not to put on the legislator a further economic burden, after the consistent one stemming from Judgment 70/2015, also considering the sharp criticism raised by the ruling on pensions' revaluation[186].

A significant moment of the judgment concerns the relevance given by the Court to the *excessive* nature – in temporal terms – of the extension of the block, which is not justified even in times of economic crisis. Indeed, it is not the act of suspending collective bargaining in the public sector per se to be judged unconstitutional, but the "unreasonable" prolongation of such a block. A conclusion reached by the constitutional judges after a comprehensive evaluation of the norms that have provided in this sense since 2010, up to 2015[187]. The appropriateness of including in the legal reasoning an evaluation of the effects of the judgment over the public budget seems uncontroversial, although, it has been emphasised, this cannot lead the judge towards a political argument, nor the freedom to collective bargaining can be deprived of its protection and be structurally subject to financial arguments and interests[188]. It has been argued that the crucial weakness of the provision at stake – namely its prolonged character – and the consequent declaration of unconstitutionality has been caused by the inability of the legislator to achieve a reasonable balance between the right to collective bargaining and public budget constraints[189].

The temporal effects of the judgment has also triggered an interesting academic debate, which has, in certain cases, inspired a comparative analysis of Judgments 10/2014, 70/2015 and 178/2015[190].

In particular, an Italian Journal has published a series of guided opinions to analyse the key aspects of the temporal effects of the constitutional rulings, starting from the Judgment at issue. Barbieri has introduced the topic, raising the most controversial issues from a labour law perspective: the grounds

[186] Mocchegiani 2015, 4; on the "systematic nexus" between Art. 36 and Art. 39 Constitution, see also Orlandini 2018, 11-14.
[187] Fiorillo 2015; Zoppoli 2017, 184, who argues that the temporal element is a decisive factor in the evaluation of the unconstitutional nature of the block, which cannot assume a structural character.
[188] In particular confront Zoppoli 2017, 185 ff. and Occhino, 2017, 9 ff., who addresses the topic of financial considerations with regard to the enforcement of social rights from a broader perspective; on the public budget constraints in the constitutional legal reasoning of the Italian (Judgments 178/2015, but also Judgment 70/2015 and Judgment 10/2014) cf., inter alia, Butturini 2016; For a reflection over the renovated Art. 81 Italian Constitution and its impact on the constitutional case law see Madau 2015.
[189] See, one for all, Butturini 2016, 29, 30. Cf. also Occhino 2017, 9. Scagliarini 2015 argues that, differently from the legislator, the Court, in this Judgment has achieved a "reasonable balance".
[190] Inter alia, Butturini 2016; Diaco 2016; Occhino 2017; for an assessment of Judgment 70/2015 – and inevitably Judgment 10/2014 - and the respective literature, refer to Chapter 2.2.2.1.

for justifying the supervening unconstitutionality, the repercussion of a decision as such in the main proceeding and the choice to lace emphasis in the evaluation of the effects on the public finances, especially with regard to the type of declaration of unconstitutionality preferred[191]. Dalfino, who is of the opinion that the declaration of supervening unconstitutionality is the most interesting element of this judgment, stresses that, albeit the Italian legal system does not include an explicit provision on supervening unconstitutionality, this type of decision stems from a dialogue between the Constitutional Court and the scholarship[192]. The author acknowledges that such a technique stems from the will to balance different constitutional values, inasmuch as the retroactive effect may cause a worse prejudice to the legal system[193]. This supervening unconstitutionality, according to Zoppoli, must be considered in the strict sense, in the sense that the constitutional norm, which determines the unconstitutionality of the ordinary measure has been reformed after the ordinary norm has been adopted, inasmuch as the Court acts in a constitutional terrain substantially new (Art. 81 Italian Constitution was amended in 2012, while the suspension of collective bargaining procedures was first provided for in 2011)[194].

Dalfino also argues that the main criticality of a declaration as such is the weakening of the nexus with the main proceeding, caused by the supervening unconstitutionality, inasmuch as in this case the constitutional ruling fails to have a concrete impact on the first one. Of the same view, Mocchegiani argues that a ruling as such "breaks" the relation between the two levels of judiciary[195] and emphasises what she identifies as a core weakness of the ruling: the violation "arises and dies" at the same time, inasmuch as the moment in which the violation has been established coincides with its annulment[196]. Zoppoli emphasises that it is true that the declaration of supervening unconstitutionality should refer to

[191] Barbieri 2017, 167,168.
[192] Dalfino 2017, 174.
[193] Dalfino, 2017, 172, who also recalls the phases in which the Court has made use of this technique; See also Madau, 2015, 15-16, who, introducing a joint assessment of Judgments 10/2014, 70/2015 and 178/2015, includes the modulation of the temporal effects of the judgments among the techniques used by the Court since the 1980s to strike a fair balance between the financial constraints and the enforcement of social rights. Especially, in this respect, the Court has used the so called supervening unconstitutionality, on the grounds of the principle of graduality, which justifies a progressive enforcement of the principle of equality in case of expensive reforms.
[194] Zoppoli 2017, 184; on the controversial choice of the Court to opt for a supervening unconstitutionality see also Pinardi 2015 and Diaco 2016, who reflects over the conclusions in Judgment 178/2015 and confronts this ruling with Judgments 10/2014 and 70/2015.
[195] Mocchegiani 2015, 3. The author, highly critical towards the judgment, emphasis the similar approach to Judgment 10/2014 and argues that the Court in this case has failed to justify the reasons that have led to the declaration of "supervening unconstitutionality".
[196] Mocchegiani 2015, 3.

a specific law, so as to be linked to the entry into force of that law, however, the labour lawyer also highlights that the declaration of unconstitutionality effective from the day of the judgment is consistent with the Italian constitutional case law and in the case at stake it does not hamper workers' organizations from initiating a suspensive action against further unconstitutional conducts[197].

In a comprehensive book on reasonableness and proportionality in labour law, Piera Loi reflects on Judgment 178/2015. The author assesses the Judgment, by attempting to frame the various steps of the Court's legal reasoning within the criteria provided by the proportionality test. The author's arguments can be summarized in four points. First, the legitimacy of the aim is identified in the public spending constraint, even more stringent due to the reformed Art. 81 Italian Constitution. Second, the suitability of the norm to achieve the aim is not explicitly addressed, and only indirectly the reader can deduce that the mean is deemed suitable. Third, also the necessity test is implicitly conducted by the Court, when it justifies the legislative choice on the grounds of the "solidaristic dimension of the measure"; "the peculiar seriousness of the economic situation"; "the temporal dimension" of the suspension based on a three year period. Forth, the balancing in a strict sense is conducted between Articles 36.1 and 39 Italian Constitution and, on the other hand, "the collective interest to contain public spending". According to the author this is the "less transparent phase of the legal reasoning", because the balancing consists in accepting that "the right can be sacrificed, but for a determined period", which means that as far as concerns that period, there is no balancing at all and a constitutional interest completely prevails over the fundamental right at issue[198].

Also Orlandini refers to the proportionality test in its concluding reflections over Judgment 178/2015. The scholar points out that the Court does not evaluate the context of economic crisis, it does not conduct an assessment which may reflect the necessity test, nor it discusses the legislator choices of economic policy, to the contrary, as severely criticised by Orlandini, it starts form the – questionable – assumption that the suspension of collective bargaining procedure may be a reasonable mean to "solve the serious economic and financial situation of the country"[199].

[197] Zoppoli 2017, 187.
[198] Loi 2016, 87-90, my translation.
[199] Orlandini 2018, 27-28, my translation.

The extensive literature on Judgment 178/2015 is made of complex arguments and provides numerous inputs. However, the complex role of the Court in this ruling and the perspective of the balancing, that is the possibility to consider the modulation of the constitutional judgments' effects, as a way to balance conflicting rights and interests has not been explored in depth.

2.2.2 Retirement benefits revaluation as a questionable terrain to comply with the balanced budget principle

2.2.2.1 A Constitutional Court either upstanding or irresponsible: the controversial Judgment 70/2015

At the end of May 2015, the Constitutional Court has released a judgment destined to become one of the most controversial of the latest years. The referring courts had questioned the constitutionality of Art. 24.25 of Decree Law 201/2011, of 6 December 2011 (Urgent provisions on growth, equity and the consolidation of the public accounts), converted into Art. 1.1 of Law 214/2011 (known as "Salva Italia"), inasmuch as, on the grounds of the contingent financial situation, it limited the automatic revaluation of pensions by 100 percent for the years 2012 and 2013 exclusively for pensions worth an overall amount of up to three times the minimum INPS pension. Overall, the referring courts consider this provision unconstitutional, with reference to Articles 2, 3, 23, 36.1 38.2, 53 and 117.1 of the Italian Constitution, the latest with regard to the duty to enforce the ECHR[200]. In particular, the block of revaluation of pensions is challenged on the grounds of Article 3 Italian Constitution (on equal treatment) Article 36 Italian Constitution (providing for the right to a fair remuneration) and Article 38 Italian Constitution (on the adequacy of social security benefits), insofar as it does not comply with the principle of proportionality between retirement benefits and salary, as well as with the principle of equality and reasonableness, thus causing an "irrational discrimination to the detriment of the category of pensioners" (in this way, *Tribunale di Palermo*, para. 1). In addition, the measure is found unreasonable and irrational due to the fact that the means chosen to achieve the aim, that is to tackle the financial situation, is excessive (in this way, *Corte dei Conti* Regione Emilia-Romagna, para. 2).

[200] Only the questions of unconstitutionality on the grounds of Articles 3, 36.1 and 38.2 Italian Constitution are founded and therefore addressed by the Court.

The Court makes clear that the suspension of the revaluation of retirement benefits is not new to the legislator, who, already in the past, had to balance the pensioners' expectations with the containment of public expenditures. In this respect, on the grounds of the constitutional case law, the legislator enjoys a certain degree of discretionality. However, the discretionality is restricted by the principle of reasonableness as developed by the Constitutional Court in relation to Articles 36.1 and 38.2 Italian Constitution. Indeed, the legislator has to comply with the principles of proportionality and adequacy of the retirement benefits and avoid reiterating the block of revaluation (the Court here refers to Judgment 316/2010), which would seriously tackle the legitimate expectations and the purchasing power of pensioners. In addition, the simple reference to a "contingent financial situation" is not enough to justify such a restrictive provision, which provides for a two year block and concerns pension brackets way lower than in previous reforms. The Court concludes that the provision under scrutiny is inconsistent with the constitutional judge's indications, and a reiteration as such is not respectful of the principles of proportionality and reasonableness and therefore it infringes upon Articles 36.1 and 38.2, Italian Constitution, as corollary of Articles 2 and 3, Italian Constitution[201].

Judgment 70/2015 has both triggered a wide public debate and attracted the attention of several scholars. A number of authors, mainly constitutional lawyers, have addressed Judgment 70/2015 in comparison with Judgment 10/2015[202]. Indeed, a number of elements allow to confront the rulings. In most of the cases, Judgment 70/2015 has been considered a missed opportunity to continue the positive path traced by Judgment 10/2015. Pin Longo has divided the numerous opinions around the two judgments in four macro-argument: the Court has been considered either irresponsible or brave in Judgment 70/2015, and either realistic or shy in Judgment 10/2015[203]. Veronesi, who sounds nearly emotional in assessing the judgments, severely states that "the two judgments speak – over a distance

[201] For a commentary cf. Cinelli 2015b; for a summary in English of the judgment see Bergonzini 2016; On follow-up to the judgment cf. Giubboni 2015a, 532-535; Morelli 2015, 709-710; D'Onghia 2015, 349-352.
[202] In Judgment 10/2015, released few weeks before Judgment 70/2015, the Court has declared the unconstitutionality of the so called Robin Tax, that is a special tax put on oil companies. The Court in this decision has made a careful consideration of the consequences on the public budget that a full declaration of unconstitutionality of the measure would have caused and, for that reason, it has regulated the effects of its judgment in such a way to avoid the reimbursement of the amounts already paid. Indeed, thanks to this temporal modulation, the judgment was effective starting from the day after its publication.
[203] Pin Longo 2015, 698.

of few weeks – different languages"[204]. Instead, other authors have emphasised the points in common, e.g. Bergonzini, who, anyway, admits a strong inconsistency between the two rulings, observes that a mistrust of the Court towards the legislator can be perceived in both judgments: one limits its-own effects and the other intervenes in a drastic way to protect retirement benefits. Moreover, in both judgments it is pointed out that the fundamental principles enshrined in Articles 2 and 3 Italian Constitution are at risk[205].

The considerations of labour – but not only – lawyers are mostly in contrast to the dominant constitutional rhetoric. Employment scholars have assessed the ruling from the perspective of fundamental social rights, which, indeed, does not allow to ground the analysis on a systematic comparison with Judgment 10/2015, and have revealed the intrinsic value of this judgment, that is the "reaffirmation of the constitutional value of social rights", against the tendency to push for their deconstitutionalization[206]. On this view, the Court has done nothing but fulfilling its role as guardian of the constitutional fundamental rights, which is also its source of legitimacy[207].

Overall, the main issues raised with regard to the Court's argumentations are: the different use of Art. 81 Italian Constitution and the economic crisis argument in the legal reasoning, linked to that, the diverse understanding of the Court's role with respect to the balancing technique and the principle of proportionality, last and to a lesser extent, the application of the judicial precedents, in particular Judgment 336/2010. While reviewing the critical academic literature on the judgment, this section also addresses the convincing counter arguments offered by those scholars who have adopted a fundamental social rights' viewpoint.

Several authors have emphasised and criticised the total absence of any reference to Art. 81 Italian Constitution in Judgment 70/2015, compared to the use made of this parameter in Judgment 10/2015. They critically observe that, while Judgment 10/2015 even intervened to regulate the temporal effects

[204] Veronesi 2015, 692.
[205] Bergonzini 2016, 187.
[206] Giubboni 2015a, 529.
[207] Cf. Cinelli 2015b, 443; D'Onghia briefly reviews the approaches of the Court towards the "spending judgments" since the 1980s, and notes that while in the 1980s the Court had conducted a proper judicial activism in favour of fundamental rights, in the 1990s its approach has shifted towards a self-restraint more keen to support economic arguments: D'Onghia 2015, 328-330. Cinelli 2015c emphasises that Judgment 70/2015 recognises the full constitutional value of social security rights, differently from the general judicial trend that rather leans towards a blind recognition of the absolute prevalence of the principle of balanced budget.

of the judgment, in order to avoid damages to the public finances, Judgment 70/2015 did not even mention Art. 81 Italian Constitution and it did not take into account at all the public finance consequences [208].

Anzon Demmig particularly concerned with the lack of reference to Art. 81 Italian Constitution, emphasises the inconsistency of the two judgments. He argues that with Judgment 10/2015 the Court has taken into due account Art. 81 Italian Constitution, that is the balanced budget principle (a parameter not mentioned by the referring Court), in the balancing with the "other rights and principles" at stake, in light of granting the respect of the Constitution, which was understood as homogeneous body. This decision is considered a turning point as to the attention conferred to the national and European balancing requirements and the impact of the constitutional rulings on them. However, in Judgment 70/2015, published few weeks later, the Court, according to Anzon Demmig, completely ignored the principle of balanced budget and it also disregarded the constitutional precedents which would have led to a more careful analysis of this principle[209].

It is still on the grounds of the homogeneous character of the Constitution that Cinelli argues in a completely different way. He points out that Art. 81 Constitution and the principle of balanced budget cannot be considered a kind of "super constitutional value", as to make sure that all rights and principles are granted, particularly in light of the fact that the Constitution has to be considered as "homogeneous"[210].

Similarly to Anzon Demmig, Veronesi is very critical towards both the disappearance of Art. 81 Italian Constitution and the undermining of the principle of balanced budget and the indifference towards the consequences that a declaration of unconstitutionality would have had on the public finances and indirectly on the most vulnerable population. According to the scholar, the Court has clearly chosen

[208] Morelli emphasises that the fact that Art. 81 Italian Constitution has not been mentioned at all is in contrast with previous decisions, such as, beyond Judgments 10/2015, 304/2013 and 310/2013: Morelli 2015, 707,708; Antonini considers the lack of reference to the constitutional norm a thunderous silence: Antonini 2015, 719; Anzon Demmig refers to an unusual seesaw of the case law about the weight of the constitutional principle of balanced budget in the judgment of constitutionality of ordinary norms: Anzon Demmig 2015, 679. The author appears shocked by several aspects of judgment 70, while in a previous article he had openly praised Judgment 10/2015, see Anzon Demmig 2015a; cf. also Veronesi 2015.
[209] Anzon Demmig 2015, 680.
[210] Cinelli 2015b, 444.

to support the pensioners "always and under any circumstance"[211]. Of the same view, Pin and Longo criticise Judgment 70/2015 for sacrificing "reasonableness and moderation" to the advantage of "an abstract defence of the pensioners' rights", given that the ruling obliges the legislator to enforce these rights, irrespectively of the fact that further legislative actions in this sense will go at the detriment of the general welfare[212].

Of a different is Giubboni, who observes that the Court has not ignored Art. 81 Italian Constitution, but it has referred to it when mentioning the financial requirements, and it has rather placed Art. 81 Italian Constitution in the right perspective, that is in relation to Articles 3, 36 and 38 Italian Constitution[213]. In this respect, Giubboni appreciates the fact that the Court, while balancing the conflicting interests, has gone against the tendency to assign "a sort of prejudicial hierarchical prevalence to the principle of balanced budget", enshrined in the renovated Art. 81 Italian Constitution. This has resulted in a renovated protection of welfare social rights, anchored to the principles of substantial equality and solidarity, that is Articles 2 and 3.2 Italian Constitution[214]. The Court has ruled consistently with its case law, thus considering the balanced budget issue, but without "deviating" its conclusions because of the economic contingency. Indeed the Court has rather conducted a careful balancing paying due attention to the enforcement of social rights[215].

D'Onghia reminds that, albeit the Court surely has to consider Art. 81 Italian Constitution and include it in its balancing between social rights and balanced budget, the Court is not bound by the principle of balanced budget, otherwise the result would be a "complete assimilation of the Constitutional Court's rulings with the legislative acts". To keep its institutional role, the Court cannot be influenced by the costs of its decisions, since how to distribute the resources is a political matter[216]. Even if a number of fundamental social rights are truly influenced by the public financial situation, it is also true that their enforcement cannot be frustrated to the point of tackling the human dignity. Indeed, Art. 81 Italian

[211] Veronesi 2015, 695, my translation.
[212] Pin Longo 2015, 698, my translation.
[213] Giubboni 2015a, 529-530; in a similar way also D'Onghia 2015, 344.
[214] Giubboni 2015a, 528, my translation.
[215] D'Onghia 2015, 348-349. Barbieri and D'Onghia have edited a collective Working Paper, introduced by an asserting statement: "some good reasons to discuss a good Judgment": Barbieri, D'Onghia 2015, 3.
[216] D'Onghia 2015, 345-346, my translation; in a similar way Cinelli, 2015b, 445, argues that the Court in Judgment 70/2015 has properly considered the economic context.

Constitution does not refer, neither directly, nor indirectly, to the duty of the lawmaker to upset the welfare state system in order to respect financial constraints. It is a matter of political choice the destination of the – even limited, but not null – resources to the welfare system. The Constitutional Court, which acts as a custodian of the core content of fundamental rights, is called upon to determine how far the economic reasons can go to the detriment of constitutionally protected rights[217].

It is still on the grounds of a comparison with Judgment 10/2015 that a number of authors have reflected upon the use made by the Italian Court of balancing and principle of proportionality in Judgment 70/2015. This point is indissolubly linked with the previous one. For instance, according to Lieto the absence of any reference to Art. 81 Italian Constitution is a clear evidence of the fact that the Court has not directly applied the balancing technique, but it has rather assessed the balancing operated by the legislator[218].

It is argued that in Judgment 10/2015, the Constitutional Court takes an active role in the balancing, as demonstrated by the choice to modulate the final decision and its effects in order to balance the constitutional interests. While, in Judgment 70/2015 the Court exercises a different function and it exclusively acts as the supervisor of the fairness of the balancing conducted by the legislator. Under the second approach, the balancing, in order to be reasonable, has to be founded upon a well-argued motivation for the measures aimed at reducing public spending at the detriment of social rights. Morelli observes that the different approaches adopted by the Court in the two judgments are not in conflict, however the criterion that leads to embrace an approach rather than the other remains obscure and should be clarified by the Court[219].

In this regard, other scholars have advanced more sharp criticisms. Miani Canevari clearly states that the balancing does not have to be conducted by the legislator, but rather by the Constitutional Court, and in this occasion, the Court has not complied with its duty to conduct a proper balancing[220]. Also according to Anzon Dammig, Judgment 70/2015 is placed "outside the balancing logic" and the Court has rather argued in favour of an absolute prevalence of the principles of proportionality and adequacy

[217] D'Onghia 2015, 326-328.
[218] Lieto 2015, 5-6.
[219] Morelli 2015, 711.
[220] Miani Canevari 2015, 600.

of salaries and pensions, thus failing to correctly understand the Constitution, that is a "unitary document", as suggested by Judgment 10/2015[221].

The lack of reference to both Art. 81 Italian Constitution and the consequences of the ruling in light of the "dramatic financial crisis of our country"[222], coupled with the choice of basing the ruling upon the failure of the legislator to develop further the justifications, has been understood by a number of scholars as an *escamotage* to simplify the legal reasoning and avoid both to deal with the issue of the economic consequences of the decision and to conduct the necessary balancing between the interests at stake, which would have required a careful consideration of the principle of balanced budget[223]. However, also an evaluation from the Court of the economic context which strongly influences its decision has hidden dangers. Antonini, who generally praises the Court's realism in Judgment 10/2015, highlights the risk that the Court may go beyond its limits of discretionality and fall into the legislative competence territory[224]. This observation confirms Morelli's view that the Court, in Judgment 10/2015, has acted as a main character of the balancing and not as a mere supervisor.

This risk can be perceived also in the analysis conducted by Pin and Longo on the use of the proportionality test in Judgment 10/2015. The author argues that, when it comes to the effects of the ruling, this Judgment generally refers to the proportionality principle to justify the intervention in a field, which is typically of a political nature, that is the temporal modulation of the effects[225].

Various authors have emphasised that, looking at the Italian constitutional case law, a proper and rigorous use of the principle of proportionality, which makes the ruling clear and transparent, can be found especially in Judgment 10/2015, but not in the subsequent Judgment 70/2015, which is seen as a

[221] Anzon Demmig 2015, 685.
[222] Anzon Demmig 682.
[223] Anzon Demmig 2015 in particular uses the expression "escamotage", cf. Anzon Demmig 2015, 683; of the same view, Veronesi also wonders whether the judges were aware of the "devastating economic situation of our country" Veronesi 2015, 695-696; Lieto concludes that the miss-consideration of the balancing and Art. 81 has led to an "uncertain argumentation": Lieto 2015, 5; also Pin Longo 2015.
[224] Antonini 2015, 721. The choice of the Court in Judgment 10/2015 was anyway highly criticised and the judges have been accused of going beyond their competence that would allow them to balance a principle, but not a rule, as it is the case for the disapplication of the norm declared unconstitutional: a rule that the Court can only comply with. For a critical evaluation of this choice see Bin 2015; of the same view also Giubboni 2015a. Of a different view on the modulation of time-effects of the decision cf. Barbera 2015. On the legislative actions, which followed judgment 70/2015, which aim at making the lawmaker complying with Art. 81 Italian Constitution also after a decision of the Court which implies further expenses, not calculated in the state budget, Turturro 2015.
[225] Pin Longo 2015, 700.

step back[226]. Indeed, the proportionality is mentioned with regard to Articles 36 and 38 Italian Constitution, and it is not clearly argued whether the Court has made use of a proper scrutiny of proportionality to come to its conclusions (which may be anyway the same) as it has occurred, inter alia, in Judgment 10/2015. Moreover, they point out that the principle of reasonableness is associated in an unstructured way to proportionality and, it is argued, the methodological shift between the two judgments weakens also Judgment 10/2015[227].

From a completely different viewpoint, it is emphasised that the constitutional judges have acted consistently with their role and have called upon the legislator to exercise a "fair balancing". Indeed, the Court does not enter the merit of the legislative choices, but it just controls whether these choices are in compliance with the criteria of reasonableness and proportionality. Indeed, the Court does not go further in its discretionality and does not go beyond its role – as if it had concluded with a ruling called *additivo di principio* – and declares the full unconstitutionality of the block. On this view, the decisive argument of the Court is that the legislator has not made clear under which criteria it has balanced the constitutional interests at stake and it has only vaguely mentioned the "contingent financial situation", which does not allow to pass the reasonableness scrutiny. The lack of indication from the lawmaker on the balancing operated by the legislator does not allow the judge to fulfil its task, that is to conduct what in other legal systems is a crucial moment of the proportionality test, that is the evaluation over the necessity of the norm for the impossibility to adopt other measures less harmful[228]. By doing so, this Court has proven to be very attentive towards social security rights and careful in not allowing an "unequal balancing between rights of individuals and economic efficiency"[229].

[226] Inter alia, cf. Pin Longo 2015, also Bergonzini 2016, Antonini 2015. However, while Antonini argues that only in recent times "the principle of proportionality has been gaining a new dignity in the constitutional case law" and a less vague use of this principle has been made only in the latest years, for instance in the Ilva judgment (85/2013) : Antonini 2015, 718,; Pin and Longo support a consolidated and rigorous use of this principle by the Court: Pin, Longo 2015.

[227] Pin, Longo 2015, 699-700; Lieto also argues that that this second ruling weakens the decision taken in Judgment 10/2015 and he concludes its commentary emphatically by suggesting that the oil companies may result damaged if compared to the pensioners and he seems to completely disregard the crucial difference that should exist in a social state between the protection of pensioners and that of multinational companies: Lieto 2015, 6.

[228] D'Onghia 2015, 340; cf. also Cinelli 2015b 442; Giubboni 2015a, 529, according to Giubboni, the Court has anyway conducted the scrutiny of reasonableness in a way in which is somehow close to the structured proportionality test

[229] D'Onghia 2015, 338, here the author in particular refers to the expression "unequal balancing" suggested by Luciani 1995, 126. In a similar way, Guiglia, 2016, 25-30, argues that the unequal balancing conducted in

The – opposite – fundamental social rights perspective emerges clearly from the argument that "fundamental rights are not born limited by financial requirements", but it is up to the legislator to conduct a transparent balance to select the resources to be invested in the enforcement of these rights. Obviously, adds Giubboni, the "more scarce are the available resources, the more stringent the constitutional control has to be"[230].

Last, but strictly connected with what said above, the issue of the still uncertain powers of inquiry of the Court, with regard to decisions somehow concerning Art. 81 Italian Constitution and the principle of balanced budget, has been raised. Morelli argues that in order to enforce Art. 81 Italian Constitution, the Constitutional Court would need room to investigate on the financial consequences of a norm. While Judgment 10/2015 seems to foresee the possibility for the Court to detain a power of instructions, Judgment 70/2015 seems to propend for a burden of proof fully on the State Advocate[231]. Differently, Bergonzini, considering the points in common between the judgments, notices that in both judgments there is a "lack of any preliminary investigative activity on the Court's part" with regard to the considerations on the impact on the state budget[232]. While this choice was made explicit in Judgment 70/2015, in Judgment 10/2015 the analysis on the financial consequences is found apodictic and deficient of any preliminary inquiry, which would have been necessary and, in addition, should have been conducted with transparency. However, as pointed out by the author, this approach is consistent with Crisculo's view, according to whom the Court does not make economic assessments[233].

D'Onghia emphasises that the Court has pointed out that during the conversion into Law 214/2011 no technical reports or documentation on the expected revenues that should follow the measure was provided, which has been decisive for the Court, as it implied an objective impossibility for the Court to engage in an examination of the balancing operated by the legislator[234].

Judgment 70/2015, which has not recognised to Art. 81 Italian Constitution the role of super-parameter, cannot be considered a constant feature of the constitutional case law, since the balancing technique is structurally unstable.

[230] Giubboni 2015a, 529, my translation.

[231] Morelli 2015, 712; cf. also Guiglia 2016, 30.

[232] Bergonzini 2016, 188, my translation.

[233] Bergonzini 2016, 189.

[234] D'Onghia 2015, 341-342; the author underlines that attaching a technical report in this sense is a duty of the executive since it allows to understand the balancing operated by the legislator.

Further criticism is raised in relation to the use of legal precedents. Inter alia, it is argued that the Court has forced the meaning of Judgment 316/2010 and wrenched from it a clear warning not to reiterate the revaluation of pensions, which was not so evidently expressed in the judgment from 2010. Furthermore, even admitting that the Court aimed at giving a clear warning to the lawmaker, Lieto points out the substantial differences between the two cases and argues that the reasonableness scrutiny should have been carried out taking into account a norm into effect, which regulates analogous situations and not with a norm approved under different circumstances. Under this view, the use of Judgment 336/2010 as an argument supporting the unconstitutionality of the norm appears extremely feeble[235].

To the contrary, according to D'Onghia, Judgment 316/2010 included a clear warning to the legislator and made clear that further suspensions of the revaluation mechanism could have infringed upon the principles of reasonableness and proportionality and this warning had to be taken into account by the legislator, which rather disregarded it. The underestimation of this warning is identified by Giubboni as one of the main arguments supporting the Court's decision, together with the comparison with the previous cases of block of automatic revaluation. The precedents are crucial to, first of all, identify the function of the revaluation mechanism, that is to preserve the real value of the retirement benefits (to grant the enforcement of Art. 38.2 Italian Constitution)[236].

Those who consider Judgment 316/2010 a turning point in the constitutional case law, inasmuch as it states that a norm, stemming from the austerity policies, has to have a temporary character in order to be legitimate, argue that Judgment 70/2015 is anything but a confirmation of such case law. Moreover, the consistency with Judgment 316/2010 is revealed by the neat declaration of unconstitutionality and the fact the constitutional judges have not been influenced by the economic consequences of their decision[237].

[235] Lieto 2015; Anzon Demmig adds a third judgment to stress the inconsistent approach of the court, that is judgment 127/2015, where the Court again takes in full account the principle of balanced budget: Anzon Demming 2015, 679.
[236] Giubboni 2015a, 527; Guiglia 2016, 24; Also D'Onghia highlights that this type of warning was not new to the 2010 case law either and already in other occasions the Court had underlined that the lawmaker had to cautious in affecting the entity of retirement benefits and respectful of Articles 36 and 38: D'Onghia 2015, 331-332.
[237] Guiglia 2016, 17, 25. In a similar way, Salerno 2015. Of a different view: Morrone 2015.

The core argument of the Court is that the revaluation of retirement benefits aims at granting the respect of the adequacy criterion, that is of Art. 38.2 Italian Constitution, and therefore of the principle of fair remuneration, enshrined in Art. 36 Italian Constitution. This point is supported by the comparison with similar norms previously adopted, in order to establish whether the norm under scrutiny was in compliance with the principle of reasonableness, as to understand the coherence of that norm with the whole legal system and welfare legal framework. It is this comparison, that shows how the norm at stake is not consistent with the others since both its time-frame and its scope are way wider, which demonstrates that the legislator has not complied with the reasonableness criterion[238].

The labour lawyers' perspective also allows to consider a crucial element of the Court's legal reasoning, that is the rationale of the mechanism tackled by the provision under scrutiny, and the respective use of the legal precedents. Indeed, the Court, by analysing the rationale of this mechanism and by comparing the norm at stake with similar ones, concludes that the legislator has violated the principles of proportionality and reasonableness, and, consequently, the norm is unconstitutional[239]. In particular, the function of the automatic revaluation mechanism consists in preserving the real value of retirement benefits, and, therefore, it implements the principle of adequacy of retirement benefits, protected under Art. 38.2 Italian Constitution[240].

Although the legislator enjoys discretionality over the amounts of retirement benefits, with regard to the public budget, the automatic revaluation of retirement benefits has to be understood as a "benefit that (generally) cannot be restricted". Even if the legislator acts in this sense, according to Cinelli, it has to bear in mind the warning expressed in Judgment 316/2010 and avoid tensions with the principles of reasonableness and proportionality[241]. A guideline to the legislator on the limits to its discretionality is provided by the link created between Art. 38 and Art. 36 Italian Constitution, which is "functional to

[238] D'Onghia 2015, 334.
[239] Giubboni 2015a, 527.
[240] Cinelli 2015b, 441.
[241] Cinelli 2015b, 442.

the ratio of the automatic revaluation" and instrumental to the substantial equality and the enforcement of Articles 2 and 3 Italian Constitution[242].

In conclusion, those who have critically reviewed Judgment 70/2015 and have blamed the Court for having failed to apply a rigid proportionality test seem to underestimate the primacy of fundamental labour rights in the Italian Constitution, as well as the legitimacy of the Court to use different legal techniques to evaluate the constitutionality of an ordinary norm. On the other hand, the authors supporting the outcome of the Judgment argue that the Court has conducted a fair balance, to the point of advocating, in certain cases, that the Court has applied a sort of proportionality test. However, this perspective fails to comprehend the argumentative approach chosen by the Court and the differences and similarities between the latest and a proportionality test.

2.2.2.2 The last episodes of a case law in search of some coherence: Judgment 173/2016 and Judgment 250/2017

Four paragraphs of Art. 1 of Law 147/2013 (Stability Law for 2014) were contested in Judgment 173/2016. Eventually, the Court declared two claims unfounded and two inadmissible. First, Art. 1.483, which provided for a new modulation of the percentage of automatic revaluation for all retirement benefits, for the three year period 2014-2016, and a block of the revaluation of pensions six times higher than the minimum for 2014. The Court, referring to its case law, concludes for the constitutionality of this measure, inasmuch as it does not provide for a total suspension of the revaluation mechanism for certain, relatively low, retirement benefits, as it was the case in Judgment 70/2015. Indeed, the norm, inspired by the criterion of graduation, is found in compliance with the principles of reasonableness and proportionality.

Second, the claim related to Art. 1.486 is admitted. The norm provided for a "solidarity contribution" to be detracted from the highest retirement benefits (15-30 times higher than the minimum), for a three year period. The constitutional legitimacy of Art. 1.486 was contested by the referring court on the

[242] D'Onghia 2015, 335, 337; Giubboni advances a criticism related to the application of Art. 36 Constitution to the case at stake, inasmuch as, it is argued, it does not pertain to the retirement benefits. However, the author emphasises that the sole application of Art. 38 would have led to the same conclusions: Giubboni 2015a, 331.

grounds of a number of constitutional provisions. Inter alia, Articles 2, 3, 36, 38 and 53 Italian Constitution were deemed violated since the norms at stake would be in contrast with the principles of reasonableness and solidarity, the principles of adequate retirement benefits and proportionality with the work carried out and the principle of legitimate expectation. After having mentioned the need to assess the norm with a "strict scrutiny of constitutionality", the Court dismissed the grounds of unconstitutionality under the arguments that the solidarity contribution at stake does not qualify as a tax revenue and it is truly destined to the welfare system solidarity, and it anyway respects the criteria of sustainability, reasonableness and proportionality. The proportionality of this measure is to be found mainly in the circumstance that it is only addressed to the highest retirement benefits and it is temporary[243].

Judgment 173/2016 is prised first of all because, in declaring unfounded the unconstitutionality of Art. 1.483, refers to Judgment 70/2015, with regard to the substantial difference identified between a block in the revaluation mechanism and a modulation by the judgment from 2015, thus creating a continuity between the two decisions[244]. Indeed, the first issue decided by the Court relates to a new modulation in the retirement benefits revaluation, which concerns all pensions (and a total block only for pensions higher than six times the minimum) for the years 2014-2018. This significant difference has allowed the Court to declare the norm legitimate, since it fulfils the principles of proportionality of retirement benefits and adequacy, consistently with Judgment 70/2015[245]. Indeed, this part of the judgment is a follow-up to Judgment 70/2015, while the legal reasoning referring to Art. 1.486 is considered more interesting, since it presents innovative elements.

In particular, Persiani discusses the reasoning grounding the declaration of constitutionality of the solidarity contribution introduced by Art. 1.486. The author highlights the main criteria used by the Court to assess the admissibility of the claim of unconstitutionality of the solidarity contribution, that is the principle of reasonableness, the principle of proportionality and the legitimate expectation, to be understood as legal certainty. While no remark is made as regard the application of the first principle,

[243] For a commentary of the judgment, cf. Pedullà 2016.
[244] Guiglia 2016, 18; see, also, Pedullà 2016, 4.
[245] Sandulli 2016, 688.

traditionally used to evaluate the discretionality of the legislator in the social security legislation, doubts are raised as to both the application of the principle of proportionate remuneration, as enshrined in Art. 36 Italian Constitution, and the use of the principle of legitimate expectation (that Persiani distinguishes from that of legal certainty) which implies that the Court considers the retirement positions acquired rights. However, the Court explains that the principle of legitimate expectation cannot be invoked if the pensioners concerned have enough awareness of the socio-economic context, and therefor in this context of crisis, these pensioners have to be aware that higher benefits cannot be fully granted due to the shortcomings of public budget. If that is the reasoning of the Court, in the scholar's opinion, there are no retirement positions that can be considered acquired rights[246]. Doubts on the appropriateness of labelling the retirement benefits as acquired rights are raised also by Pedullà, who observes that it is hardly arguable that a right as the retirement benefit, so strongly subject to the economic and financial trend and which can be limited – albeit under certain conditions – by the discretionality of the legislator, can be easily defined an "acquired right"[247].

Persiani also focuses on the fact that the Court has confirmed the functional link between Art. 36 and Art. 36 Italian Constitution set in Judgment 70/2015, but, in theory, it has a mitigated the scope of this connection (in particular he refers to paragraph 5 of the judgment). Nevertheless, in practice the link seems to remain tight. It is emphasised that the Court applies the principle of sustainability of retirement benefits, in order to verify the compliance with the principle of proportionality and assess whether the benefits are proportionate to the pension contributions (Art. 36 Italian Constitution) and not to the adequacy of the benefit itself (Art. 38 Italian Constitution)[248].

Farther observations relate to, first, the relevance given to the temporary character of the measure both because the "temporal character" – emphasised by the Court to ground the constitutionality of the provision – does not relate at all to the concept of "adequate means" and because "it seems ingenuous

[246] Persiani 2017, 284-285.
[247] Pedullà 2016, 7.
[248] Persiani 2017, 286. The author reflects upon the missed opportunity of defining the meaning of "adequate means to life needs" and the controversial application of Art. 36 Italian Constitution to measures regulating the retirement system, especially since the sole application of Art. 38 Italian Constitution, in his view, would have led to the same conclusion; in this respect see also Giubboni 2015a, with regard to Judgment 70/2015.

to think that the social security financial crisis is a temporary phenomenon"[249]. According to Sandulli, the temporal element is crucial, especially because the ruling does not crystallise the solidarity contribution and it is rather up to the lawmaker to decide, considering the developments of the financial crisis, whether to consolidate this measure or not and what other reforms of the social security system may be necessary[250]. A last point raised by Persiani concerns the missing assessment on whether other alternative and less harmful means would have been available[251]. Moreover, it has been noted, that the Court for the first time has established a principle of solidarity and responsibility between generations, thus adopting an approach that understands rights and duties in a circular way, which is founded upon Art. 2 and Art. 38 Italian Constitution[252].

In Judgment 250/2017, the Court has declared the legitimacy of two provisions adopted with the explicit aim of implementing Judgment 70/2015 and amending the regulation on the automatic revaluation of pensions, in compliance with the principle of balanced budget and the public finance targets (Art. 24.25 and Art. 24.25-bis of D.L. 201/2011, as substituted by Art. 1.1-1) of D.L. 65/2015).

The norms at issue reconsider the modulation of the automatic revaluation of pensions for the years 2012-2013 (the automatic revaluation for retirement benefits six times as high as the minimum INPS benefit is ruled out and for retirement benefits between three and six times the INPS minimum the revaluation is based upon decreasing percentages) and its weight in the determination of the automatic revaluation for the years 2014-2016 (so called *trascinamento*). The Court rules in favour of the legitimacy of the contested norms, because they have "introduced a new and *not unreasonable* modulation of the mechanism for the revaluation of pensions" (italics added). It has been highlighted that the principle of reasonableness has been defined the cornerstone of the pension system, in the sense that should represent the centre around which the legislator conducts its activity[253]

The Court legitimates the legislator's choice by putting emphasis on the technical documents provided by the Parliament and the Government and by "clarifying even better the nexus between Art.

[249] Sandulli 2016, 691, my translation.
[250] Sandulli 2016, 691the author also compares assesses Judgment 173/2016 jointly with Judgment 174/2016.
[251] Persiani 2017, 293.
[252] Pepe 2016; Pepe 2017. A different perspective over Judgment 173/2016 is offered by Procopio 2016.
[253] D'Onghia 2017, 103.

36 and Art. 38 Constitution". According to D'Onghia, this ruling makes clear that the nexus between the right to a proportionate remuneration (Art. 36 Italian Constitution) and the right to adequate retirement benefits (Art. 38 Italian Constitution) is indirect, even though the principle of adequateness is anyway informed also by meritocratic criteria[254].

Overall, this is the last Italian post-crisis case where fundamental labour "rights" and their effectiveness have a central position, and the importance of ensuring coexistence between economic sustainability and social sustainability emerges and an equilibrium between the values concerned has to be found[255].

Conclusion

In the Spanish Constitutional post-crisis case law, a structured proportionality test is only allegedly applied. However, even though the dissenting Judge has widely referred to the misuse of the proportionality test in both Judgments, the labour law scholarship has not assessed the missed application of this argumentative technique and the constitutional lawyers have done so only to a minor extent and, especially without focusing enough on the fundamental labour rights concerned. In these cases, the decisions of the Court have been accused, mostly by labour lawyers, of being oriented to support economic interests at the detriment of fundamental labour rights, in order to uphold the Government's choices slavishly. On the other side of the Mediterranean, the Italian case offers a reach case law, mostly dealing with provisions aimed at enforcing the balanced budget principle, which appears not always consistent and coherent and it has been accused of having failed to develop a structured and convincing legal reasoning, which can satisfy the demands for transparency. However, the same case law has also been prised for an active defence of labour rights and a correct understanding of the Constitutional Court's role in a democratic system based upon a rigid Constitution that enshrines a wide range of fundamental labour rights.

Judgment 70/2015 of the Italian Constitutional Court provides a significant example, inasmuch as it has stimulated the Italian academic literature to address more closely the legal reasoning of the Court

[254] D'Onghia 2017, 98, my translation.
[255] D'Onghia 2017, 97 and 106.

and the application of the balancing technique, with a peculiar focus on the relevance of the balanced budget principle. However, the references that can be found in the literature to this element do not take into due account the theoretical questions behind the key principles of proportionality and reasonableness in the Italian legal system, nor a comprehensive analysis of the judicial discourse of the crisis-case law – in its entirety – has be conducted, yet.

The first question that a labour lawyer approaching topics such as the constitutional balancing, traditionally addressed by constitutional lawyers, is tempted to ask is whether priority should be given to the structure of the legal reasoning, or to the effective protection of the fundamental labour rights at issue. In other words, from a labour law perspective: is it more important to adopt a structured balancing, which in practice risks to be easily circumvented, or an approach that allows the Court to fulfil its role of warrantor of fundamental labour rights and guarantee that these rights are enforced?

One the one hand, certain literature, mainly Italian, seems to suggest that the application of a rigid proportionality test is a priority, in order to assure transparency and consistency of the constitutional legal reasoning. This literature undermines the prominence of an effective enforcement of fundamental labour rights, which is instead the central argument of a number of Italian labour lawyers. On the other hand, the missed application of the proportionality test is beclouded, mainly from the Spanish labour scholarship, by the legitimate reflections on the missed protection of the fundamental labour rights concerned by the Spanish judgments.

While, the arguments in favour of the application of a systematized technique as the proportionality test are remarkable and comprehensible, it is legitimate to wonder whether a fundamental rights' discourse, as long as it is well framed and structured, should prevail over a systematised and rigid technique. Therefore, it is necessary to investigate what is the legitimate alternative, in terms of legal reasoning, on how to balance fundamental labour rights with other constitutional interests and principles, bearing in mind the urgency to enforce fundamental labour rights and comply with the values of a Social Constitution (this concept is elaborated further in Chapter 2). Linked to that, further relevant issues have been raised by the literature discussed in this chapter: which elements can be balanced against? Can we give for granted that a balancing of fundamental social rights and financial requirements on an equal basis is a "fair balancing"? Is the balancing between labour rights and economic freedoms (even if

carried out by applying the proportionality test) appropriate to the enforcement of a Constitution socially grounded? And, if so, to what extent fundamental labour rights can be compressed and upon which arguments?

In order to properly discuss the constitutional case law, the labour law perspective cannot abstain from reflecting upon the constitutional categories and the impact of the legal reasoning structure on the effective enforcement of fundamental labour rights. The literature review conducted in this chapter suggests a necessity to integrate the constitutional and labour perspectives of analysis of the constitutional case law. In particular, such a reconciliation, as far as concerns the post-crisis case law, allows to address in a comprehensive way the impact of the economic crisis on fundamental labour rights, at the latest stage of legal analysis that of the *giudice delle leggi*.

The analytical focus on the structure of the legal reasoning of the Constitutional Court cannot avoid the crucial aspect of an effective enforcement of social rights, considering the core values underpinning Constitutions such as the Italian and the Spanish ones, and vice versa. The matter is extremely relevant, in the opinion of whom is writing, in light of the increasing legal – and even constitutional – value that economic interests – both private and public - are gaining in legal systems with a strong social connotation, deriving from a Constitution, which reserves consistent qualitative, as well as quantitative, space to the protection of social and labour rights. For this reason, the next chapter is devoted to illustrate and discuss the relevant Italian and Spanish theories on constitutional balancing.

Chapter 2

A reappraisal of constitutional balancing in Italy and Spain

Introduction

"Proportionality test" and/or "principle of proportionality", as well as "reasonableness" are often used with levity by labour law scholars. For instance, it is not uncommon to find, in the Italian literature addressed in the previous chapter, evaluations of the Italian judgments, which give for granted that the Italian Court should apply the proportionality test and its sub-tests: suitability, necessity and balancing in a strict sense. Equally striking is that it is very rare to perceive, in the literature reviewed, a conscious use of the term "balancing", not only as far as concerns its application, but also as regards the subject which should conduct the balancing.

Although, obviously, the analysis of constitutional judgments and, in general, fundamental labour rights adjudication, as far as concerns both legal arguments and conclusions, conducted from a labour law perspective strongly concentrates on the labour rights' enforcement, this viewpoint cannot underestimate the necessity to understand and apply properly the analytical categories traditionally belonging to constitutional studies. In the opinion of whom is writing, labour law scholars need to approach the post-crisis (but not only) constitutional case law by taking seriously the constitutional criteria, in order to cleanse the analysis of the constitutional interpretation of fundamental labour rights of cliché and inaccuracies and increase the value of a perspective usually more prone to support the application of fundamental labour rights and widen their scope.

Therefore, it is necessary to address the constitutional literature on balancing in Italy and Spain, by carefully contextualizing this technique in the respective legal systems, as to avoid approximations and identify the criteria respectively used, their contents and the national judicial practice to which they belong. For this reason, the following pages discuss balancing in the Italian legal system, with a focus on the principle of reasonableness; and balancing in the Spanish legal system, with a focus on the proportionality principle. The necessity to approach the theoretical studies on the balancing method and the proportionality and reasonableness criteria in precise legal contexts – in our case Italy and Spain –

stems from the assumption that these are not absolute criteria, but they are inextricably linked to their legal and judicial terrain, composed by legal sources, judicial tradition and academic literature[256]. However, this distinction, made for systematization purposes, does not want to suggest that the reflections developed in the two strains of literature strictly apply only to the respective national judicial cases. To the contrary, they give cause for reflection, as concerns the entirety of all of the Judgments discussed.

Before going to assess the two national legal approaches, the chapter briefly introduces the key features of the so called neo-constitutional theory, which provides the necessary conceptual basis to understand the theoretical justification that allows to balance conflicting rights and interests. Eventually, the conclusions summarise the main concepts and frame the fundamental rights' theory that underlies the analysis carried out in Chapter 3 and Chapter 4.

1. Constitutional balancing and its theoretical justifications

The increasing compression of constitutional labour rights requires a reflection upon the role that the constitutional balancing and the general clauses – applied in the Italian and Spanish cases – can have in order to limit this tendency and foster the dialogue between written norms and their context, through a "solid awareness of the purposes and a fine argumentative technique"[257]. It has been argues that, differently from the legal reasoning that applies in the domain of ordinary law, where the balancing technique is used only to found the premises of the decision, in the constitutional judgment it constitutes "the form of the decisions, which consists of a judgment of prevalence between different principles,

[256] Following the global success of balancing and principle of proportionality, the academic literature has often addressed these concepts extrapolating them from their national legal context. See, for instance, the confusing international approach in Young 2017, who reflects on proportionality, reasonableness and economic and social rights. Bomhoff, to the contrary, starts its analysis from the assumption that "we are not in a global age of balancing" and the national peculiarities need to be properly considered: Bomhoff 2013. Also within the EU legal framework – strictly speaking –, balancing is a controversial issue, especially as concerns the Court of Justice legal reasoning. The proportionality test, i.e. the argumentative technique normally applied by the CJEU, is especially criticised when used to adjudicate cases dealing with fundamental rights; see, inter alia, De Witte 2009; Loi 2011; De Vries et al. 2012. For a focus on the balancing in the well-known cases Laval, Viking and Omega see, inter alia, Sybe 2013.

[257] Mengoni 1986, 165-178, my translation.

which are in conflict in the concrete case, or a judgment of coexistence and competition (*concorrenza*), where there is reciprocal limitation"[258].

Before analysing the role of general clauses and the more general balancing techniques, in relation to a proper enforcement of fundamental labour rights in the case law on post-crisis measures, it is necessary to reflect upon the constitutional balancing as it has been conducted so far by the two Constitutional Courts and interpreted by the relevant national scholarship. Therefore, this chapter aims at reconstructing the key moments and aspects of the constitutional balancing and assess the application of the respective general clauses – the principle of reasonableness in the Italian legal system and the principle of proportionality in the Spanish case law –, which serve the purpose to rationalize the balancing process.

However, the reflections on the balancing of conflicting rights, principles or interests in the two national legal systems selected need to be introduced by a short reflection on the recent legal theoretical debates on modern constitutionalism and fundamental rights. In particular, the balancing of fundamental rights and principles is a judicial technique deemed essential by neo-constitutional theories. Neo-constitutionalism has various shades and grades, however, this concise review does not go into detail on the different and elaborated neo-constitutionalisms, but only the key points of this approach are traced[259].

One of the core aspects of neo-constitutional theories is the relevance recognised to the constitutional principles in constitutional legal systems. Therefore, it is paramount to begin by introducing the concept of *principle* and the differences between *principles* and *rules*, under this approach.

Certainly, in several legal systems, the application of general principles represents an efficient way to adapt rights to the changing economic and social context; in this sense, the combination of rules and principles constitutes a key feature of modern constitutional States[260]. Furthermore, a principles' sub-cluster can be identified, which is composed by *fundamental principles* that affect any branch of ordinary law[261].

[258] Mengoni 1996, 122, my translation.
[259] On the distinction between neo-constitutionlism and neo-constitutionalisms see Ratti 2015.
[260] Loi 2016, 169; see also the review on neo-constitutional theories by Ratti 2015.
[261] Chiassoni 2015, 52.

The centrality of the constitutional principles is well expressed by Zagrebelsky who points out that "only principles [and not rules] play a proper constitutional role, which is "constitutive" of the constitutional system"[262]. In modern Constitutions, as the Italian and Spanish ones, fundamental rights are formally expressed by norms, but they retain the structure of and act as principles and express a preference for protecting certain interests over others[263]. Hence, constitutional principles make values enforceable and underpin rights and interests constitutionally protected[264]. In the words of an authoritative Spanish scholar: "[L]as reglas son formas de realizar los principios y los principios son formas de realizar un valor"[265].

Various theories have been developed, in order to justify and frame the distinction between principles and rules, in addition, the concept of principle is highly debated and the only uncontroversial feature seems to be its indeterminacy.

Zagrebelsky identifies the main difference between rules and principles in the different "treatment" to which the two concepts are subject. Indeed, only the rules are interpreted through methods, which assess the wording of the legislative act, while in the case of principles "there is not much to be interpreted", given that their lexical meaning is plain[266]. Rather than being interpreted, principles shall be understood in terms of the values they express, and that is because, while we must obey the rules, we adhere to principles, hence there is a necessity to understand the set of values to which they belong[267]. The *value* is a pre-legal concept that becomes legal – is "positivizzato" - once it is incorporated in a principle or in a fundamental right, and fundamental principles and rights are norms, albeit weaker norms, which need to be recognised and enforced. So, for instance, the value of *freedom* is legally

[262] Zagrebelsky 1992,148, my translation.
[263] See Bin 1992, 1-8. Also, Pino 2009.
[264] Modugno 2007, 33.
[265] "Rules are ways to realize principles and principles are eays to realize a value", Preciado Domènech 2016, 84, my translation. The author widely refers to Anotnion Enrique Pérez-Luno theories: Pérez-Luno 2017.
[266] Zagrebelsky 1992, 148, my translation.
[267] However, a relationship between principles and interpretation seems to exist and to be bidirectional, so that the principles are both functional to the interpretation and deriving from the hermeneutic activity, see Loi 2016, 168; a concrete example can be found in the Italian legal system and Art. 12 Civil Code, see further in this Chapter.

expressed in a series of fundamental rights[268]. No need to specify that the norm in a strict sense is a "strong" legislative requirement, which requires obedience[269].

Under the neo-constitutional perspective, the circumstance that a difference between rules and principles exists does not mean that principles are ancillary to rules and only have an integrating function in the legal system – as a positivistic approach would support[270]. To the contrary, principles have a direct impact on the reality and are able to shed a normative light over the factual case. Zagrebelsky summarizes this concept with an eloquent sentence: "each principle underpins the imperative: 'you will take a stand on the reality, on the grounds of what I am stating'"[271].

When discussing neo-constitutional theories a reference to Dworkin, one of the pioneers of this approach, is paramount. The author argues that a rule is a norm that sets a goal, while the principle does not entail the achievement of a specific aim, but it can influence the final decision depending on the weight assigned by the judge. In practice, if two rules are in conflict, one of them is simply not valid, since the rule has an absolute weight. To the contrary, if two principles are in conflict, both are still valid and the weight of one principle has to be decided in relation to the other, so that they can be applied by the Judge in the most controversial cases[272].

Drawing on Dowrkin's theory, Alexy elaborates that, while a rule is a norm that can be simply complied with or not, the principle represents an *optimization command* (*Optimisierungsgebote*), which is in a structural and indissoluble relationship with values, inasmuch as a judgment based on principles entails a reference to values. Principles can only be applied in relation to the judicial and factual possibilities of the legal system, in the sense that the enforcement of a principle requires both an assessment of the concrete case at stake and the legal possibilities (that is other principles and rules). Therefore, for both authors, a conflict of principles is inherent in a constitutional system providing for

[268] Mengoni,1993, 257. Zagrebelsky 1992, 147, 149. The constitutional lawyer, in another occasion, clarifies the distinction between the rule and the principle, on the grounds that the first is a norm with closed antecedent, which clearly identifies the facts that trigger the application of the norm, while the principle is a norm with open antecedent, hence the norm does not make the triggering facts explicit: Zagrebelsky 2008, 210.
[269] Mengoni 2008, 246.
[270] Nor the neo-constitutionalism correspond to natural law, besides Zagrebelsky 1992, see the accurate distinction made by Mauro Barberis on the various philosophies of law, inter alia, neo-constitutionalism and natural law: Barberis 2011.
[271] Zagrebelsky 1992, 163, my translation.
[272] Dworkin 1967, 22 ff.

fundamental principles and it can be solved by taking into account the relative weight of each of them, hence, by balancing the principles. As a result of this rational process, no principle is declared inapplicable (as it would happen in case of conflict of rules), but simply slightly recessive compared to the other, nor an absolute prevalence of a principle over the other is established. Under this view point, the Constitutional Court shall have a pervasive role in the continuous construction of the legal system[273].

On the grounds of Dworkin's and Alexy's theories, also Luigi Mengoni advocates for the application of the constitutional balancing. According to the Italian authoritative scholar, the normative structures expressing values – that is both general clauses, as the principle of equality, and fundamental rights – differ from the traditional legal norms, especially in their application, which occurs through the balancing of "corresponding goods and interests". Therefore, it is up to the Judge to conduct a scrutiny, which puts in an equality order the concurring values (*giudizio di equiordinzione*). Under this view, the scrutiny over fundamental principles and rights shall be based upon the application of the proportionality criterion[274]. Indeed, the balancing of principles requires a theory that circumscribes rigorously the discretionality of the Judge and avoids the "apparent collisions", which, according to the author, are the result of the introduction of extraneous ideological factors. The "apparent collision" is not direct outcome of the application of the balancing method, but it rather stems from a weak analysis of the normative scope of application of fundamental rights and principles, which should be the first phase of this type of constitutional judgment, in order to detect when a real collision occurs[275].

The protection of several and diverse interests from the Italian and Spanish Constitutions makes the balancing of conflicting principles – and respective rights or interests - a crucial moment of the constitutional judgment in both legal systems addressed in this dissertation. Indeed, "[T]he constitutional judgment rather consists in the identification of the relevant constitutional principles and their balancing, in order to evaluate the compatibility of the ordinary norm under scrutiny, with those principles"[276]. To say it in Modugno's way, the balancing guarantees that each value expressed by each

[273] Alexy 2000.
[274] See also Pino 1999.
[275] Mengoni 1993; as well as Mengoni 1992.
[276] Modugno 2008, 229, my translation.

principle is protected and enforced at least to a minimum extent[277]. Bin argues that the Italian Constitution – but the same applies to the other Constitutions as the Spanish one – differently from the Constitutions of the 19th century, has embedded the conflict of values, rather than providing a solution. In other words, it does not freeze the power relationships between conflicting interests, and, hence, it qualifies as a *pluralist* Constitution. This feature makes modern Constitutions able to face the social complexities of modern societies[278].

Under this view, an absolute hierarchy of principles would contradict the nature of *principles*, which are legal expressions of values and, hence, cannot be classified, inasmuch as a value cannot be considered higher than any other. "As *in abstract* principles are never logically incompatible, *in abstract* it is not possible to establish an order of preference"[279], differently from the norms in a strict sense, which can be organized hierarchically. Mengoni adds that the political character of the Constitution implies that its norms cannot be translated into neutral concepts responding to a pre-ordered scale of values ("concetti assiologicamente neutrali"). Indeed, the relationship between the person and the society/State cannot be pre-determined in light of a static hierarchy of values[280].

Among those arguing against an assimilation of values and rights or principles, it is worthwhile to mention at least Jurgen Habermas, who denies the rationality and, hence, the applicability of the balancing. The distinction between values and rights/principles is supported by the argument that once a value is translated into a norm – that is a principle –, its meaning changes, in the sense that it acquires a legal significance. In brief, Habermas identifies four core distinctions. First, norms show the correct behaviour, while values simply recommend the most suitable behaviour. Second, norms can only be either valid or not valid, while values establish preference relationships. Third, principles are universally binding; while values provide for a general estimation of what is good for the society. Last, and crucial, while norms can never contradict each other and shall be coherent to frame the legal system, values are in a constant struggle for prevailing[281].

[277] Modugno 2008, 250.
[278] Bin 2007, 23-24.
[279] Bin 1992, 33, my translation, italics in the original text.
[280] Mengoni 1996, 122-123.
[281] Habermas 1996, 243 ff.

The renowned philosopher argues in favour of a more limited role of the judicial constitutional body, which should be confined to grant the proper functioning of the democratic mechanisms[282]. As Alexy, also Habermas grounds its reflection upon the German constitutional case law, but differently from its colleague he criticizes its role as interpreter of the constitutional values, which, in his opinion, causes an overlapping with the democratic decisions, given that principles, as norms, are not optimizable and have to be entirely applied, therefore cannot be subject to a balancing. Furthermore, the author advocates that it is impossible to grant rationality in the application of the balancing technique and stresses the subjectivity of this procedure[283].

However, also Habermas argues that principles are undetermined norms, compared to rules, but this does not entail an incoherence of the overall legal system. Indeed, the principles' indeterminacy exclusively entails that a legal argumentation is necessary, in order to understand which principle is applicable. In the end, only a norm (a principle) is the valid one, in relation to the factual case, and applicable in the case at stake[284].

In a remarkable essay, Luigi Ferrajoli elaborates a critique to both the neo-constitutional distinction between rights and principles, and the respective theory on constitutional balancing. Ferrajoli argues that the sharp differentiation between rules and principles does not reflect a structural feature of the constitutional system, but it is rather a merely stylistic choice, which, however, has a practical effect: it weakens the normative power of principles, that is fundamental rights. The scholar proposes a different distinction, between *Principi direttivi* (that provide for general guidelines) and *Principi regolativi* (which content is imperative). With the result that a constitutional norm can either express a *Principio regolativo* or a *Principio direttivo*, but also both of them, in the sense that it can be *regolativo* as to the *an* and *direttivo* as to the *quomodo (*e.g. Art. 38.1, Italian Constitution). "Behind every rule there is a principle"[285], and the *Principi regolativi*, if violated, act as rules[286].

[282] Habermas 1996.
[283] Habermas 1996, 303 ff.
[284] Habermas 258 ff.
[285] Ferrajoli 2010, 2799.
[286] Ferrajoli 2010, 2794-2805.

As a consequence, also the appropriateness of the balancing conducted by the Constitutional Courts is put into question. In this respect, he openly opposes what he calls *costituzionalismo principialista* to the *costituzionalismo garantista* – which he favours. Ferrajoli introduces its argument, by sharply distinguishing between judicial balancing and legislative balancing. The balancing conducted in the law-making process is welcomed, albeit only between *Principi direttivi*, and the same is true when fundamental social rights that include both types of principles come into question, so that the full application of the *Principi regolativi* expressed therein cannot be put into question (see again the example of Art. 38 Italian Constitution). This is necessary in light of the fact that fundamental rights mutually reinforce each other, so that if social rights are not guaranteed, liberty rights cannot be properly exercised and, as a consequence, also political rights remain unenforced. Different is the case of the judicial balancing. Indeed, the *costituzionalismo garantista* understands the judicial power as tightly limited by the law and the Constitution, and requires the Court to balance exclusively factual circumstances and not also the norms – of any kind.

The author agrees with the *costituzioanlismo principialista* insofar as it supports that constitutional balancing must be conducted on a case-by-case basis, but he argues that factual circumstances and not principles are subject to the balancing exercise, given that principles, in Ferrajoli's view, have an absolute and not relative weight and therefore cannot be sacrificed, neither partially, nor occasionally. If this were to happen, the Constitution would be dis-applied and the legislator authorized to exercise its power in conflict with the primary source, thus overly widening the Court's discretionality and, hence, raising controversies over a political role of the Constitutional Judge. In light of the constitutional judicial tradition, judicial balancing seems to be a little more than a new word to call the old "systematic interpretation" …. which consists of the interpretation of the meaning of a norm in light of all other norms of the legal system"[287], on this ground the scholar criticises what he calls an excessive emphasis put on the idea of judicial balancing that has become a "terminological bubble"[288].

In his most recent publication, Roberto Bin discusses a number of issues around the understanding and enforcement of rights. Among the various matters addressed, it is noteworthy that the authoritative

[287] Ferrajoli 2010, 2809, my translation.
[288] Ferrajoli 2010, 2806-2815, my translation.

constitutional lawyer has decided to devote a chapter to answer a question, which is a crucial – in the opinion of whom is writing – precondition to analyse the balancing method: "whose job is it to balance rights?". The concise reflection helps clarifying an aspect that, so far, has not been widely addressed by the traditional academic literature on balancing, even though it is of paramount importance to evaluate both the legal reasoning on a Constitutional Court and whether the Court remains within its constitutional competence, or it trespasses on the political domain, pertaining to the legislative power (even Roberto Bin, in his popular book on balancing published in 1992, did not make this element clear). The author's main argument cannot be misunderstood, as he reiterates it clearly, several times: "it is up to the legislator to set the balancing terms"[289] and "reconcile different interests"[290]. The balancing is conducted by the legislator in abstract terms, the same legislator sets the point of equilibrium in an ordinary law, according to its political vision. The Constitutional Court may be called upon "to verify if the balancing that the legislator has translated into legal terms remains within the tolerance limits"[291]. Indeed, the national Constitutional Courts do deal with the balancing of interests to verify its constitutional consistency, but they do not conduct directly the balancing: in a proper constitutional judicial balancing the balancing conducted by the legislator is the object of the constitutional legal reasoning[292].

2. Balancing in the Italian constitutional case law

The first and paramount reason for the Italian Constitutional Court to apply the balancing method stems from the absence in the Italian legal system of an abstract and predetermined hierarchy of constitutional rights and principles[293]. A large part of the scholarship disagrees with the creation of an absolute hierarchy, since it would be in contrast with the pluralist character of the Italian constitutional system. Under this perspective, the pluralist system per se rejects a crystallisation of the social structure and a rigid approach to the relationship between social interests. Indeed, all comparable constitutional

[289] Bin 2018, 28, my translation.
[290] Bin 2018, 52, my translation.
[291] Bin 2018, 54, my translation.
[292] Bin 2018, 55.
[293] See, for all, Cartabia 2013; Morrone 2007; Cheli 1999; Mengoni 1993 who suggests the elaboration of a system that may give more certainty of the judicial decisions, without renouncing to the absence of absolute hierarchy.

interests have to be confronted on equal terms, and a system where certain interests are structurally defeated from others cannot be conceived[294]. Consistently, Luciani argues that balancing can be conducted only "among equals"[295].

However, a principle can prevail over another, in relation to a concrete case. In fact, it is in the occasion of a concrete judicial case, and in relation to factual assumptions[296], that the "balancing, reconciliation, composition of and among different principles" takes place, without this resulting in a hierarchy of constitutional principles[297].

This does not mean that the fundamental principles are not subject to any limit or constraint. In the Italian Constitution, albeit neither a general norm on the essential content of fundamental rights, nor a general limitation clause were included in the 1948 Constitution[298], every right is recognised together with its limit and, often, the limited character of a fundamental right emerges explicitly from the provision in which it is enshrined. In certain occasions, the Italian Constitutional Court has considered the essential content of rights a necessary condition to realize the human dignity, in the sense that, in any case, the sacrifice of a fundamental right can go that far to obstacle the realization of personal dignity, or the dignity of others. A glaring example of the strict link existing between fundamental rights

[294] Scaccia 2000, 3964.
[295] Luciani 1995, 569, my translation. This view is sharply criticised by Bin, who finds Luciani's assumption "strange", in the sense that "in order to address equal things it is enough to count them; while only unequal things can be weighted", and hence, balanced: Bin 2018, 39. However, this argument apparently fails to take into account that these "things" are equal, and absolute, only in abstract terms, while they have to be balanced in the concrete case, inasmuch as it is in relation to the concrete case that these "things" may acquire a different weight, but they still remain equal in abstract terms. According to Messineo, the necessity to conduct the "unequal balancing", introduced by Luciani, between economic and social interests, is imposed by the Italian Constitution itself, because of its structure and content: Messineo 2010, 112.
[296] English expression used by Bin 1992, 35.
[297] Modugno 2008, 247-250, the author marks the difference between an absolute hierarchy of values and the tendency of the Court to give prevalence to specific principle, which therefore acquire and progressively strengthen their supreme character. Of the same view, Bin: "the balancing of principles shall take place in relation to specific situations": Bin 1992, 39, my translation. Morrone, 2007, talks about a "mobile hierarchy" of constitutional principles. The Italian Constitutional Court has never attempted to create an absolute hierarchy, differently from the German and US ones.
[298] A general limitation clause was adopted, for instance, in the Universal Declaration of Human Rights Art. 29.2. While the Charter of Fundamental Rights of the European Union, Art. 52, devotes a single and general norm to the scope of rights, which allows limitations, is they are provided for by law, respect the "essence of those rights", meet objectives of general interests or the protection of other rights and freedoms. The article, expressly subjects these limitations to the principle of proportionality.

and human dignity in the Italian Constitutional structure is provided by Art. 36 Italian Constitution, where the *right to a decent existence* is a structural feature of the right to a fair remuneration[299].

The Constitutional Court in Judgment 1146/1988 has stated that fundamental constitutional principles "cannot be upset or modified in their essential content", because it is precisely the essential content that makes them expression of values and not simple legal requirements. Therefore, the principle can be tackled and derogated from as long as the underlying value is not affected. This does not exclude the supreme principles from the constitutional dialectic, where all principles operate a mutual restriction[300]. "The interferences take place at the principles' margins, which remain untouched in the nucleus"[301].

The peculiar case of the implementation of a social right, which requires the legislator to provide for enough financial resources, is no exception to the rule of the essential content. In fact, albeit the legislator enjoys full discretionality on the allocation of the public resources, the Constitutional Court has the duty to hamper a "macroscopically unreasonable exercise of this discretionality"[302], when the legislative choice "compresses the essential nucleus of a right"[303]. In light of the strict connection between the fundamental rights' essential content and "human dignity", "the essential content of social rights is an expression that refers to the services which are necessary to realize the processes of inclusion of the single person into the dynamics of the community. Clearly, the legal institute alludes to a minimum standard of constitutionally active interventions imposed to the public powers, with an immediate practical consequence: it means that the protection of the essential content of fundamental social rights occurs through remedies that can fix negligent behaviours by the legislator or the public administration"[304].

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[299] On "essential content" and "human dignity" see, for example, Judgment 366/1991 and Judgment 293/2000, both commented by Messineo 2010, 20. For an assessment of Art. 36 Italian Constitution under this perspective, see Messineo 2010, 35-36.
[300] Modugno 2008, 247; the "supreme principles" are represented by the fundamental rights of a legal order see http://www.cortecostituzionale.it/documenti/convegni_seminari/STU185_principi.pdf. The concept of "supreme constitutional principle" is however controversial, see Farugna 2015.
[301] Modugno 2008, 251, my translation.
[302] Scaccia 2000, 3983, my translation.
[303] Judgment 304/1994, as quoted in Scaccia 2000, 3983, my translation.
[304] Messineo 2010, 95¸ my translation.

Recently, in Judgment 85/2013, the Court has eloquently pointed out that "every fundamental right protected by the Constitution is mutually integrated, therefore it is not possible to identify one with absolute prevalence over the other"[305], as to avoid the unconceivable scenario of the unlimited expansion of a right. The Court proceeds by asserting that "the point of equilibrium, dynamic and not fixed in advance, has to be evaluated [...] according to the criteria of proportionality and reasonableness" in such a way that the "essential nucleus" of fundamental rights is not sacrificed[306].

The Italian scholarship is not only divided between the absolute theory and relative theory on the essential content (see the chapter 3.3, on the Spanish legal system, where this theoretical debate is more articulated), but, especially, what is still very controversial is the convenience of applying such a concept. The possibility to evaluate and define the essential content of a fundamental right is strongly questioned by authoritative Italian authors. In a recent book, Roberto Bin explicitly refers to and share Giuliano Amato's theories, by arguing that "the content of rights cannot be determined, rather we must investigate the origin, justification and scope of their limits"[307]. Bin adds that "none knows exactly" what is the minimum essential content that cannot be compressed, therefore the protection of a fundamental right cannot be constrained to the recognition of the essential content[308].

The judicial technique of balancing is therefore of paramount importance in a pluralist Constitution, in which concrete situations of conflict of interests occur. Indeed, the *giudizio di bilanciamento* has long been known and practiced by the Italian constitutional case law in order to apply the pluralist Constitution[309]. Its application is essential especially in the event that the legislator excessively favours a principle over another[310].

The balancing of interests in the constitutional case law is understood by certain authoritative Italian scholarship as a non-interpretative and non-deductive argumentative framework, by which the Court balances concurring constitutional principles and creates a hierarchical relationship[311]. The distinction

[305] My translation.
[306] Cartabia 2013; arguing for the unalienable character of the essential nucleus, see also Morrone 2008, 285.
[307] Bin 2018, 34, my translation; Giuliano Amato's work to which Bin refers is Amato 1967.
[308] Bin 2018, 44-45
[309] Cartabia 2013, 8; Bin 1992.
[310] Modugno 2007, 37.
[311] Scaccia 2000, 3953-4.

between balancing and interpretation is stressed by Bin, who argues that the two techniques represent parallel legal reasoning, given that the latter concerns the text of the law, while balancing mostly not[312].

Overall, as already discussed, balancing constitutes a dynamic exercise, which is carried out on a case-by-case basis, without an attempt to establish an absolute hierarchy among rights and interests constitutionally protected. The pure balancing must be distinguished from the interpretation in the sense that, while the latter aims at giving a meaning to a legislative act with *erga omnes* effect, the balancing aims at solving a specific conflict of interests. Indeed, "balancing does not claim to establish the sole possible meaning of a provision, but to identify the point of equilibrium between the interests involved in the specific case"[313]. On the other hand, the definitional balancing, applied by the Italian Court in several occasions especially in its first decades, still belongs to the domain of the interpretation, inasmuch as it serves the purpose to understand the content of the constitutional provisions which provide for fundamental rights[314].

As to the terms of the balancing, without denying that the Italian Constitution does not provide for a formal hierarchy of constitutional values, Morrone reminds that the balancing exercise can only be founded upon comparable interests[315]. Indeed, there are cases in which the Italian Constitution itself recognizes a hierarchy of values and principles. For instance, Art. 42 Italian Constitution. recognizes and guarantees the private property, but it also provides for its limitations, which derive from the duty to ensure its "social function and make it accessible to everyone". In that case, the Constitution establishes a so-called "*garanzia d'istituto*", by which it creates an order of preference between conflicting interests[316].

Moreover, the precondition for conducting the balancing is the qualitative homogeneity of the interests to be confronted. In fact, if the interests have already been placed by the constitutional provisions on a different hierarchical level, the prevailing interest is set by the constitutional law. In that case, when the Court builds its legal argument by saying that an interest is prevalent compared to the

[312] Bin 1992, 143. In a similar way, Mengoni 1996 argues that the constitutional balancing is "a different technique (albeit not always easily distinguishable) from the interpretation", 124-125.
[313] Bin 1992, 60, my translation.
[314] Bin 1992, 68.
[315] Morrone 2001, 286.
[316] Morrone 2001, 287, my translation, the expression "garanzia d'istituto" is from Baldassarre 1898, ad vocem.

other, it does not apply the balancing reasoning, since the balancing can take place only if the interests are comparable. Thus, for instance, ordinary and constitutional norms cannot surely be balanced[317].

The first step of the balancing reasoning is the identification of interests and rights in conflict, that is the terms to be balanced, which entails that the Court shall look for the *rationale* of the challenged norm, in order to identify which interest is pursued and to what extent. Secondly, that extent has to be confronted with the extent of protection of the interest allegedly violated. The Court shall understand whether the interest protected by the norm under scrutiny can justify a limitation of the constitutional right affected. If that is the case, the Court shall decide whether the sacrifice of the latter right is excessive. In order to provide an answer to this crucial question, the Italian Court has not elaborated a specific test[318].

A number of scholars call *sindacato interno* (internal scrutiny) the process that assesses the norm directly and in relation to the whole legal system. As opposed to the *sindacato esterno* (external scrutiny), that is the process that retraces the justification of the legislative act, and, hence, refers to ethical issues, implying value judgments. Therefore, while the external evaluation concerns the "foundation of the premises"[319], so that the Court addresses interests, values and principles overlapping the legislator's evaluations, the internal control focuses on the deductive reasoning that has guided the lawmaker in the drafting of the norm under scrutiny and not the premises behind the logic adopted[320]. Under this view, it is in the "external scrutiny" that the balancing takes place, in order to justify the premises[321].

However, in the Italian experience, the constitutional balancing – an essential technique for a Constitutional Court operating in a constitutional system characterized by a plurality of values – is

[317] Scaccia 2000, 3957, 3958.
[318] Scaccia 2000, 3962. For a review of key cases where the Court adopts similar legal reasoning, see Bin 1992, 81-88.
[319] Bin 1992, 142, my translation. The author makes the following distinction: the internal justification addresses the logical process of the lawmaker; the external justification determines the point of equilibrium between conflicting interests, and hence determines the premise, therefore this is where balancing of interests belongs: Bin 1992, 143.
[320] See Moscarini 1996, 103; Moscarini points out the distinction made by an authoritative constitutional lawyer, who names *controllo interno* the assessment aimed at preserving the internal coherence of the legal system, and *controllo esterno* the expression of an autonomous judgment over the norm, by the constitutional judges, in addition to the lawmaker's evaluation, see Zagrebelsky 1998, 149 ff.
[321] Bin 1992, 143.

applied through a criterion, which is widely identified in the principle of reasonableness, also called, by a minority of the literature, principle of proportionality[322], and it is supposed to grant what is generally called a "reasonable balancing"[323]. Derived from the principle of equality, the principle of reasonableness, little by little, has gained a proper autonomy and it is now applied by the Court to conduct any type of balancing between conflicting interests, expressing its hermeneutic function.

To be noted that in the Italian legal system, the application of general principles by the interpreter is expressly provided for by Art. 12 of the preliminary provisions to the Civil Code. The measure at stake establishes that if a dispute cannot be settled by applying a specific provision, the judge shall invoke the general principles of the legal system. However, Mengoni clarifies that Art. 12, Civil Code, refers to those principles which are not subject to balancing with other principles or interests, thus excluding, for instance, the freedom to economic initiative or the freedom to conduct collective bargaining, as well as all conditional social rights[324].

Given the peculiar soul of fundamental social rights, the next section briefly introduces some key elements of the balancing of these rights against economic interests, in the Italian legal system. Subsequently, in order to shed some light over the controversial application of the balancing in the Italian constitutional case law, it is essential to proceed with a reflection over the widely accepted principle of *ragionevolezza* (reasonableness)[325], by outlining its genesis and evolution. At a second stage, in order to avoid linguistic misunderstandings, a reflection over the difference between the latter and the principle of *proporzionalità* (proportionality), as well as on the relationship with the rationality, is discussed.

2.1 Some reflections on balancing from the fundamental social rights' perspective

[322] On a reflection over a rational application of the balancing of rights, which goes beyond the principle of reasonableness, see Maniaci 2007. For a clarification on the terms principle of reasonableness and principle of proportionality, see further in this Chapter.
[323] Morrone 2007, Cartabia 2013, 8; Cheli 1999, 94, who argues that this is one of the reasons why the balancing is needed.
[324] Mengoni 1992, 248.
[325] Contributions on the topic, see Modugno 2008, Moscarini 1996, Morrone 2001, Sandulli 1975.

Fundamental social security rights (which partially intersect with fundamental labour rights, as understood for the purpose of this thesis) are strictly dependent upon the – discretional – legislative action, which has to take into account organizational and financial resources. According to Modugno, the legislative acts concerning *diritti di prestazione* enjoy a sort of presumption of legitimacy. As a consequence, these acts can be questioned by the Court only if they make the exercise of the right at stake "excessively difficult" or "its [essential] content is frustrated"[326].

However, the debate on the possibility to admit balancing of fundamental labour rights (thus including, for instance, both pension rights and the right to collective bargaining) with public spending necessities is extensive and mainly concerns our perception as regards the legitimacy of compressing these rights and, eventually, of the extent of compression allowed (e.g. only to the point of preserving the essential nucleus of the said right?)[327], in a way that, admitting that these rights are balanced, means accepting that they can be compressed. A different view, in favour of balancing of fundamental labour rights, is offered by Piera Loi, which shifts the main focus from labour rights to the principle of solidarity and the right to equal treatment, upon which the principle of reasonableness is based. The author observes that "proportionality and balancing appear as indispensable tools of redistributive justice", these instruments are seen as an efficient way to avoid the "unequal distribution of rights"[328].

The constitutionalization of the principle of balanced budget, as it has occurred both in Italy and in Spain, may have intervened in favour of the balancing of fundamental social rights with public budget interests. However, according to D'Onghia, "the Constitutional Court is neither formally nor directly bound to respect Art. 81 Constitution and, therefore, as regards its Judgments it can never discuss the issue of the quantification of financial expenditures in a strict sense, not even after the adoption of Constitutional Law 1/2012". The author admits that the constitutionalization of the balanced budget principle may induce the Constitutional Judge to pay particular attention to the arguments in favour of

[326] Modugno 2007, 42, my translation.
[327] The compression of the content of rights is also the object of Bin's reflection, who repeatedly argues that financial means and content of rights, or, more precisely: "the limitation of means corresponds to the compression of rights": Bin 1992, 102-107. Among the various views, Contiades, Fotiadou 2012 understand social rights as dynamic and flexible and see in proportionality and constitutional balancing a proper opportunity to define the content of these rights and set ground rules for the legislator.
[328] Loi 2016, 93.

the public finance equilibrium, which "carries the risk to compromise the possibility to achieve effective protection of social rights, both at national and local level"[329]. This argument is efficiently supported by, *inter alia*, a textual explanation: Art. 81 Italian Constitution, also in its renovated version, assigns to "the law" the duty to provide for its fiscal coverage. Indeed, even if the Court can completely disregard the consequences of its decisions on the public budget it is not the Constitutional Court's duty to indicate the economic means, which are necessary to achieve the aim[330]. Modugno, drawing on Scaccia's theories and on the grounds of a comprehensive analysis of the constitutional case law, observes that the Court, on the one hand, carefully evaluates the economic consequences of a decision of unconstitutionality, to the point that it may postpone the Judgment's effects (in particular, he refers to Judgment 243/93 and Judgment 370/03), on the other hand, it affirms the binding nature of constitutional principles, even if this implies economic burdens on the State[331].

According to Mengoni, the evaluation of "foreseeable and possible practical consequences of a decision on the social environment"[332] is one of the most interesting criteria of the balancing technique. The legal scholar identifies two main underlying reasons that justify a careful application of this criterion: the pursuit of an ethic of responsibility and the need for rationalization of the constitutional judgment. However, he specifies that an evaluation of the social consequences of the judgment cannot always prevail over other elements: "[T]he balancing model cannot be confined to a purely consequentialist way of thinking, especially when fundamental rights are at stake. However, the justice principle has to be always interpreted in a way to highlight also the collective interests (*interessi della collettività generale*) and the duty to preserve the common good"[333]. Implicitly, Mengoni suggests that the consequences do not constitute a legal argument, when he underlines that, as a general rule, they are discussed in order to either complement or reinforce the *ratio decidendi* resulting from an evaluation of the ordinary norm in light of the constitutional principles, or solve persisting doubts. Under this

[329] D'Onghia 2013, 131-132, my translation. The author also provides an attentive assessment of the Italian constitutional case law on the "delicate balancing between social security rights and financial equilibrium", with an extensive focus on the concept of "adequacy" of social security benefits, provided by Art. 38.2 Italian Constitution: D'Onghia 2013, 133-256.
[330] D'Onghia 2013, 92-98.
[331] Modugno 2007, 45, drawing on Scaccia 2000.
[332] Mengoni 1996, 133, my translation.
[333] Mengoni 1996, 134, my translation.

perspective, the role of the social consequences criterion seems to be downsized and placed in an ancillary dimension of the constitutional judgment, not because the social consequences are an ancillary element per se, but because they do not pertain to the constitutional legal reasoning strictly speaking, inasmuch as they do not constitute a legal argument.

However, in practice, there are cases in which the Constitutional Court has used the analysis of the consequences in order to assess the "necessity or suitability to achieve the aim of a limit imposed to a fundamental right"[334]. Anyway, also Mengoni, who is in favour of the use of the social consequences' argument which, he argues, allows to underscore the practical effects that are simultaneous to the legal effects, emphasises that this approach has some crucial shortcomings. First and foremost, the consequences to be taken into account cannot be unlimited, but they should be restricted. The fact that the authoritative author fails to indicate a possible method to identify this limit, raises a doubt of feasibility of such an identification, which, in the opinion of whom is writing, would further complicate the constitutional proceeding, inasmuch as the judges should engage in an in-depth assessment in the sphere of the norm's "practical effects", hardly conceivable, especially considering a further shortcoming that is the impossibility to rely on a "law of evidence" for the constitutional judgment[335].

2.2 The principle of reasonableness and its genesis

Albeit the principle of reasonableness is well established in the Italian legal system[336], it is not expressly provided for by the Constitution. Indeed, the principle of reasonableness has become one of the key criteria to judge upon the legitimacy of the legislative choices because of a consistent case law, which has developed its content on the basis of the principle of equality that finds expressed constitutional recognition in Art. 3 Italian Constitution[337]. Therefore, the principle of reasonableness

[334] Mengoni 1996, 136, my translation.
[335] Mengoni 1996, 133-139.
[336] On the principle of resonablness in Labour Law see Perulli 2005.
[337] Art. 3: "1. All citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinion, personal and social conditions. 2. It is the duty of the Republic to remove those obstacles of an economic or social nature which constrain the freedom and equality of citizens, thereby impeding the full development of the human person and the effective participation of all workers in the political, economic and social organisation of the country". Official translation available at: https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf

can be briefly introduced as a general principle with hermeneutic origins, applied in a hermeneutic context[338].

Before moving to the genesis of the principle of reasonableness, it is worthwhile to spend few words to introduce the principle of equality in the Italian constitutional case law[339]. During the first phase, the Constitutional Court has interpreted the principle of equality restrictively, focusing on the prohibition of discrimination expressed in Art. 3.1 Italian Constitution. Therefore, the distinctions made by the norms under scrutiny were assessed exclusively with reference to the first part of Art. 3, that is the seven listed grounds of discrimination. In doing so, the Court aimed to avoid any interference with the legislative power and evade the risk to make considerations of a political nature, which would have infringed upon the discretionality of the legislator. The judgment was exclusively aimed at disclosing and prohibiting formal inequalities[340] (see, inter alia, Judgment 28/1957).

In a second phase, the Court began to interpret the content of Art. 3.1 Italian Constitution not as a mere prohibition of discrimination, but rather as the *principle of equality*, coherently with the wording of the constitutional provision. Consequently, a discrimination could occur also beyond the seven grounds listed in section one[341]. This new approach was triggered by the necessity to both recognize and protect the numerous differences characterizing the Italian society, and satisfy the need to grant different treatment to different cases, which may arise also in the categories listed by Art. 3.1. For instance, in Judgment 53/1958 the Court overcomes the concern to interfere with the lawmaker's discretionality, in those cases in which situations, which are deemed to be different by the lawmaker itself, are treated analogously by the Law[342]. Therefore, during the first decade of its activity, the Court has progressively adopted a more open approach, which includes the scrutiny of the reasons justifying the adoption of a given norm[343].

[338] Modugno, 2007, 252, emphasises that the reasonableness is an interpretative criterion, rather than a proper and autonomous constitutional principle.
[339] For further considerations, see Aa. Vv. 2002; Ghera 2003.
[340] In this sense, inter alia, Modugno 2007, 11.
[341] Barberis 2013, 193.
[342] This judgment is considered a turning point by Modugno 2007, 11.
[343] Cheli 1999, 88, 89.

In order to assess the legislative choices to this extent, the Court has soon started making use of the reasonableness criterion. In Judgment 15/1960, the latter concept makes its first appearance; in that case, often recalled by the literature, the Court argues that the principle of equality is violated even if the same situations are treated differently, without a *reasonable justification*[344]. Consistently, the Court has then admitted a different treatment based upon one of the seven grounds listed at Art. 3.1 Italian Constitution if "reasonably justified", eventually deducing from Art. 3 Italian Constitution the unconstitutionality of unreasonable norms[345].

Beyond any doubt, the principle of reasonableness has now gained complete autonomy from the principle of equality, despite its judicial derivation, as proved already in 1987, when the Constitutional Court plainly treated them as different criteria (Judgment 284/1987)[346]. However, a relationship between the two criteria still exists[347].

In the first phase of its application, the reasonableness judgment has been applied in light of a *tertium comparationis*. Indeed, the principle of reasonableness entailed an evaluation of the coherence of a provision "as compared to the norms adopted by the same legislator for analogous situations"[348]. In light of an approach as such, the Court declared that, albeit exemptions from the general rule are allowed, they cannot create unjustified discriminations (see Judgment 43/1987)[349]. However, a slightly different understanding of the reasonableness judgment seems to have consolidated in the latest decades, in relation to cases not concerning equal treatment, but rather "evaluations of adequateness, pertinence, congruity, proportionality or also internal coherence or inherent reasonableness of the law"[350]. Under this approach, the principle of reasonableness is not applied following the scheme of the *tertium comparationis*, as it is still the case for the principle of equality, and it can be violated independently

[344] "Il principio di eguaglianza è violato anche quando la legge, senza un ragionevole motivo, faccia un trattamento diverso ai cittadini che si trovino in eguali situazioni", see, inter alia, Barberis 2013, 193; Modugno 2007, 12.
[345] Cheli 1999, 90. The same author also emphasises that the constitutional case law has, thus, overcome Art. 28, Law 87/1953, which aimed to exclude that the Court may conduct any evaluation over the merit and purposes of the Law. Sandulli mentions also Judgments 108/1963 and 166/193 among the first cases in which the Court extends its understanding of Art. 3 Constitution: Sandulli 1975, 668.
[346] See Barile 1994, also quoted by Moscarini 1996, 98; as well as Barberis 2013, 195. To be noted that the Court, in some occasions, still expressly refers to the principle of reasonableness as enshrined in Art. 3 Italian Constitution, e.g. Judgment 113/2015.
[347] For further reflections see Morrone 2001, 37-128; Loi 2016, 95 ff. and Barberis 2013.
[348] Cheli 1999, 90.
[349] As emphasised by Cheli 1999, 91.
[350] Anzon 1990, 32.

from the comparison with other norms. In other words, the reasonableness scrutiny is used in order to "detect the objective irrationalities of the law, independently from subjective prerogatives and, hence, independently from trilateral schemes"[351], so that the inherent unreasonableness of a norm depends on the ability of the norm to achieve the aims pursued by the legislator.

Barberis distinguishes the principle of equality from the principles of reasonableness on the grounds of their levels of specification. The author suggests that while the principle directly expressed by Art. 3 Constitution is aimed at hampering the discriminations between agents, the principle of reasonableness addresses the latter discrimination as well as a situational discrimination, thus achieving a higher level of abstraction. Under this argument, the principle of equality represents a specification of the reasonableness criterion[352].

2.2.1 Reasonableness and its application

To sum up, the principle of reasonableness can be identified as a peculiar type of norm, which is unexpressed in the written sources of law, but stems from the interpretation of a constitutional norm (enshrined in Art. 3 Italian Constitution) and is the result of a "process of generalization"[353]. According to Modugno, the need for a principle of reasonableness lies in the Constitutional system itself, indeed the Court cannot limit its scrutiny to the conformity of the secondary norms with specific constitutional provisions, but it has to evaluate the overall constitutional coherence of the norm, which implies also the assessment of the internal "plausibility or persuasiveness"[354].

An absolute and static definition of the principle of reasonableness can be hardly given, most likely precisely because of the interpretative origins of this principle. However, the scholarship has extensively reflected upon its content and structure and has provided crucial contributions to its understanding, mainly on the grounds of the constitutional case law[355].

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[351] Modugno 2007, 12, my translation.
[352] Barberis 2013, 196.
[353] See Loi 2016, 171, on the grounds of the distinction developed by Guastini 2010.
[354] Modugno 2007, 10.
[355] Romboli states: "many things have been said and written about the reasonableness and often also quite different among themselves, but if we want to look for a common element among those who have addressed this topic, I think we may identify it in the argument the notion of reasonableness has pretty nuanced and elusive characters, which make it difficult to provide a real definition": Romboli 2000, 89, my translation.

Overall, "reasonableness is exactly the logic of values" and its purpose is to evaluate to what extent the ordinary norm is consistent with the constitutional values, mainly expressed in principles[356], and the application of this criterion "has the function of obstructing the infiltration in the legal system of any kind of fundamentalism, ethical, political or economic"[357].

According to Scaccia, the principle of reasonableness has become an "all-encompassing and comprehensive criterion"[358], to the point that it does not represent one possible way to conduct the constitutional scrutiny, but the constitutional judgment "is completely permeated, is characterized by, the reasonableness method: *it is a reasonableness scrutiny*"[359]. Scaccia, defines the Constitutional scrutiny per se as the judgment over the existence of the minimum amount of "suitability, congruence, proportionality in respect of the fact (in a word, reasonableness)" of the legislative act[360].

Moreover, albeit the reasonableness criterion is one of the parameters that guides, and limits, the reasoning of the Court, it is not sufficient to develop the constitutional judgement. Indeed, this *clausola generale*[361] serves the purpose to widen the content of a specific and pertinent constitutional norm, which varies according to the relevant right in the concrete case[362].

It has been argued that *reasonableness* does not constitute a proper constitutional principle, notwithstanding its uncontroversial genesis, but it rather is an interpretative method, which therefore has a bearing in every constitutional judgment[363]. Of a different view are other authors, as, for instance,

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[356] Modugno 2007, 46 ff.; in a similar way also Morrone reminds that the fact that the reasonableness criterion entails value-oriented choices is a clear element to distinguish this approach from the a-positivistic one, that would aim at an objective and value-unrelated solution: Morrone 2001, 387.

[357] Mengoni, 1996, 120, my translation. "…it is therefore necessary that the norm is openly in contrast with the reasonableness criterion, that is it constitutes, in practice, the expression of a dysfunctional use of the dicretionality, so evident to be a clear symptom of an 'abuse of power…'" (Judgment 313/1995, as emphasised by Romboli 2000, 88, my translation).

[358] Scaccia 2000, 388, my translation.

[359] In this way Modugno 2007, 50, my translation, drawing on Sciacca's thesis.

[360] Scaccia 2000, 387.

[361] On the concept of *clausola generale* see Mengoni 1986. The *clausola generale* is a normative structure that expresses ethical values, as for instance Art. 2 and 3 Constitution, see Mengoni 1993,256. Litterally translated with "general clause", this concept is not to be confused with the general clause as intended in common law, that is a sort of contractual clause. In the Italian legal system, as in other civil law systems, the expression general clause still identifies a norm (See the reflection upon the dangers of a misunderstanding triggered by the translation by Loi 2016, 145).

[362] Moscarini 1996, 111.

[363] Modugno 2007, 55 ff. Of a similar view also Rossano 1994, 169 ff. The author also underlines that the principle of reasonableness should have a relative role in the constitutional judgment, given that it constitutes a meta-legal principle. This theory seems to be in conflict with those arguing that the balancing differs from the interpretation, see above in this Chapter.

those who argue that reasonableness is a flexible and undefined concept[364], or Paladin who provocatively wrote, in 1992, that a "principle of reasonableness does not exist" in substance, but it is only a verbal expression[365].

In 1975, Sandulli developed one of the first systematizations of the principle of reasonableness. The author identifies certain sub-criteria, which shall compose the reasonableness judgment. According to the scholar, the unreasonableness of a norm can be identified by its *incoherence* (lack of coherence). The constitutional incoherence can take the form of *contradditorietà*, *impertinenza* or *inadeguatezza*. Let us know see what the scholar means by these criteria.

The *contradditorietà* occurs every time a legal statement/norm is in contrast with one of the following elements: the aims of the measure, other norms of the same Act, the text in which the norm is enshrined as a whole, other Legislative Acts of the legal system, or, in general, the legal system. In that case, the norm that appears – more – abnormal, considering the general context, has to be removed[366].

Second, the incoherence – or unreasonableness – of the norm can result in what Sandulli calls *impertinenza*, that is the "lack of logical correlation (functionality) of the legislative tool, in respect of the aims pursued"[367]. In this phase of application of the reasonableness scrutiny, the Court has to evaluate the norm starting from the identification of its rationale. Sandulli seems to implicitly link the principle of reasonableness to the principle of equality when he explains that assimilations or differentiations can be *non pertinenti* in relation to the objective pursued and, hence, lead to unjustified different treatments[368]. However, as clarified by Moscarini, in this case the unjustified different treatment is ancillary to the irrelevance (*non pertinenza*) of the means used by the lawmaker to achieve the aim[369].

[364] D'Andrea 2005, 10 ff.
[365] Paladin 1992, 163 ff. (as reported By Modugno 2007, 52); Paladin's point is discussed further in this Chapter.
[366] Sandulli 1975, 673: the author supports his thesis by providing some examples from the constitutional case law, where the Court has openly reflected upon possible contrasts of the norm under scrutiny with the whole legal system.
[367] Sandulli 1975, 673, my translation.
[368] Sandulli 1975, 673-677, also in this respect, the author mentions a number of cases in which the Court has used the *impertinenza* argument.
[369] Moscarini 1996 112, 113. Moreover the author makes a crucial distinction between *non pertinenza* and *imperizia*, she argues that the two shall not be confused, inasmuch as the latter refers to an evaluation of the technical choices of the legislator, upon which the Court does not have, according to the author, competence to decide, since they belong to the factual issues: Moscarini 1996.

Third, the norm can incur in the so-called *inadeguatezza*, and hence be unreasonable, if the legislative tools are disproportionate in relation to the objective of the norm. Therefore, the means can be excessive and consequently can either have an unnecessary impact on rights constitutionally protected, or be unable to achieve the aims. Moreover, the latter result can also be achieved if the tools are too scarce; also in this case the *inadeguatezza* occurs.

A further parameter of the reasonableness principle applied has been identified, 20 years later, by Moscarini in the *incongruenza* (inconsistency), which is also grounded upon a reflection of the constitutional judge on the *ratio legis*. Indeed, in order to judge upon the *congruenza* of the norm, the judge has to assess the relationship between the aims pursued (*ratio legis*) and the means. The lawyer points out that in this case the reference elements are principles and values of the legal system. So under this profile, the reasonableness of the norm is evaluated considering the values expressed by both the given norm and the more general legal field and legal system's principles, to which the norm belongs. According to Moscarini, it is also a matter of *incongruenza* if the means are deemed excessive to achieve the aim pursued. Last, the author refers this criterion also as far as concerns the judgments on the emergency legislation, in which the Court, thanks to the judgment of *incongruenza*, can develop a comprehensive assessment and justify exceptions to the protection of fundamental freedoms, precisely if the latter are *congruenti* and reasonable[370]. Last, the *incoerenza* serves the purpose to judge upon the syntax of the norm and focuses on its linguistic incoherence[371].

In a number of occasions, the Court, in line with most part of the scholarship, has opted for a balancing of interests conducted through the modulation of the temporal effects of its decisions. According to Silvestri, there is a duty of the Court to limit the retroactivity of the ruling's effect, which stems from the active role of the Constitutional Court and entails a responsibility to re-establish an equilibrium among the interests constitutionally protected. The modulation of the temporal effects serves the purpose to prevent a dysfunctional effect over the public budget[372] and, also for the

[370] Moscarini 1996, 115-118, to be noted that according to the Moscarini the *incongruenza* corresponds to the lack of suitability of the proportionality test.
[371] Moscarini 1996, 119.
[372] Silvestri 1993, 81.

modulation of the temporal effects, the Constitutional Court is increasingly using the reasonableness principle both to decide upon the type of ruling and the temporal effects of the judgment[373].

One of the key applications of the principle of reasonableness relates to the considerations over the public budget. This element has become increasingly important in the constitutional settlement with the recent reform of Art. 81 Constitution, adopted in line with the obligations taken at supranational level[374].

Nevertheless, the public budget discourse has always been crucial in the constitutional case law and in the respective literature. In 1993, Rombli published and interesting contribution on the topic. The scholar reflects upon the general principle of balanced budget and the balancing of constitutional values conducted by the Constitutional Court and, hence, the applicability of Art. 81 Constitution to the Court's decisions. In particular, reference is made to the previous Art. 81.4 Constitution[375], which, according to Romboli, was not directly applicable to the Constitutional Court decisions, since it pertained to the legislative power[376]. However, a crucial clarification is made, also on the grounds of the constitutional case law[377]: albeit the Court does not have a duty to include in its legal reasoning Art. 81.4 Constitution, it has to consider the general principle that stems from this provision, that is the principle of balanced budget (*equilibrio finanziario*). This approach is coherent with the balancing technique and the subsequent application of the principle of reasonableness, inasmuch as this criterion entails a comprehensive evaluation of "all constitutional principles and values involved in the controversy"[378]. In this respect, Romboli suggests three methods that the Court could use to include the public budget in its arguments. First, the contextual economic situation of the country could constitute a guideline. Second, the Court could decide the weight of the principle of balanced budget in each specific case on the grounds of the principles allegedly violated. As a tendency, the result may be that the principle of balanced budget would be predominant if only the general principle of equality is concerned, while it

[373] Modugno 2007, 8.
[374] See Chapter 1.
[375] Now Art. 81.3 Italian Constitution: "Any other law involving new or increased spending shall detail the means therefor" (official translation).
[376] Romboli, 1993, stresses that the same point is supported by Onida 1993 and Zagrebelsky 1993. Moreover, also the Court had always rejected the applicability of this norm to the constitutional judgments.
[377] However, Romboli 1993 points out that the Court has never expressly referred to Art. 81 Constitution in its decisions, even in those cases in which it has applied the principle of balanced budget. The author hazards that the Court seems to have a sort of "fear" in making the use of Art. 81 explicit and it rather leaves the financial argument in the background: Romboli 1993, 194 (quoting also Mortati 1970).
[378] Romboli 1993, 187.

would be recessive if also other constitutional principles come into play. Third, in the case of *sentenze additive*[379], a feasible criterion is the consideration over the economic burden upon the State, stemming from the constitutional ruling[380].

As to the form in which the Court shall express the criteria and the arguments that have led to decide in favour of a principle prevailing over another, the author argues that "the balancing between different values and interests constitutionally granted, simultaneously involved, but not jointly enforceable, to the contrary should always be extensively and clearly justified"[381]. A clear justification would be a necessary prerequisite to create a scale of values, which, according to Romboli, is essential in order to allow the Court to judge even upon the most politically sensitive cases. A scale of values, which allows to understand under which arguments Art. 81 Italian Constitution is considered prevalent or recessive, on the one hand, would allow the Court to intervene more easily even as regards issues considered highly political and, on the other, it would "grant more homogeneous judgments and allow a supervision of the public opinion […] as well as constitute a guide to the balancing of different constitutional values operated by the Parliament during the legislative activity"[382].

However, this point of view does not deny that the Italian constitutional hermeneutic has a "dialectic way of developing a legal argument, not connected by deductive chains and definite procedural rules"[383].

Judge Cartabia points out that in the Italian constitutional case law the strict argumentative framework inspired by the German tradition has never been applied. However, the single criteria which form the so-called proportionality test are used by the Italian Court, although without a systematic and progressive approach. A number of authoritative scholars argue in favour of an increase in the structuration of the use of this principle, or even for the strict application of the test. On this view, to formalize the argumentative approach could have positive effects in terms of coherence and persuasiveness of the motivation, as well as on the legitimacy of the Court[384].

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[379] A decision by which the Court declares the unconstitutionality of a norm "for the part in which it does not provide for…".
[380] Romboli 1993,190.
[381] Romboli 1993, 195, my translation. The expression "to the contrary" refers to the fact that the Court has refused such an approach and it has rather left the economic argument in the background.
[382] Romboli, 196, my translation. On the role of – the previous – Art. 81 Constitution in the constitutional case law and in the balancing between rights and interests see also Mazzù 2008.
[383] Mengoni 1996, 124.
[384] Cartabia 2013, 6,7; see also Cheli 1999, 97.

Indeed, over the decades, the increasing "political" power of the Constitutional Court has triggered wide debates[385]. According to Cheli, the tendency to interfere with the political discretionality may be inextricably linked with the principle of reasonableness, or, better, with the lack of a systematic approach to its application. The constitutional lawyer identifies a solution to this confusion over the institutional roles in a clear, transparent application of the reasonableness principle, which refers to precise criteria. "In other words, it shall be properly argued with arguments meeting the common sense"[386]. In order to achieve a legal reasoning responding to these requirements, Cheli suggests to reconsider the application of a systematic technique, such as the proportionality test applied in other legal systems, with the respective three sub-criteria. A rationalization of the application of the principle of reasonableness, together with a comprehensive understanding by the Court of the overall dynamics of the constitutional system would bring long term benefits to the role of the Court and its case law[387].

Also Romboli, although without referring to the proportionality test, argues that the Court should provide a substantial motivation that clarifies the criteria applied to decide which value prevails over the other, in order to decide especially on the most "political" matters. Otherwise, as far as these most political cases are concerned, according to the author, the Court should refrain from deciding. In addition, an approach as such would first guarantee an easier "control of the public opinion", second, it would provide a guideline to the legislator in the balancing of conflicting constitutional values[388].

2.2.2 Reasonableness, proportionality and rationality

The distinction between the principle of reasonableness and proportionality represents a controversial issue for the Italian scholarship and the constitutional case law does not provide clear

[385] This debate has raised the controversial issue of the legitimacy of the Constitutional Court in the Italian legal system, see, inter alia, Mezzanotte, 2014; Mezzetti 2010; Modugno 1982.
[386] Cheli 2011, 33.
[387] Cheli 2011, 33-36. Also in favour of a formalized approach to the application of the principle of reasonableness or proportionality see Luciani 1994 and Paladin 1992 who supports the introduction of a rigid proportionality test in order to give content and strength to the balancing reasoning of the Court. To the contrary, Modugno argues that it is the reasonableness criterion itself that traces an obligatory path for the constitutional judges: Modugno 2008, 255. Indeed, a number authoritative scholars argue for the appropriateness of a more structured use of this principle, or even for a strict application of the test, in order to strengthen the legal reasoning in terms of coherence, transparency and persuasiveness and to make sure that the Italian Constitutional Court is not excluded from a the international courts' dialogue, see, inter alia, Cartabia 2013, 7, and Pino 2014.
[388] Romboli 2000, 90-91.

answers, either[389]. Indeed, differently from other supreme courts, the Italian Constitutional Court makes use of various terms that refer, more or less directly, to the concept of proportionality and reasonableness, e.g. *razionalità, adeguatezza, non arbitrarietà, congruenza* and many others. The terms are also often used as synonymous in the same judgment, or they seem to be overlapping[390].

Drawing on the Italian academic literature and on the grounds of authoritative theories, Piera Loi has summarized this plurality of views. On the one hand, a number of constitutional law scholars argue that the connection between reasonableness and proportionality is so strict to the point that the two either coincide completely or, at least, proportionality is a subcategory of reasonablness[391]. To the contrary, an assimilation of the two concepts is rejected by certain academic literature where it is argued that the feeble, not to say null, formalization of the legal reasoning founded upon the principle of reasonableness does not allow any connection between the two[392].

As a matter of fact, in latest years the Constitutional Court has increasingly referred to the principle of proportionality especially when the infringement of social rights has been at stake, notwithstanding that it does not apply the principle by means of a structured method, as it is the case in, for instance, the German Constitutional Court[393].

A close connection between the principle of reasonableness and proportionality has first appeared in Judgment 1130/1988, where clear reference is made to the principle of proportionality, understood as "suitability or relationship means-aims"[394]. According to Penasa, in the judgment from 1988, the Court develops both the teleological nature and the substantial features of the principle of reasonableness. In particular, the Court maintains that the reasonableness scrutiny, does not entail the use of absolute and abstract criteria, but "it is developed through reflection related to the proportionality of the means chosen

[389] This research does not investigate the principle of proportionality as enshrined in Art. 36 Italian Constitution and related to the proportionality of remuneration. The principle of proportionality is here intended especially with regard to the legal technique used by the Court.
[390] Cartabia 2013, 2.
[391] Anzon 1990; or Di Gregorio 2002, 237 ff., who concludes that the principle of reasonableness is an autonomous principle in the Italian legal system and structurally corresponds to the Principle of proportionality applied in the German legal system.
[392] See, inter alia, Morrone 2002, 285 ff., who argues for a complete difference in the nature of the two concepts: See also the review by Piera Loi 2016, 81 ff.
[393] According to Cartabia, the Constitutional Court regularly uses the so called "giudizio di ragionevolezza" and "giudizio di proporzionalità", literally "reasonableness judgment" and "proportionality judgment", whether explicitly or implicitly: Cartabia 2013, 1. See also Loi 2016, 5.
[394] Loi 2016, 84, my translation.

by the lawmaker in its unquestionable discretionality with regard to the objective needs to be covered or the aims pursued, taking account of the circumstances and the concrete limitations"[395].

Notwithstanding the reference to the proportionality, the Court did not seem to be looking at the principle of proportionality as applied in the German constitutional tradition, given that neither the necessity requirement nor the proportionality in the strict sense have been discussed. Indeed, in Judgment 1130/1988, the Court only addressed the proportionality as suitability to achieve the aim, therefore it has applied the suitability test, rather than the proportionality test[396].

However, the Court itself has clearly reiterated the strict link between the principle of proportionality and that of reasonableness, in 1995: "the principle of proportionality represents a direct expression of the general principle of reasonableness" (Judgment 220/1995).

Constitutional judge Cartabia makes clear that the "the Italian Constitutional Court does not make any distinction, neither explicit nor implicit, between the principle of reasonableness and the principle of proportionality, which are often used in a completely fungible way, so that a disproportionate provision is unreasonable and viceversa"[397]. Under this view, the proportionality has always been used as a guiding principle and requirement, which, according to Cartabia, also in the Constitutional Court is applied in a similar way as in other courts, at least in the merit (*an*), although it has not been formalized and systematized in a progressive fashion, yet (thus stressing a difference from the other judicial constitutional traditions, in terms of *quomodo*).

However, the relationship between the two principles appears way less fluent in the academic literature, or at least, not so uncontroversial. According to Pino, "the instrument to assess whether a limitation is reasonable is, indeed, the proportionality criterion". In particular, this criterion is applied in order to structure the reasonableness requirement, when fundamental rights are at stake, in order to measure whether the sacrifice imposed upon a constitutional right is legitimate[398].

[395] See Penasa 2009, 818, my translation.
[396] Bindi 2014, 15-18; See also Rauti 2002, 378 ff.
[397] Cartabia 2013, my translation.
[398] Pino 2014, 6; Bindi 2014, instead, calls it "test", rather than "principle" or "criterion" as more often done, in relation to the reasonableness.

Zagrebelsky subdivides reasonableness in three sub-criteria, namely rationality, equality and justice. And it is precisely in the latter case that the proportionality, as a tool for balancing, arises, inasmuch as the justice criterion is founded upon principles – not only rules – and the application of principle inevitably needs a form of balancing[399]. Zagrebelsky's theory put emphasis on a further concept to be distinguished from that of reasonableness, that is *rationality*, which, in his understanding, is the logic coherence of the norm with regard to the whole legal system[400]. The assumption that the two concepts are different, but interconnected is way less controversial than in the previous case. However, the nature of this distinction is still debated.

Without going into much detail on this extensive debate, let us see some key theories.

Moscarini reflects over the possible legal meanings of reasonableness in the Italian legal system. First, reasonableness is understood as equality, where the norm is interpreted through the *tertium comparationis* seen above. Second, reasonableness is applied as an autonomous parameter, based upon the assessment of the rationale of the norm. Third, it can be understood as proper application of the law. Forth, reasonableness may reflect the *rationality* of a norm, understood as *coherence* and *non-inconsistency* of the provision[401]. Hence, a similar approach to Zagrebelsky's one.

Also in Scaccia's opinion rationality is an aspect of reasonableness; the scholar argues that the reasonableness criterion can be divided in systematic rationality, that is coherence, and a prupose-oriented efficiency (that is *pertinenza*, *congruenza*, *imperizia*, *proporzionalità*) and, last, justice-equity[402]. Moreover, the Constitutional Court, in Judgment 172/1992, has made a distinction between the *razionalità pratica* (practical rationality), which is expressed by the principle of reasonableness, and the *razionalità formale* (formal rationality), understood as a logic principle of non-contradiction (a distinction recently reiterated in Judgment 113/2015)[403].

It has also been argued that, the principle of reasonableness expresses a "reinforced reason", more careful about the concrete context and aware of the legal system as a complete evolving system.

[399] Zagrebelsky1994.
[400] Zagrebelsky 1994.
[401] Moscarini 1996, 88 ff.
[402] Scaccia 2000.
[403] Rivera 2016; Cartabia 2013, 16; on the role of reasonableness and proportionality in labour law and other branches of law see Perulli 2005 and Loi 2016.

3. Applied balancing in the Spanish constitutional case law and the principle of proportionality

The Spanish constitutional system, as pluralist as the Italian one, does not foresee a clear hierarchy of constitutional rights and freedoms, to the contrary it is characterized by a ductile character, which "makes the Constitutions particularly suitable to become sustainable projects of coexistence"[404]. Therefore, as expressly argued by Prieto Sanchis, the conflicts arising among them can only be solved on a case-by-case basis, albeit the method used to figure out normative antinomies clearly triggers controversies, "and that's what is called balancing", in Spanish: *ponderacion*[405]. In 1986, it was the Spanish Court itself to point out that rights and interests constitutionally protected do not respond to a fixed hierarchy, which necessarily implies a "balancing on a case-by-case basis" (Judgment 104/1986). On this view, the *ponderacion* does not entail the establishment of an everlasting hierarchy of interests and rights, but only an order of preference applicable to the specific case[406].

According to Gonzales, in 1981 the balancing discourse has entered the Spanish case law with expressions such as "natural balancing of values" and "balanced rationality". The scholar offers a very critical perspective over the use of constitutional balancing. His criticism is mainly based upon the argument that *balancing* constitutes an argumentative path, rather than an interpretative technique, which takes several names, as "*razonabilidad, la adecuación, la proporcionalidad, y la ponderación*" and has gained a central role without being founded upon any legal basis. The author grounds his argument on a number of cases in which the *ponderacion* – that is in general the balancing approach – has been adopted by the Constitutional Court. He identifies the first cases in which the Spanish Constitutional Court has used a balancing approach. The first one is the Auto 29/81, where the Tribunal mentions the "natural balancing of values" and argues that the Constitutional Court, in order to solve a conflict between interests and values, has to evaluate their scope and content by applying a "weighted rationality" (*ponderada racionalidad*). The second case of interest deals with the relationship between

[404] Preciado Domènech 2016, 79.
[405] Prieto Sanchis 2000, 436.
[406] Prieto Sanchis 2000, 442, 443. On the prevalence of one principle against another in circumstantial and concrete cases, as well as on the various understandings of the term "ponderacion", see also Prieto Sanchis 2001 and Prieto Sanchis 2002.

different evidence items: the Constitutional Court states that the balancing allows to judge upon the meaning and importance of each evidence (Judgment 31/1981). In Auto 375/83, the Court asserts that it is up to the Law to conduct the necessary balancing in order to harmonize the different values and interests constitutionally relevant "y a este Tribunal *compete corregir*, en su caso, los errores que pudiera cometer el legislador al efectuarla"[407].

In Judgment 53/1985, where a serious conflict between the right of life of the unborn child and the right to life and dignity of the woman was at stake, the Court, in a key judgment for the evolution of this case law, affirmed that, given that "none of those rights can be said to be absolute, the constitutional interpreter is obliged to balance the interests and rights". A further well known case in which the Court has used the balancing argument is Judgment 53/1986, where it has addressed the relationship between the right to strike and the public interest to essential services[408].

A different viewpoint is offered, inter alia, by Francisco Fernández Segado, who, with reference to a conflict between the right to honour and the freedom of expression, argues that "it is unnecessary to assert that in case of conflict between rights or between a right and an interest constitutionally protected it is necessary to conduct the adequate balancing", to the point that it is in the Constitutional Judge's competence to revise the correct balancing conducted by an ordinary judge[409].

Differently, Bernal Pulido argues that a first use of the principle of proportionality can be found, already before the entrance into force of the Spanish Constitution in 1978: Tribunal Supremo, Judgment 5/1959. The scholar refers to a judgment delivered during the Franco regime by the Tribunal Supremo, which, in his opinion, pioneered the use of balancing and, more precisely of the principle of proportionality, by arguing that the aim pursued may have been achieved by more "appropriate measures"[410]. However, given that the Spanish Constitution and, hence, the Constitutional Court is from 1978, it is hardly conceivable a use of the principle of proportionality, in the current sense, beforehand.

Overall, Spanish constitutional judgments have often balanced conflicting interests by applying the principle of proportionality. It is quite uncontroversial that the Spanish Constitutional Court has used

[407] Gonzalez 2003, 11-12, italics added, my translation.
[408] Sánchez Gonzalez 2003, 11-13, my translation.
[409] Fernández Segado1993, my translation.
[410] Bernal Pulido 2005, 50 ff., my translation.

the proportionality principle in an intuitive and informal way from the very beginning of its activity. Indeed, according to a number of authors, the principle of proportionality is embedded in the constitutional system and it is structural of the Spanish legal system, especially because of the European Convention on Human Rights and Fundamental Freedoms and the case law of the respective Court (ECtHR), which has often used the proportionality principle and has, in this respect, influenced the Spanish Court[411]. However, the actual application of the principle of proportionality, by the Spanish Constitutional Court, is the outcome of a process started decades ago.

From the 1980s to 2015, 494 judgments using, either explicitly or implicitly, the principle of proportionality have been identified. Although the constitutional case law must be considered as a continuum, three main phases of application of this principle from the Constitutional Court have been identified[412]. In a first phase, ended in the mid-1990s, the Constitutional Court started using this principle, while increasing, little by little, its formal application[413]. Indeed, albeit the Spanish Constitution does not expressly provide for a principle of proportionality, this concept has appeared already in an early phase of the Constitutional Court' activity, albeit as an "argumentative formula semantically vague". According to González Beilfuss, what fostered the use of the proportionality principle in the Spanish constitutional case law was the ECtHR case law on the principle of equal treatment. The author refers to a real "fascination" of the Spanish tribunal towards the Strasbourg Court, based upon Art. 10.2 Spanish Constitution, which provided for the duty to interpret the fundamental rights envisaged by the Spanish constitution consistently with the ECtHR case law[414]. Indeed, in a number of judgments (e.g. Judgments 21/1981, 34/1981, 75/1983, 6/1984) the Constitutional Court made use of the proportionality argument to interpret the principle of equality in the sense that the different treatment must be proportionate to the aim pursued by the differentiation. The application of

[411] González Beilfuss 2015, Barnes 1998a; Medina Guerrero 1998. However, the appropriateness of the application of the principle of proportionality in the Spanish constitutional case law is not so uncontroversial: a different perspective, mostly critical towards the balancing approach and the use of terms such as "reasonable" and "adequate" is offered by Gonzalez 2003, where the author argues for the absence of a legal justification, in both the Spanish Constitution and the case law of the Spanish Constitutional Court, for the adoption of such an approach (see further in this Chapter). On the value of ECHR see Perello Domenech 1997, 70, the author also agrees on the progressive, but uncontroversial, incorporation of the principle of proportionality in the Spanish case law.
[412] A distinction proposed by González Beilfuss 2015.
[413] On the fragmented use of this principle in the first years of activity of the Spanish Constitutional Court, see also Medina Guerrero 1998.
[414] González Beilfuss 2015, 21.

this principle was slowly extended to many other fundamental rights, as the right to a fair trial, trade union freedom and right to property[415].

However, even if already in the first phase of the Court's activity, the principle of proportionality has been applied, a clear and uniform understanding was missing and its use was still "informal and intuitive". Therefore, there was a lack of clarity over the normative content of this principle, as well. However, various elements of the proportionality test were already present in the Spanish constitutional case law, although they were still disconnected and mostly unstructured. Overall, two main elements were: public authorities had to expressly justify the restriction of a fundamental right and the restriction had to be really proportionate. In this phase of the Spanish constitutional case law, we can already find the concept of "adequate provision" (e.g. Judgment 142/1993), as well as that of "necessity" of the measure subject to constitutional scrutiny (e.g. Judgment 178/1985). Last, and starting from 1985, the Court slowly introduced the evaluation of the concrete proportionality of the challenged measure and the aim pursued. Moreover, the judgments, in this phase, were mostly concluding in favour of the proportionality of the provision at issue: a case law, in González Beilfuss words, "respetuosa con el legislator"[416].

In a second phase, started in the mid-1990s, the Constitutional Court introduced and openly made use of the so called German test of proportionality, grounded upon three criteria: suitability (*idoneidad*), necessity (*necessidad*) and proportionality in the strict sense (*proprtionalidad en sentido estricto*); concepts only vaguely mentioned in the earlier stage[417]. In this phase, started with Judgment 66/1995[418], the Court expressly referred to the "proportionality judgment" and used the three requirements in a tidy and structured way, thus formalizing the principle of proportionality, analogously to the German Court,

[415] González Beilfuss 2015. One of the uncontroversial features of the principle of proportionality is its paramount application in relation to fundamental rights see Perello Domenech 1997, 73.
[416]González Beilfuss 2015, 40.
[417] González Beilfuss 2015,16.
[418] González Beilfuss 2015, Prieto Sanchís 2001; The turning point is identified also by Perello Domenech 1997, 72 ff., in Judgment 66/1995; on the gradually more systematic approach from the Spanish Court, since the mid-1990s, see also Villaverde 2008.

without, however, expressly referring to the German origins of this technique[419]. The first occasions in which the Court expressly referred to the principle of proportionality concerned criminal law norms.

In a judgment from 1996, the Spanish Court clarified that the proportionality principle is based upon constitutional norms, especially those providing for fundamental rights, which is also its main scope of application (Judgment 55/1996)[420]. However, already in previous judgments, the Court had pointed out that the principle of proportionality stems from various explicit constitutional principles, such as the value of justice (Judgment 160/1987; Judgment 50/1995), or the principle of the *Estado de Derecho* (Judgment 160/1987)[421].

In 1999, the Court reiterated, in a sole ruling, that the principle of proportionality is a "general principle, which can be derived from various constitutional provisions" and stems "from the value of justice [...], the principle of *Estado de Derecho* [...], the prohibition of arbitrariness of public powers [...] and the human dignity". Moreover, express reference is made here to Art. 1.1 and Art. 10.2, Spanish Constitution, and Articles 10.2 and 18 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (Judgment 49/1999)[422].

A turning moment in the evolution of the Constitutional Court case law has been identified in Judgment 136/1999, where the Court, fully and expressly applying the proportionality test, for the first time concluded for the violation from the legislator of the proportionality principle[423]. However, there was no unanimity within the Court over the application of the test. Indeed, a clear dissenting opinion came from judge Conde Martín de Hijas, who argued that an approach as such was a source of uncertainty for the criminal legal system. The judge pointed at the absence of conceptual clarity of the proportionality requirement, which was due to a failure of the Court to sufficiently explain its

[419] González Beilfuss 2015, 42. See also Preciado Domènech 2016, 141. Also Stone Mathews, 2008, 161, argue that the German tradition has strongly influenced the adoption of the proportionality adjudication by European Constitutional Courts.
[420] See González Beilfuss 2015, 43.
[421] See Perello Domenech 1997, 73.
[422] As discussed in Pereira 2004, 1048, my translation.
[423] These and other first cases in which the principle of proportionality was applied concerned issues of criminal/penal law. E.g. of non-structured application of the test: Judgment 76/1996; Judgment 107/1996) Structured application: Judgment 207/1996; Judgment 161/1997; Judgment 37/1998. Judgment 49/1999 (less rigorous application. Cf. also Preciado Domènech 2016.

entrenchment in the constitutional system. Consequently, in his opinion, the Court should refrain from applying *proportionality* as a constitutional criterion[424].

Even though, also in the latest decades, the Court has referred, more or less explicitly, to the "principle of proportionality" in several judgments, since 2000 the Constitutional Court has applied the proportionality test in a more relaxed and inhomogeneous way. Indeed, at the beginning of the century the alleged third phase of the principle of proportionality in the Spanish constitutional case law begins. For instance, in Judgment 98/2000, the Court used the German test criteria without explicitly mentioning them and in an unstructured fashion, while few months later, with the same judge rapporteur, in Judgment 186/2000, the German test was again applied in a structured way. However, since 2000, only in isolated cases the judges extensively and rigorously applied the proportionality test, thus assessing whether the norm was *idonea*, *necessaria* and *proporcionada*[425].

It has been argued that, in the latest decade and a half, the constitutional case law has increasingly applied the principle of proportionality in an informal and vague manner, which is giving rise to both the "deconstitutionalization" of the principle of proportionality and the development of questionable lines of reasoning on fundamental rights and their normative content. The lack of a dogmatic approach risks making this principle nothing but an "empty category" used to justify decisions taken on extra-legal grounds, as well as hampering any predictability over further decisions[426]. The judgments that we are going to assess in the next Chapters provide emblematic examples of this tendency. The misuse of the principle of proportionality may be one of the causes of the strong criticism that certain authors advance as regards its application by the Spanish Constitutional Court[427].

Bernal Pulido groups the critical arguments against the application of the principle of proportionality in five clusters: 1) the lack of conceptual clarity of the principle of proportionality; 2) the absence of a legal basis; 3) the incommensurability argument, which rejects the idea that elements which are too

[424] Gonzalez 2003, 20; Pereira 2004, 1048.
[425] A structured application can be found again in Judgment 48/2005, or Judgment 11/2006, or Judgment 60/2010.
[426] González Beilfuss 2015. Also Pereira Sáez 2004, 1049-1051, who discusses judgments from 2000, albeit with a different analytical method, emphasises that the Court mostly applies the principle of proportionality without mentioning and strictly following the proportionality test and, in some cases, the proportionality appears related to the essential content, in other judgments it seems to be coinciding with the necessity scrutiny, or composed by the three sub-requirements: suitability, necessity, proportionality in the strict sense, as in Judgment 14/2003.
[427] Beyond Gonzalez 2003; see also Pereira 2004, 1060, who critics that the application of the principle of proportionality by the Court, because of its partiality.

different to be compared and balanced; 4) the difficulties in identifying the rights and interests to be balanced; 5) the subjectivity and irrationality of the application of the principle of proportionality. The author carefully dismisses each of these critiques and proceeds with a reflection over a further counter-argument put forward by the academic literature: the lack of legitimization of the Constitutional Court to apply the proportionality principle. According to this critical view, every time the Constitutional Court addresses the legal questions by balancing fundamental rights and interests constitutionally protected extends its competence in an illegitimate way and, hence, reduces the – legitimate – scope of action of the legislator, democratically elected. Bernal Pulido argues that, in fact, the conflict is not between the legislator and the Constitutional Court, but it is endemic to the democratic legal systems that, on the one side, provide the legislator with the competence to produce normative acts, but, on the other, binds it to respect the fundamental rights. These two elements (fundamental rights and democratic principle) enter into conflict during the scrutiny of the Constitutional Court, which cannot be empowered with an unlimited competence to solve this conflict, but cannot even be denied this competence and intervene in the legislative action, and that's because the limits to the legislative competence cannot be always determined in advance and in abstracts terms. Therefore, the difficulty resides in finding the criterion that offers the best solution to manage the endemic tension that arises in the concrete cases. According to the author the criterion that offers the most rational solution to delineate the competence of the legislator and of the Constitutional Court is the principle of proportionality. After having dismissed – with an attentive analysis – the alternative techniques to interpret the fundamental rights and solve the conflicts, the author emphasises that the proportionality principle, if applied in a rigorous and rational way is the best tool not only for the interpretation of the Constitution, but also in order to reduce as much as possible any doubt as to the legitimacy of the Constitutional Court to apply this technique[428].

3.1 The – minor – role of the principle of reasonableness

Before moving to discuss the features of the principle of proportionality – and its correct application – as well as other related concepts, let us now briefly dwell on the principle or reasonableness. The

[428] Bernal Pulido 2014, 203-264.

principle of reasonableness per se has played a way less crucial role in the Spanish constitutional case law, compared to the Italian case. In what González Beilfuss has identified as the first phase of application of the proportionality principle by the Spanish Constitutional Court (see chapter above), the Court was, according to the author, strongly linking the principle of proportionality with that of reasonableness, as demonstrated by the use of expressions such as "reasonable proportionality" (e.g. Judgment 178/1985). However, already in 1981, the Court had declared that a different treatment is allowed only if justified in an "objective and reasonable" way (Judgment 22/1981). Judgment 22/1981 can be understood in the sense that the Court has applied both the principle of reasonableness and the principle of proportionality. It has been argued that the Court has made use of the reasonableness criterion "which implies that the distinction shall pursue a legitimate aim, as well as that the mean shall be suitable to achieve the aim"[429], and together with this requirement, it has applied the principle of proportionality, albeit inexactly, and has investigated over the proper balancing of the conflicting interests. This understanding seems to suggest that the Court, in the first phase of its activity, was equating the principle of reasonableness with one of the sub-tests of the proportionality test, where the suitability is evaluated, while the principle of proportionality consisted in the latest phase of the German test, that is balancing in the strict sense. Moreover, interestingly, this case is one of the firsts in which the two principles emerge and it concerns the right to equal treatment. Indeed, as pointed out by Perello Domenech, the principle of proportionality has been often used to judge upon the infringement of the principle of equality[430]. In this respect, that is in judicial cases concerning the right to equal treatment, Prieto Sanchis argues that the principle of reasonableness is translated in a need to balance the conflicting principles. Under this perspective, "a law is justified when it is reasonable, that is when the violation of a right is reasonable in light of enforcing another right"[431].

According to González Beilfuss, although in the proportionality adjudication the reasonableness corresponds to the assessment of the suitability of the law examined, therefore in the first phase, it also

[429] Perello Domenech 1997, 71, my translation.
[430] Perello Domenech 1997, 71, my translation. On the Spanish constitutional case law on the principle of equality up to 1994, see Carmona Cuenca 1994.
[431] Prieto Sanchís 2000, 75.

constitutes an autonomous parameter[432]. Indeed, Roca Trias emphasizes that the principle of reasonableness (*razonabilidad*) plays/has played a crucial role in the constitutional case law especially with regard to the right to equal treatment and the right to a fair trial. In the first case, the influence was clearly from the ECtHR (as also expressly referred to in/stated in Judgment 22/1981)[433]. The autonomy of the reasonableness requirement is limited, in fact it is normally applied jointly with other criteria. For instance, in a case concerning the right to equal treatment, the criteria selected in order to conduct the scrutiny were the reasonableness of the norm and its necessity, as expressly done in Judgment 103/1983. In that case, the necessity requirement was applied independently, therefore beyond the scope of application of the proportionality principle.

A further example is provided by a case on the right to a fair trial, the second criterion selected by the Court was the arbitrariness, and the conclusion was that the judicial decision is constitutionally illegitimate if the legal reasoning is manifestly arbitrary and unreasonable (Judgment 214/1999)[434]. Perez, drawing on the latest mentioned judgment (Judgment 214/1999) argues that the reasonableness adjudication is based upon the formal coherence of the measure assessed, together with the absence of evident unreasonableness[435]. According to the scholar, the "reasonableness judgment" coincides with the content of the constitutional scrutiny, but it also constitutes its limitation, inasmuch as only what is reasonable is constitutional and the Court can validly conclude for the constitutional legitimacy of a norm, only if it is cleared of any arbitrariness. However, the author is aware of the indeterminacy of the legal concept of reasonableness and, by quoting a judgment from 2002 he argues that, in order to provide reasonableness with a content, it is necessary to start from the assumption that "the validity of a reasoning is, from a purely logical perspective, independent from the truthfulness or falseness of its premises and conclusions" (Judgment 164/2002, my translation). In other words, what the reasonableness scrutiny investigates is the coherence of the norm[436].

[432] González Beilfuss 2015, 83.
[433] Roca Trias 2013. For an analysis of the constitutional case law over the principle of equal treatment and the legal reasoning and methods used, that is also the principle of proportionality see Barnes 1998b, 337-343.
[434] See Roca Trias 2013 (also on reinforced reasonableness).
[435] Perez 2014; also in this respect, the use of the reasonableness principle, Gonzalez, 2003, 22, is critical, in the sense that in his opinion this concept is too vague to constitute a valuable criterion for the constitutional case law.
[436] Perez 2014, 9-10, my translation.

3.2 Principle of proportionality and its content

The structured application of the proportionality principle in the Spanish legal system is, at least theoretically, consistent with the way in which other Courts, both national and regional, make use of this principle. Indeed, a proper application of the proportionality principle, by the Spanish Constitutional Court, would mean a first assessment of whether the provision is able to achieve the aim pursued, that is its *suitability*. Second, the Court shall focus on the *necessity* of the norm, in the sense that a more moderate provision, equally achieving the aim, is not feasible. In the third phase, the Court shall evaluate whether the provision is *proportionate in the strict sense* and it results in more advantages to the general interest, than prejudices to other interests or values. The added value of such a structured proportionality test is the possibility for the Court to assess beforehand the aim of the provision under scrutiny, giving relevance to the means-purpose relation, so that a provision pursuing an aim prohibited by the Constitution would be rejected at hand. It is worthwhile to underline that, according to the Spanish Constitutional Court, the aim pursued, to be legitimate, does not need to be expressly phrased in the Constitution, but it is enough that it is allowed by the Constitutional norms[437].

In the development of the Spanish constitutional case law the introduction of the so-called German test[438] has helped clarifying the already existing principle of proportionality, introducing an – at least apparent – rationality. It has provided what in the words of Stone Mathews is an "argumentative framework" or "analytical procedure", and in Bernal Pulido's view a "methodological criterion"[439], which "clearly indicates to litigating parties the type and sequence of arguments that can and must be made, and the path through which the judges will reason to their decision"[440]. Therefore, under this view, the German test increases, first of all, certainty and transparency of the decision.

[437] González Beilfuss, 2015, 42-56; Roca Trias, 2013.
[438] "German test", as it has been systematically designed for the first time by the German constitutional court (*Bundesverfassungsgericht*), for an analysis of the work of the German Constitutional Court see, one for all, Alexy 2010.
[439] Bernal Pulido 2005, 77, my translation. The author, writing in 2005, was arguing that this "criterio metodologico" is consolidated in the Spanish constitutional case law.
[440] Stone Mathews 2008, 76-89.

Interestingly, the literature that describes the normative content of the principle of proportionality in the Spanish legal system, draws extensively on the relevant German studies, first and foremost Alexy's theory[441].

Indeed, while the three requirements of suitability, necessity and proportionality in the strict sense are acknowledged pretty unanimously by the literature, there is some inconsistency over the phase or phases that can be considered preparatory to the, so-called, proportionality test[442].

One of the leading Spanish scholars, while assessing the principle of proportionality in the Spanish legal system, as well as in other legal systems, has identified five steps that characterize, in his view, the application of the principle of proportionality. The first two represent the precondition and the second three the proper application of the proportionality principle. On this view, first, it comes the identification of the fundamental right concerned and its enshrinement in a fundamental right's provision. Second, the judge has to verify whether the secondary law examined is related to the relevant fundamental right provision[443]. Another authoritative scholar, Prieto Sanchis, breaks down the application of the proportionality principle in four phases, each of them based upon different elements to be evaluated by the judge. First, and as a precondition for the following three steps, the interference in the domain of a fundamental right must pursue a constitutionally legitimate aim, otherwise the balancing cannot take place, inasmuch as a main element is missing, that is the term of comparison[444]. This theory is consistent with the constitutional case law, which often addresses, as a first step, the constitutional legitimacy of the aim pursued[445].

The necessity to apply the proportionality criterion stems from the need to conduct a balancing. Under this perspective, the proportionality entails the establishment of an order of preference related to the concrete case and it does not provide an answer always valid. Therefore, the result of the application

[441] To the point that Gonzalez 2003 argues that the principle of proportionality has been completely borrowed by other legal systems and does not belong to the Spanish constitutional tradition at all; Pereira 2004 also refers to Latin American studies to introduce, from a theoretical perspective, the principle of proportionality in the Spanish Constitutional Court). Bernal Pulido, 2013, assesses the legal transplant that proportionality has experienced all over Europe.

[442] While in the literature discussing the application of the proportionality principle by the CJEU the use of the expression "test" is widespread, among the Spanish scholars not all use this wording, among those who do we find González Beilfuss 2015, and Perez 2014.

[443] Bernal Pulido 2005, 131.

[444] Prieto Sanchís 2000, 445.

[445] E.g. see Judgment 169/2001, para. 9.

of the principle of proportionality is a "mobile hierarchy, which does not lead to the declaration of invalidity of one of the interests or values in conflict, nor to the permanent demotion of one face to the other"[446].

The relationship between the proportionality test and the more general concept of *ponderacion* is addressed by Prieto Sanchis also in other occasions. The author argues that that the "law of balancing", a "peculiar exercise of rationality"[447] precisely comes into play in the latest stage of application of the proportionality principle: the assessment of the proportionality in the strict sense. This element also makes the last step the key one to solve the conflict between the, inevitably, conflicting interests in a neo-constitutional state[448].

Although a number of authors have argued that, so far, the Constitutional Court has failed to clarify the exact role of these criteria[449]. It is worthwhile to acknowledged that, albeit in 1992 (Judgment 219/1992), the Court had stated that the principle of proportionality was just one of the ways in which the balancing judgment (*juicio de ponderacion*) could be carried out, in subsequent and consistent case law the Court reiterated that the balancing mandate is an integral part of the principle of proportionality, in particular it relates to the proportionality in the strict sense[450].

3.3 The principle of proportionality, fundamental rights and their essential content

The crucial role of the principle of proportionality in the fundamental rights' adjudication is often addressed by the literature[451]. It has been argued that this principle serves the purpose to structure the legal reasoning needed to determine, or redefine, the essential content of fundamental rights[452]. The

[446] Prieto Sanchís 2001, 216-217, my translation.
[447] Prieto Sanchís 2000, 450.
[448] Prieto Sanchís, 2001, understands Neo-constitutionalism as an idea of State organization, which combines strong normative content and a key role of the judicial control and represents a formula for the concretization of the Rule of Law.
[449]González Beilfuss 2003; Sánchez Gonzalez 2003; Sánchez Gonzalez 2015, 84; Barnes 1998a; Rodríguez Ruiz 1999.
[450] E.g. Judgments 50/1995, 66/1995, 161/1997 y 53/2002, as referred to by Gonzales 2003, 19.
[451] For a review on the TC case law on fundamental rights, and especially fundamental social rights, see Baylos Grau 2015. On the concept of fundamental rights confront Villalon 1989. On the specific case of the "derechos fundamentals inespecificos" before the Constitutional tribunal, and the application of the proportionality principle see, inter alia, Goñi Sein 2014.
[452] Bernal Pulido 2005.

Spanish Constitution expressly refers to the protection of the essential content of rights and freedoms[453]. Indeed, Section 53.1 states that the exercise of rights and freedoms recognised by the Constitution can be regulated "only by an act which in any case must respect their essential content". This norm derives from Art. 19 of the Basic Law for the Federal Republic of Germany[454], but it differs from the German provision, in two crucial aspects. First, in Spain, the constitutional provision allows the ordinary law to interfere in the exercise of any freedom, independently from the existence of specific norms expressly providing for such legislative capacity. Second, and more subtle, in the Spanish Constitution the norm on the essential content seems to be addressed to any legislative act, including – but not only – those that limit rights and freedoms[455].

In light of a constitutional norm establishing that fundamental rights are characterized by an essential content that must be respected in any case, the application of the principle of proportionality also serves the purpose to provide the legislator with an understanding of which duties must be fulfilled in order to enforce the fundamental rights enshrined in the Constitution[456].

Consistently, in the implementation of a fundamental right the legislator can establish restrictions or put conditions upon the exercise of the given fundamental right, for the purpose of protecting or enforcing other rights or interests equally protected by the Constitution. However, restrictions as such cannot be established in an unlimited fashion: a "limit to the limits" is needed. It would be enough to read Judgment 2/1982 where it is plainly declared that "unlimited rights do not exist"[457] and this limited character is grounded upon the need to protect also other constitutional rights, as well as other interests constitutionally protected[458].

[453] The legal scholarship has clearly borrowed the concept of "contenido esencial" or "nucleus" from the sciences, where it has a concrete and tangible meaning (e.g. the nucleus of a cell), while in law it acquires a metaphoric significance; see Bernal Pulido 2014, 512.
[454] The Basic Law for the Federal Republic of Germany, the constitutional law, was approved on 8 May 1949.
[455] Prieto Sanchis 2000, 70.
[456] Bernal Pulido 2005; Villaverde 2008; According to Prieto Sanchis, the judicial balancing comes after the legislative balancing operated by the legislator during the legislative phase (2002, 105, 106).
[457] Judgment 2/1982.
[458] For a discussion, both from a European and Spanish perspective, of the limits to fundamental rights see also Aguiar de Luque 1993. Inter alia, the author highlights that the Spanish constitution does provide for a specific provision dealing with the limits to fundamental rights, while it does provide, at Article 53, that the legislator has to regulate the exercise of such rights.

The first of these limits is provided for by the already mentioned Article 53.1 Spanish Constitution, inspired by the German tradition, which states that the exercise of fundamental rights can be regulated "only by an act which in any case must respect their essential content"[459].

Two main theories have been developed to frame the concept of essential content in the Spanish legal system: *teoria relativa* and *teoria absoluta.* The first theory strictly connects the content of the essential content to the justification of the provision that imposes the right's sacrifice, with the result that the essential content is the portion of the right that survives, once a justified or valid limitation of that right has been imposed, which – in theory – may entail even the complete sacrifice of that right, if the protection of the conflicting right requires so. The *teoria absoluta* argues for a strong nucleus of the right, which must be preserved in any case, even though a justification for its limitation exists. However, it has been noted, also this theory harbours dangers. In particular, the risk is that once the essential content is respected the law is free to interfere in the implementation of a given right, without being subject to compliance with the "peripheral content". This deficiency may be overcome by understanding the essential content as the latest possible boundary not to be crossed in any case, the insurmountable one, not the only one[460].

According to Medina, the case law has rejected the *teoria relativa* that equates the limit of the essential content to the limit of the principle of proportionality, and it has instead adopted the *teoria absoluta*, which maintains the existence of an essential core of each fundamental right, which cannot be touched upon by the legislator, independently whether the provision adopted is proportionate or not. Therefore, the proportionality principle represents the second limit, to be applied jointly with the first one[461].

Bernal Pulido, in his enlightening monograph on the principle of proportionality and fundamental labour rights[462], assesses a further theory on the essential content, supported by renowned Spanish scholars, such as Perejo, Prieto Sanchis and Medina Guerrero. The author groups this approach under

[459] Article 53.1 Spanish Constitution, official translation.
[460] Prieto Sanchis 2000, 70, 71.
[461] Medina Guerrero 2008; Aguiar de Luque 1993; the "limit to the limits" issue is widely addressed also by Prieto Sanchis 2000, 437-441.
[462] Bernal Pulido 2014.

the name of *teoria mixta del contenido esencial*[463]. This theory combines the absolute theory with the proportionality principle, as a criterion to bind the legislator to comply with the fundamental rights. Under this view, the hard core of the fundamental right remains stable and cannot be sacrificed for any reason and to any extent, to the contrary the peripheral zone can be affected by ordinary norms and the proportionality principle is applied to assess whether the intervention of the legislator on the peripheral zone complies with the criteria of suitability, necessity and proportionality in a strict sense. In particular, Medina Guerrero points out that the essential content and the proportionality principle are the "limites de los limites" of fundamental rights that operate independently from each other[464]. However, according to Bernal Pulido, while this theory has the merit to improve the absolute theory by envisaging a method to protect the fundamental right beyond the essential content, it does not overcome a crucial shortcoming of the absolute theory, in particular, he argues that a rational criterion that allows to separate sharply the essential content from the periphery of the fundamental right does not exist[465]. In conclusion, according to the scholar, the theory of the essential content and the proportionality principle are incompatible in terms of theoretical structure. Therefore, it is necessary to get rid of the abstract idea of essential content and apply plainly and exclusively the principle of proportionality. However, he adds, the mixed theory can inspire a rule to be applied in the course of the proportionality assessment, especially in the phase of the balancing in the strict sense: the most intense sacrifices to fundamental rights can be admitted only exceptionally[466].

It is quite uncontroversial that the concept of essential content, significant as it is, is an unpredictable and open concept, which could be defined differently, depending on the values applied. However, its significance is justified, according to Prieto Sanchis, by two core arguments. First, it reminds the legislator and the judges the centrality of fundamental rights in the Spanish Constitution. Second, it obliges the legislator to provide an extensive justification for the limitation of the rights concerned.

[463] Bernal Pulido assesses and develops counter arguments of a number of theories on fundamental rights and their essential content, one for all Habermas' theory, see Bernal Pulido 2014, 509-621.
[464] Medina Guerrero 1996, my translation.
[465] Bernal Pulido 2014, 452-544.
[466] Indeed, according to Bernal Pulido, the theory of the principle of proportionality offers a stronger protection to fundamental rights and binds the legislator more tightly, than the essential content theory, see Bernal Pulido 2014, in particular 551.

Indeed, the duty to provide detailed justifications has a central role in the process of limiting the enjoyment of a fundamental right[467].

Bernal Pulido, drawing on the assumption that a full objectivity in determining the essential content of fundamental rights is nothing but a fascinating utopia, argues that methodological interpretative approaches are necessary to reduce the normative indeterminacy of such rights, and the proportionality principle offers the most rational interpretative method[468]. This is especially true if the fundamental right's content is not made explicit in the text of the constitutional provision, which is not exhaustive enough and makes the provision characterized by a high degree of normative indeterminacy. In other words, the intrinsic, but not the explicit, limits to fundamental rights, and, at the same time, the explicit constitutional recognition of an essential content, imply the need to find an efficient interpretative pattern. Nevertheless, this should not exclude the joint application of other techniques and principles[469].

Preciado Domènech comes to different conclusions as to the relationship between the essential content and the principle of proportionality. He clearly interprets the essential content (Art. 53.1 Spanish Constitution) as the content of the constitutional norm, which is directly applicable, independently from the intervention of public authorities – such as the legislator – in the sense that "it precedes and exceeds the exercise of the legislative power"[470]. The only authority which can determine the scope and meaning of a fundamental right's essential content is the Constitutional Court, while the remaining extent of the right at stake, that goes beyond the essential nucleus, can be subject to the legislator's interpretation[471]. Moreover, the author points out that a norm may respect the essential content of a fundamental right, but, at the same time, be disproportionate. However, the other way round is not as true: a norm not fulfilling the essential content of a fundamental right cannot be proportionate. This argument follows from the assumption that a norm infringing upon the core of a fundamental right is never suitable to achieve a constitutional aim, unless violating a fundamental right is necessary in order to implement

[467] Prieto Sanchis 2000, 73 ff.
[468] Bernal Pulido 2005, 68; in a similar way see also Stone Mathews 2008.
[469] Aguiar de Luque 1993, 17. See also Medina Guerrero 1998.
[470] Preciado Domènech 2016, 77, my translation.
[471] The reason for this crucial distinction between the interpretative powers of the Constitutional Court and, on the other hand, of the legislator, lies in the fact that "the Constitutional Court has to guard the permanent distinction between the objectivity of the constituent power and the implementation from the constituted powers, which will never be entailed to go beyond the limits and the competences set by the former" (Judgment 76/1983, 5 August 1983, my translation).

another fundamental right[472]. According to the scholar, which seems to adopt the *teoria absoluta*, to distinguish essential content and proportionality we need to look at the different phases in which the two are considered: the essential content is determined at an earlier stage, "at the moment of the delimitation of the content of the right" and, secondly and consequently, the proportionality can be evaluated[473]. However interesting this view is, it does not help clarifying how the core content can be determined.

Parejo Alfonso traced the meaning of the essential content and the method used by the Court to identify it, on the grounds of a Judgment of 1981 (Judgment 11/1981). The author argues that the essential content of a fundamental right is "that part of the right's content, which is absolutely necessary so that the interests legally protected, that enliven the right, result real, concrete and truly protected". This content is not general, but "essential" in the sense that it concerns the elements which are paramount to legally recognize the right at issue, both in its meaning and in its justiciability. In addition, according to the 1981 Constitutional Court, the essential content must be understood in relation to the historical context in which the judicial case is decided. However, according to the author, it constitutes an "undetermined legal concept", which becomes a tool for the assessment and protection of a fundamental right, with due regard to both its original meaning, that is the intention and will of the constituent assembly, as well as the "evolutionary adaptation" that it has undergone over the years[474]. Bernal Pulido identifies a further weakness in the absolute theory in the importance given by the Court to the historical context in the determination of the essential content of a fundamental right. Under this view the absolute theory is dismissed by the Constitutional Court, inasmuch as, while the Court emphasises the role of the temporal dimension, the theory at issue considers the right's nucleus as a static and abstract element and fails to contemplate the historical context as a crucial criterion, with the effect of supporting an "ahistorical idealization" of fundamental rights' essential content. This deficiency makes the *teoria absoluta* inapplicable in the practice of a legal system[475].

In order to identify whether the essential content of a fundamental right is violated, the Constitutional Court, in its renowned judgment from 1981, identifies two methodological ways. The first technique

[472] Preciado Domènech 2016, 143; see also González Beilfuss 2015, 86-88.
[473] Preciado Domènech 2016, 143, my translation.
[474] Parejo Alfonso 1981, 186-190, my translation.
[475] Bernal Pulido 2014, 531, 532.

lies on the assumption that the interpreter shall be able to identify the "tipo abstracto del derecho", which pre-exists the legislative act, in the ordinary law under scrutiny. However, the "tipo abstracto" is not fixed and absolute, but it reflects the collective idea in a precise historical context, which is shaped by the legal scholarship and the case law. Therefore, the Judges have to conduct a comparison between what the legislator has produced and how the right at stake is normally understood. The second step does not concern the internal dimension of the fundamental right, but rather the beam of faculties that emanate from a given right, that is the various elements that compose the interest protected. Therefore, in light of the two key elements pointed out (the consistency with the "abstract type" and the satisfaction of the interest protected), the essential content is violated when the ordinary law does not comply with the abstract category of the said right, or when, even if the abstract category of the constitutional right is reflected in the ordinary norm, the latter limits or complicates the exercise of the said right, or its justiciability, in an unreasonable way[476].

It has been argued that the Constitutional Court has made a prudential use of the concept of "essential content", without sharply dividing the constitutional rights into two parts: the core one and the one that can be left aside and does not need to be enforced. Indeed, according to Prieto Sanchis, for an ordinary norm to be legitimate, the degree of impact upon the essential content of a fundamental right must be directly proportionate to the extent of the justification provided by the norm, in other words: "the more a right is scarified, and therefore the more we get close to touch the essential content of it, the more justified the restricting provision must be"[477].

Conclusion: balancing, hermeneutic criteria in Italy and Spain and the Social State theory

The enormous food for thought provided by the constitutional literature addressed cannot be constrained in a single and all-embracing definition of balancing. To the contrary, the scholarship's production demonstrates the complexity of the criterion at issue.

[476] Parejo Alfonso 1981, 186-190. Also Solozabal Echavarria 1991 refers to Judgment 11/1981, to identify the scope of the essential content of constitutional rights. However, the meaning and interpretation of the concept of "essential content" of fundamental rights is controversial, for an attentive review of the academic literature by Rodríguez-Armas 1996; See also Martìnez Pujalte 1997; Prieto Sanchìs 2003.
[477] Prieto Sanchìs 2000, 441, my translation.

Besides those authors who challenge the existence of a balancing procedure tout court and/or the use of balancing as a valid and effective way for deciding disputes over conflicting rights and interests, others have recently questioned the assumption that we are in an "age of balancing", a theory developed in certain academic literature, mostly since the end of the 1980s[478]. The authors who advocate this argument tend to emphasize the points of convergence of the case law of various national and supranational legal systems, even though they do acknowledge that some differences exist[479]. Jacco Bomhoff disagrees and calls into question what he characterizes as the "global age of balancing: an age in which even those wanting to emphasize differences between legal systems find themselves having to rely on this unifying language to make their point"[480]. He aims to show that, even though "basic similarities" cannot be denied, "crucial differences" still exist in the way in which the Courts balance conflicting interests and rights, starting from and especially because of the differences in the "language of balancing"[481]. The Italian and Spanish experiences are far from providing a clear example in support of the assumption that we are not in a global age of balancing, but the consistent differences cannot be underestimated, both in the merit and in the so-called "language of balancing".

Indeed, in the Italian and Spanish case law addressed, the balancing of conflicting rights and interests is a central element, albeit it still is highly controversial among the scholars and not clearly defined by the case law.

The fact that in the Italian legal system the essential content of fundamental rights is not explicitly protected by a constitutional provision, as it is in the Spanish case, but it finds explicit recognition in the case law of the Constitutional Court, which has elaborated this concept in line with the Spanish system's understanding, is one of the elements that suggests that, beyond the differences in terms of *quomodo*, the two constitutional judicial traditions share considerable similarities with regards to the approach to fundamental rights.

[478] The expression was coined by Aleinikoff 1987 and it refers to the widespread use made by the Courts, all over the world, of the balancing technique.
[479] One for all, recently, the idea that we live in an "age of constitutional balancing" has been reiterated by Gardbaum 2010.
[480] Bomhoff 2013, 15.
[481] Bomhoff, the author draws his theory upon the Bundesverfassungsgericht and the US Supreme Court's case law.

However, the most striking difference certainly lies in the criteria chosen by the Courts to apply and rationalize the balancing. The Italian Constitutional Court relies way more on the principle of reasonableness, which has been extensively applied and framed, and the concept of proportionality that has appeared in recent years and with an ancillary role. While, on the one hand, the Italian Court has been framing the reasonableness criterion and has – recently and occasionally – began to associate it with the proportionality requirement; on the other hand, the Spanish Court has been constructing – more or less consistently – the principle of proportionality, which has been relatively linked with the reasonableness criterion. In both cases, the scholarship, which has widely assessed and discussed these concepts, especially on the grounds of the constitutional case law, has not defined one for all the distinction and content of these two principles, nor their correspondences (considering the respective applications of the two criteria). Even though, the theory in favour of an overlapping of the two concepts seems quite accredited, especially in the Italian literature, in light of the analysis conducted in this chapter, it would be contrived and reductive to attempt to find a correspondence between the reasonableness criterion and the principle of proportionality. The principle of reasonableness is structurally unable to allow a definitive comparison with the proportionality test. Indeed, the principle of proportionality has been disseminated across modern legal systems once it had already been systematized by the German Constitutional Court (at least in its core content), the principle of reasonableness, as applied by the Italian Court, is peculiar of the Italian constitutional system and it is in constant evolution, which does not allow the academic literature, either, to come to a definitive (as definitive as could be) definition of this principle. While the proportionality test is clearly – at least formally – composed by the suitability test, the necessity test and the balancing in a strict sense, the only certain element of *reasonableness* seems to be that it serves the purpose to assess the internal coherence of the norm, that is evaluating the relationship means-aim (which may be compared to the suitability test), and the coherence with the overall legal system, especially in relation to fundamental rights and principles (which may only superficially seem to correspond to the necessity test).

Nevertheless, albeit the criteria applied do not precisely coincide, both Courts balance conflicting rights and interests, in order to establish an order of preference, which is not absolute, but is pertinent only to the concrete case under scrutiny.

The necessity to apply the balancing stems precisely from the structure of the two Constitutions, which provide for fundamental rights and principles, which are absolute, in the sense that they are not hierarchically ordered, but limited, in the sense that their enforcement cannot infringe upon other rights and principles equally granted by the Constitution. This feature of fundamental rights and the evolving economic and social context lead to assess the legislative acts in a dynamic way, as it is the case with a balancing technique, which determines the recessive and the predominant constitutional value, and hence principle, on a case-by-case basis. Indeed, an absolute hierarchy would be in contradiction with the pluralist character of the constitutional systems under assessment and would cause a "tyranny" of a value over another[482].

However, the strength of such an approach fades away if the conflicting terms of the balancing do not express comparable values, and therefore, it is arguable whether they can be addressed through this legal reasoning. The choice of the elements to be balanced is likely the most sensitive moment of the constitutional reasoning.

The first and most problematic moment is the identification of the rights and/or principle eligible for a proper balancing, that is those that are in "real conflict" with each other. For instance, assuming that public budget necessities must be taken into account by the Court, does this mean that the balanced budget principle shall become an element of the balancing, that is a "real conflict" occurs between that principle and a fundamental right (or any other labour right and an economic driven need, such as that of flexibilisation)? Therefore, should the balancing be conducted or the two principles are not homogenous and hence no balancing should occur? In the latter case, how could the Court include the other arguments in the legal reasoning? The magnitude of these questions does not allow this thesis to suggest definitive answers, however, drawing on the theoretical reflections reviewed, the constitutional judgments assessed in the next chapters contribute to shed light over these controversial issues.

The strong similarities in the constitutional setting and in the general approach of the Courts allow addressing the way in which the two national Courts have approached to the balancing in the case law on post-crisis measures in a parallel fashion. However, the criteria of *proporcionalidad* and that of

[482] In particular, Zagrebelsky 1992, 160, uses the expression "tyranny", my translation.

ragionevolezza do not seem to be strictly comparable in any respect, especially because of their application in the legal reasoning of the Courts: the – not always consistent – application of a rigid test in the first case and a more dialectic approach in the second. Nevertheless, the concept of proportionality is being increasingly introduced in the Italian case law and that of reasonableness seems to have a role in the Spanish Court's legal reasoning.

The assessment of the most recent case law on labour and social security norms of the two Courts, under this perspective, has the purpose to contribute both – and mainly – to define the current status of the constitutional conflict of fundamental labour rights with other interests of an economic nature in national legal systems strongly influenced by the EU policies, as well as to the reflection over the most recent developments in the use of the balancing method in the respective legal arguments.

The reviewed carried out in this chapter, besides providing the essential notions to assess the constitutional case law under the balancing perspective, has identified the most sensitive aspects of this process. Therefore, it allows a better understanding of what elements of the case law selected need to be investigated and provides a guideline for approaching the units of analysis.

Moreover, the theory on fundamental rights adopted, that is the lenses with which we look at the constitutional labour rights at issue, has a significant, or even decisive, role in the interpretation of the fundamental rights enshrined in a Constitution[483]. The same can be said when the analysis of the Constitutional Courts' arguments is conducted, in the sense that the interpretative framework selected, as regards fundamental rights, constitutes a strong underlying assumption, which conditions the assessment of the Court's legal reasoning, as well. In other words, certain steps of the analysis of the balancing of fundamental rights conducted by a Constitutional Court certainly hinges on a specific understanding of the Constitution, and, precisely, of the value and role of the fundamental rights provided therein.

Preciado Domènech, drawing on Böckenförde[484], reviews five theories of fundamental rights[485]. The liberal theory, grounded upon the *favour libertatis*, entails that the State has the exclusive competence

[483] See Preciado Domènech 2016, 107.
[484] Böckenförde 1993, 44-83. See also Künkler Stein, 2017.
[485] These theories, according to the author, are not independent and self-standing, but, to the contrary, they all provide for key interpretative criteria, complementing each other.

of guaranteeing the enjoyment of constitutional freedoms, on the other hand, the citizens shall simply comply with the generic rule that "everything that is not forbidden is allowed" and, under these view, fundamental rights work as the "law of the jungle"[486]. According to the institutional theory, a Statute or any legal provision that concerns a fundamental right, on the one hand, facilitates the exercise of the liberty enshrined in that right, but, on the other, directs that liberty to a specific goal, so that the law becomes the framework of that liberty. The axiological theory puts emphasis on the values expressed by each fundamental right, which are crucial and coherent tools that lead the State in the construction of an integrated and homogeneous society, insofar as they inspire every normative intervention. The functional-democratic theory (an evolution of the institutional theory), divided in functionalist-institutional theory and multifunctional theory, in brief, stresses on the institutional dimension of public freedoms[487].

The Social State theory is the latest theory addressed by the Spanish author, as it is the theory that permeates the Social state and, in both the Italian and Spanish legal systems, finds explicit grounds in the Constitutional norms that provide for the duty of the public authorities to grant the substantial equality among citizens, which goes way beyond the "non-interference" and requires positive actions by the State bodies (see Art. 3.2 Italian Constitution, and Art. 9.2 Spanish Constitutions). If *equality* were not elaborated also in substantial terms, rights and freedoms would be purely declarations and they would fail to become real tools[488]. The establishment of a society founded upon substantial equality is guaranteed by the enforcement of economic, social and cultural rights, the so called rights of second generation (which are not rights of subordinate importance) and allow to realize both the positive freedoms and the social equality. This follows the nature of the fundamental rights at stake, which are both welfare rights and require a positive action consisting in the allocation of resources, as well as liberty rights, as the right to strike and the trade union freedom. A proper enforcement of these rights, and, hence, the full implementation of the substantial equality are the necessary preconditions for the

[486] Preciado Domènech 2017, 108, my translation.
[487] Preciado Domènech 2017, 107-112.
[488] Bin 2007, drawing on Karl Marx's arguments (Marx 1974) points out that this was one of the features of the French Constitution of 1848, which was a mere declaration of rights and freedoms.

human freedom[489]. The Italian Constitutional Court, in Judgment 15/1975, underlines that the Italian Constitution recognizes and protects also "fundamental liberty rights, mostly covered in the category of inviolable rights generally included in Art. 2 Constitution and recognised both to the individuals and the social groups where human personality is expressed. Beyond any doubt, the assembly and trade union freedoms, at Articles 18 and 39 [Italian] Constitution, fall into the inviolable human rights"[490].

The very first sentences of the two Constitutions are expressive of the dualistic dimension of the legal systems they are designing, which is built around both the individual and the collective dimension of labour. Art. 1.1. Spanish Constitution declares: "Spain is hereby established as a social and democratic State". In a similar way, Art. 1.1 Italian Constitution states that "[I]taly is a democratic republic, founded on labour".

Furthermore, the thesis calling into question the justiciability of this cluster of rights is deemed obsolete, by now. Indeed, on the one hand, there is no legal ground upon which the justiciability of these rights could be denied and, on the other hand, international and national judges are strengthening their justiciability and effectiveness[491]. In addition, also the argument that only welfare rights impose upon the State the duty to allocate resources is to be dismissed, given that is now widely accepted that the enforcement of every right entails a public financial allocation, for instance, the right to judicial protection requires the State to set up a judicial system made of structures and employees[492].

Preciado Domènech acknowledges the economic constraints imposed by the reformed Art. 135, Spanish Constitution, which corresponds to the renewed Art. 81, Italian Constitution, and provides for an obligation upon the State to respect the principle of balanced budget. However, the author advances a proposal, which sounds as an open criticism to the political and social direction the EU has taken. He

[489] The economic, social and cultural rights are recognised also by international Charters and Conventions, as the ECHR and the numerous ILO Conventions. As to the interplay between socio-economic rights and political rights in the ECHR see, inter alia, Thornton 2014; as to the social rights protection by the ILO, see, one for all, Kott, Droux 2013.

[490] Bin also notices that "the Constitutional Court often identifies in the constitutional provisions a favour for social interests, which are not among the traditional fundamental rights, as, inter alia, the favour for employees recognized in Art. 35 (Judgment 180/984) and Art. 38.2 (Judgment 286/1987)": Bin 1992, 4.

[491] On the compatibility of social rights with political and civil rights, in terms of structure and scope, see Pino 2016; on the justiciability of economic cultural and social rights, see Saura Estapà 2011 and, with particular reference to social rights, see Aa. Vv. 2010. Cf. also Rey Pérez 2007.

[492] The same is true for the liberty rights, given that "very few rights are inexpensive, especially in the complex contemporary socio-political systems": Ruiz Miguel 1994, 660, my translation.

wonders why it is not possible to establish a mechanism to ascertain the responsibility of the State that fails to fulfil a minimum level of enforcement of economic, social and cultural rights, while, to the contrary, the member States have to respond to the EU as to the implementation of the balanced budget principle, given that there are not legal constraints to a mechanism as such[493].

Without denying the significance of all of the mentioned theories, nor their interaction, the analyses of the Italian and Spanish judgments are conducted wearing the lenses of the Social State theory, which implies an understanding of the Constitution as the tool that grants substantial equality among citizens: a "socially oriented" Constitution[494]. Labour rights, understood for the purpose of this thesis as rights aimed at protecting workers and their dignity, either during their working life or after retirement, are traditionally included in the cluster of economic, social and cultural rights, as they encompass both welfare rights and liberty rights of workers. Under this perspective, both these types of rights, grouped under the hat of labour rights, necessitate the intervention of the State in order to be effective. Indeed, the public authority has to intervene not only to allocate the resources for the effective enjoyment of welfare rights, but also to "remove the obstacles" (expression used in both by Art. 3.2, Italian Constitution, Art. 9.2, Spanish Constitution) that hamper the full enjoyment of the liberty rights; in fact, an abstentionist attitude from the State, towards labour liberty rights, would lead to greater power inequality and would fail to balance in an equal way the interaction of social forces. Contemporary democracies, based upon the Social State, do not consider economic rights as absolute and immune from democratic rights. In order for this principle (which stems from various constitutional norms) to be applied, the active participation of workers and their organizations must be not only allowed, but also, granted and favoured. Therefore, public powers must actively promote the collective participation, which means that, for instance, in order to allow the exercise of the trade union freedom, the State cannot simply adopt a tolerant and abstentionist attitude[495].

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[493] Preciado Domènech 2016, 107-119; on the Social State theory see also Bernal Pulido 2007, 352-402. Consistently, Ciolli 2012b argues that the only way to overcome the recent crisis is to reintroduce the centrality of the Constitutional norms, in order to promote social equality.

[494] Expression recently used by Bavaro, in a brilliant essay on the relevance of the material Constitution for the enforcement of labour – social – rights: Bavaro 2018, 261.

[495] See the essay by Antonio Baylos Grau on the relationship between private powers and fundamental rights in Baylos Grau 2017, 10. On the qualification of social rights as fundamental rights see, inter alia, Prieto Sanchís 2016. On the value of labour in modern Constitutions, cf. the latest book by Ruth Dukes, where the author reflects on the meaning of "labour constitution" in current times and in the EU context, drawing on Sinzheimer's and

On the grounds of the theoretical discussions addressed in this Chapter and the theoretical framework adopted – the Social State theory – the following chapters assess the Italian and Spanish judgments in detail, by focusing on the type of rights and interests subject to the balancing, the way in which they have been balanced (principles applied and technique used) and by which institutional actors (legislator and/or the Courts). Even though, the main aim of the judgments' assessment is to identify the outcome in terms of enforcement of fundamental labour rights and the role of Constitutional Courts in this respect, in countries seriously affected by the 2008 crisis, it is also considered whether, in these cases, the legal reasoning is consistent with the respective national constitutional case law.

Kahn-Freund's theories about the economic constitution as a way "to meet the need for the organisation of economic life, to put to an end to the anarchy of so-called 'economic freedom', and to ensure that the economy was run so as to fulfil social ends" (Dukes 2014, 18) and the labour constitution, invoked in Germany in the 1920s, which provided for the concepts of workers' organisation, industrial action and arbitration, at a very early stage compare to other legal systems: Dukes 2014.

Chapter 3

The Italian post-crisis case law and balancing of fundamental labour rights

Introduction

The broad investigation on the application of the balancing technique in the Italian constitutional case law, and the referring principles, conducted in the first part of the previous chapter, is functional to the evaluation of a number of judgments of the Italian Constitutional Court that constitute the Italian constitutional post-crisis case law on labour rights, that is the constitutional rulings, which have decided upon legislative measures, whose adoption has been triggered by the 2008 crisis and its consequences on the national economic context.

The selected judgments can be divided into two groups: those concerning the reduction of public employees' wages and those on the reduction of the revaluation of retirement benefits. Namely, Judgment 223/2012, Judgment 310/2013, the extensive legal reasoning of Judgment 178/2015 and the recent Judgment 124/2017 belong to the first cluster. While, the controversial Judgment 70/2015 and the subsequent and consistent Judgments 173/2016 and 250/2017, the most recent of which was published in December 2017, concern the pension system.

As seen in the first chapter, most of these judgments have been widely discussed in the academic literature from various perspectives, but a detailed and comprehensive analysis of the balancing conducted by the Court and its effects on the fundamental labour rights concerned has not yet been developed, even though a number of scholars have provided interesting insights also in this respect. Therefore, this section analyses the selected judgments, by focusing on the legal reasoning of the Court in terms of elements subject to the balancing, with special emphasis on the constitutional status of fundamental labour rights, the use of the constitutional principles, the overall structure of the balancing discourse and the role played by the Court – either an active balancer or the supervisor of the balancing conducted by the legislator.

These Judgments may be addressed under various profiles, however the following pages circumscribe the analysis to the elements that are significant to trace the balancing conducted by the

Judge and its effects on the relevant fundamental labour rights, leaving aside the other, significant and anyway controversial, aspects (see Chapter 1).

Clearly, the Italian constitutional case law is far richer than the cases discussed in this thesis. Indeed, this section does not claim to systematise in an absolute and all-encompassing manner the Italian Constitutional Court's approach, but rather it aims to highlight some elements common to the most recent Judgments on fundamental labour rights, in order to trace constitutional trends in the application of the balancing technique and identify the current status of the relationship between fundamental labour rights and other interests of an economic character.

The line of thoughts of the various judgments are not fully consistent, but the analysis conducted still allows to identify common and recurrent elements, as well as highlight significant differences**.** First, the chapter addresses the role of the Court; second, the technique used to carry out the legal reasoning; third, it identifies which rights and principles have been the subject of the balancing exercise; last, it draws some preliminary conclusions on the effects of this case law on the scope of the fundamental labour rights concerned. Before focusing on the assessment of the judgments under these four profiles, a brief summary of the factual circumstances of the selected judgments is provided[496].

1. The selected judgments: a recapitulation

1.1. Public employees' wage reduction before the Court

What has been identified, for the purpose of this thesis, the first – in a chronological order – Judgment on post-crisis measures evaluates a norm, which had the effect of suspending the automatic adjustment mechanism of the Judges' salaries and reducing progressively indemnities that are peculiar to the Judiciary members. In other words, the provision at stake was freezing a number of salary items for an overall period of 5 years, from 2011 to 2015. The Court explains that the legal mechanism affected by the norm under scrutiny provides for the salary of Judges to be automatically adjusted every three years, according to a percentage calculated by the General Statistics Office (*Istituto Centrale di Statistica*) and

[496] The Italian judgments' quotations are translated from Italian by Giulia Frosecchi, but for Judgments 70/2015 and 178/2015, which have been officially translated in English, by the Italian Constitutional Court's staff.

approved by Prime Minister Decree (para. 11.2) and concludes that the principle of independence of the judiciary (Art. 104 Constitution) has been sacrificed in an unreasonable way.

In Judgment 310/2013 – that strongly reiterates the conclusions of Judgment 304/2013 on the wage block of the diplomatic staff – the Court has to assess the constitutionality of Art. 9.2 and Art. 9.21 of Decree Law 78/2010, which had provided for a block of wage rises and deactivated service seniority for university lecturers and researchers for the years 2011, 2012 and 2013[497]. The Court rules in favour of the constitutional legitimacy of the norms challenged. In a concise judgment, the Court recognises that the block represents a sacrifice for the employees concerned. However, it cannot be considered unreasonable, not even for the employees subject to the heaviest sacrifice, such as the researchers, because of three main reasons: its limited period and the necessity to contain public spending, as well as the general character of the sacrificed imposed. This is one of the first occasions in which, the Court, in order to justify the length of the block and its reasonableness, emphasises the need to respect the principle of balanced budget and enforce the reformed Art. 81 Constitution, as well as Directive 2011/85/UE, which has imposed a medium term approach to economic policies.

The second relevant judgment concerns the right to collective bargaining and the necessary temporary character of its limitation. In November 2013, the *Tribunale di Roma* and, in March 2014, the *Tribunale di Ravenna* initiated the proceeding concerning the constitutionality of certain measures provided for by reforms aimed at urgently addressing the economic and financial situation; these measures were adopted by Decree Law in 2010 and 2011 , the effects of which were partially extended by the Stability Laws for 2014 and 2015. A number of subjects, including trade unions, intervened in the proceeding. In particular, the employees of the Ministry of Justice and the CONFSAL-UNSA brought the reasonableness and proportionality arguments to the forefront. They argued that the further extension of the block of collective bargaining (for the economic part) operated with the Stability Law for 2015, had balanced in an unreasonable and disproportionate way Articles 35.1, 36.1, 39.1 Constitution, with the aim of achieving economic recovery, and in particular, with the principle of balanced budget enshrined in Art. 81 Constitution. Although in Judgment 178/2015, the Court had the

[497] Considering the referral requests presented by various regional courts the constitutionality of the measure has been challenged on the grounds of Articles 2, 3, 9, 33, 34, 36, 37, 42, 53, 77 and 97 Italian Constitution.

occasion to discuss a number of provisions and elaborate on the right to a fair remuneration (Art. 36.1 Constitution) as well, this analysis focuses on the legal reasoning concerning the freezing of the bargaining procedures for the economic part and the right to collective bargaining provided for by Art. 39 Constitution. Eventually, the Court concluded that a number of subsequent provisions limiting the right to collective bargaining in the public sector for an overall period of five years constitutes an infringement of Art. 39.1 Constitution, which protects trade union freedom and, hence, the right to accede bargaining procedures. In particular, the constitutional legitimacy of the restriction imposed by Art. 9 of D.L. 78/2010, which had already been scrutinised in previous Judgments from 2013 and 2014, are reiterated and the Court briefly recalls the legal grounds used in its case law to conclude in favour of the reasonableness of this norm (para. 12). Subsequently, the Court assesses the legitimacy of Art. 16.1.b), D.L. 98/2011, which authorized the adoption of a regulation providing for the extension until 31 December 2014 of the provisions limiting the increase of financial remuneration. Already at a very first stage of its argumentation, the Court points out that, in order to decide upon its constitutionality the contested provision has to be read in conjunction with the Stability Law for 2014 (the Court talks about an "Inseparable link") (Art. 1.453, Law 147/2013) for the part that provides for the suspension of the bargaining procedure on the economic aspects for 2013 and 2014. In other words, these norms have the effect of suspending for additional two years the collective negotiation in the public sector (para. 13). After having concluded for the non-unreasonable sacrifice of Art. 36.1 Constitution, that is the principle of proportionate remuneration, and, consequently, having dismissed the claims for damages (see paras. 14.1, 14.2), the Court finds "a clear violation of the trade union freedom", based on the fact that the suspension of collective bargaining was "so prolonged over time" (para. 15). This conclusion is supported by the evaluation of another provision that further prolonged the block of collective bargaining up until the end of 2015: the Stability Law for 2015 (Art. 1.254, Law 190/2014).

In 2017, the reduction of public employees' wages has been discussed again by the Constitutional Court. Even though Judgment 124/2017 has not attracted much the attention from academic and legal scholars (indeed, Chapter 1 could not provide an articulated literature review on this Judgment), it needs to be briefly addressed, since the judicial reasoning makes use of certain elements that are recurrent in the case law under assessment, namely the use of the principle of reasonableness, the supervision over

a proper balancing of different constitutional principles and the relevance of the economic context and the general character of the measure under scrutiny, as well as the discretionality of the legislator. The first measure discussed provides for an all-encompassing maximum limit for the economic treatment of any person working for the public administration, whether employed or self-employed, which shall not exceed the economic treatment perceived by the First President of the Supreme Court (*Corte di Cassazione*), currently set at 240000 euros (Art. 23-ter D.L. 201/2011, converted by Law 214/2011 and Art. 13.1 D.L. 66/2014, converted by Law 89/2014). The second provision assessed (Art. 1.489 of Law 147/2013 (Stability Law for 2014)), considered by the Court to be the development of the previous norm (para 9.1), prevents public bodies to pay the remuneration to those who already receive a retirement benefit, in a way that the total amount received, by summing up remuneration and retirement benefit (including annuities), exceeds the limit of 240000 euros per annum. Both norms have passed the test of constitutionality and have been found reasonable beyond any doubt.

1.2. Retirement benefits revaluation and the modulation of the Court

The extremely controversial Judgment 70/2015 discusses the constitutional legitimacy of a provision providing for a limit to the revaluation of pensions by 100%, for the years 2012 and 2013, concerning pensions worth an overall amount of up to three times the minimum INPS (National Institute of Social Security) pension, namely, Art. 24.25 of Decree Law 201/2011, converted with amendments into Art. 1.1, Law 214/2011. The Court discusses the questions of unconstitutionality on the grounds of Art. 36.1 Constitution (providing for the right to a fair remuneration) and Art. 38.2 Constitution (on the adequacy of social security benefits), read in light of Article 3.2 Constitution (on the right substantial equal treatment). Eventually, the block of revaluation of pensions is declared in violation of all of these constitutional norms.

In Judgment 173/2016, the Court evaluates the legitimacy of two norms of the Stability Law for 2014: Articles 1.483 and 1.486 of Law 147/2013. Both provisions have passed the test and have been declared consistent with the constitutional sources. The first measure addressed provided for a new modulation of the retirement benefits revaluation, which concerned all pensions, for the years 2014-2018. The legal reasoning of the Judge, which has declared the claim of unconstitutionality against this

norm unfounded, widely refers to Judgment 70/2015. Indeed, the Court does not develop a proper legal reasoning as to this norm, but rather it reiterates the crucial distinction between a block and a modulation in the revaluation of pensions, which has allowed to declare Art. 1.483 legitimate. Therefore, the analysis of this Judgment focuses on the legal reasoning developed as regards the second norm evaluated by the Court, Art. 1.486, that provided for a solidarity contribution to be detracted from the highest retirement benefits (14-30 times higher than the minimum INPS pension), for a three year period (2014-2016). The contested provision is found reasonable, "albeit to the limit". This parenthetical element of Court's conclusion is meaningful since it suggests that the solidarity contribution under scrutiny is at the edge of violating the essential content of the right to adequate retirement benefits (Art. 38 Constitution). Overall, the line of thought of the Judge is brief and at times hasty, but it offers interesting elements to be added to the general reflection on the post-crisis constitutional case law.

The last episode of a case law in search of some coherence is represented by Judgment 250/2017, released in December 2017, which responds to fifteen questions of unconstitutionality raised by several ordinary Courts and assesses the legitimacy of three norms concerning the automatic revaluation of pensions. One of them, namely the question referring to Art. 1.483, has been solved mostly on the grounds of previous case law. Therefore, this section focuses on the other two norms and the elaborated legal reasoning that have declared their constitutionality. Art. 24.25 and Art. 24.25-bis of D.L. 201/2011, as substituted by Art. 1.1)-1) of D.L. 65/2015, have been adopted with the explicit aim of implementing Judgment 70/2015 and amend the regulation on the automatic revaluation of pensions censured by that Judgment, in compliance with the principle of balanced budget and the public finance targets. In particular, paragraph 25 rules out any automatic revaluation for retirement benefits six times as high as the minimum INPS benefit and provides for a revaluation based upon decreasing percentages for retirement benefits between three and six times the INPS minimum, for the years 2012-2013. Paragraph 25-bis has to do with the so-called *trascinamento*: the norm regulates the percentage of the revaluation for the years 2012-2013 recognised in order to determine the automatic revaluation for the years 2014, 2015 (20%) and 2016 (50%). Both provisions are declared legitimate because they do not affect the adequacy of the retirement benefits, precisely due to the application of the progressivity criterion, which ensures the conservation of the purchasing power and resistance to the erosion.

2. The role of the Court

In these Judgments, the Court has not conducted directly the balancing, but rather it has assessed the balancing conducted by the legislator, acting as a supervisor of the legislative initiatives, in dialogue with the legislator and with due regard for its discretional competences. In this respect, a sentence of the controversial Judgment 70/2015 is representative: “the legislator must operate on this terrain in striking a correct balance whenever the need to make cost savings arises”. In light of this, the Court draws attention to the generic justification provided by the legislator for the contested norm, arguing that it fails to explain “why financial requirements should necessarily prevail over the rights affected by the balancing operation”, nor it is supported by technical documents produced for this purpose. This paragraph confirms that the Court unquestionably understands the legislator as active balancer of conflicting interests. Indeed, it concludes that the right of pensioners to maintain the purchasing power, protected by constitutional norms, “has been unreasonably sacrificed in the name of financial requirements which are not illustrated in detail” (para. 10).

Similarly, in Judgment 124/2017, the Court states that the legislator has "to balance numerous values of a constitutional status", considering that the limited resources available have to be allocated in a proper and transparent way (para. 8.1). In this occasion, probably with the aim of providing guidance to the legislator, the Court makes some examples of constitutional value that may be subject to the balancing process, for this purpose, i.e. Art. 3 Constitution (equal treatment), Art. 36.1 Constitution (proportionate remuneration), Art. 38.2 Constitution (adequacy of the retirement benefits) and Art. 97 Constitution on the smooth running of the public administration. Quoting from its case law, the Court adds, already at this stage of the judicial reasoning, that also the establishment of a maximum limit for the combination of remunerations and pensions affects various constitutional values, again it makes what seems to be a non-exhaustive list, which aims to give the legislator certain indications, by mentioning Art. 4 on the right to work, Art. 38.2 and Art. 2 on the “solidarity between the different generations that interact in the labour market” (para. 8.2). However, the Court stresses that this interference is allowed if the values concerned are *balanced* and the measure is *not manifestly unreasonable*. In the same judgment, as concerns the second norm under scrutiny, the Judge underlines

that "*the legislator is called upon* to ensure a systematic, and not fragmented, protection of the constitutional values at stake" (para. 9.2, italics added). Therefore, the Court is making clear that it is up to the legislator to conduct the reasonable balancing, while the Court is intervening only at a later stage and in a dialectic way with the legislator.

In Judgment 223/2012, by quoting Judgment 111/1997, the Court points out that also as regards public fiscal matters and the compliance with the principle of proportionate and progressive tax contribution (Art. 53), which is expression of the principle of equality (Art. 3), "the scrutiny of the Court …. consists of a 'judgment on the reasonable, or unreasonable, use of the legislator of its own discretional power'" (para. 13.3.1). Hence, the Court does not interfere with the competence of the legislator and its main faculty, that is the discretionality, but rather it intervenes to recall the limit of this discretionality (paramount in a democratic system), that is a reasonable exercise.

In addition, in Judgment 223/2012, the Court carries out the legal reasoning by considering, first of all, the reasons why the legislator has originally put in place the automatic mechanism tackled by the norm under scrutiny and how these reasons have been elaborated by the relevant case law. In a similar way, in Judgment 70/2015, the Court investigates on the rationale of the overall legislation on the automatic revaluation of pensions in order to identify the aim pursued. This evaluation, carried out by reviewing norms providing for temporary suspension, or reduction, of such a mechanism – and the respective constitutional judgments where they exist –, allows the Judge, as a first step, to identify the intention of the legislator who has designed such a mechanism, consolidated in the Italian legal system also thanks to a consistent constitutional case law. So, for instance, the assessment of a previous judgment on an analogous norm serves the purpose to identify the criterion to be applied in order determine the legitimacy of a provision that imposes a sacrifice on a fundamental right (in that case the defence of the purchasing power of pensions is the criterion that justifies the sacrifice of Articles 36.1 and 38.2 Constitution). The assessment in light of the norm's rationale, and respective case law, reflects the will of the Court not to be the main character of the balancing process, but rather the supervisor of the consistency with the whole legal system of the new balancing of interests conducted by the legislator and expressed in the norm under scrutiny.

In few cases, the legal reasoning has helped to define the labour rights at stake and their content. However, it cannot be said that the Court has conducted what has been called in the academic literature the "definitional balancing", that is a balancing finalized to an advanced understanding of a fundamental right. Indeed, the only moment in which it has actively conducted the balancing is the decision to declare the supervening unconstitutionality of the provisions discussed in Judgment 178/2015. This ruling of supervening unconstitutionality is the only case in which the Court has acted as an active balancer, by modulating the effects of its judgment to balance the right to access collective bargaining procedures, which has been unlocked by the Court starting from the day of the publication, with the aim to preserve the stability of the public budget, which, in fact, has not been touched by the ruling. Indeed, the Court declares the "supervening unconstitutionality" of the freeze of collective bargaining procedures, with effect from the day after the publication of the Judgment. As a consequence, the perpetration of the effects of the norms at issue beyond the publication date is to be considered unconstitutional, which, in practice, imposes upon the public body a duty to initiate the bargaining procedures with the public employees' representatives as soon as possible. On the contrary, the situation created by the norms under scrutiny in Judgment 178/2015 up to the day of the publication is accepted as constitutionally legitimate. The choice to adopt this kind of constitutional decision – quite controversial in the academic literature – can be attached to a will of the Court to tackle the intention to give structural effect to the block, and its possible future crystallization, rather than the norms per se, thus completely avoiding the risk of interfering with the legislator's discretionality.

At the same time, in substantial terms, with the new start of the collective negotiation the social partners cannot demand, for the new collective agreement, a restoration of the missed improvement that would have been achieved if the collective negotiation would have taken place regularly, inasmuch as the interruption of the bargaining procedures is constitutionally illegitimate only starting from the day of publication and not for the whole 5 years of effective block. Hence, this type of ruling saves entirely the effects of the suspension, that is the public expenditure restraint and the collective interest in a "rational distribution of resources". In that sense, the modulation of the temporal effects of the Judgment constitutes the balancing operated by the Court, which consists properly in condemning the attempt to structurally sacrifice the right to collective bargaining, while at the same time preserving its public

financial effects. On the contrary, in the course of its legal reasoning the Court acts as a supervisor of the balancing operated by the legislator. It is noteworthy that this rare case in which the Court has actively balanced the constitutional interests in conflict has been strongly conditioned by an attentive evaluation, by the Court of the financial context and the public economic needs (on the role of the economic and legal context in the selected judgments, see further in this Chapter).

However, besides the concluding moment in which it has released the ruling of supervening unconstitutionality, also in Judgment 178/2015, the Court has acted as a supervisor, as proved by the attentive analysis of the norms concerned, which has been carried out in order to detect the intention of the legislator, which is a decisive element to understand whether the provision is reasonable. In a similar way, in Judgment 173/2016 and Judgment 124/2017, the assessment of the intention lying behind the norms under scrutiny has been crucial to conclude for their legitimacy. In particular, in the latter case, the intention of the legislator to set a "foreseeable and general limit" to the high professional's emoluments has been an important argument in favour of the legitimacy of the contested norm.

Last, in several occasions, the Court stresses the relevance of the discretionality of the legislator, reiterated, for instance, in the already quoted Judgment 223/2012, as well as in Judgment 173/2016 (see para. 8.6). In Judgment 124/2017, the concluding points made by the Court emphasise the discretionality of the legislator, which is allowed to reconsider the limits on the combination of remunerations and pensions for persons working for the public administration, in light of public spending trends in the economic and social context. However, in this forward-looking statement the Court does not fail to point out that the legislator can exercise its discretional power only if an attentive assessment of the long term effects of further restrictive measures is conducted (para. 9.4). While in Judgment 70/2015, the discretional power of the legislator is not put into question, but it is pointed out that this discretionality must be exercised in compliance with Art. 36.1 (right to a fair remuneration) and Art. 38.2 (right to an adequate pension), that, read jointly, guarantee a full implementation of the principle of substantial equality (Art. 3.2) (para. 8). The relevance given by the Court to the discretionality of the legislator is a crucial feature of the entire Judgment 250/2017, not only because the legal reasoning initiates by pointing out that the discretionality of the legislator does exist, but is limited by the reasonableness criterion, but also because of the dialogue established with the legislator. In fact, the Judge recognizes

that the legislator, in the attempt to implement Judgment 70/2015, has newly balanced the values and constitutional interests at stake by adopting the provisions under assessment. Therefore, says the Court, the norms at stake, in their new formulation, do not represent a "mere reproduction" of the provisions declared unconstitutional in 2015, to the contrary they are characterized by "relevant novelties" and have been adopted promptly (paras. 6.1, 6.2). The consideration given to the technical reports attached to the measure under scrutiny to justify the economic restrictions on retirement benefits is a further confirmation of the respectful attitude towards the legislator's competence. Also in this latest Judgment, the Court has acted as a supervisor, which is confirmed by an uncontroversial sentence, where it states that the technical reports explanatory of the legislative choices "represent an instrument for the *verification* of the legislator's choices" (6.5.1, italics added) (although the reference to the technical documents carries along other criticalities, addressed in the next section).

The capability of the Court to remain a warrantor of the balancing conducted by the legislator and do not become a direct balancer of conflicting interests solves the doubts, often raised by both the academic literature and the public opinion, on the danger of a political role of the Constitutional Court, since it tackles the root causes of the problem: the Court does not invade the legislator's competence, but carries out a supervision at a second stage, in case an ordinary Court raises doubts over the legitimacy of the legislative act.

Furthermore, the different role of the Court is expressed also by the evidence that, while, in general, the ordinary norms are not preceded by a structured justification of the balancing conducted, which shall include an extended reflection over the constitutional rights eventually sacrificed and, on the other hand, the reasons that make this sacrifice legitimate, the constitutional judgments (albeit with the due differences and without a recurring scheme) provide for a rich legal reasoning that investigates the alleged balancing of the legislator. The fact that a ruling may result in the unconstitutionality of a norm, and therefore its cancellation from the legal system, which entails that the matter concerned turns out to be regulated differently from what the latest legislator had decided, does not mean that the Court has acted as a legislator. Indeed, the Government and Parliament remain entitled to adopt a new regulation on the matter, which modifies the legal state of play as set by the constitutional judgment, as long as this new act is respectful of the constitutional rights, as interpreted by the Constitutional Court. In this sense,

in Judgment 178/2015, final paragraph, the Court states: “it will be up to the legislator to restart the usual dynamic of collective bargaining”. The external role of the Court, which provides guidelines to the legislator, is exemplified in Judgment 70/2015, where the Court strongly refers to its case law (Judgment 316/2010) and grounds its conclusions on a warning given in a previous ruling, which was advising the legislator that an “indefinite suspension” or a “frequent repetition” of measures as the one at stake would have affected the purchasing power of pensions, therefore exposing “the system to evident tensions with the mandatory principles of reasonableness and proportionality” (para. 9). This scenario, in which the Constitutional Court and the legislator build a constructive dialogue, is nothing but the fulfilment/enforcement/application of the division of powers that grounds the contemporary democracies.

3. The technique applied

Ascertained that the Italian Constitutional Court mostly exclusively supervises on the balancing conducted by the legislator, let us focus, at this stage, on the criteria and technique applied by the Court to carry out its warrantor role as well as on the evidence that the post-crisis case law provide in this respect. This aspect is addressed by assessing, first, the extent of systematization of the legal reasoning (having in mind the proportionality test model) and, second, the indications provided from the selected judgments as regards the meaning of the principle of reasonableness and its relationship with the criterion of proportionality in the Italian legal system.

3.1 Seven judgments and the inconsistent structure of the legal reasoning

As far as concerns the structure of the legal reasoning, the judgments assessed are heterogeneous and, although in some cases the Court has attempted to systematize its arguments, they fail to provide a clear and consistent idea of the argumentative technique applied by this Court. Moreover, the selected case law can be hardly used to argue that the Italian Constitutional Court implicitly applies the proportionality test. Even thought, some moments of the proportionality test are encountered throughout the legal reasoning, as in Judgment 124/2017, where the legitimacy of the aim pursued, that is the general

interest, plays a decisive role and is also based on the evidence that the resources saved by the contested provision have been reallocated for the public benefit.

Judgment 178/2015 provides a clear example of the relevance of the assessment of the contested norm's aim, for the Italian Court. Here, by describing the content of the norm, the Court reconstructs how the aim is achieved and, where the aim is deemed legitimate, it assesses the suitability of the measure to achieve its aim. However, the Court has never built its line of thought following the proportionality test. Indeed, overall, we see that the Court has plainly opted for a different approach. And, even where it has made an effort to systematize its legal reasoning and it has clarified in advance the criteria applied to conduct the scrutiny, it has done so without referring to the proportionality test, neither implicitly nor explicitly.

As a first step and consistently with its case law, the Court makes clear that in order to evaluate whether the challenged provisions are compatible with the constitutional norms at issue it is necessary to reconstruct both their rationale and their aims (para. 10) and, in particular, to decide whether a block on the bargaining procedures is unconstitutional an assessment on a case-by-case basis must be conducted (para. 10.2).

First, the Court scrutinises Article 9 of Decree Law 78/2010 and observes that the policy line of the norm is expressed explicitly in the title: "[c]ontaining expenditure in public sector employment" (para. 11). The Court does not elaborate on the constitutionality of this aim, but it seems implicit from previous considerations that the purpose of the reform is legitimate precisely in light of the reformed Art. 81.1 Constitution. It is exactly the legitimacy of the aim that allows the Judge to proceed with the constitutional balancing, given that the precondition for the balancing is met, that is the ordinary norm pursues a constitutionally protected purpose. Second, by describing the content of the norm, the Court reconstructs how the aim is achieved. This step of the line of reasoning corresponds, in practice, to the suitability sub-test of the systematized proportionality test.

Still in Judgment 178/2015, but as regards the second provision scrutinized (Art. 16.1.b), D.L. 98/2010, the Court begins by addressing the aim of the norm in the attempt to identify whether it is legitimate or not. Therefore, the evaluation of the aim, which has constituted the first step of the legal reasoning also for the first measure, is again the starting point. Nonetheless, as regards Art. 16.1.b), the

conclusions are different, not because of the aim per se, which is, in fact, the same as that of the previous provisions, but rather because of the repetition of the aim in subsequent provisions. In sum, the latest norms have the effect of putting the block "on a structural footing" and a comprehensive assessment of the norms – and their analogous aim – highlights that the impact on the constitutional values at stake is "anything but episodic" (paras. 15.1, 15.2), a circumstance that has the effect of altering the dynamic of negotiation as a whole (para. 17). Given that the provisions are found illegitimate at the first stage of the reasoning because of the analysis of the aim, there is no reason to proceed further with the assessment of the norms in relation to both the legal and/or economic context.

An implicit application of the proportionality sub-tests newly arises in the assessment of Judgment 250/2017, where the Court emphasises that the technical reports, as well as any other document that elaborates upon the financial measures, "represent an instrument for the verification of the legislator's choices" (para 6.5.1). In fact, the possibility to accede to explanatory and technical documents seems crucial for the Court to rule for the constitutional legitimacy of the norms at issue. In particular, the Court denies the unreasonableness of the provisions by insisting on the fact that the reformed paragraphs were aimed at complying with Judgment 70/2015 and by adding that a "Report", a "Technical Report" and an "Examination of the quantifications" provide for accounting data. Without going into detail, nor presenting any of the mentioned data, the Court concludes that the documents provide a comprehensive understanding of the amended paragraphs 25 and 25-bis and a highlight the "financial needs taken into account by the legislator in the exercise of its discretionality".

The choice of the Court to demand for and refer to an appropriate justification, or better to technical documents is extremely interesting (in Judgment 70/2015 it had explicitly required the legislator to provide such documents). At first, the Court's request appears uncontroversial, since it seems obvious that the weaker is the justification, the harder is for the Court to conduct a supervision of the legislator's balancing. However, the paragraph in judgment 250/2017 that refers to the "Report", a "Technical Report" and an "Examination of the quantifications" raises further questions. Indeed, this formulation leaves the impression that it is sufficient that these data are provided for the justification to be proper. It is not clear whether those documents were accurately analysed by the Court itself or they were just read and accepted. A further elaboration on the reasons why these data can be considered a sufficient

justification, which goes beyond the mere mentioning of the documents' names and the fact that they provide for accounting data, would have clarified which features a technical document needs to have in order to serve its justification purpose. In this sense, the reference to the technical documents seems just a first attempt to consider the financial reasons of the legislator and a more extensive explanation would have been necessary to clarify which accounting data can justify an impact on the enforcement of fundamental social rights. Moreover, if the Court decides to build its legal reasoning not only on the grounds of a proper enforcement of fundamental rights, but also on the basis of the financial justifications – still an open question for whom is writing – , it is legitimate to wonder whether it should also make a step further and enter into the merit of the whole State expenditure, considering whether the resources taken at the detriment of labour rights could have been found somewhere else, for instance by cutting on expenditures which do not serve the purpose to implement a fundamental right. In other words, by applying what in a number of foreign legal orders would be called the necessity test.

Another attempt to provide the legal reasoning with a marked structure can be found in the first of this series of judgments. In Judgment 223/2012, after having legally framed the principle allegedly violated by the norm under scrutiny, principle of independence of the judiciary (Art. 104 Constitution), the Court draws on its case law (in particular Judgment 299/1999), in order to identify the abstract criteria to be applied to the case under assessment and understand whether the sacrifice imposed upon the principle of independence of the judiciary is constitutional. The Judgment from 1999, taken as reference point by this Court, had addressed a sacrifice of the emoluments of public employees – hence not specifically judges – which salary was set according to an automatic adequacy mechanisms. On this ground, the Court sets out the criteria that may justify the sacrifice of the fundamental principle at stake and allow to declare the norm under scrutiny legitimate. First, there must be a need to recover the balanced budget, caused by a problematic phase of the national economy; second, the imposition of economic sacrifices shall be generalized; third, the sacrifice imposed shall be "exceptional, transitory, non-arbitrary and suitable to achieve the aim; last, the Court underlines the relevance of the non-unreasonable temporal extent of the economic restriction (para. 11.5). As a consequence, the reader of the Judgment would have expected that the assessment of the norm would have faithfully reflected the rigorous criteria traced in the first part of the legal reasoning. However, when it comes to the analysis

of the norm it fails to apply these criteria with the same strictness. In fact, it refers only indirectly to the public financial reasons of the norm – without even mentioning the constitutional interest and respective article protected – and it does not explain exactly in what sense the provision does not meet the criteria deduced from its case law ("exceptional, transitory, non-arbitrary and suitable to achieve the aim").

A positive example of structured legal reasoning, which, however, does not follow the proportionality test structure, is offered by Judgment 70/2015. This complex legal reasoning, that makes a wide use of the constitutional case law as well, can be systematized as follows. First, the Court identifies the rationale and aim of the automatic adjustment system provided for by the law reformed by the contested provision; second it detects the constitutional principles that have been implemented by the affected system; third, it explains which criterion shall guide the legislator that, with its acts, imposes a sacrifice over those fundamental principles, that is the reasonableness criterion. Subsequently, it derives from Judgment 316/210 the reasons that have justified – and may justify – the constitutionality of a measure which interferes with the automatic revaluation mechanism. In the concluding paragraph, the Court illustrates which constitutionally protected interest has been violated by the contested norm and, in line with the mentioned case law, concludes that this sacrifice is in breach of the principle of reasonableness as assessed with reference to the fundamental labour principles enshrined in Articles 36.1 and 38.2 Italian Constitution. Eventually, the Court points out that the "unreasonable sacrifice" of the constitutional right at stake is not supported by a sufficient justification. Therefore, as last statement, it concludes for the unconstitutionality of the contested provision.

In the following Judgment, strictly related to Judgment 70/2015, a further attempt to systematize the legal reasoning is made. Indeed, in Judgment 173/2016, in order to evaluate whether the constitutional principles concerned have been complied with, the Court states that a "'strict' scrutiny of constitutionality" (inverted commas at 'strict' in the original text) shall be conducted. Consequently, the judge has to determine if three requirements have been met by the contested measure, namely the norm is required to be "surely reasonable, not unpredictable and sustainable" (para. 11.1). First, the Court attempts to elaborate these concepts, then, the norm is assessed – allegedly – consistently.

Eventually, the norm "passes the 'strict' scrutiny of constitutionality" because: it acts within the overall social security system, which is undergoing a crisis phase; it contributes, as other structural or

occasional reforms adopted to manage this phase, to finance this troubled system, hence it pursues a strong solidarity goal; it only affects the higher pensions and, providing for increasing rates, fulfils the proportionality criterion. In addition, it is sustainable because of its temporary character (para. 11.2). The train of thought of this Judgment is surely interesting especially for the effort made to systematize and clarify in advance the technique applied to investigate on the constitutionality of the contested provision. However, it is striking that the Court has elaborated the described scrutiny without referring to its case law. The self-standing character of this systematization weakens its weight, at least as long as the Court does not reiterate it in its forthcoming case law, thus corroborating its validity.

3.2 Reasonableness: tracing its meaning

The Judgments assessed in this section allow to identify some crucial features of the principle of reasonableness, especially in its relationship with fundamental labour rights. For instance, in Judgment 250/2017, the Court reiterates that the reasonableness criterion, that shall guide the exercise of the discretional power by the legislator, has to be interpreted in relation to Articles 36 and 38 Constitution (para. 5.2) and it represents a proper "limit" that the legislator cannot circumvent (para. 6.5.1). In this recent ruling, the Court underlines that the principle of reasonableness is *principio di sistema* to be applied by the legislator when dealing with the legal framework for retirement benefits. In other words, it constitutes the cornerstone of the retirement benefits' legislation, and a proper justification for the sacrifice imposed upon fundamental labour rights seem to be a crucial factor for the legitimacy of a measure with an effect as such (para. 10).

However, the whole of post-crisis case law offers valuable indications to frame this concept in light of the recent legal and economic trends.

In Judgment 310/2013, drawing on its case law the Court points out that the "unreasonableness" of the contested provisions has to be excluded if the provision at issue meets certain requirements, namely: *exceptionality, transitorieness, non-arbitrariness, suitability to achieve the aim*; it is *temporarily limited*; and it responds to the *need to contain public spending* (see also Judgment 223/2012, mentioned above) (para. 13.2). Indeed, in Judgment 310/2013, the fact that the norm was enshrined in an Act

(decree law 78/2010) that provided for a wide economic intervention concerning the whole of the public employees has been a crucial factor of legitimacy for the restriction under assessment (para. 13.11).

In Judgment 178/2015, the Court explains that the reasonableness follows, first, from the general application of the contested provision (in that case Art. 9, D.L. 78/2010) to the whole public sector (as stressed also in Judgment 310/2013) and, second, from the "particular seriousness of the economic and financial international context" and the "repercussions on the national economy", which were clearly pointed out in the preparatory works (especially in *Seduta della Quinta Commissione del Senato – Commissione Bilancio – del 16 giugno 2010*). Further, and the third point, the reasonableness of a provision as such also derives from the suggestion of the Court of Auditors to urgently intervene with measures to contain remuneration in the public sector. Forth, the reasonableness derives from the fact that these measures, framed in a programmatic dimension limited to a three-year period, met the requirement of governing the public spending and the whole dynamic of remuneration in the public sector, which was substantially higher than in the private sectors of the economy (para. 12.2). In short, according to the Court, the reasonableness of this provision resides in the rationale of the provision itself, in the legal context in which it is framed and in the economic context to which it responds. Also other Judgments selected for the purpose of this dissertation confirm that the "reasonableness" of a norm strictly pertains to the "overall legal-economic framework, both national and European" (as explicitly stated in Judgment 310/2013, 13.4). In addition, according to the Court, it is paramount that the solidarity contribution scrutinised in Judgment 173/2016 is not "detached from the socio-economic reality", of which the pensioners are aware and, the reader can infer, the fulfilment of this requirement makes the contribution not-unpredictable. However, the context, continues the Court, does not justify a reiteration of the contribution, as to transform it in a stable "mechanism to feed the social security system". In other words, also in this case the measure is reasonable, and hence tolerated, if it is exceptional (para. 11.1).

A general understanding of the role of the principle of reasonableness can be derived from Judgment 70/2015. Here, the Court emphasises that it is precisely the constitutional case law on the principles enshrined in Art. 36.1 Constitution and Art. 38.2 Constitution that helps to identify the function of the reasonableness criterion, which "circumscribes legislative decisions and subjects its choices to the adoption of solutions consistent with the Constitution" (para. 8). This step of the legal reasoning

contributes to the definition of the reasonableness criterion, since it identifies the purpose of the hermeneutic principle. In conclusion, it is argued that the right of pensioners to conserve the purchasing power, protected by constitutional norms, "has been unreasonably sacrificed in the name of financial requirements which are not illustrated in detail" (para. 10). From this concluding reasoning of the Court, it follows that the "unreasonable sacrifice" is not a consequence of the lack of sufficient justification, in the sense that the contested provision is not unreasonable because it is not properly justified, but it is unreasonable because it violates Articles 36.1 and 38.2 Constitution, by reaching what is called in the judgment the "critical levels", which in the case of retirement benefits, are represented by the "detriment of purchasing power". Even though the Court does not mention the "essential content" of the fundamental labour right to adequate and proportionate pensions, this concept seems to find full application in the case at stake and it is reflected precisely in the conservation of the purchasing power. Indeed, the words of the Court suggest that the principle of reasonableness aims to strengthen and underline the value of the fundamental labour rights concerned from time to time, as well as to delineate their essential content. Under this view, the reasonableness criterion helps the interpreter to identify the inviolable core of a fundamental labour right, which cannot be infringed upon, not even in order to adopt a norm, which implements – competing – constitutional interests. The connection between the principle of reasonableness and the "essential content" of fundamental rights emerges also in Judgment 173/2016, where the Court argues that a contribution, deducted from the retirement benefits, has a solidarity character and is reasonable – in the sense that it does not violate Art. 38 (and the linked Art. 36 Constitution) – if it only affects the higher benefits, to be identified taking into consideration the "essential nucleus" of the pension rights, that is the minimum INPS retirement benefits.

In addition, a legislative act that partially sacrifices the principle of legitimate expectation of pension rights may anyway be "incontestably reasonable", as long as it results from a careful weighting of various factors as "the international economic crisis and its impact on the national economy" and it constitutes a measure of "strong solidarity" – not only intergenerational – which has the effect of supporting the most vulnerable part of the population and is contextualized in the overall social security system's regime (Judgment 173/2016, para. 11.1).

3.1 Reasonableness: the relationship with the criterion of proportionality

In the selected judgments, it can be observed that the Court does mention occasionally the concept of proportionality, and, even if the relationship between reasonableness and proportionality remains uncertain and there is no full consistency in this respect, some of the judgments provide guidance as to the relationship between these two concepts, which, anyway, remains highly controversial and unclear. Some moments of the lines of thought suggest that proportionality – as hermeneutic principle – in the Italian constitutional tradition does not enjoy an ontological autonomy and it is used as a synonymous of reasonableness, normally as a way to emphasise it.

An emblematic case is Judgment 178/2015, where the reasonableness criterion is expressly mentioned in a number of occasions, while the concept of proportionality seems to partially lie behind the entire reasoning of the Italian Constitutional Court, but there is no explicit reference to either the proportionality test and the three requirements nor to the proportionality principle in the legal reasoning. The concept of proportionality is, indeed, mentioned only in the concluding paragraph on Art. 9 of Decree Law 78/2010, when the Court states that the – first – sacrifice imposed to the right to a fair remuneration and the right to access collective bargaining is "neither unreasonable, nor disproportionate" (para. 12.2). Used in these terms, it seems that the concept of proportionality is applied to reinforce and complement a principle proper to the Italian constitutional case law, that is the reasonableness criterion, rather than as a self-standing criterion or a systematised tool to balance conflicting interests[498]. However, in the attempt to understand the "disproportionate" at para. 12.2, Sandulli's view could be adopted and "reasonableness" could be the principle applied to evaluate the coherence of the norm with the legal and economic system, while "proportionality" could be interpreted as the criterion used to measure the interference on the fundamental rights affected, in relation to the aim of the contested norms[499].

[498] The principle of proportionality is expressly mentioned by the Italian Constitutional Court only with regard to the proportionality of the remuneration, a key principle enshrined in Art. 36 Constitution. Therefore, judgment 178/2015 corroborates the thesis that the principle of proportionality is not a key criterion of the legal reasoning of the Italian Constitutional Court, despite the fact that the Court does conduct a form of balancing, albeit discursive.

[499] Sandulli 1975, see chapter 2.3.1.

In Judgment 70/2015, the Court has referred to the principle of proportionality alongside the reasonableness criterion - although only in one occasion - on the wave of Judgment 316/200. However, if we address this ruling in detail, in order to ascertain whether *proportionality* shall be understood as a stand-alone concept or as a term added to reinforce the concept of reasonableness, we can observe that the Court ruling in 2010 had used the concept of proportionality as an interpretative tool, but only in the concluding cited sentence, while the reasonableness criterion had been used frequently alongside the legal reasoning, therefore suggesting that even in this case the will of the Judge was not to provide autonomous status to the aforementioned concept.

The subsequent case law does not help to clarify this distinction. Indeed, even more confusing is Judgment 173/2016, where it is stated that pensions can only be affected within "sustainable limits" and the call rate "cannot be excessive" and have to comply with the "*principio di proporzionalità*, which is criterion of reasonableness of the provision" (para. 11.1). However, the Court fails to explain what is meant here by *principio di proporzionalità*, if it refers to the proportionality principle of remuneration, which completes the principle of adequacy of retirement benefits, or to an interpretative principle that supports and develops the reasonableness criterion. A puzzle, which is not solved by looking at the argumentative context either, insofar as also the meaning of "excessive" is not examined.

In Judgment 124/2017, it is underlined that the balancing between conflicting values must be conducted in compliance with the principle of reasonableness, hence, the Court says, the balancing is not "manifestly unreasonable" if all of the conflicting interests are guaranteed in an "adequate and proportionate way" (para. 8.3). Here, it expressly refers to "proportionality" as a parameter, together with "adequacy", and it clarifies that, in abstract terms, a measure is proportionate if, on the one hand, it rationalizes the public spending consistently with the available public resources and, on the other, it fully guarantees the exercise of fundamental labour rights. As far as concerns the case at stake, the reasonableness of the contested provisions is justified by two main features: the long-term perspective that frames these measures, the general interest pursued and the general character of the measures in terms of its addressees (a crucial criterion also in Judgments 310/2013 and 178/2015). In particular, what makes the remuneration limit (the first measure contested) reasonable is the objective pursued, that is the rationalization of public spending: "the provision at stake pursues the aim of containing and

rationalizing the public spending, in order to guarantee the other constitutional interests concerned, given the limited resources" (para. 8.4). As to the second norm reviewed, the Court points out that the Stability Law for 2014 does not impose an arbitrary and "disproportionate" sacrifice to the right to work of pensioners (para. 9.3). Again, the terminology used by the Court varies around the criterion of reasonableness. The concept of "arbitrariness" seems to refer to the fact that the sacrifice is objectively justified by the economic constraints. While the concept of proportionality – used in its contrary as disproportionality – is clarified by the following sentences, which point out that the right to work of the pensioner remains effective, as it can be enjoyed by the interested persons (para. 9.4)[500], the "arbitrariness" criterion is not elaborated further. Judgment 173/2016 contributes to frame the concept of arbitrariness in relation to the reasonableness criterion. Here, the Constitutional Judge recognizes the legislator's faculty to introduce a solidarity contribution on retirement benefits, but it stresses that a legislative intervention as such shall be supported by a "comprehensive degree of reasonableness" way higher than what is normally considered *lack of arbitrariness*. The message is clear, and it helps to further understand the content of the hermeneutic criterion applied by the Court: it is not enough to detect the absence of arbitrariness in the legislator's choices, in order to declare a norm reasonable (para. 11.1).

In the latest judgment, the proportionality criterion bears an analogous meaning to that of the principle of reasonableness, as seen in the previous Judgements assessed in this chapter: it serves the purpose to identify the essential content of the fundamental labour right tackled by the contested provision. According to the Court, the norm under scrutiny is the result of a fair balance. Indeed, the Court states: "the proportionality criterion was also respected", because the "substance of the pension rights" is not touched and the modulation of the revaluation of pensions, as provided for by the 2015 reform, does not constitute an exorbitant burden and, thus, it does not infringe upon the fundamental

[500] Also in this judgment, the Court has used the proportionality principle expressly with respect to a fair wage, which, indeed, according to Art. 36 Constitution, must be proportionate to the work performed. However, in a couple of cases it has referred to the proportionality of the norm per se. Nevertheless, an attentive reading of the whole legal reasoning suggests that the concept of "proportionality" is used as a synonymous to the reasonableness and it does not enjoy an ontological autonomy.

right to retirement benefits (Judgment 250/2017, para. 6.3). This sentence seems to corroborate the argument that proportionality is used as a synonymous of reasonableness.

In conclusion, as to the technique applied to conduct the constitutional scrutiny, the Italian Court confirms its tendency to adopt a less structured, albeit still logical legal reasoning, grounded upon the application of the principle of reasonableness, given that the legislator must conduct a "reasonable balance between the constitutional values" (Judgment 70/2015, para. 8). The analysis conducted suggests that the principle of reasonableness is an interpretative criterion, which serves the purpose to supervise the balancing of conflicting interests conducted by the legislator in the process of adopting an ordinary norm. This principle allows the Judge to evaluate whether the legislator, in the exercise of its legitimate discretionality, has acted not only in absence of arbitrariness (Judgment 173/2016), but also in compliance with the essential content of fundamental labour rights.

Indeed, the principle of reasonableness contributes to define the "critical levels" (expression used in Judgment 70/2015) that the legislator has to respect when it causes a sacrifice to a fundamental labour right. Which means that an effective enforcement of fundamental labour rights necessarily requires the intervention of, or better the compliance with the reasonableness criterion, which is used to identify where these critical levels are.

4. The terms balanced

In all of the assessed Judgments the balancing focus is, on the one side, on fundamental labour rights and, on the other, on the general financial interest. Overall, the fundamental labour rights concerned are the right to collective bargaining, the right to a proportionate remuneration and the right to an adequate pension (See the next section for a focus on the fundamental labour rights concerned).

Looking at the selected case law, it emerges that a careful attitude of the Court in explicitly admitting the balancing between fundamental labour rights and the principle of balanced budget enshrined in the reformed Art. 81 Constitution. Indeed, rather it often recalls, with various expressions, the general economic interest, as in Judgment 223/2012 where it refers only indirectly to the public financial reasons of the norm – without mentioning the precise constitutional interest and the respective article implemented, here the Court concludes its legal reasoning by stating that "[T]he *exceptionality of the*

economic situation that the State has to face is such as to allow the legislator to make use of exceptional instruments, in balancing the *satisfaction of financial interests* and the guarantee for services and protection needed by every citizen." (Para. 13.3, italics added). In this sentence, two main elements can be identified. First, the Court emphasises the economic context in which the measure has been approved and, second, it suggests that the terms of the balancing operated by the legislator are, on the one hand, the public financial interests, and, on the other, the social rights protected in the case at stake. Neither Art. 81 Constitution, nor the principle of balanced budget are mentioned expressly. Given this – methodological – premise, the Court elaborates on the relationship between fundamental rights and the economic and financial context: "… it is up to the State to guarantee, also under these conditions, the compliance with the fundamental principles of the constitutional system, which, obviously, is not indifferent to the economic and financial circumstances, but, with just as much certainty, [the economic and financial circumstances] cannot allow to derogate from the principle of equality that grounds the constitutional system" (para. 13.3). In this first ruling, the Court sets a clear boundary to the legislative action, by pointing out that the derogation from the founding constitutional principles on economic and financial grounds cannot be unlimited.

While at first sight Judgment 310/2013 seems to adopt a different approach, also in this case, as already mentioned in the previous chapter, the Court includes in its reasoning the financial reasons, which have supported the contested measure, but this element is not presented as one term of the balancing, it is rather used to put emphasis on the economic and legal context in which the measure has been adopted, thus going beyond a purely *legal* approach. In a key paragraph of the judgment, we can observe how the principle of balanced budget is not clearly placed in the balancing framework, while it is considered an element to be taken into account as it represents the recently amended legal context: "there is no alternative *to consider* the evolution of the overall legal-economic framework, both national and European" (para 13.4, italics added). The Court continues by stating that "[T]he recent reform of Art. 81 Constitution …. and the introduction of the expenditure rules, as well as Art. 119.1 Constitution, emphasise the duty of the public administrations to comply with the balanced budget, also in light of the general European economic context". In addition, as a unique case in the post-crisis case law, the Court refers to Directive 2011/85/UE on requirements for budgetary frameworks of the Member States (para.

13.4), with aim to draw a clear picture of the legal European framework. In conclusion, still without referring to the balancing of conflicting values, the Court states that "the expenditure restraint and rationalization, that implements the *policy* of balanced budget, imply serious sacrifices, as those under assessment, that find justification in the context of economic crisis" (para. 13.5, italics added).

In Judgment 70/2015, the Court makes a step further and points out that the mere generic reference to a "contingent financial situation" in the legislation under scrutiny is precisely the reason for the unconstitutionality of the contested provision, given that the legislator has failed to provide enough indications as to the terms that have been balanced in the process of approving the norm at stake. In addition, in the introduction to the official English translation of the judgment, it is specified that "the overall design of the legislation does not establish why financial requirements should necessarily prevail over the rights affected by the balancing operation, against which such highly invasive initiatives are adopted". "Whilst the right to an adequate pension was not absolute, any sacrifice in the name of budgetary requirements must be justified in detail." Therefore, not only the broad reference to the financial situation, as a supposed parameter of the balancing, is criticised by the Court, but also the lack of sufficient justification for the sacrifice imposed upon the right to an adequate pension (Art. 38 Constitution), counter-term of the balancing of interests, is considered a source of illegitimacy of the contested measure.

Consistently, the Court does not dare to make explicit reference to Art. 81 Constitution, inasmuch as the legislator itself has not referred to this parameter in the process of balancing conflicting interests and approving the contested measure. Furthermore, differently from the cases considered so far, in this occasion the Constitutional Judge does not even underlines the peculiarity of the economic context, limiting itself to conduct a legal reasoning, based upon the *legal* sources put forward by the legislator.

Not even the legal reasoning of the strictly connected Judgment 250/2017 includes a reflection on the economic context. However, this ruling represents a remarkable case, given that, in the attempt to build a dialogue with the legislator, the Court emphasises the fact that the legislation under scrutiny has expressly mentioned as a justification for the sacrifice imposed upon the pensioners' rights (in particular the right to an adequate pension at Art. 38.2 Constitution, as read jointly with Art. 36.1 Constitution (on the right to a fair remuneration) the principle of balanced budget (that, as already explained, is now

enshrined in Art. 81 Constitution). The absence of any explicit reference to this interest constitutionally protected had been the crucial for the declaration of unconstitutionality of the norm discussed in Judgment 70/2015 and the Court recognises that the legislator has properly understood the Court's guideline.

It is noteworthy to underline that Judgment 173/2016 just refers to the "context of crisis of the welfare state system", without identifying the constitutional article that protects the interest pursued by the ordinary norm assessed. However, here the relevance of the financial context is highlighted when the Court points out that the legitimate expectation of the pensioners is not infringed upon if the solidarity contribution "is *not disconnected from the socio-economic reality*, of which the pensioners are aware and in which they are involved" ("la realtà economico-sociale, di cui i pensionati stessi sono partecipi e consapevoli") (para. 11.1, italics added).

The tendency to adopt a careful approach towards the inclusion of the principle of balanced budget among the terms of the constitutional balancing is not confirmed by a significant Judgment, which deals with the public employee's wage reduction: Judgment 178/2015, on the freezing of collective bargaining in the public sector. This ruling raises a major issue as regards the status of the principle of balanced budget enshrined in the amended Art. 81 Constitution. To be balanced here are, on the one hand, the rights protected under Articles 36.1 and 39.1 Constitution against, on the other hand, "the collective interest of containing public spending", which, in turn, has to be addressed bearing in mind the "progressive deterioration of the equilibriums of the public finances". Although the Court had already addressed the legitimacy of a measure providing for collective bargaining suspension, caused by public financial constraints, it considers a careful evaluation of the specific case even more necessary given the recent reform of Art. 81 Constitution, from 2012, which has introduced into the Constitution the principle of balanced budget, by making "today's measures … more stringent" (para. 10.3). In short, it follows from this premise to the proper Court's legal reasoning that the principle of balanced budget, which has acquired constitutional status following the 2012 reform aimed at implementing the Europlus Pact, is going to be balanced against the fundamental rights protected under Articles 36(1) and 39(1). According to the Court, this evaluation is necessary to understand whether the protection of another constitutional "interest" justifies the sacrifice of the collective autonomy perpetrated by the ordinary

norms under scrutiny. The Court cannot be misunderstood: it adopts this approach on the grounds of its-own case law by adapting it to the current – recently changed – constitutional framework. However, a controversial element already arises: the Court clearly frames the dispute as conflict between rights and interests, which therefore have to be balanced in order to assess the constitutional legitimacy of the contested norm. In other words, it accepts the balancing between constitutional norms protecting fundamental rights and a constitutional norm, which is expression of a general interest.

Nevertheless, it is questionable whether the reformed Art. 81 Constitution is the normative expression of a general – and constitutional – interest in containing public spending, hence, in order to clarify this link an extensive elaboration from the Court would have been necessary. Moreover, the constitutional balancing is founded upon the assumption that conflicting constitutional principles and rights are expression of founding values and values cannot be hierarchically ordered in absolute terms, hence they have to be balanced on a case-by-case basis with the aim to solve the single conflict. Therefore, in light of this, the choice to accept the balancing of the principle of balanced budget with fundamental labour rights seems to imply that the principle introduced in 2012 into the Italian Constitution is expression of a founding value of the Italian legal system. Provided that the principle of balanced budget, as it is now enshrined in Art. 81 Constitution, is a novelty of the Italian legal system, a further elaboration on the value – presumably – expressed by the amended Art. 81 and the respective principle would have been necessary.

Remarkably, the ruling released two years later (Judgment 124/2017) is more careful in attaching to the recently introduced principle of balanced budget the status of *constitutional principle* – in neo-constitutional terms – representing perhaps an evolution in the Italian case law on the terms of the constitutional balancing. In this occasion, the Court recalls the need to consider, on the one hand, the "resources concretely available" and, on the other hand, the constitutionally protected value of highly professional jobs (Judgment 124/2017, para. 8.3) and it implicitly suggests that the balancing must occur between the collective interest to an adequate management of public resources and individual fundamental rights not clearly identified in this paragraph. However, from the overall text of the ruling we can deduce that it refers to the right to work (Art. 4 Constitution), right to a fair remuneration (Art. 36.1 Constitution) and right to an adequate pension (Art. 38.2 Constitution). In the next paragraph, the

Court, by underling the aim pursued by the contested provision reiterates which is the element balanced against the fundamental labour rights and it does so, once again, only in general terms, by referring to the rationalization of public spending (para. 8.4). Also in this case, the economic argument is not relevant only as an element of the constitutional balancing, but it becomes part of the broad legal reasoning of the Court, as well. Indeed, the limitedness of the resources plays again a crucial role and justifies the comprehensive predetermination of the payments the public administration can guarantee, as provided for by the norm under scrutiny. The Court stresses the value of the peculiar context, which does not allow a relative consideration of retirement benefits, on the one hand, and remuneration, on the other (para. 9.2). Albeit it is not specified at this stage, from the above, "peculiar context" shall be likely understood in both economic and legislative terms, concerning both the limited public resources and the reforms of latest years leaning towards a reduction of the public spending.

Next to the fact that in Judgment 124/2017 the Court never refers to Art. 81 Constitution, but it only mentions the need to consider the "resources concretely available", which is not exactly as referring to the constitutional principle of balanced budget, it develops a legal reasoning which is remarkable, insofar as the Court seems to lean towards a less incisive strength of the economic principles constitutionalized by Constitutional Law 1/2012. Here the Court indirectly provides some food for thought in relation to the weight of Art. 81 Constitution, even though expressly referring only to Art. 97 Constitution. In this ruling, the Court briefly mentions a key factor of the constitutional order, namely that the constitutional principles are expression of constitutional values, which have to coexist in the legal system. It shall be emphasised that, next to the social principles mentioned, when the Court refers to Art. 97 Constitution, it does not refer to the first paragraph of the renovated Art. 97, introduced by Constitutional Law 1/2012, which provides for the duty of the public administrations to ensure the balanced budget and the sustainability of the public debt, coherently with the EU legal order, but it rather includes among the norms expression of constitutional values the general principle of *buon andamento* (smooth running) of the public administration. The Court seems to take a clear stand in including among the values, which are founding the Italian constitutional order, this principle that belongs to the Italian Constitution since its enforcement in 1948, and not that of balanced budget recently and offhandedly included following the international institutions' pressure, because of a contingent economic situation.

5. Fundamental labour rights in the balance

The supervision of the balancing conducted by the legislator and the respective application of the reasonableness criterion, which have occurred in these judgments, has offered an insight into the scope and effectiveness of the fundamental labour rights concerned, in the current political, legal and economic context. Although openly and repeatedly admitting the possibility for the legislator to impose a sacrifice on fundamental labour rights, in the legitimate exercise of its discretionality, the Court has been very careful in assessing the legitimacy of the contested provisions and, especially, their justification. This section addresses, first, the judgments concerning public employees' wage restrictions, second, those that have scrutinized the norms affecting the regular retirement benefits system.

In the first relevant Judgment (Judgment 223/2012) the principle violated by the norm under scrutiny – the principle of independence of the judiciary (Art. 104 Constitution) – is not directly a fundamental labour right, since it immediately pertains to the division of powers in a democratic legal system and the referring articles are enshrined in Part II on the "Organization of the Republic". However, its content, as elaborated by the Court in the first part of the legal reasoning, strongly pertains to the domain of judges' labour rights, especially, in practice, it guarantees the enforcement of the right to a fair remuneration, given the impossibility of this group of public employees to access collective bargaining procedures (Art. 36.1 Constitution).

First, the Court suggests that, while a temporary "freezing" of the salary dynamics may be legitimate, the "unreasonable reduction" of acquired economic rights perpetrated by the contested provision goes beyond an acceptable sacrifice of the constitutional right. Indeed, the norm exceeds in an illegitimate way the temporal limit of three years (2011-2013), which is, instead, the time limit of the legislative emergency action that concerns the generality of the public employment. Therefore, we can observe that the legitimacy of a restriction as such, of a fundamental right, is also linked with the overall legal context.

Second, the lack of a transitory character of the norm under assessment, and hence its illegitimacy, stems from its non-reversible effect, in the sense that this measure influences the amount of certain salary items for the future, as well.

In conclusion, the Court stresses on the fact that this provision has the effect of creating "permanent effects of the block" of the automatic adjustment mechanism exclusively for the members of the Judiciary and it is only apparently time-limited, which triggers a violation of both the principle of equality (Art. 3 Constitution) and the various principles that protect the independence of the judiciary (Articles 100, 101, 104, 108 Constitution). As a result, the mechanism introduced by the norm under scrutiny rather than being a protective mechanism is the source of an "unreasonable discrimination", which damages only one category of public employees (para. 11.7).

However, it is widely explained that the main cause of unconstitutionality shall be identified in the surpassing of the temporal limit, which may refer to both a lack of exceptionality and transitoriness. Furthermore, the fact that the extended restriction only affected a certain type of public employees may be a signal of arbitrary decision, albeit the text of the judgment does not allow a clear conclusion in this respect.

Similarly, the subsequent judgment (Judgment 310/2013) deals with a reduction of public employees' wages (by means of freezing of the adjustment mechanisms). However, the outcome is different. The Court reiterates the conclusions of Judgment 223/2012 and underlines the difference between the previous and the present case on the grounds of the specific role of the public employees concerned with the norm discussed in the 2012 ruling and the fundamental principle that protects their function: the principle of independence of the judiciary (Art. 104 Constitution). To the contrary, Judgment 310/2013 deals with a provision that has involved university lecturers and professors, not covered by the aforementioned constitutional norm. However, unfortunately, despite the emphasis on this normative element already clarified in the previous ruling, in this judgment the Court does not take the opportunity to elaborate, not even indirectly, on any of the constitutional principles quoted, but for Art. 36 Constitution, to which it devotes a short paragraph. Here, it is pointed out that the legitimacy of an ordinary norm in light of Art. 36 cannot be assessed looking at the "single elements of the economic treatment", but rather at the "overall remuneration", hence given that the contested provision does not tackle the overall structure of the university lecturers and researchers' wages it is no illegitimate (para. 13.9).

Already at the first stage of the legal reasoning developed in Judgment 178/2015 and on the grounds of the relevant case law, the Court reiterates that a restriction of Art. 39.1 Constitution may be legitimate in "exceptional and eminently transitory situations, provided that the 'safeguarding of higher general interests' is at stake" (para. 10.2).

As regards the specific case discussed in Judgment 178/2015, the Court underlines that the structural character of the block persists even though the collective negotiation on the normative part is not suspended, given that "[t]he bargaining procedure must allow a comprehensive position to be stated regarding every aspect pertaining to the determination of employment conditions, which invariably also impinge upon the significant issue of financial aspects" (para. 15.2). On this occasion, the Court provides additional elements to define the content of the right to collective bargaining, which is not exclusively functional to the determination of financial aspects, but it is deemed to regulate the employment relationship comprehensively, thus including terms and conditions of employment in the widest sense. This argument is crucial to explain an infringement of Art. 39.1 Constitution by a legislative act, which is found in compliance with Art. 36.1 Constitution.

The structural character of the block, says the Court, "violates the principle of trade union freedom". The connection between the right to access collective bargaining procedures and the trade union freedom explicitly granted by Art. 39.1 Constitution and the fact that the bargaining autonomy is a "necessary complement" of, and functionally linked to, the trade union freedom can be derived not only from the national case law and scholarship, but also from the international sources, which apply in the Italian legal order. It is remarkable that the Court referred to both ILO Conventions and case law of the European Court of Human Rights (ECtHR). The Strasbourg Court broadly interpreted, in the Demir and Baykara judgment, that trade union freedom, guaranteed by Article 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, also includes the right to conclude collective agreements for public workers.

With regard to ILO sources, three ratified conventions were mentioned: Convention No. 151, which guarantees the right to organize and negotiate conditions of employment in the public sector; Convention No. 98, which protects the right to organize and to collective bargaining; and Convention No. 87, on freedom of association and the right to organize. The latest Convention must be read in light of the Court

the interpretation provided by the Digest on Freedom of Association, which underpins the right to collective bargaining as an essential corollary to the freedom of association in both the public and the private sector[501]. The Court also found direct support for the protection of the right to negotiate and conclude collective agreements in two other sources. The first is provided by the Council of Europe, namely Article 6 of the European Social Charter. The second is the Charter of Fundamental Rights of the European Union, Article 28, which has the same legal value as the European Union Treaties, since the entry into force of the Treaty on European Union (TEU) in December 2009. Last, the judgment contextualizes and therefore upholds the right to collective bargaining in the EU by referring to another primary source, specifically, Article 152.1 TFEU, which aims to promote dialogue between social partners without infringing on their autonomy (para. 16).

In addition, to corroborate the argument that the suspension of the bargaining and contractual provisions cannot be "extended at will", the Italian Judge expressly refers to the European Court of Human Rights (ECtHR) case law, which envisages in the time-limit a key element to determine whether a fair balance between fundamental rights of the individual and the general interest of the community is met (para. 17).

Throughout its legal reasoning, the Court makes use of expressions that refer to the circumstance that, in particular, the temporal limit has been exceeded, which had the effect of unbalancing the relationship – as in para. 17 where it refers to a "repeated prolongment" (para. 12.2, last paragraph). Furthermore, and still in light of its case law, the Court insists on the strict relationship between the three-year duration of the contractual rounds (collective bargaining) and the multi-year nature of budgetary policies (para. 12.1). This consideration contributes to identify a further element of the right to collective bargaining's content, that is the programmatic dimension of collective bargaining in relation to both the normative and the economic part.

In light of the generous legal reasoning developed, the Court concludes that what makes the sacrifice of the right to accede collective bargaining not any more bearable is "[t]he now *structural nature* of this suspension" (para. 17, italics added).

[501] Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO, 5th ed. (Geneva: International Labour Office), especially paras. 880–1064.

In Judgment 124/2017, the violation of Art. 104 Constitution, the principle of independence of the judiciary comes once again at the forefront, however in this case its violation is excluded (as opposed to the ruling in Judgment 223/2012) (para. 8.5). Indeed, in the case at stake, the general scope of the contested provision (read in a comprehensive way), together with the maximum limit set at the remuneration of the Supreme Court's President (a decent and fair wage) excludes the violation of the principle of independence of the judiciary. The element of "generality" of a norm affecting labour rights, in order to assess its legitimacy, had already been applied in 310/2013 and 178/2015. Therefore, the idea that the effective enforcement of a fundamental labour right (understanding, in this context, the principle of independence of the judiciary as a specification of the right to a fair remuneration under Art. 36 Constitution) depends also on the normative context, in the sense of the extent of generality of the sacrifice, is being strengthened.

Moreover, the legitimate limit is not only *general*, but also *foreseeable*, as can be understood from paragraph 8, in which the Court points out that the fact that the limit is steadily set at 240000 euros per annum reveals the intention of the legislator to establish a foreseeable and general limit and high-level professionals are respected inasmuch as the maximum limit is set taking as parameter the remuneration of a high and prestigious office (of the Supreme Court's President) (para. 8.6). The respect of the professional level of the work performed entails that the sacrifice is reasonable, inasmuch as it does not touch upon the core of the right to work of the claimants (Art. 4 Constitution), nor does it infringe upon their dignity. Further on, the Court recalls that "the legislator is called upon to ensure a systematic, and not fragmented, protection of the constitutional values at stake", in the specific case it refers to the principle of proportionality between remuneration and work performed (Art. 36 Constitution). The circumstance that the resources are limited plays again a crucial role and justifies the comprehensive predetermination of the payments the public administration can guarantee, as provided for by the norm under scrutiny, hence corroborating the relevance of a *foreseeable* limit. In quantitative terms, the Court expressly refers, also in this case, to the point of reference taken to set the limit, that is the First President of the Supreme Court's salary, which implies that the right to a proportionate remuneration is not sacrificed in an illegitimate way (para. 9.2).

As already seen in the first part of this chapter, in Judgment 70/2015 the question of unconstitutionality is discussed on the grounds of Art. 36.1 Constitution (providing for the right to a fair remuneration) and Art. 38.2 Constitution (on the *adequacy* of social security benefits), read in light of Article 3.2 Constitution (on substantial equal treatment). In particular, the Court argues that Art. 36.1 Constitution (right to a fair remuneration) and Art. 38.2 Constitution (right to an adequate pension), read jointly, guarantee a full implementation of the principle of substantial equality (Art. 3.2 Constitution) (para. 8). Therefore, the combination of these two constitutional principles results in a further elaboration – and concretization – of the principle of substantial equality. In the case at stake, the Court identifies in Art. 36.1 and 38.2, as development of Art. 3.2, the fundamental rights that ground the automatic adjustment system for retirement benefits. However, it also admits that these principles can be partially sacrificed by a reform of the said automatic system (para. 8).

In this occasion, the Court argues for a "strict connection" between Art. 36.1 and Art. 38.2 Constitution, on the grounds of its case law and, in particular, it stresses that in order "to avoid the occurrence of 'an untenable mismatch' between pension increases and salary trends, the legislator cannot disregard the *limit of reasonableness*" (see Judgment 226/1993) (para. 8, italics added). In other words, the principle of fair wage and that of adequate pension have to be matched by the legislator in a reasonable way.

This case is interesting in terms of content of fundamental labour rights especially because, it is the first occasion – among the judgments assessed in this dissertation – in which the Court identifies the core content of the principle of adequate retirement benefits. In this ruling, the contested provision is unreasonable, because it violates Articles 36.1 and 38.2 Constitution, by reaching what is called in the judgment the "critical levels" (para. 10), which in the case of retirement benefits, are represented by the "detriment of the purchasing power". Even though the Court does not mention the "essential content" of the fundamental labour right to adequate and proportionate pensions, this concept seems to find full application in the case at stake and it is reflected precisely in the conservation of the purchasing power.

The normative element subject to the balancing in Judgment 173/2016 can be identified by assessing, especially, paragraph 11 of the judgment. The evaluation of the legislator's balancing, according to the Court, should be conducted bearing in mind the necessity to balance "the legitimate expectation of legal

certainty, with other values constitutionally protected" (para. 11). What is meant by "legitimate expectation of legal certainty" becomes more clear in the following paragraph, where it is argued that the principle of reasonableness, the principle of legitimate expectation and the principle of the social security protection shall be applied jointly, in order to assess whether the solidarity contribution does not exceed the mandatory "limits". Indeed, the Court, while pointing at these three principles, only refers to Art. 3 and Art. 38 Constitution. Considering that Art. 3 provides for the reasonableness principle and Art. 38 for the principle of adequacy of the social system benefits, it may be deduced that the legitimate expectation, which constitutes one of the elements subject to the balancing exercise, is understood, for the purpose of this Judgement, as the legitimate expectation to an adequate pension, which turns out to be an aspect of the right protected under Art. 38.2 Constitution (para. 11.1).

In addition, in this judgment explicit reference is made to the essential nucleus of the fundamental rights concerned, which is also clearly identified. The Court argues that a contribution deducted from the pensions has a solidarity character and is reasonable, in the sense that it does not violate Art. 38 (and the linked Art. 36 Constitution), if it only affects the higher benefits, to be identified taking into consideration the "essential nucleus" of the pension rights, that is the minimum INPS retirement benefits (para. 11). In this occasion, the Court modulates the relationship between the principle of fair remuneration and that of adequateness of retirement benefits by arguing that Art. 38 Constitution is "coupled also to Art. 36 Constitution, but not in a constant and strictly proportional way" (para. 11.1). In addition, also in this case the measure is tolerated because it is *exceptional* (para. 11.1).

In the last episode of this case law in search of some coherence, Judgment 250/2017, Art. 36.1 and, especially, Art. 38.2 are again at the forefront of the balancing exercise, as interpreted by the Court. Also in this case, it is stressed that the right of pensioners can be sacrificed only in a partial and temporary way. This argument is supported by reasonable choices of the legislator, namely the fact that the revaluation of pensions is modulated according to a decreasing percentage in favour of the lower benefits, considering that the higher benefits have a stronger resistance to inflation (para. 6.5.2). The Court asserts that the negative impact of the contested provisions on the higher retirement benefits is not sufficient to affect their adequacy, which is safeguarded even if the automatic revaluation is temporary suspended, as it is the case for retirement benefits six times higher than the INPS minimum.

Indeed, these pensions enjoy a higher margin of resistance to the erosion of the purchasing power caused by the inflation (para. 6.5.3.1).

Overall, two main elements are recurrent: the relevance of the temporal element to justify the sacrifice of a fundamental labour right (exceptional transitory measures) and an increasing emphasis on the concept of core content of the fundamental labour rights, even if expressed in various ways, for which the tool of the reasonableness criterion has been paramount. Although an attentive analysis of the previous case law has not been conducted, from the case law mentioned by the Court in these judgments, we can infer that the "critical levels" of the both the right to an adequate pension and the right to collective bargaining have moved a bit further, in the sense that apparently their core content has been reduced, following the post crisis reforms.

Indeed, in the six cases selected, we can observe that the Court, on the one hand, assesses the connection between the budgetary needs and the contested provisions, in light of the overall normative context, which shall go in the direction of reducing public spending, so that there is an equal distribution of the sacrifice. On the other hand, it focuses on the temporal scope of these restrictions as a crucial element to determine whether the core content of a fundamental right has been infringed upon. The reasonableness criterion has crossed all of these moments of the legal reasoning, giving a key contribution in the definition of the essential content of the said rights.

Conclusion

In the six judgments assessed in this chapter, the Italian Court acts as a supervisor of the legislative choices and it does so in a dialogical sense. The Court attempts to complement the recognition of the legislative competences with general warnings – hence going beyond the cases at issue –, as far as concerns which rights and interests can be balanced against and how this balancing must be conducted. In particular, it emphasises the reasonableness of this balancing. Indeed, on the one hand, it recognises the discretionality of the legislator and, on the other hand, it underlines the limits of the discretional power, circumscribed by the principle of reasonableness and by the duty not to infringe upon Constitutional rights.

So, for instance, it states that "the legislator must operate on this terrain in striking a correct balance whenever the need to make cost savings arises" (Judgment 70/2015, para. 10), or that the legislator has "to balance numerous values of a constitutional status" (Judgment 124/2017, para. 8.1). Consistently, in most of the cases, the Italian Court does not attempt to balance rights and interests in conflict, but rather it looks for the norm's justification, not in the form of simple statements but proper technical documents that may explain why an interest should prevail over the other. However, the Court does not offer an analysis of these documents, where they exist, but it just refers to the fact that they were provided by the legislator. Alternatively, it attempts to identify the legislator's intention expressed by the contested norm, by reconstructing the legal and historical evolution of the legal institution.

The so called "definitional balancing" has not been conducted by this Court, either. Nevertheless, a single case in which the Court has behaved as an active balancer has been observed: Judgment 178/2015. Here, a ruling of supervening unconstitutionality has modulated the judgment's effects, in a way that the legislator could have not perpetrated its violation any further, but, at the same time, it was not obliged to impact on the public finances to reimburse the workers in view of the violation perpetrated. Also in this case the Court does not renounce to support the dialogue between democratic powers and invites the legislator to recreate the usual dynamics of collective negotiation in the public sector.

As far as concerns the techniques applied, the Italian judgments are not homogeneous and a common structure can be hardly traced, but some commonalities do exist. The judgments have different shades of rigorousness of the legal reasoning structure, and the most systematized and consistent legal reasoning can be found in Judgment 70/2015. In certain phases, the Court's interpretation reflects some steps of the proportionality test, or, at least, they present very similar features. For instance, the focus on the aim is recurrent and, in most of the cases, the Court starts by identifying whether the norm's aim is legitimate and, if so, it proceeds by assessing the suitability of the norm to achieve its aim. Nonetheless, the judgments assessed do not allow to conclude that the Italian Court implicitly applies the proportionality test.

The principle of reasonableness is confirmed as *the* interpretative criterion, which is applied by the Italian Constitutional Court in the evaluation of the legislative choices and shall guide the legislative action, in a way that goes beyond the mere absence of arbitrariness. The Court clearly affirms that this

principle is to be applied in conjunction with the fundamental rights at issue, as a guideline to their interpretation and application.

The norm's reasonableness must be assessed in light of both the rational of the norm and the economic context. In the peculiar case of a norm that aims to contain public spending, the principle of reasonableness indicates that this necessity has to be connected to a peculiar and particularly serious economic phase.

Overall, the principle of reasonableness suggests that a norm, to be constitutionally legitimate, has to limit fundamental labour rights in an exceptional, transitory (temporarily limited) and non-arbitrary way. Furthermore, as far as concerns the subjective scope of a fundamental labour right, the sacrifice imposed on a given right cannot concern, and hence affect, only a precise group of workers, but it has to be a generalized sacrifice in application of the principle of solidarity.

The relationship between the principle of reasonableness and proportionality cannot be ultimately defined by looking at the selected judgments. However, it is hardly arguable that the Court applies the proportionality as a self-standing principle. Indeed, it rather seems to be used as a rhetoric support to the concept of reasonableness.

In these judgments, the Italian Court timidly introduces the concept of essential content of fundamental rights in a couple of occasions. As regards the fundamental labour right to adequate and proportionate pensions, it uses the expression "critical levels", which, for retirement benefits, hence for the fundamental labour rights to adequate and proportionate pensions are represented by the "detriment of the purchasing power" (Judgment 70/2015, reiterated in Judgment 205/2017). However, the protection recognised to the retirement benefits seems to go beyond that essential nucleus, which, therefore, remains a floor of protection and does not become a ceiling.

The Court is careful in allowing the legislator to balance fundamental labour rights with the recently reformed Art. 81 Constitution, i.e. the principle of balanced budget, and it expressly refers to the economic context and the general financial interest only in some of the Judgments assessed, with various expressions and at various degrees. Moreover, in those cases where the economic context is identified as a justification for the contested norms, the Court specifies that this element cannot just be mentioned, but the causal link with the provision at issue must be explained (see especially Judgment 70/2015).

Art. 81 Constitution and the respective principles are never expressly recognised as terms of the balancing, even though this conclusion cannot be generalized in equal terms for all of the Judgments. For instance, Judgment 310/2013 puts strong emphasis on both the Article and the principle enshrined therein. A glaring exception is Judgment 178/2015, where the Court highlights the changed relevance of Art. 81 Constitution, following the 2012 reform, which becomes – in the Court's understanding – the normative expression of a general interest, which is to be balanced against the fundamental labour right concerned, that is the right to collective bargaining.

The selected case law contributes to define the right to collective bargaining, inasmuch as it underlines the programmatic dimension of collective bargaining in relation to both the normative and the economic part and the fact that it is not exclusively functional to the determination of the financial aspects, but it is deemed to regulate the employment relationship comprehensively, thus including terms and conditions of employment in the widest sense. About the right to collective bargaining the most interesting element of the case law at issue is surely the wide use made by the Court, in Judgment 178/2015, of international legal sources, which are not applied as proper parameters of legitimacy of the contested provision, but they still have a significant interpretative role. Indeed, ILO Conventions, the case law of the European Court of Human Rights become hermeneutic tools, which corroborate the understanding of trade union freedom as including the right to collective bargaining. Moreover, the Court refers to other supranational sources, as the European Social Charter (Art. 6) and the Charter of Fundamental Rights of the European Union (Art. 28). One of the main features of the right to collective bargaining that we can derive from this case law concerns the boundaries that the legislator cannot overcome, in particular the temporary character of its limitation.

As far as concerns the compliance with Art. 36.1 Constitution, that is the right to a fair remuneration, the Court clarifies that the interpreter has to take as reference point the overall remuneration and not its single elements. In Judgment 70/2015, Art. 36.1 Constitution is understood as strictly connected to Art. 38.2 Constitution, which guarantees the right to an adequate pension. However, this jurisprudence is not confirmed in a subsequent ruling, where the link between the right to a fair remuneration and the right to an adequate pension is weakened, albeit still recognised (Judgment 173/2016).

As to the right to an adequate pension (Art. 38.2 Constitution), this case law suggests that the core of this right is not only the minimum INPS pension, which can never be sacrificed, but also the conservation of the purchasing power of the retirement benefits, which derives from the duty to fulfil the legitimate expectations of workers.

Last, the principle of independence of the judiciary (Art. 104 Constitution) becomes, in the context of the first Judgment assessed, a fundamental labour right, in as much as it is structurally interrelated with the right to a fair remuneration of this peculiar category of public employees. This principle, apparently not belonging to the fundamental labour rights' cluster, serves the purpose of protecting one of the cornerstones of the labour system, that is the right to a proportionate remuneration, under Art. 36.1 Constitution, in relation to a group of workers that cannot determine the salary dynamics through collective bargaining. We can observe that the mentioned right (the right to a fair remuneration which also goes true the right to independence of the judiciary) cannot be limited in a structural way, nor the legislator can impose a sacrifice only on one precise category. While, in general, as regards Art. 36.1 Constitution, a generalized and foreseeable limit that respects the professional level of the work performed is allowed.

Chapter 4

The Spanish Constitutional Judgments on the right to work and the right to collective bargaining

Introduction

As for the Italian case law addressed in the previous chapter, also the analysis of the Spanish judgments selected is conducted drawing on the constitutional balancing theories developed by the Spanish scholarship and jurisprudence, which have been discussed in the second chapter of this dissertation. In particular, the extensive studies reviewed suggest that the Spanish constitutional case law should adopt the proportionality test as a technique to balance conflicting rights and interests of a constitutional nature and decide over the legitimacy of the contested norms. Furthermore, a peculiarity of this constitutional tradition is the relevance of the essential content of a fundamental right to assess and identify the unconstitutionality of contested provisions.

The Spanish constitutional case law on post crisis measures discussed in this chapter deals with a number of norms of a unique, but comprehensive and significant, Act: Law 3/2012, of 6 July on "urgent measures to reform the labour market".

The applicants maintain that these norms are infringing upon certain fundamental rights protected by the Spanish Constitution. Overall, the constitutional provisions concerned are: Art. 14 (equality before the law), Art. 23.2 (equality in participation of citizens in public affairs), Art. 24.1 (right to effective judicial protection), Art. 28.1 (trade union freedom), Art. 35.1 (right and duty to work[502]), Art. 37.1 (right to collective bargaining) y Art. 103.3 (civil servants status) of the Spanish Constitution. The focus of the next pages is on the right to work and right to collective bargaining, mostly because the claims concerning the other constitutional articles have been dismissed rather hastily. The claimants raised a substantial number of issues and most of them concerned the lack of proportionality of the measures

[502] "All Spaniards have the duty to work and the right to work, to the free choice of profession or trade, to advancement through work, and to a sufficient remuneration for the satisfaction of their needs and those of their families."

adopted, indeed the principle of proportionality was, in several cases, already invoked by the claimants themselves.

The two judgments selected are rich, extensive and consistent with each other. Overall, as already emphasised in the first chapter, the hermeneutic principles are applied in a way that raises doubts over a possible strategic use of the legal reasoning. Indeed, both in Judgment 119/2014, and in Judgment 8/2015, the Spanish Constitutional Court has ruled in favor of the constitutionality of the challenged legal provisions, to the point that its approach has been defined "maybe close to the government"[503] and surely very cautious.

Without denying the relevance of the numerous elements of these judgments that would deserve an attentive evaluation, this chapter focuses exclusively on the legal reasoning developed by the Court in order to justify the constitutionality of the challenged provisions and on the fundamental labour rights concerned.

Judgement 119/2014 has been triggered by a question of constitutionality submitted by the *Parlamento de Navarra* in October 2012. According to the claimant, Articles 4; 14.1, 14.2 and 14.3 and the fifth attached provision were infringing upon Articles 14 (principle of formal equality), 24 (right to effective judicial protection), 28 (trade union freedom and right to strike), 35 (right to work) and 37 (right to collective bargaining and the right to engage in industrial disputes), Spanish Constitution. Nevertheless, the Spanish Court admits only the questions of constitutionality as regards Art. 4 and Art. 14, paragraphs 1 and 3, of Law 3/2012.

From a labour law perspective, the latest relevant post-crisis constitutional judgment is Judgment 8/2015. On 5 October 2012, 104 deputies of the Socialist Group in Parliament and 11 of the parliamentary group *Izquierda Plural* challenged the constitutionality of a number of norms enshrined in Law 3/2012. In particular, the present chapter addresses the legal reasoning related to Articles 4.3, 12.1, 14.1 and 2, 18.3 and 8, which were deemed unconstitutional by the applicants because in violation of various Constitutional norms: Articles 14, 23.2, 24.1 (right to participate in public affairs), 28.1, 35.1, 37.1 and 103.3 (statute of civil servants) Spanish Constitution. Some of the questions of constitutionality

[503] Fontana 2016, 147.

raised in this case had already been raised, discussed and solved in Judgment 119/2014. The Court points out, at a very first stage, that the legal reasoning on those norms reiterates the same arguments developed in Judgment 119/2014 (Judgment 8/2015, para. 1, c). In addition, this Court devotes the first part of the judgment to dismiss a general claim against Law 3/2012, according to which the Law at issue "was born outside of the constitutional coordinates", in other words the applicants argue that Law 3/2012 ignores the structural and axiological framework of labour relations designed by the Spanish Constitutional model (Judgment 8/2015, para. 2).

The analysis conducted in the present chapter is structurally similar to the previous chapter. Before assessing the selected rulings and in order to have a clear picture of the legal provisions discussed by this case law, it first summarizes the content of the contested norms and the main arguments of the applicants, where relevant. Subsequently, it reflects on the role of the Spanish Court in relation to the legislative power. Third, the technique used to conduct the legal reasoning and present the arguments that support the legitimacy of the contested provisions is reviewed. Last, it identifies the constitutional rights and interests balanced against the fundamental labour rights allegedly violated. In conclusion, the chapter recapitulates the main elements that can be drawn from the selected case law and their effects on the scope of the fundamental labour rights referred to[504].

1. The contested norms

As already mentioned, all of the provisions contested in Judgments 119/2014 and 8/2015 are enshrined in Law 3/2012 and all of them have been declared legitimate, hence the questions of constitutionality have been entirely dismissed. The first, and maybe more controversial, norm among those discussed in both rulings, is Art. 4, paragraph 3, of Law 3/2012, which provides for an open-ended contract of employment with a probationary period of one year, known as the open-ended entrepreneur-support contract, *contrato de apoyo a los emprendedores* (CAE). This contract can be applied in companies with less than 50 employees. In particular, the norm at stake (Art. 4.3) is deemed unconstitutional, by the *Parlamento de Navarra,* as it is considered in violation of the right to work, that

[504] The Spanish Judgments' quotations are translated from Spanish by Giulia Frosecchi.

includes the right "to the free choice of profession or trade, to advancement through work, and to a sufficient remuneration for the satisfaction of their needs and those of their families" (Art. 35.1 Constitution); the right to collective bargaining (Art. 37.1 Constitution); the right to a fair trial (Art. 24 Constitution) and the principle of equality (Art. 14 Constitution) (Judgment 119/2014, para. 3).

Second, the Parliament of Navarra also raised question of constitutionality as concerns Art. 14.1, Law 3/2012, which amends Art. 82.3 Workers' Statute. The contested measure provides the *Comisión Consultiva Nacional de Convenios Colectivos*, and the respective bodies in the Autonomous Communities, with the power to allow the disapplication of terms and conditions agreed by workers' and employers' representatives in the generally binding collective agreements (regulated by Title III of the Workers' Statute). According to the claimants, this norm violates Art. 37.1 Constitution, in the sense that it infringes upon the constitutional recognition of the biding effect of collective agreements; Art. 28.1 Constitution, inasmuch as it hampers the exercise of the trade union freedom; Art. 24.1 Constitution, that is the effective judicial protection (Judgment 119/2014, para. 4). Only a specific norm of the amended Art. 82.3, Workers' Statute, is questioned: the possibility for each of the parties to appeal to these specific Commissions, in case the negotiating process fails. Therefore, neither the possibility to disapply the collective agreement, nor the procedures to come to a further agreement are addressed by the Court. The provision at issue establishes that "when the period of consultation between workers' representatives and the company ends without agreement", either of the parties can turn to the *Comisión Consultiva Nacional de Convenios Colectivos* – or the respective bodies of the Autonomous Communities – in order to reach a final decision. The disagreement can be solved with a decision released directly from the Commission, or with a decision taken by a mediator appointed by the same Commission. The norm clarifies that this unilateral decision, taken by a public body, has the same legal effect as the agreements concluded during the consultations. So, in short, following this provision, a public body can solve a controversy over the dis-application of a generally binding collective agreement, following the request of only one of the parties concerned, without the need for the parties to agree upon the Commission's intervention (see also the review of the norm provided by Judgment 119/2014, para. 5).

Third, in both Judgments, the applicants also question the constitutionality of Art. 14.3, Law 3/2012, as being in violation of Art. 37.1 Constitution and Art 28.1 Constitution. The contested norm amends Art. 84.2 Workers' Statute, which now provides that, as regards certain subjects, the application of terms and conditions set in a company level agreement, which can be negotiated at any time, has priority over the higher level collective agreements. The same provision establishes that the company level agreement's priority cannot be modified by inter-professional or sectorial collective agreements either. In particular, the constitutionality of this provision is questioned on three main grounds. First, it gives priority to the application of company level agreements as regards a number of subjects; second, it provides that company agreements may be negotiated at any time during the validity of a collective agreement of a superior level; third, neither the inter-professional agreements, nor the sectoral collective agreements (those regulated under Title III) can modify the priority recognised to company agreements by law. The subjects in which the company level collective agreement has priority are various, the Court summarizes them as: "given aspects linked to remuneration, working time and holidays, professional categories, systems of negotiation or work-life balance" (Judgment 119/2014, para. 6).

The following provisions have been, instead, challenged only in Judgment 8/2015. In particular, the second

group of applicants argue that Art. 12.1, Law 3/2012 infringes upon Art. 37.1 Constitution and, consequently, Art. 28.1 Constitution, because of the unilateral power given to the employer to amend conditions of employment set by collective agreements. Indeed, this authority recognised to the entrepreneur is a novelty of Law 3/2012. As also the Court underlines, the contested provision concerns the disapplication or amendment of terms and conditions established by the so called "extraestatutarios" collective agreements, which are not generally applicable, but apply only to the signatory parties and their members, which are not regulated by Title III of the Workers' Statute (Judgment 8/2015, para. 4, a).

A further norm contested only at a later is stage is Art. 18.3, Law 3/2012, which reforms Art. 51 Workers' Statute on collective redundancy. The norm at issue provides for the power of the employer to terminate the employment contracts, following a consultation period with the workers' representatives, on the basis of certain circumstances, that is if "economic, technical, organizational and

productive causes" exist. What is contested of the said norm are the ambiguous definitions of the causes that may justify the collective redundancies and the possibility for the employer not to justify further the application of a given cause. The applicants argue that the causes' contents, as framed by the legislator, violate the right not to be dismissed without a just cause (Art. 35.1 Constitution) and the right to an effective judicial control over the dismissal's causes (Art. 24.1 Constitution) (Judgment 8/2015, para. 7, a).

The last ruling assessed in this chapter concerns Art. 18.8, Law 3/2012, that amends Art. 56.2, and, consequently, Art. 23 Workers' Statute. The contested norm provides for the possibility for the employer, in case of unfair dismissal, to decide whether to reintegrate the worker by paying given indemnities (*salarios de tramitación*) or to pay an economic indemnity. This provision is challenged for being in violation of Art. 35.1 Constitution and Art. 14 Constitution (Judgment 8/2015, para. 8).

2. The role of the Court

The wide margin of discretion enjoyed by the legislator is a recurrent and strong argument in the selected case law. The Court refers to the *libertad* (freedom) of the legislator in several occasions, and mostly as far as concerns the opportunity and efficacy of the contested norms.

In Judgment 119/2014, with regard to the first norm contested (Art. 4.3, Law 3/2012), the Court starts by constraining its role and that of the judgment of constitutionality. Indeed, both the state attorney and the applicant had questioned, in their allegations, whether a long period, as the one conceived by the contested provision, can be considered a probationary period in the proper sense, or whether, to the contrary, a norm as such alters the legal substance of the probationary period as envisaged and allowed by Art. 14, Workers' Statute (*Ley del Estatuto de los Trabajadores*). Interestingly, the Court pulls itself out of this debate, upon the argument that the probationary period in the employment contract does not constitute an institution expressly provided for by the Constitution. It points out that, even though the legislator is entitled to provide for a probationary period on the grounds of Art. 35.2 Constitution, the probationary period itself is not a constitutional institution. Therefore, it is up to the legislator also the determination of its length and possible conditions. However, the Court clarifies that, albeit in this field the legislator has a wide freedom, it cannot overcome the constitutional limits. Therefore, it concludes

that the debate on whether the institution of a "probationary period for the employment contract" is respected is not relevant for the Constitutional Court, while it is relevant whether the provision enshrined in Art. 4.3 of Law 3/2012 violates or not Art. 35.1 Constitution. The Court immediately presents itself as the supervisor of the consistency of an ordinary norm - exclusively - with regard to the Constitution and not the overall normative framework built by the legislator. Indeed, in this case, the Court does not look for a general consistency of this legal institution in light of its normative development. However, the fact that the Court needs to stress on this point is surprising, since if we admit that an illegitimate probationary period is in compliance with the legal institution "probationary period", we accept that the institution itself can be unconstitutional. In fact, it can be argued that, stating whether the CAE probationary period is legitimate or not could help to define the boundaries, and, hence, the features of the employment contract's probationary period in the Spanish legal system (Judgment 119/2014, para. 3).

Nevertheless, in the following paragraph, the Court contradicts itself, by referring directly to the Workers' Statute in order to support the legitimacy of the norm's aim and the strengthen the value of the implementation by the legislator of Art. 41 Constitution (see further). The mentioned ordinary provision "provides the Government with the power to adopt reservation measures […] that aim to facilitate the placement of unemployed workers" and support stable employment, as well as conversion of fixed term contracts into permanent ones (Art. 17.3, Workers' Statute) (Judgment 119/2014, para. 3, A, e).

In Judgment 8/2015, the Court expresses clearly the extent of its own margin of action, denying its competence to enter into the merit of the legislative choice. In particular, it argues that "it is not the Court's competence to establish if the solutions adopted by the contested Law are the most correct from a technical point of view, or if they constitute the most appropriate among possible alternatives, in order to achieve the aim pursued" (Judgment 8/2015, para. 2, g). To strengthen this argument, and hence its limited scope of action, it quotes a recent constitutional judgment, that excludes the possibility for the Court to "examine the necessity of the legal provision to decide whether it is the most appropriate or the

best among the possible options"[505]. The sole aspect that, according to the Court, can be subject to its analysis is if a contested provision "complies with the mandates, rules and principles that the Constitution imposes upon the legislator". Indeed, it is again by quoting previous Judgments, that the Court argues that "every legislative option … is admissible from a constitutional point of view if it complies with the constitutional rules"[506] (Judgment 8/2015, para. 2, g). It is noteworthy that these strong and clear statements on the role of the Court in the supervision of the legislator's activity are either supported by, or direct quotations of Judgments from 2013[507], while the rest of the rich case law quoted dates back to various and diversified periods.

Therefore, essentially, in this paragraph, where the Court has not yet began to properly conduct the scrutiny of constitutionality of the contested norms, it denies the application of the proportionality test and justifies the Court's - limited – role, by underlining the wide scope of action of the legislator. That is a first and crucial moment of the Court's legal reasoning.

Also further on, in the same judgment (Judgment 8/2015), the Court, by quoting a recent judgment, points out that it is not up to the Court to evaluate upon the "appropriateness or convenience of the legislator's choice"[508], but it only has to assess whether the option picked by the legislator "in the exercise of the competence attributed by the constitution" is respectful of the "reasonable margin of freedom recognised by Art. 35 Constitution" (Judgment 8/2015, para. 7, a).

The same case law is quoted in the following decision (on Art. 18.8). Indeed, it newly quotes the Constitutional judgment from 2012: "it is not our duty/function to declare/state the opportunity or convenience of the choice made by the legislator, in order to establish whether it is the most appropriate or the best possible"[509]. The Court can only determine if the option adopted by the legislator goes beyond the margin of freedom provided for by Art. 35 Constitution, which means that the justification of the norm cannot be arbitrary or unreasonable. Also in this case, the Court concludes that "given that the

[505] Here the Court quotes literally Judgment 17/2013, 31 January, para. 11.
[506] Here it quotes Judgment 20/2013, 31 January, para. 3.
[507] Judgment 20/2013, 31 January, and Judgment 17/2013, 31 January.
[508] Judgment 198/2012, 6 November, para. 11.
[509] Judgment 198/2012, 6 November, para. 11.

justification cannot be qualified as unreasonable" it is sufficient to legitimize the contested norm (Judgment 8/2015, para. 8, b).

The case law selection made by this Court to build this legal reasoning seems to confirm that in recent times (2012 and 2013) the Spanish Constitutional Court has leaned towards a less invasive approach to the legislator's action, as well as a less rigid application of the proportionality test (see next section), and this Court seems determined to confirm the trend.

The same concept is expressed in the first Judgment where the Court states that it is not its competence "to judge upon the opportunity and efficacy" of the contested norm. A statement as such contradicts what stated in the previous paragraphs, that is that the provision at issue can achieve the aim pursued (Judgment 119/2014, on Art. 4.3, Law 3/2012, para. 3, A, f). Indeed, either a Court can evaluate the efficacy of a norm, hence, the suitability of the norm to achieve its aim, or it cannot. In that occasion, the Court upholds the State attorney argument, by arguing that "in a crisis context as the present one" such a probationary period allows to understand if the working position is economically sustainable (Judgment 119/2014, para. 3, A, e). However, the link between the phase of crisis of the country and the need to make use of a full year to understand whether the working position can be maintained is not explicated at all. Nor the Court seems to look for such a causal link in the words of the Law. Indeed, assuming that the Court shall act as a supervisor, is to be excluded that it should provide such causal link itself, but, surely, it should check on the arguments put forward by the legislator.

In a similar way, in Judgment 119/2014, paragraph 6, thus referring to the regulation of the collective bargaining structure, it states that "it is not up to this Court to evaluate the opportunity or efficacy of the legislative decision" (Judgment 119/2014, para. 6, e).

This contradiction between the theory and the practice of the Court, that on the one hand argues that it is not entitled to enter the merit of the legislative choice, but on the other supports the existence of a – invisible – causal link between the contested measure and its purpose, legitimately raises suspects of a blind support from the Court to the legislator.

Even though the Court never expressly mentions the "discretionality" of the legislator, but rather it uses words as "freedom", as a matter of fact what the Court does is to recognise a wide margin of

discretion to the legislator. At the same time, in the first Judgment, the Court does not even build a real dialogue with the legislative process.

The only moment it seems willing to build a dialogue with the legislator can be found in Judgment 119/2014, on Art. 4.3, Law 3/2012. Here, the Court links so strictly the decision to the current economic context that it feels the need to conclude by stating that the future amendments to the probationary period needs to be subject to a new and further analysis "not necessarily conditioned by the solution adopted here" (Judgment 119/2014, Par. 3, A, f). In addition, in a couple of cases, Judgment 8/2015 traces the legislative evolution of the legal institution under discussion, but only with clarification purposes (see, for instance, Judgment 8/2016, para. 7, a).

The discretionality of the legislator is also an implicit light motif, in those cases where the Court has to evaluate the compliance with Art. 37.1 Constitution (right to collective bargaining and binding force of collective agreements), as when it states: "[T]he legislator enjoys a wide margin of freedom in the elaboration of the right to collective bargaining", in the first part of Judgment 8/2015, to answer the general claim according to which Law 3/2012 would be in contrast with the Spanish constitutional model. The Court starts by pointing out that the Constitution assigns an exclusive competence as concerns both labour law (Art. 149.1.VII Constitution) and the "regulation of the basic conditions guaranteeing the equality of all Spaniards in the exercise of their rights and in the fulfilment of their constitutional duties" (Art. 149.1.I Constitution). These provisions have to be read in conjunction with other two constitutional norms. First, Art. 35.2 Constitution, that states that "the law shall establish a Workers' Statute", in order to stress the unity of the labour system as regulated by the legislator, the Court emphasises that this Constitutional article refers to *one single* Workers' Statute. Second, Art. 53.1 Constitution, which establishes that the exercise of labour rights and liberties provided for by Cap. II, Title I, may be regulated only by law (Judgment 8/2015, para. 2, a).

Subsequently the Court assesses the constitutional trade unions' role and their relationship with collective bargaining. While trade unions are recognised an important position in the Spanish system, collective bargaining is not their prerogative[510]. Therefore, still relying extensively on its case law, the

[510] On the right to collective bargaining under Art. 37 Constitution and its interpretation from the Court see further in this chapter.

Court concludes that, given that the Constitution recognises to the legislator the power to guarantee the right to collective bargaining, and this right represents "essentially a right of legal configuration"[511], "the legislator enjoys a wide margin of freedom" to regulate various aspects of the said right, as: "collective bargaining's structure, content, scope and limits" and that's because, adds the Court, the law has "a superior position in the normative hierarchy" (Judgment 8/2015, para. 2, e).

The Court concludes that "the 1978 Constitution does not draw a closed model of labour relations, nor of collective bargaining", thus, it is up to the legislator to provide for "what it considers more appropriate in each moment"[512] (Judgment 8/2015, para. 2, f). Indeed, the legislator enjoys enough freedom to choose among possible alternative options and realize its "legal concept", by taking into account "the economic circumstances" and the "social needs" that the legislator wants to address (Judgment 8/2015, para. 2, g).

The Court, in order to support the margin of action of the legislator in this field, points out that, since 1978, it has modulated the labour relations model has represented "different legislative options at the service of a concrete economic and social policy of the Government or Parliament of each time" (Judgment 8/2015, para. 2, g).

The margin of freedom left to the legislator in shaping the national labour relations system is mentioned often in these rulings. As in Judgment 8/2015 on Art. 18.8, when the Court simply states that the Court concludes that the norm is compliance with Art. 35.1 Constitution, because the legislator has acted within the margin of freedom the Constitution guarantees as to the configuration of the labour relations (para. 8, a). In the same ruling, the Court stresses that it is up to the legislator to decide on the consequences of unfair dismissal "in view of the economic and social circumstances" (Judgment 8/2015, para. 8, a).

Last, the Court recognises great relevance to the preamble of Law 3/2012. For instance, in Judgment 119/2014 the Court interprets the contested norm, and contextualizes it to the case under discussion, in the sense that the reforms on the duration of the employment contract are a "typical variable" for public

[511] It expressly quotes Judgment 85/2001, 26 March, para. 5.
[512] Here it refers to a Judgment which has been a milestone for the Spanish labour system, Judgment 11/1981, 8 April, para. 7.

authorities, “especially in periods – as the present one – of emergency as to the employment levels”. Therefore, the Court concludes, the contested provision “represents just a new provision of the legislator on the length of the labour contract and the stability of the employment”, it continues by asserting that this represents an attempt “to offer an appropriate answer to the situation of serious crisis of employment, as referred to in the preamble to Law 3/2012” (Judgment 119/2014, para. 3, A, e).

In conclusion, the role of the Constitutional Court in these judgments is surely not that of a “direct balancer”, in the sense that it does not conduct a constitutional balancing. Therefore, one could argue that the Court supervises the balancing of the legislator, even though the following chapter illustrates how this supervision is conducted in a – surprisingly – de-structured way. What arises from the analysis conducted so far is mainly a precise intention of the Court to frame its role and shrink it as much as possible, in order to recognise a wide margin of discretion to the legislator.

3. The technique applied

An evident evolution marks the construction of the legal reasoning from Judgment 119/2014, to Judgment 8/2015. In particular, a change in the use of the proportionality test criteria, as well as the essential content can be observed.

Overall, and with simplification purposes, we can observe that the Court tend to adopt the same structure in the first phase of its argumentation. First, it identifies the Constitutional article(s) allegedly violated. Second, it discusses the aim of the norm. Third, it evaluates if the aim is legitimate and if it implements a constitutional norm. To the contrary, the following steps, as the distinction between the legitimacy of the aim and the legitimacy of the norm are, are relatively more disorganised.

Before going to assess profoundly the – formally – different approaches and the substantial analogies between the two Judgments, it is noteworthy to underline that in both cases, the use of judicial precedents is quite wide. The Court not only quotes its case law to support its arguments, but also dialogues with its case law in “negative” terms, in the sense that it highlights the differences with the actual case that do not justify similar conclusions. For instance, in Judgment 119/2014, on the power attached to the *Comisión Consultiva Nacional de Convenios Colectivos*, the Court devotes a whole paragraph to assess the difference between the case at stake and previous judgments in which an analogous norm has been

declared illegitimate. Indeed, according to the Court, the substantial differences do not allow to come to the same conclusions. In particular, the Court insists on the tripartite composition of the Commission (workers and employers' representatives and public administration), the fact that it is not a labour authority and the need for the Commission to identify the concrete causes that justify the disapplication of given labour conditions. The Court also stresses again the justification of the norm: it is a measure aimed to favour competitively and sustainability of the companies, as an alternative to unemployment[513] (Judgment 119/2014, para 5, A, c).

In both Judgments, most of the time, the Court develops a dialectic argumentation and adopts the hermeneutic criteria imprecisely, to the point that, for instance, in certain cases the Court declares that it is analysing the proportionality and reasonableness of the norm, while in others the reasonableness of the justification. In addition, the reasonableness of the norm is, in most of the cases, assumed without being supported by insightful analyses. For instance, in Judgment 8/2015, assessing Art. 12.1, Law 3/2012, the Court starts by making some short considerations over Art. 37.1 Constitution, which has been allegedly violated by the contested provision. Second, it evaluates the aim to establish whether it is legitimate. Also in this case, the Court takes into account the general aim of Law 3/2012: legitimate aim is "to favour the internal flexibility of the companies as an alternative to job losses", which allows the companies to adjust the organization to the "economic situation" and "facilitates the rational adjustment of the productive structures to the unexpected market evolutions". The Court argues that this aim is justified and legitimate because it implements constitutional provisions and it plainly deduces that the norm has a "reasonable justification from a constitutional point of view". Here, apparently, the Court infers that the justification is "reasonable" for the only fact of being consistent with constitutional provisions (Judgment 8/2015, para. 4, a).

The following sections bring evidence of the formal differences between the two Judgments, as regards the technique used to conduct the balancing and, especially, as far as concerns the application of the suitability and necessity criteria. In addition, the ambiguous application of the ILO sources in Judgment 119/2014 is highlighted.

[513] The Court refers to Judgments 11/1981, 8 April, and 92/1992, 11 June.

3.1 The rejection of the proportionality test criteria: Judgment 119/2014

In the first judgment, the Court never refers to the proportionality test, nor to its sub-tests and structures the legal reasoning in a highly informal way, mostly focusing on the constitutional legitimacy of the aim and the counterweights provided to each contested provision. A glaring example is offered by the legal reasoning on the legitimacy of Art. 4.3, Law 3/2012, on the grounds of Art. 35.1 Constitution. First, the Court declares the limits of its role and scope of action (see above). Second, it elaborates on the constitutional norm allegedly violated (Art. 35. 1 Constitution), in light of the contested provision (see the next section). Third, it identifies the conflicting constitutional right, implemented by the contested provision (Art. 38 Constitution) and relates it to Art. 35 Constitution. The Court follows a very clear path and points out that the enjoyment of the selected fundamental right can be subject to restrictions. Indeed, the third step of the Court consists in pointing out that the "right to work", enshrined in Art. 35.1 Constitution, is not "absolute and unconditional", but "it can be subject to justified limitations in order to comply with other rights and goods constitutionally protected" (Judgment 119/2014, para. 3, A, c).

Fourth, the Court elaborates on and frames the legal institution at stake (the probationary period) and its justifications, making use of ILO sources, too. The Court continues and illustrates that the legislator, in the exercise of its "already mentioned *libertad de configuración*" (Judgment 119/2014, Para. 3 A, c, italics added) – in practice its discretionality - has instituted the probationary period, which allows the unilateral contractual termination from both parties and without justification. Thus, the probationary period represents an *exception* to the "causal character" that the termination of the employment contract by the employer must have. Interestingly, the Court adds that "as reiterated by the Court, the motivation for termination of employment is limited by the necessary compliance with fundamental rights and the principle of non-discrimination"[514], but no further elaboration on the principle of non-discrimination is provided. Furthermore, at this stage, the Court uses the International legal sources to support the legitimacy of the probationary period per se. In particular, it quotes ILO Convention No. 158 concerning

[514] In particular, it refers to Judgment 94/1984, 16 October, para. 3; Judgment 166/1988, 26 September, para. 4.

Termination of Employment at the Initiative of the Employer that allows the Member States to exclude from "all or some of the provisions of the Convention: (b) workers serving a period of probation or a qualifying period of employment, determined in advance and of reasonable duration" (Art. 2.2).

Subsequently, the Court identifies a further constitutional norm that may justify the contested provision: Art. 40.1 Constitution. By doing so, it identifies the constitutional interests in the balance, although it never expressly uses this concept at this stage.

Subsequently, the Court reviews the limitations allowed to Art. 35.1 Constitution (see further) and points out that, in abstract terms, a limitation to the right to work, to be constitutional, must be: justified by legitimate reasons; not absolute; reasonable and "proportionated to the aim pursued". In mentioning this last requirement the Court could have easily used the concepts of "suitability and necessity", however, it keeps avoiding to mention the proportionality test criteria. Nevertheless, this introduction seems to work as a theoretical description of the argumentative path that it is going to be applied. In other words, this paragraph may look like an anticipation of the technique applied to scrutinize the legitimacy of the contested norm (Judgment 119/2014, para. 3, A, c). However, immediately after, it clearly states what it is going to determine with its legal reasoning: "if the limitation to the right to work under Art. 35.1 Constitution, that can derive from this norm, provides a reasonable and proportionate justification, with the aim to guarantee other constitutional rights and goods" (Judgment 119/2014, para. 3, A, c), while the other possible steps mentioned earlier are set aside.

To assess the rationale of the norm, the Court firstly refers to the preamble of Law 3/2012, focusing in particular on the "negative consequences of the economic crisis" (Judgment 119/2014, para. 3, A, e). In addition, the Court finds the aim clearly stated in Art. 4.3, Law 3/2012: "[T]he aim and objective of the norm at stake is [….] the promotion of permanent contracts and the creation of stable employment for companies with less than 50 employees, while fostering the business initiative". On the basis of these elements, the Court confirms the strict link between the contested norm's content and its objectives, constitutionally legitimate under Art. 40.1 Constitution as well as because of an ordinary norm (see next chapter) (Judgment 119/2014, para. 3, A, e). The probationary period is understood as one of the incentives to favour companies and support employment, that is the aim of the norm, as it is, says the Court "an additional instrument to encourage the creation of employment" (Judgment 119/2014, para.

3, A, e). A statement as such, not elaborated further and not placed in the context of the suitability test, seems to contradict the will of the Court not to judge upon the opportunity and efficacy of the norm (see above, "the role of the Court").

At this stage, the Court newly refers to the mentioned ILO source, in order to support the legitimacy of the aim of the norm that provides for the one year probationary period. The Court finds the objectives of the norm in line with the ILO interpretation of Art. 2.2, ILO Convention 158, according to which States are authorized to exclude from the protection of the Convention "workers serving a period of probation or a qualifying period of employment". The Court adds a crucial condition and it recognises that the probationary period that allows such an exclusion must be "determined in advance and of reasonable duration" (Art. 2(2,b), ILO Convention No. 158). By referring to an ILO Report from November 2007 concerning a reform approved by the French government, the Court finds a peaceful solution to the issue of the interpretation of the wide concept of "reasonable". In the 2007 Report, the ILO Director General has pointed out that it is up to each State to solve this issue (reiterated in Paragraph 242, ILO Report 2014). However, the Court does recognize that the international institution imposes some constraints on the Member States, which, however, it says, are still open to interpretation. According to the ILO, the probationary period cannot be "excessively long". However, it can be "relatively long" if this is motivated by justified reasons, as the promotion of full employment. The Court points out that, in the case discussed by the ILO bodies in 2007, the two year duration of the probationary period was not found in compliance with ILO Convention No. 158, and in that occasion it was specified that "the period of exclusion from the protection [of Convention No. 158] normally considered reasonable is 6 months". However, adds the Court, "the Committee cannot exclude that a longer period may be justified in order to allow the employer to assess the economic viability and the perspectives of development of its company" (Judgment 119/2014, para. 3, A, e). In the Court's view, the aims identified by the ILO Committee that may justify a probationary period longer than 6 months are consistent with those of Art. 4.3, Law 3/2012. Provided that these arguments do not relate to periods of crisis, nor to the promotion of employment, but they may rather concern specific sectors (on the side of the employer) or tasks (on the side of the employee), to evaluate the sustainability of the employment in exceptional sectors and/or tasks, the use of the ILO norms appears stretched to the point that it

legitimizes doubts over a strategic use of this international source, with the aim to support a strategic judicial reasoning.

The Court elaborates this point further and states that the contested provision allows "not only the reciprocal knowledge" and "the verification/observation of the worker's skills", but it also "facilitates and promotes the creation of employment in small and medium enterprises", in the sense that with such a probationary period the uncertainties are reduced and, thus, the employer is more inclined to conclude open-ended contracts (Judgment 119/2014, Para. 3, A, e). What strikes here is the reiteration of the relevance of the specific aim to favour the creation of stable employment, that is: boosting the business initiative. In fact, this is the real justification for such a length, as it can be considered, or, better, it is considered by the Court as the direct implementation of a constitutional provision: Art. 40 Constitution. It is not clear, however, how such a long probationary may be useful to this aim. In other words, the causal relation is left unspoken.

When it comes to assess the reasonableness of the norm, the Court starts reminding that the ILO (ILO Report, June 2014) had been called upon to evaluate the reasonableness of Art. 4.3, Law 3/2012. However, the international body refrained from providing an opinion on this point, because it missed sufficient grounds to elaborate a strong conclusion. Differently, the Court states, it is in its full competence and duty to assess the reasonableness of the provision. However, suspects of a strategic use of the ILO sources arise again given that the Court does not even mention the following paragraph of the same Report, which states: "Consequently, the Committee invites the Government to provide information on the evolution of the "open-ended entrepreneur-support contract" and, in light of the information available, to examine the possibility of adopting measures, in consultation with the social partners, to ensure that this contractual arrangement is not terminated at the initiative of the employer in order to avoid in an abusive manner the protection provided for in the Convention." (ILO Report, June 2014, para. 247).

The analysis of reasonableness and proportionality of the contested measure must be conducted, says the Court, by taking into account a number of elements of the CAE. At this stage, it partially anticipates its conclusions by stating that the contested duration of the probationary period "is subject to important

limitations or legal conditions, some of which translate into parallel guarantees in favour of workers and employment" (Judgment 119/2014, para. A, 3, f).

Therefore, in the process of assessing reasonableness and proportionality, the Court points out that, first, Law 3/2012 sets a temporal limit, which is based on the unemployment rate criterion: the CAE is not any longer applicable as soon as the unemployment rate falls below 15%. This element, according to the Court, is expression of the fact that the legislator conceives this measure as having a short-term nature, thus it reflects the intention of the legislator not to make the one-year probationary period structural. Second, the Court points out that also the "objective scope" of the norm is limited: only companies with less than 50 employees can make use of the CAE. The Court adds arguments in support of such a rationale: these are the companies that most rarely conclude open-ended employment contracts, "because of the economic risks and vicissitudes". Third, the Law sets cautionary provisions (*cautelas*) "aimed at dissuading the employer from declaring the dismissal before the probationary period has expired". In short, the Law allows the employer to enjoy the economic incentives only if the worker is not dismissed before three years have passed, and the overall employment level remains stable during the first year of CAE (both apply only in case of unjustified dismissal) (see Art. 4.7, Law 3/2012).

Considering especially the third point, the Court seems to suggest that the norm is reasonable and proportionate because there are economic disincentives to unjustified dismissals. Which can be rephrased as follows: in theory, it is illegitimate to dismiss the worker in that case, but given that the state pays the employers not to do so, the worker's right can be considered respected, or at least violated in a reasonable way.

Last, the Court argues that the contested provision is connected to other measures that "can contribute to temper the burdensome character the one-year probationary period may have for the worker". These provisions are: the contribution accumulation for the purposes of unemployment benefits, which are paid once the contract is over; the consolidation in open-ended unemployment contract once the probationary period has finished (Judgment 119/2014, para. 3, A, f). Nevertheless, this is a structural feature of the contract, that impacts on the right of the worker once the probationary period is over, it does not protect in anyway the worker's right during the probationary period.

The Court, in light of the "appropriate balancing of constitutional rights and goods/interests in conflict", concludes that the contested norm that introduces a probationary period of one year, constitutes a reasonable measure, given both the current economic context and the link with the unemployment levels. The Court adds that the norm passes the "rule of adequate proportionality between the sacrifice to the right to a stable employment and the benefits that it can represent for the individual and collective interest to the promotion and creation of stable employment" (Judgment 119/2014, para. 3, A, f). The linguistic nuance can get lost in translation, hence it is important to emphasise that the Court has not used the expression "test of proportionality", but it has opted for "rule of adequate proportionality". Indeed, we can observe that even if the Court, in its conclusions, talks about a balancing, it has not structured the legal reasoning following the technique applied by the Spanish Constitutional Court, that is the proportionality test.

When it comes to judge upon the constitutionality of Art. 4.3, Law 3/2012, with reference to Art. 37.1 Constitution, the Court follows a partially analogous path. First, it defines and frames in abstract terms the right to collective bargaining, with a strong focus on the limits of this right. Second, it evaluates the legitimacy of the norm. Indeed, addressing the contested measure specifically, it admits that a norm as such constitutes a limitation of the right to collective bargaining. Therefore, for this limitation to be legitimate it must provide a "reasonable and proportionate justification, in compliance with constitutional rights and goods". Hence, says the Court, the analysis of the legitimacy of a norm that restricts the scope of action of the collective negotiation must be analysed on a case by case basis (Judgment 119/2014, para. 3, C, b). The principles of reasonableness and proportionality are mentioned again by the Court, as features that the norm's justification must have to be legitimate.

In order to discuss the legitimacy of the norm's justification, the Court expressly refers to the legal reasoning conducted as regards the alleged violation of Art. 35.1 Constitution, by the norm providing for the one year probationary period. It peacefully states that the norm has the "same legitimate, reasonable and proportionate justification", given that "the arguments presented apply also here". Henceforth, the Court summarizes synthetically the legal reasoning developed as far as the violation of Art. 35.1 Constitution is concerned. It underlines the "serious economic crisis context" and the "high unemployment rate"; it recalls the duty of public powers to adopt a policy oriented to the full

employment (Art. 40.1 Constitution), which is an aim pursued by this measure; it stresses that the application of the contested provision is subject to certain legal constraints. All that make the norm reasonable and proportionate (Judgment 119/2014, para. 3, C, b).

To scrutinize the remaining contested provisions, in Judgment 119/2014, the Court extensively relies on the previous legal reasoning, in both structure and content. For instance, the whole ruling on the last norm assessed is quite dismissive, compared to the previous ones and the Court immediately anticipates that the allegations against the norm are rejected because of "the mandate given by Art. 37.1 Constitution to the legislator to guarantee the right to collective bargaining and the binding force of collective agreements", already assessed in the same judgment (Judgment 119/2014, para. 6).

In analysing the compliance of Art. 14.1, Law 3/2012, with Articles 36.1 and 28 Constitution, the Court expressly reiterates some features of the right to collective bargaining already discussed with regard to the norm providing for the one-year probationary period and it clearly states that the pattern that it is going to follow is the same as for the analysis of the other norms contested (Judgment 119/2014, para. 5, A).

Hence, it elaborates on Art. 37.1 Constitution, which, the Court concludes, is a right subject to limitations. Once it has traced the main features of the fundamental labour right allegedly violated, the Court scrutinizes the contested norm: Art. 14.1 (Judgment 119/2014, para. 4, B). First, it defines the norm an "exception" to the right provided for by Art. 37.1 Constitution, not a violation. Then, the Court observes that this norm has a constitutionally legitimate aim, and, also in this case, the Court points out that the protection of the employment levels is a duty of public powers, as provided for by a precise constitutional norm: Art. 40 Constitution (Judgment 119/2014, para. 5). The Court addresses the concrete normative case. It starts by assessing the contested provision in light of Art. 37.1 Constitution "and, by extension, of Art. 28.1 Constitution" and it recognises that a norm as such (that is a decision of the Commission according to the procedure provided for by Art. 82.3) may have an impact on and restrict the binding effect of the collective agreement (Judgment 119/2014, para. 5, A).

Therefore, first it assesses whether "the restriction to collective negotiation procedures and binding force of collective agreements that stems from the amended Art. 82.3 Workers' Statute reflects a

legitimate aim, in order to guarantee other constitutional rights and goods, and if, in addition, it complies with the criteria of reasonableness and proportionality" (Judgment 119/2014, para. 5, A).

The Court plainly (in the sense that it does not analysis the various factors) states that a norm with an aim as such attempts to "facilitate the business sustainability and avoid recourse to the extinction of the employment contracts". According to the Court this is a "constitutionally legitimate aim" that implements specific constitutional provisions (Art. 35.1 Constitution; Art. 38 Constitution; Art. 40.1 Constitution) (Judgment 119/2014, para 5, A, a).

Second, once the legitimacy of the norm's justification is declared, the Court assesses whether the contested norm is reasonable and proportionate, in order to decide if it is constitutionally legitimate. In order to do so the Court addresses the functioning and structure of the procedure ex Art. 82.3 Workers' Statute (Judgment 119/2014, para. 5, A, b). In this analysis, the Court identifies 6 points that shall support the reasonableness of the norm.

First, in case the causes to justify the dis-application are met, the Commission will be able to adjust the final decisions in light of a general evaluation and it may also consider the disapplication of employment terms with "varying degrees of intensity".

Second, the Court underlines that the Commission cannot decide to disapply the whole agreement, but only given subjects listed at Art. 82.3, which in sum, concern working time, including shifts, remuneration system productivity and tasks. The fact that these subjects are numerous and regard delicate and substantial aspects of the employment relationship does not ring any bell to the Court as to the possible violations of workers' rights, that may arise from different points of view. What matters is that not all elements of the collective agreement can be deregulated: the quantity is saved, the quality is not an issue. Furthermore, when it says that "the employment conditions and subjects selected by the legislator are directly connected with the causes that justify the disapplication", it enters into the merit of the legislative choice, upholding it, without, however, explaining this statement further. Furthermore, the Court links these causes to the "aim to defend the companies' productivity and the respective consequences on the employment levels".

Third, the Court emphasises that the Commission's decision is subject to a temporal limit. Either the decision itself sets a limit of effectiveness for the disapplication, or, in any case, the arbitral decision ceases its effects at the moment a collective agreement applicable to the company comes into force.

Forth, the Court highlights the "subsidiary character" of the Commission's interventions. Indeed, the Court reconstructs the steps to be taken before Art. 82.3 becomes applicable. First, the parties (company and workers' representatives) have to proceed with a consultation, which can lasts up to 5 days, with the aim to achieve an agreement on the disapplication. In case the parties do not reach an agreement in these 5 days of consultation, either of the parties can trigger the second step, which consists in submitting the disagreement to a commission composed by workers and employers' representatives that has 7 days to decide. If the commission is not requested, or it does not come to a decision, the parties have to apply the procedures provided for by inter-professional collective agreements. Only if these procedures are not applicable or do not succeed in reaching a decision, either of the parties can request the Commission's intervention. According to the Court, this procedure shows that "the contested provision gives priority to the collective autonomy to solve the conflict", given that the Commission represents the means of last resort, if the parties do not reach an agreement in any of the possible ways. In addition, the Court identifies a further norm that demonstrates the will of the legislator to give priority to collective autonomy: Art. 85.3, Worker's Statute. This provision states that the collective agreement have to provide for procedures to solve the disagreements that may arise in case of disapplication ex. Art. 82.3.

Fifth, the Court includes among the features that make the norm at issue reasonable nature and features of the body delivering the final decision. In particular, it underlines the tripartite and equal composition of the Commission, which is attached to the Ministry of Employment and Social Security, but it is an independent and fully autonomous body. The Commission is composed by representatives of the State administration and the most representative workers' and employers' organisations. The decisions are taken "preferably by consensus", but if not possible, by absolute majority. This system should be a guarantee precisely because of the role of the public administration's representatives, as understood by the Court. Indeed, on the one hand, the administration cannot take decisions unilaterally, on the other hand, "there is no reason to suppose that the public administration representatives' vote would be in favour of the disapplication of the agreement". According to the Court all of these elements

make the Commission independent and impartial. Last, the ordinary courts can exercise judicial control over the arbitral decision (Judgment 119/2014, para. 5, A, c).

Overall, we can observe that the legal reasoning developed in Judgment 119/2014, except for the very first steps, does not follow a clear path, neither in theory, nor in practice and disregards completely the proportionality test and respective criteria. Furthermore, it alternates, incoherently, the assessment of the justification's reasonableness and proportionality with the norm's reasonableness and proportionality.

3.2 A – formal – evolution and the empty hermeneutic categories: Judgment 8/2015

In Judgment 8/2015, the Court does refer to the three mentioned interpretative criteria that compose the proportionality test: suitability, necessity and balancing in a strict sense. At the same time, it does not apply the mentioned criteria in a rigorous and structured way. To the point that, in practice, it refuses to assess the necessity of the norm.

When the Court has to newly evaluate the legitimacy of Art. 4.3, Law 3/2012, it strongly reiterates what already argued in Judgment 119/2014 on this point (Judgment 8/2015, para. 3). Only as far as the scrutiny as regards Art. 35 Constitution is concerned, some interesting elements can be identified. The Court briefly concludes that the contested provision is in compliance with the *proportionality requirement*. In other words, there is an appropriate balancing between the sacrifice imposed to the workers' guarantees and the individual and collective benefits of this provision. The Court adds something to what had been already stated in Judgment 119/2014: "the measure is, equally, necessary and suitable to achieve the legitimate aim". It justifies such a conclusion with the argument that the employer has a concrete chance to assess both the abilities of the workers and suitability of the job. What is surprising here is not – only – the merit of the discourse, but especially the – approximate – use of criteria that had been "rejected" in the first part.

However, these criteria are used in a very vague way. In addition, all of the arguments used to support the constitutionality are not properly and rigorously attached to these categories. However, the misuse (or superficial use) of "suitability and necessity" is not surprising considering the premise to the proper rulings, where it has been argued that it is not up to the Court to assess whether other and better measures

would could have been approved (see above, "the role of the Court"). Indeed, it is doubtful how could the Court *truly* assess suitability and necessity of a norm, without judging upon the "opportunity and efficacy" of the said norm.

Interestingly, the Court concludes by recognising that "the legislator could have adopted other alternative measures". However, it adds that, "from a *strictly* constitutional perspective" (italics added), the one year probationary period ex. Art. 4.3 Law 3/2012 does not violate Art. 35.1 Constitution (while it legitimately implements Art. 40.1 Constitution) (Judgment 8/2015, para. 2, b). The reasoning is quite disorganised and the impression is that the Court admits that the legislator could have adopted different measures, but, on the other hand, this is not a direct concern for the Court, which rather considers enough for the contested provision to be legitimate the fact that it does not violate a constitutional norm. Therefore, consistently with the premise to Judgment 8/2015, the Court does not evaluate upon the necessity of this precise provision, hence, the necessity test is not needed to judge upon the constitutionality of the legislative measure.

As to the violation of Art. 37.1 Constitution, the Court just reiterates that also in light of Art. 37.1 Constitution, the justification is legitimate reasonable and proportionate (Judgment 8/2015, para. 3, c).

Again in Judgment 8/2015, on Art. 12.1, Law 3/2012, the Court starts by introducing the criteria of the proportionality test that it is going to – theoretically – apply. This is the first, and only, time in the case law discussed in this dissertation that the Court expressly refers to the three criteria and frames them from a theoretical perspective, before proceeding with the legal reasoning. In particular, it asserts that "in order to demonstrate if it is proportionate to the aim pursued", it has to assess whether the norm is: a) suitable to achieve the aim; b) necessary, "in the sense that other measures, less harmful/detrimental, do not exist to achieve the aim with the same effectiveness"; c) if the suitable and necessary measure is balanced, in the sense that it brings more advantages to the "general interest", than prejudices to the constitutional interest at issue.

As to the necessity requirement, the Court specifies that "the necessity evaluation is up to the legislator" and the Court can only assess whether the norm "has sacrificed in a clearly unnecessary way the constitutional rights" (Judgment 8/2015, para. 4, a).

Forth, the Court applies the three criteria, even though very superficially. It starts by listing the constraints linked to the measure, in order to justify the suitability of the norm. In particular, the constraints to which the unilateral modification of the employment conditions ex. Art. 41 Workers' Statue is subject. First, it can only affect *extraestatutarios* agreements. Second, it is exclusively alternative to the failure of the collective negotiation previously conducted. Third, it does not exclude the application of alternative procedures set by collective agreements. Firth, it does not exclude that the party can opt for mediatory or arbitrary procedures, either. Fifth, the unilateral amendments can be decided only if "proven economic, technical, organizational and productive reasons occur". Sixth, in certain cases the employee enjoys the right to withdraw from the contract and receive indemnities. Last, the employer's decision can be subject to the judicial control (Judgment 8/2015, para. 4, a).

From these constraints, the Court deduces that "the measure passes the suitability test, being adequate to achieve the aim legitimately pursued". In other words, the Court argues that the existence of conditions that the employer has to comply with before unilaterally amending the working conditions, and other collateral measures, means that the norm is suitable to achieve the aim. This conclusion is controversial given that the collateral measures, which function as shock absorbers, may refer to the extent of impact the contested norm may have on the constitutional right allegedly violated and not on the suitability of the measure to achieve the aim pursued. Indeed, in order to explain the suitability of the norm the Court should have elaborated on the causal relationship between the aim of the norm and its content. For instance, given that the aim here is identified as "avoiding job losses, by adapting employment to the concrete companies' conditions/necessities", it is legitimate to wonder how could the judicial control contribute to achieve this aim.

Also the necessity test is passed, according to the Court. That is because the contested provision has not created a "clearly unnecessary sacrifice of the constitutional rights". The necessity of the measure is explained by pointing out, first, the constraints to which the employer's power is subject and, second, the fact that this power is recognised to the employer only "following the failures of the negotiations with the employer's representatives". The relevance of this argument vacillates because the Court does not explain what is meant by failure and it completely disregards the fact that if the failure consists in not reaching an agreement within a certain time, this scenario can be easily achieved by the employer.

Nor it is explained why the sacrifice imposed to the fundamental labour right concerned could not be considered “clearly unnecessary”.

Last, the norm “passes the proportionality test in a strict sense, given that the measure is balanced” and this positive result, also in the third sub-test, is given to: first, the limits and guarantees provided for by the legislator; second, because its implementation implies more advantages to the right to work, than disadvantages to the right to collective bargaining” (Judgment 8/2015, para. 4, a). The contradiction between the right to work and right to collective bargaining is not clear. If the advantages are to the right to work and not to the labour market, it is confirmed that the right to work is understood exclusively in quantitative terms, being the right to a decent work, granted precisely by the dialogue between social partners and, especially, by the workers representatives’ role in collective bargaining, is considered less urgent and of a minor value.

When the question of constitutionality of Art. 14.2, Law 3/2012, is raised for the second time, the applicants challenge the necessity of the norm that provides for a priority of application of the company level agreement. In particular, it is argued that the legislator could have “opted for other options, less harmful of the right to collective bargaining and of the binding effect of collective agreements”. The applicants also provide examples of these possible alternatives (Judgment 8/2015, para. 6, b). In other words, they expressly challenge the necessity of the norm. However, instead of proceeding with the necessity test the Court recalls the conclusions reached in Judgment 119/2014 and argues that the legislator has legitimately decided to give priority to the criterion of “closeness” of the workers’ representative to the company, when it comes to regulate labour conditions related to given subjects. Moreover, this norm does not hamper the collective negotiation at higher level, which makes it consistent with both Art. 37.1 and Art. 28.1 Constitution. In essence, none of the arguments presented by the applicants are strong enough to subverts the conclusions reached in Judgment 119/2014 (Judgment 8/2015, para. 6, c). Also in this case, we can observe that the legal reasoning is not articulated at all and the conclusion is reached in a cursory way.

In conclusion, formally the technique used in the second judgment seems way more structured and respectful of the proportionality test, but in practice it is not more rigorous that in Judgment 119/2014. This – formal – shift in the Court's approach, in the development of the legal reasoning, may be due to

the critiques moved to the 2014 Judgment. Indeed, not only the academic literature had expressed a clear dissent as to the missed application of the proportionality test, but especially the dissenting opinion of Judge Valdes Dal Re to that judgment, which to the contrary elaborates its counter-arguments by following the three criteria, may have pushed the Court, in this second occasion, to refer to the mentioned hermeneutic principles.

4. The terms balanced

The Court often reiterates that the constitutional labour rights at issue can be limited by a norm that provides a "reasonable and proportionate justification and aims to guarantee other constitutional rights and goods" (e.g. in Judgment 119/2014, para. 3, A, c).

In the selected Judgments, first, Art. 35.1 Constitution, allegedly violated by a number of the contested provisions, enters into conflict with the implementation of Art. 38 Constitution. Art. 38 Constitution provides for the freedom to conduct a business, which includes, according to the Court, the mandate to the public authority to guarantee its exercise and the "defence of productivity". Here the Court peacefully identifies the constitutional right to be balanced against the right to work. On the grounds of its case law, it points out what is included in the right protected under Art. 38 Constitution: the adoption of norms that provide the entrepreneur with a power of extinction of the contract of employment, as part of its power of management of the company. However, the Court specifies that this cannot prejudice the "necessary limits" (Judgment 119/2014, para. 3, A, c).

Second, Art. 35.1 Constitution also – and mainly – comes into conflict with Art. 40.1 Constitution. By explaining the scope of Art. 40, the Court also traces the limits of Art. 35.1 Constitution (see next section). Art. 40.1 Constitution states that public authorities "shall in particular carry out a policy aimed at full employment". This provision, according to the Court, "shapes the collective dimension of the right to work" and can legitimate limitations to the fundamental right under assessment. The collective dimension, that founds the policy aimed at full employment, becomes a crucial element in the legal reasoning of the Court, that quotes its case law and states that "a given restriction to the individual right to work 'is constitutional if it pursues the aim pursued by the employment policy: that is, in case of unemployment, it guarantees that with a given limitation is provided/offered a job opportunity to the

unemployed people, which could not lead, in any case, to a decrease in employment'"[515] (Judgment 119/2014, para. 3, A, c).

The Court elaborates on the reasons that justify the provision of such a contract of employment (CAE) recalling the pertinent Transitional provision 9, Law 3/2012, which, in the Court's view, confirms the strict link of the contested norm with its objectives. Transitional provision 9 limits the effectiveness of Art. 4.3, Law 3/2012, until the unemployment rate falls below 15%. The Court interprets this normative framework as perfectly consistent with the duty of public authorities to adopt a policy oriented to full employment, hence in line with Art. 40 Constitution. Indeed, it states: "[W]e are in front of a conjunctural measure, bound to a concrete situation of the labour market, of very high unemployment and that, beyond any doubt, is linked with the already mentioned duty of public authorities to realize a policy oriented toward full employment (Art. 40.1 Constitution)" (Judgment 119/2014, para. 3, A, e). The main point is that the contested provision is legitimate, especially because it allegedly responds to the "specific aim to foster the business initiative", this aim is consistent with Art. 41.1 Constitution, which gives to the legislator the mandate to develop a policy oriented to full employment (Judgment 119/2014, para. 3, A, e).

What strikes here is the reiteration of the relevance of the specific aim of the contested measure to favour the creation of stable employment, that is "boosting the business initiative". In fact, this is the real justification for such a length, and it is considered by the Court the direct implementation of a constitutional provision: Art. 40 Constitution. It is not clear, however, how such a long probationary may be useful to this aim. Let us say that the causal link here is left unspoken. Therefore, the Court does not provide substantial indications about the content of this constitutional norm. Indeed, the Court finds new arguments to support that the contested provision is justified in a legitimate way, because the reasons behind such a norm find explicit recognition in a constitutional provision. However, it shall be emphasised that this is not a fundamental constitutional right, but it relates to the duty of public authorities to implement a general interest.

[515] The judgment quoted by the Court is Judgment 22/1981, 2 July, paras. 8 and 9.

Likewise, as regards Art. 37.1 Constitution, the conflicting interest is enshrined in Art. 40.1 Constitution. The Court summarizes synthetically the legal reasoning developed as far as the violation of Art. 35.1 Constitution is concerned and it underlines the "serious economic crisis context" and the "high unemployment rate"; it recalls the duty of public powers to adopt a policy oriented to full employment (Art. 40.1 Constitution), which is an aim pursued by this measure; it stresses that the application of the contested provision is subject to certain legal limits (Judgment 119/2014, para. 3, C, b). However, in this case the "collective dimension of labour", as expressed by collective rights such as the right to collective bargaining is not mentioned at all.

Therefore, as far as concerns the scrutiny of Art. 4.3, Law 3/2012, the Court offers a clear picture of the rights that have been balanced against Art. 35.1 Constitution: Articles 38 and 40.1 Constitution. However, Art. 38 Constitution seems to have a minor weight for the Court in the case at issue, given that when the Court links the aim of the Law with a constitutional norm it only refers to Art. 40.1 Constitution.

When assessing the possible violation of Art. 37 Constitution from other norms enshrined in Law 3/2012 the Court puts in the balance not only Art. 40.1 and Art. 38 Constitution, but also Art. 35.1 Constitution, which instead of the constitutional right allegedly violated, in this case, becomes, according to the Court, the right implemented by the contested norm (specifically on Art. 35.1 Constitution, see next section). In light of what stated in the preamble to the Law, the main objectives pursued are "the defence of productivity and sustainability of the company and, eventually, employment". The Court plainly (in the sense that it does not analyses the various factors) states that a Law with an aim as such attempts to "facilitate the business sustainability and avoid recourse to dismissals". According to the Court, this is a "constitutionally legitimate aim" that implements three constitutional provisions: Art. 35.1 Constitution, the right to work; Art. 38 Constitution, the public powers' duty to protect productivity; Art. 40.1 Constitution**,** that is the already mentioned duty to adopt policies oriented to full employment. In addition, the Court also refers to a general "necessity to face the serious unemployment situation" (Judgment 119/2014, para. 5, A, a).

The Court also argues that this aim is relevant especially because of the high number of small companies that characterize the Spanish system, which do not have workers' or employers'

representations and therefore do not negotiate company level agreements (Judgment 119/2014, para. 6, c).

Again in Judgment 8/2015, Art. 37 Constitution is balanced against the same three constitutional norms. Likewise, the Court takes into account the general aim of Law 3/2012. So, the legitimate aim is "to favour the internal flexibility of the companies as an alternative to job losses", which allows the companies to adjust the organization to the "economic situation" and the fact that it "facilitates the rational adjustment of the productive structures to the unexpected market evolutions". The Court argues that this aim is justified and legitimate because it implements constitutional provisions. In particular, "the citizens' right to work (Art. 35 Constitution), through the adoption of a policy oriented to full employment (Art. 40.1 Constitution), as well as the business freedom and the defence of productivity". This is enough for the Court to plainly deduce that the norm has a "reasonable justification from a constitutional point of view". Therefore, we could infer that the justification is "reasonable" for the only fact of being consistent with constitutional provisions, given that how this aim is achieved is never discussed, coherently with the intention of the Court to recognize a wide margin of freedom to the legislator, as, inter alia the efficacy of a norm (Judgment 8/2015, para. 4, a).

The economic context is mentioned several times, especially, but not only, as "unemployment situation" (recurrent in scrutiny on Art. 4.3, Law 3/2012), but it is never used as a term of the balancing conducted by the legislator (for instance as in Judgment 8/2015, para. 3, where it refers to the legislator's necessity to take into account the "context of serious economic crisis").

Already in the evaluation of the first contested provision in judgment 119/2014, the Court uses the economic crisis argument as referred to by the legislator and it quotes the preamble to identify the reasons for such a norm, and the reasons why this norm is targeted to this type of companies. In a way, scrutinizing the new CAE, the Court starts looking at the norm's justification, which is not only the economic crisis, but "the negative consequences of the economic crisis" (see judgment 119/2014, para. 3, A, c).

In practice, in the first ruling addressed (on Art. 4.3, Law 3/2012), the Court argues that the "context of serious economic crisis and high unemployment", together with the aim "to foster business initiative" (Judgment 119/2014, para. 3, A, e) allow a limitation of the right to work. While as concerns the norms

contested as allegedly infringing upon the right to collective bargaining, the violation is not found illegitimate as it implements, inter alia, the right to work. Overall, the Court peacefully accepts that the economic circumstances play a decisive role in the legislator's decisions (especially as far as concerns the measure on the one year probationary period), however it does not balance directly the economic crisis with the fundamental labour rights concerned. On the same line is the scrutiny of Art. 18.8, Law 3/2012, which provides a further example: it is up to the legislator to decide on the consequences of the unfair dismissal "in view of the economic and social circumstances" (Judgment 8/2015, para. 8, a).

As far as concerns the norms that impose a direct sacrifice on the right to collective bargaining, the economic crisis argument has a remarkably minor role. Only in the preliminary phase of the legal reasoning on Art. 14.4, Law 3/2012, (that reforms the access procedure to the *Commision consultiva*), the Court refers to the economic crisis. In Judgment 119/2014, it points out that the "challenged norm has been adopted in a context of serious economic crisis" (para. 5, A, a). This sentence is reiterated in Judgment 8/2015 (para. 5, b). The limited use by the Court of the economic crisis argument raises some concern as to the possibility to allow such restrictions of the fundamental right to collective bargaining, in principle, at any time.

5. Fundamental labour rights in the balance

The selected cases provide many elements on two fundamental labour rights: the right to work and the right to collective bargaining. Both constitutional norms are widely addressed and assessed in abstract terms, especially as far as concerns the first contested provisions evaluated in each judgment. As regards the norms assessed at a later stage, in each of the Judgments, the Court extensively relies on the legal reasoning developed in relation to the contested measures evaluated at first. Moreover, in Judgment 8/2015, as far as concerns the norms already scrutinized in Judgment 119/2014, the Court reiterates briefly the main points of the arguments presented in the first Judgment.

5.1 Right to work

As a very first step of the legal reasoning aimed to ascertain the constitutional legitimacy of Art. 4.3, Law 3/2012, the Court defines the right to work on the grounds of its case law and states that the right

to work represents, "in its individual version, the right to enjoy continuity and stability of employment, that is, the right not to be dismissed without a cause"[516], as well as the right to an "'appropriate reaction against dismissals or redundancies, which configuration, in the definition of its methods and extent is left to the legislator"[517] (Judgment 119/2014, para. 3, A, b). However, when the Court points out that Art. 4.3, Law 3/2012, cannot be related in any way to a discussion on the cause for dismissal, nor the to the reaction to the a-causal dismissal, because the termination during the probationary period is not a dismissal, but rather it is the "formalization, by a declaration of will, of the resolution, affirmative and arbitrary (*positiva y potestativa*), expressly accepted by the parties at the time the contract was signed" (Judgment 119/2014, para. 3, A, b), it seems to suggest that the applicability of Art. 35.1 Constitution shall be excluded.

Nevertheless, the Court proceeds by recognising that the fact that the contract can be terminated – during the probationary period – only upon declaration of will of one of the two parties implies that the probationary period as it is framed by the legislator "can act as a limitation to the right to employment stability – which is greater, the longer is its duration – and, for this reason, is linked to Art. 35.1". Therefore, the Court ascertains that Art. 4.3 has to be examined in light of Art. 35.1 Constitution. Thus, it has identified the interest protected by this constitutional norm, that is the right to employment stability.

In brief, the right to work, as defined at first, would not cover the probationary period, but the probationary period "provided for and framed by the legislator" is anyway "connected to art. 35.1", inasmuch as it causes a limitation to the right to stability of employment.

Subsequently, the Court points out that the enjoyment of the selected fundamental right can be subject to restrictions. As already mentioned, the second step of the Court consists, indeed, in pointing out that the "right to work", recognised by Art. 35, Constitution, is not "absolute and unconditional", but "it can be subject to justified limitations in order to comply with other rights and goods constitutionally protected" (Judgment 119/2014, 3, A, c). In particular, it refers to Art. 40.1 Constitution, which states that public authorities "shall in particular carry out a policy aimed at full employment".

[516] in particular it refers to Judgments 22/1981, 2 July, para. 8 and 192/2003, 27 October, para. 4.
[517] Judgment 20/1994, 27 January, para. 2.

This provision, according to the Court, "shapes the collective dimension of the right to work" and can legitimate limitations to the fundamental right under assessment (Judgment 119/2014, para. 3, A, c).

The limitations have to fulfil certain criteria: they have to be supported by a legitimate justification; they cannot be absolute; they cannot frustrate the fundamental right beyond what is reasonable[518]; they have to be, in any case, "proportionated to the aim pursued"[519]. In other words, using the proportionality test terminology, the Court has established that, in abstract terms, a limitation to the right to work, to be legitimate must be: justified by legitimate reasons; not absolute; reasonable; and suitable to achieve the aim (Judgment 119/2014, para. 3, A, c, see also Chapter 4.2).

However, with regard to the first norm scrutinized, that is Art. 4.3, Law 3/2012, the Court is very cautious in explicitly recognising that the norm at issue affects workers and, hence, presumably the right to a stable employment. Indeed, the recognition of the negative effect of the contested provision on the mentioned fundamental right can be deduced only when the Court states that the contested provision is connected to other measures that "can contribute to temper the burdensome character the one-year probationary period may have for the worker" (Judgment 119/2013, para. 3, A, f).

The second time the Court assesses Art. 4.3, it recalls that the contested provision had been declared in compliance with Art. 35.1 Constitution, since "it provides a legitimate justification, it results reasonable and proportionate with respect to the aims pursued" (as reiterated also in Judgment 8/2015, para. 3, b). It summarizes the legal grounds that have justified the declaration of constitutionality of the contested norm in 2014: the context of serious economic crisis; the aim, that is to foster the conclusion of open-ended contracts, given the context and the serious situation of unemployment; the time-limited character of the norm, linked to the decrease of the unemployment rate; the limited subjective scope of application; fiscal benefits that the company can enjoy only if the employment relationship continues after the probationary period and the employment level is maintained; other related norms that moderate the negative effects of the measure, that is the legal context (Judgment 119/2014, para. 3, A, f, and Judgment 8/2015, para. 3, b). These "legal limits", to which the application of the one year probationary

[518] Judgment 195/2003, 27 October, para. 4; Judgment 110/2006, 3 April para. 3.
[519] Judgment 292/2000, 30 November, para. 15; or Judgment 196/1987, 11th December, para. 6; Judgment 37/1989, 15 February, para. 8; Judgment 112/2006, 5 April, paras. 8 ff.

period is subject, reduce the impact the contested provision has on the workers' right to employment stability, which, therefore, is not violated by the provision of one-year probationary period.

Interestingly, the Court adds, among the arguments that shall justify the legitimacy of the contested norm, an apparent hierarchy between the fundamental rights protected under Art. 35 Constitution. Indeed, it argues that the "both from a logic and a chronologic point of view", the right to access employment, which constitutes the "essential content" of the right to work, ex. Art. 35.1 Constitution, comes before the right to a stable employment (Judgment 119/2013, para. 3, A, f). This phase of the legal reasoning that seems to establish an absolute hierarchy between the right, and hence the value, of a decent work above the right (and value) of having a job is inconsistent with the fundamental assumption of a constitutional order, where values and respective fundamental rights have, in principle, the same values and only on a case by case basis can be "ordered" by the legislator. To the contrary, in this passage, the Court seems to suggest that, in absolute terms, a decent employment does not have the same constitutional weight as being employed. The two rights are not, under this view, integrated in the social constitution, but they are hierarchically ordered. Furthermore, the Court is telling that the fundamental rights in conflict, that – apparently – need to be hierarchically ordered, are protected by the same constitutional Article, which essential content is "the right to work", while, by exclusion, we can deduce that (although the Court does not explain this clearly) the right to a stable employment is not expression of the essential content of the fundamental right to work.

5.2 Right to collective bargaining

Even though all of the rulings discussed refer to Art. 37.1 Constitution, the first part of Judgment 8/2015 surely provides the most comprehensive assessment of the fundamental right to collective bargaining, from the perspective of the constitutional trade unions' role. This section is devoted to explain the labour relations model designed by the Spanish Constitution. Here, the Court contributes to define the role of trade unions, especially as regards collective bargaining and, therefore, it provides important indications as to the subjects entitled to conduct collective negotiations.

The Court emphasises the "singular role" of trade unions in the Spanish system, which is defined as a "social and democratic State" (Art. 1.1 Constitution). To strengthen this point, the Court quotes Art. 7

Constitution: "[T]rade unions and employers' associations contribute to the defence and promotion of the economic and social interests which they represent". This norm, according to the constitutional Judge, includes trade unions among the fundamental institutions/bodies of the society entrusted with the duty to defend, protect and promote collective interests of worker[520] (Judgment 8/2015, para. 2, b).

In a similar way, it develops the same point in Judgment 119/2014. Indeed, in order to underline that Art. 37.1 Constitution does not frame an abstract and rigid model of industrial relations and/or collective bargaining, the Court quotes also Art. 1.1 Constitution to underline that the "political pluralism", as one of the "superior values of the legal system", admits various legal solutions to regulate the industrial relations system, still remaining within the constitutional framework (Judgment 119/2014, para. 4, A).

This argument is made in a comparable way in the legal reasoning that discusses the legitimacy of the norm that entrusts a specific Commission, at national or autonomous communities' level, with the power to establish working conditions (Art. 14.1, Law 3/2012, amending Art. 82.3 Workers' Statute). Supported also by the constitutional case law[521], the Court states that Art. 37.1 Constitution merely recognises the right to collective bargaining, "which protection is assigned to the legislator", and identifies the right holders, that is workers and employers' representatives, and the legal effect of the collective bargaining outcome, i.e. the binding effect of collective agreements. In light of this the Court comes to the conclusion that "[T]he legislator enjoys a wide margin of freedom in the elaboration of the right to collective bargaining, even though this freedom is not absolute" (Judgment 119/2014, para. 4, A).

In addition, trade unions are entrusted with the specific responsibility "to determine the content of the employment relationship, together with the minimum regulation by the legislator". In light of its case law, the Court also points out that it is conducted by the social partners in the exercise of the right to collective bargaining and, given that collective agreements are "sources of the employment relationship", they have binding force. The Court continues by pointing out that collective bargaining

[520] The Court also quotes a number of constitutional judicial precedents that underline the relevance of this institution in the Spanish constitutional system, e.g. Judgment 11/1981, 8 April, para. 11 that defines trade unions "basic bodies of the political system".
[521] In particular, the Court quotes Judgment 210/1990, 20 December, para. 2.

improves the working conditions, as well as workers' lives, and, hence it is "an essential tool to manage the employment relationship"[522] (Judgment 8/2015, para. 2, c).

The Court keeps making a large use of its case law to stress on the constitutional role of trade unions as warrantors of workers' rights and interests, as well as on the relevance of the collective negotiation as main expression of the trade union action and crucial part of the essential content of the trade union freedom[523] (Judgment 8/2015, para. 2, c).

Once the trade unions' prerogatives in the Spanish constitutional system are well framed, the Court makes a step further and specifies that "surely, the Constitution, by institutionalizing the labour collective rights (strike, collective negotiation and collective conflict) has not reserved their regulation exclusively to trade unions"[524]. In particular, it highlights that while Art. 7 Constitution institutionalizes trade unions as fundamental bodies of the constitutional system and Art. 28.1 Constitution recognises trade union freedom as a fundamental right, Art. 37.1 Constitution does not recognise "collective bargaining as a right that belongs exclusively to the trade union domain". Indeed, also in Judgment 8/2014 the Court underlines that the right to collective negotiation is not a trade union prerogative, but it is recognised to workers' representatives in the widest sense, hence also to those organisations, which are workers' representatives, but are not covered by Art. 7 Constitution. In sum, the Constitution does not recognise the right to collective bargaining exclusively to trade unions (Judgment 8/2015, para. 2, d). On the other hand, in Judgment 119/2014, the Court points out that the collective bargaining conducted by social partners is part of the essential content of "the right to trade union freedom", protected by Art. 28.1 Constitution, inasmuch as the collective negotiation is a "necessary mean for the exercise of the trade union activity" (Judgment 119/2014, para. 4, A).

In addition, the "principle of collective autonomy can be derogated from, only if its limitation is found justified"[525]. Therefore, quoting from its case law, the Judge concludes that the Law "can limit the collective negotiation, and, on an exertional basis, it can retain the regulation of certain subjects, by

[522] Inter alia, the Court quotes Judgment 151/1994, 23 May, para. 2, and Judgment 208/1993, 28 June, para. 4.
[523] See, for instance, Judgment 222/2005, 12th September, para. 3 and Judgment 118/2012, 4 June, para. 4.
[524] Also as regards this point the Court makes wide use of its case law, see. Inert alia, Judgment 134/1994, 9 May, para. 4; and Judgment 95/1996, 29 May, para. 3.
[525] It mentions Judgment 11/1981, 8 April, para. 24.

excluding them from the collective negotiation" (Judgment 8/2015, para. 2, e). Indeed, the essential content of the right to collective bargaining includes the freedom to conduct collective negotiations and the freedom to conclude a collective agreement, understood as the faculty to select subjects and topics to be negotiated. However, the Court adds that this freedom "is not absolute but, for justified reasons, can be limited by the law". To stress the legislator's discretionality here the Court rapidly refers to Art. 35.2 Constitution, which provides for a legal competence to establish a workers' statute. The Judge makes use of this norm only to reinforce its interpretation of Art. 37 Constitution and to stress that it is the legislator's competence to regulate the labour relations' system[526] (Judgment 119/2914, para. 3, C).

Art. 37.1 Constitution provides for a legal competence in guaranteeing the right to collective bargaining and the binding effect of collective agreements. The constitutional case law has specified that the limits to the right at stake are "beyond the social partners' control"[527]. To corroborate its argument, the Court adds that Art. 53.1 Constitution provides for a general competence of the legislator to regulate the exercise of the rights and freedoms recognised in the section to which Art. 37 belongs. Therefore, it concludes that it is constitutionally legitimate for the legislator to limit the scope of collective bargaining with regard to given aspects and subjects (Judgment 119/2914, para. 3, C, a). The hierarchical relationship between these two sources of regulation of the employment relationship is clear: no collective agreement can be considered the sole legal source of employment terms and conditions and the law is surely hierarchically superior to any collective agreement[528] (Judgment 119/2914, para. 3, C, a).

Consistently, the Court underlines that "beyond any doubt", the collective agreement "as any other act of private autonomy has to comply with the law". The Spanish Court had already addressed an analogous question, and it had stated that the law, "on an exceptional basis", can limit the scope of collective bargaining and identify certain subjects that cannot be discussed and regulated by collective

[526] It refers to its case law: Judgment 20/1994, 27 January, para. 2.
[527] In particular, the Court refers to: Judgment 136/1987, 22 July, para. 5; and Judgment 208/1993, 28 June, para. 3.
[528] Judgment 210/1990, 20 December, para. 2; also, on the legal supremacy over collective agreements the Court refers to Judgment 58/1985, 30 April; Judgment 177/1988, 10 October; 62/2001, 1 March and Judgment 110/2004, 30 June.

agreements[529]. This Court interprets the judicial precedent as a validation of the point that it is not unusual for the labour legal framework to provide for imperative norms that cannot be amended/deregulated by collective negotiation, without, however, emphasising the element where "exceptionality", underlined in the Judgment from 1985, can be found here (Judgment 119/2014, para. 3, C, a).

Art. 37.1 Constitution cannot be read in such a way to interpret the freedom to conduct collective bargaining as a "sphere free from interference". The legislator has the duty, continues the Court, to implement the right at issue, "without prejudice to the legislator's possibility to set restrictions to the binding effect of collective agreements in order to protect or preserve other rights, values or goods constitutionally protected or constitutional interests"[530]. It can also "exclude given subjects from the collective negotiation and provide for imperative norms that cannot be deregulated by collective agreements". In addition, the principle of legal certainty is not violated even if the legislator amends terms and conditions set by collective agreements still in force when the relevant legislative act is implemented[531]. On the other hand, it is underlines that the mandate given to the legislator by Art. 37 Constitution to guarantee the right to collective bargaining and the agreements' binding effect does not frustrate the direct effectiveness of the constitutional norm at stake. Indeed, it is unquestionable that the faculty of workers' and employers' organisations to negotiate in order to regulate the respective interests is recognised by Art. 37.1 Constitution (Judgment 119/2014, para. 4, A).

So, for instance, according to the Court, Art. 4.3, Law 3/2012, does constitute a limitation to the right of collective bargaining (Judgment 119/2014, para. 3, C, b). Nevertheless, this restriction is justified on the grounds of the same arguments that validate the limitation to the right to the employment stability. Indeed, when assessing the violation of Art. 37.1 Constitution, from Art. 4.3, Law 3/2012, the Court summarizes synthetically the legal reasoning developed as far as the violation of Art. 35.1 Constitution is concerned. It underlines the "serious economic crisis context" and the "high unemployment rate"; it recalls the duty of public powers to adopt a policy oriented to the full employment (Art. 40.1

[529] Judgment 58/1985, para. 3.
[530] Here it expressly refers to Judgment 11/1981, 8 April, para. 24.
[531] Here the Court refers to Judgment 58/1985, para. 3; Judgment 177/1988, para. 4; Judgment 210/1990, para. 2; Judgment 62/2001, para. 3.

Constitution), which is an aim pursued by this measure; it stresses that the application of the contested provision is subject to certain legal constraints. These arguments support the reasonable and proportionate character of the contested provision, in this case as well.

The conclusion, says the Court, is the same as concerns Art. 35.1 Constitution, therefore the contested provision – an imperative norm that introduces the one year probationary period and cannot be modified by collective agreements – is not infringing upon Art. 37.1 Constitution, either. In particular, the Court lists (but does not elaborate) two reasons that corroborate such an argument. First, the imperative norm aims to avoid that collective bargaining "may reduce or delete" the incentive to conclude open-ended contracts that the legislator has introduced; second, it contributes to prevent the collective autonomy from frustrating the legitimate objective of creation of stable employment (Judgment 119/2014, para. 3, C, a). On the one hand, the Constitution recognises the role of trade unions as fundamental bodies, as well as bodies authorized to conduct collective bargaining and conclude collective agreements with *erga omnes* effect. However, on the other hand, the Constitutional Court suggests that the collective autonomy must be constrained and the legislative prerogatives maintained, since the collective autonomy may hamper the creation of stable employment. In other words, here social partners (and not just trade unions) are implicitly considered potential enemies of the employment stability (and hence of the right to work under Art. 35 Constitution). However surprising this conclusion may sound, the Court's approach is not inconsistent with the rest of the Judgment, to the contrary such a vision of the trade unions' role is coherent with the logic that places the job creation at a higher level than decent jobs (see above, the reflection on the internal hierarchy of Art. 35 Constitution).

As concerns the binding force of collective agreements, the Court reiterates that Art. 37.1 Constitution provides for a legislator's duty to guarantee the right to collective bargaining and the binding force of the agreements, without, however, imposing upon the legislator the adoption of a precise option. In implementing this norm, says the Court, the legislator has legitimately decided to recognise general binding effect to those agreements that have respected precise procedural and content rules (*estatutarios* collective agreements), while the agreements that do not apply the rules provided for by Title III Workers' Statute have a personal limited scope and they follow the norms of civil law (*extraestatutarios* collective agreements) (Judgment 8/2015, para. 4, a).

Therefore, the Court points out that Art. 37.1 applies to, and hence protects, both types of collective agreements, having both a "binding force", albeit to a different extent. At this point the Court is clear "it is clear that the contested measure impacts on the mentioned constitutional right, by allowing the disapplication of the *extraestatutarios* collective agreements upon the decision of the entrepreneur". However, the Court adds right away that this does not imply necessarily that this "interference is unconstitutional", indeed, "it can be legitimate if it provides a reasonable justification, proportionate to the aim" (Judgment 8/2015, para. 4, a).

The court does not define the content of the right to collective bargaining, but it mostly focuses on the scope of action left to the legislator in relation to the right to collective bargaining (however not defined). The scrutiny of Art. 14.1, Law 3/2012, (which entrusts the *Comisión Consultiva Nacional de Convenios Colectivos* with the power to disapply terms and conditions set by collective agreements), offers interesting elements to understand the boundaries that circumscribe the right to collective bargaining. First, in case the causes to justify the dis-application are met, the Commission will be able to adjust the final decisions in light of a general evaluation and it may also consider the disapplication of employment terms with "varying degrees of intensity". Second, the Court underlines that the Commission cannot decide for the disapplication of the whole agreement, but only for given subjects listed at Art. 82.3, which in sum, concerns the working time, including shifts, remuneration system productivity and tasks. The fact that these subjects are numerous and regard delicate aspects of the employment relationships, allowing for substantial modifications, does not ring any bell to the Court as to the possible violations of workers' rights, that may arise from different points of view. What matters is that not all elements of the collective agreement can be deregulated: the quantity is saved, the quality is not an issue. Third, the Court emphasises that the Commission's decision is subject to a temporal limit. Either the decision itself sets a limit of effectiveness for the disapplication, or, in any case, the arbitral decision ceases its effects at the moment a collective agreement applicable to the company comes into force. Forth, the Court highlights the "subsidiary character" of the Commission's interventions. Indeed, the Court reconstructs the steps to be taken before Art. 82.3 becomes applicable. First, the parties (company and workers' representatives) have to proceed with a consultation, which can lasts up to 5 days, with the aim to achieve an agreement on the disapplication. In case the parties do

not reach an agreement in these 5 days of consultation, either of the parties can trigger the second step, which consists in submitting the disagreement to a commission composed by workers and employers' representatives that has 7 days to decide. If the Commission is not requested, or it does not come to a decision, the parties have to apply the procedures provided for by inter-professional collective agreements. Only if these procedures are not applicable or do not succeed in reaching a decision, either of the parties can request the Commission intervention. According to the Court, this procedure shows that "the contested provision gives priority to the collective autonomy to solve the conflict", given that the Commission represents the means of last resort, if the parties do not reach an agreement in any of the possible ways. In addition, the Court identifies a further norm that demonstrates the will of the legislator to give priority to the collective autonomy: Art. 85.3, Worker's Statute. This provision states that the collective agreement have to provide for procedures to solve the disagreements that may arise in case of disapplication ex. Art. 82.3. Fifth, the Court includes, among the features that make the contested provision reasonable, the independency and impartiality of the Commission, demonstrated both by its composition (tripartite body) and by the procedures to come to a decision, which is taken "preferably by consensus", but if not possible, by absolute majority[532]. As a last element, the Court points out that the ordinary courts can exercise judicial control over the arbitral decision (Judgment 119/2014, para. 5, A, c).

When discussing the Art. 14.3, Law 3/2012, that amended Art. 84.2 Workers' Statute and gives priority to the application of company level collective agreements as regards a number of subjects, the Court provides some insights on the value of Art. 37.1 Constitution with respect to the possibility to decentralize collective bargaining, by means of legislative acts. We can observe that, apparently, Art. 37.1 does not provide any indication as to the relationship between centralized and decentralized collective bargaining, nor it sets a priority between the two levels. Indeed, the Court rejects the claim of

[532] This system should be a guarantee precisely because of the role of the public administration's representatives, as understood by the Court. Indeed, on the one hand, the administration cannot take decisions unilaterally, on the other hand, "there is no reason to suppose that the public administration representatives' vote would be in favour of the disapplication of the agreement". And that's because of a series of constitutional norms that the Administration has to comply with: "La Administración pública debe servir con objetividad los intereses generales (Art. 103.1 CE), que evidentemente no están sólo integrados por la defensa de la productividad y la libertad de empresa (Art. 38 CE), sino también por el respeto a los demás derechos, bienes y principios constitucionales, como el derecho a la negociación colectiva (Art. 37.1), el derecho al trabajo (rt. 35.1 CE), o la realización de una política orientada al pleno empleo (art. 40.1 CE)." (Judgment 119/2014, para. 5, A, c).

the *Parliament of Navarra*, who argues that Articles 37.1 and 28.1 Constitution impose upon the legislator the duty to regulate the collective bargaining system in a given way and would envisage a priority of centralized collective agreements. The Court states: "both a legislative policy that gives priority to collective agreements at sectorial level and a legislative policy that gives preference to the company level collective agreement are constitutionally legitimate". Once again, the Court underlines that the right to collective bargaining ex. Art. 37.1 Constitution is a "right of legal configuration" and the legislator is entitled to restrict or extends the scope of intervention of the collective autonomy depending on the context. Indeed, the Court reminds that the legislator had already intervened in order to decentralize collective bargaining procedures, in favour of intermediate levels (autonomous regions and provinces) (Judgment 119/2014, para. 6, a).

A further argument in favour of the constitutional legitimacy of the amended Art. 84.2 Workers' Statue, according to the Court, is the fact that "it does not hamper the negotiation of sector level collective agreements", hence it does not restrict the trade union freedom to determine collective bargaining levels, the contested norm only intervenes on the relationships between these levels, which, according to the Court is perfectly legitimate under Art. 37.1 Constitution (Judgment 119/2014, para. 6, b). Therefore, in other words, as long as the parties are free to negotiate, Art. 37.1 Constitution is not violated, even if, in practice, they negotiate in vain.

The Court wants to draw attention to the fact that "the contested provision does not exclude completely the intervention of collective bargaining in the establishment of the negotiation structure", since the inter-professional agreements can still regulate some aspects, as the rules to solve possible conflicts between collective agreements at different levels. In addition, Art. 84.2 Workers Statute do not oblige the social partners not to regulate certain subjects within the sector level collective agreements. Indeed, in those companies where a company level collective agreement does not exist the sector level agreement's conditions will continue to apply (Judgment 119/2014, para. 6, c).

The Court then underlines that the company level agreement, concluded later then the higher-level agreement, has priority only in relation to some of the labour terms and conditions. These subjects are listed in an imperative way. Which corroborates the conclusion that collective bargaining at higher levels is not hampered by the contested norm (Judgment 119/2014, para. 6, d). The Court argues that

recognising a priority to the company level agreement does not mean that the collective negotiation conducted by trade unions is undermined. Indeed, it is true that at company level the collective negotiate can be conducted by bodies which represent workers, but are not trade unions, as the company committees. However, the Court emphasises that Art. 37.1 Constitution does not legitimate only trade unions to conduct collective negotiation, but it refers, in general, to "workers' representatives", which could be also representatives elected at company level and not belonging to any trade union (Judgment 119/2014, para. 6, e).

To support this argument the Court refers to the ILO CFA Report, No. 371 of March 2014, Para. 454, where it states that "the determination of the bargaining level is essentially a matter to be left to the discretion of the parties", which shall demonstrate how a reform as the one at issue is consistent with the ILO indications, given that it does not tackle the social partners' autonomy in determining collective bargaining levels. However, this quotation disregards completely not only the context in which the sentence was placed[533], but also the following paragraph, in which the "the Committee stresses the importance of ensuring that the essential rules governing the system of labour relations and collective bargaining are shared, to the maximum extent possible, by the most representative workers' and employers' organization. It, therefore, invites the Government to "promote a tripartite dialogue on Act No. 3/2012 in order to achieve this goal from the perspective of the principles established in the ILO Conventions on collective bargaining that Spain has ratified" (para. 455), which has not been done by the Spanish Government. This passage allows supposing a strategic use of the ILO Committee Report by the Court (Judgment 119/2014, para. 6, b).

In sum, nor Art. 37.1 Constitution, neither any other constitutional provision establishes a rigid constitutional collective bargaining system. First, Art. 37.1 Constitution entrusts "the law" with the duty to guarantee the right to collective bargaining and the binding force of the agreements, in other words:

[533] The whole para. 454 states: "The Committee further notes that article 14, paragraph 2, of Act 3/2012 introduces new rules for private sector collective bargaining and the structure thereof, including by giving enterprise collective agreements priority of application over higher level collective agreements on certain matters, which, as the Government points out, were not covered by the previous legislation. The Committee also notes that the complainant unions and other complainant organizations have clearly expressed their opposition to this new legislation and recalls its position that the determination of the bargaining level is essentially a matter to be left to the discretion of the parties." (ILO CFA Report, No. 371 of March 2014, para. 454).

the right to collective bargaining is a "right of legal configuration"[534]. Second, as any other right, the right enshrined in Art. 37.1 Constitution is not absolute and can be subject to limitations. Third, the limits to this right are accepted if justified and, in the specific case of arbitration, a valuable justification, in light of the constitutional case law, is represented by the need to avoid that the conflict between parties may damage the general interest[535].

In conclusion, Art. 37.1 Constitution recognises the right to conduct collective bargaining and conclude collective agreements; it identifies the negotiating parties; it establishes the binding effect of the negotiation's outcome. The Court also underlines that the legislator enjoys a wide margin of freedom to frame the right to collective bargaining and its implementation (Judgment 119/2014, para. 6, a).

Conclusion

Neither in Judgment 119/2014, nor in Judgment 8/2015, the Spanish Court goes beyond a – timid – supervision of the legislator's choices. Indeed, it is highly respectful of the legislator's prerogatives, to the point that it refuses to judge upon "appropriateness and convenience" of the legislative actions (see, for instance, Judgment 8/2015, para. 7, a), or their "opportunity or efficacy" (Judgment 119/2014, para. 6, e). The emphasis on the *discretionality of the legislator* is even stronger when the Court comes to evaluate upon the possible violation of Art. 37 Constitution: not only the margin of discretion is extensive as to the implementation of the right to collective bargaining, but also when the whole industrial relations' system is at stake. This respectful attitude is so extensive that, in various parts of the rulings, it is even questionable whether the Court conducts a supervision of the legislative provisions, or rather it constructs a series of arguments that shall justify its submissive attitude. Interestingly, in order to justify and support the limits of its competence, the Court only quotes and refers to its most recent case law: Judgments from 2012 and 2013, where the margin of intervention of the Court is framed as strongly constrained.

This element seems to confirm the recent trend of the Spanish Court, suggested by the academic literature, which tends to renounce to develop a strict assessment of the legislative actions and end up

[534] See, inter alia, Judgment 8/2015, para. 6, a, on Art. 14.2, Law 3/2012.
[535] The Court refers to Judgment 11/1981, 8 April, paras. 19 and 24.

constructing unclear and weak legal reasoning, without applying the proportionality test. One could wonder whether the wide margin of freedom recognised to the legislator is a reason (or a pretext) not to apply properly the proportionality test.

Indeed, the hermeneutic criteria are not applied rigorously either. While in Judgment 119/2014 the legal reasoning is plainly informal and there is no reference at all to the proportionality test, understood as test of suitability, necessity of the norm and balancing in the strict sense, in Judgment 8/2015 the Court apparently adopts a different technique and it refers in numerous occasions to suitability and necessity, as well as to a certain "proportionality rule". However, the mentioned criteria are not applied rigorously, nor systematically, suggesting that the reference made to them should have worked as a consolation for those scholars and practitioners, which, after the 2014 Judgment publication, had underlined the Court's failure to apply the proportionality test.

While, the proportionality test is, in practice, never applied, the reasonableness criterion appears in various occasions, even though there is no attempt to build a systematized legal reasoning on its grounds, nor it is clarified how it is applied. For instance, when the Court wants to assess the "reasonable margin of freedom recognised by Art. 35 Constitution" (Judgment 8/2015, para. 7, a), or as concerns an alleged scrutiny of the reasonableness of the norm and the norm's justification. In this regard, the Court refers to the reasonableness and proportionality alternatively in relation to either the norm's justification or the norm itself.

The economic crisis argument is expressly used in assessing the constitutionality of the one year probationary period, applicable to the CAE and strictly linked to it ("in a crisis context as the present one" Judgment 119/2014, para. 3, A, e). However, the Court fails to investigate on the link between the context of crisis and the fact that for a whole year the worker is not protected against unfair dismissal. Moreover, the economic crisis argument is coupled with the main aim of the norm: boosting the business initiative.

Different is the case for those norms that are scrutinized on the grounds of Art. 37 Constitution, where the economic crisis argument is not used so openly, the Court rather refers to elements such as the necessity to "facilitate the business sustainability and avoid recourse to dismissals" and "the internal flexibility of the companies as an alternative to job losses". These provision, in sum, increases the

employer's power to modify terms and conditions of employment and, therefore, they have a long term effect and impact on the labour law system in a permanent way. While the CAE and its one year probationary period will be no longer applicable once the unemployment rate will be below a given threshold (hypothetically, a sign that the economic crisis' effect are over).

The right to work (Art. 35.1 Constitution) and the right to collective bargaining (Art. 37.1 Constitution) are the two main fundamental labour rights at issue in the assessed Judgments. Overall, their content and protection hardly benefit from the legal reasoning addressed in this chapter and the Court main concern seems to be underlying that the fundamental rights at stake are "limited" and "not absolute", although it recognises that the limitations must be justified and legitimate. The right to work, says the Court, can be applied to the probationary period as it includes the right to employment stability. Nevertheless, everything considered, the Court maintains that the right to access employment is hierarchically superior to the right to a stable employment, by applying the essential content principle in a way that excludes the right to a stable employment from the core of the right to work. In other words, it denies the inextricable link between having a job and having a decent job.

From the commented judgments, we can derive that the right to collective bargaining does not belong exclusively to trade unions, but to workers' representatives in general, hence including workers' representatives at company level, which are, therefore, allowed to conduct plant level negotiations with any content. This element, coupled with the facts that the Spanish Constitution, according to the Court, does not provide for a rigid model of industrial relations and the law remains hierarchically superior to collective agreements makes the norms under assessment, including those supporting the decentralization of collective bargaining, legitimate. When the Court refers to and elaborate on Art. 37.1 Constitution, it mentions only in a minor way the "essential content" of the fundamental right in the balance, by stating that it includes the right to conduct collective negotiations and conclude collective agreements. However, the absolute supremacy of the law over collective bargaining substantially undermines the effective value of this "essential content".

Overall, in practice, the Court does not balance the fundamental labour rights concerned with the economic crisis, but it admits a balancing between the right to work (Art. 35.1 Constitution) and the freedom to conduct a business (Art. 38 Constitution), which is interpreted as providing for a positive

duty of public authorities to defend productivity, as well as between the right to work and the public authority's duty to conduct a policy aimed at full employment (Art. 40 Constitution). These latest term of the balancing is strongly dominant over the Art. 38 Constitution and, understood as protecting a general interest to full employment, it is the main element that legitimates the contested norms. Furthermore, Art. 40.1 Constitution is often linked with the defence of productivity, which becomes, in the Court's discourse, as a sort of super-value.

Also the right to collective bargaining (Art. 37.1 Constitution) is balanced against Art. 40.1 Constitution, Art. 38 Constitution, as well as against Art. 35.1 Constitution. Indeed, when it comes to assess the violation of the right to collective bargaining the right to work's position is reversed, as it becomes one of the constitutional rights implemented by the contested norms. Overall, the Court's argumentation in this respect demonstrates an understanding of one of the main collective labour rights as disconnected from the individual right to work.

Last, it is noteworthy to emphasise the misuse of ILO sources. While in Judgment 8/2015 the international tools are not even mentioned by the Court, in Judgment 119/2014, there is an extensive, but questionable, use of ILO Convention No. 158 and the respective ILO Report as regards the norm on the one year probationary period, and just a quick and misleading quotation of an ILO Report on norms allegedly infringing upon the right to collective bargaining. Indeed, the sentence quoted by the Court, in order to support and justify the limitation imposed by the contested norm to the right to collective bargaining, has been completely extrapolated from its original context. If interpreted and applied properly, the ILO tool would have arguably upheld the Spanish legislative action. Furthermore, in both judgments a number of supranational instruments, such as the European Social Charter or ILO Conventions (e.g. ILO Convention No. 158, ILO Conventions No. 87 and 94) would have been perfectly applicable, but the Court completely disregards them.

In conclusion, the missed application of the proportionality test together with the ambiguous use of ILO legal sources reinforce the argument that, in both Judgments, the Court has deliberatively developed strategic judicial reasoning.

Conclusions: an inclusive reappraisal of the Spanish and Italian judgments

The analytical approach adopted for assessing the selected post-crisis judgments has been developed drawing on the Italian and Spanish academic literature on constitutional balancing. It has been designed in order to answer a number of questions that the labour law scholarship reviewed has not properly and comprehensively addressed yet, with a view of reconciling the constitutional and labour perspectives. Moreover, this structured analysis allows to evaluate the judgments in a systematic way, which facilitates a joint assessment of the Italian and Spanish cases.

The evaluation is based upon the Social State theory and, therefore, upon the assumption that the Italian and Spanish Constitutions are social Constitutions that guarantee full enforcement of social rights. In particular, the focus of this work is on fundamental labour rights, which are understood as rights aimed at protecting workers and their dignity, either during their working life or after retirement.

The four angles of analysis of the Italian and Spanish judgments are: the role of the Court; the technique used by the Courts; the rights, principles or interests subject to balancing; the fundamental labour rights at issue. Obviously, these profiles do not constitute tightly separated areas of analysis as they interlink and mesh in various occasions, but they simply provide a systematic guideline to conduct the analysis and organise the main findings.

The focus on the role of the Court has shed light over the discussion on the political role of the Constitutional Court[536]. That Roberto Bin has recently felt the need to elaborate on the role of the Court, with regard to constitutional balancing, is telling of the lack of clarity over this crucial element[537]. Indeed, this aspect is of paramount importance, since the less the Court can be accused of overcoming the boundaries of its competence the more its authoritativeness is recognised and its conclusions accepted by the legislator and the civil society. The relationship the Court establishes with the legislator demonstrates to what extent it recognises its discretionality. In several cases, the Mediterranean Courts have explicitly underlined the discretionality of the legislator, as "discrezionalità" for the Italian Court (e.g. see the conclusions in Judgment 124/2017) and as "libertad" for the Spanish Court (one for all, see

[536] One for all, Cheli, 2011, had raised this danger.
[537] Bin 2018; to the contrary, in favour of a balancing-Court is, inter alia, Miani Canevari 2015.

the first section of Judgment 8/2015). Nevertheless, the legislative competence is recognised also indirectly, as in some of the Italian judgments, where the Court establishes a dialogical relationship with the legislator by providing clear and direct indications as to the principles to be complied with by future reforms (in particular, see Judgment 70/2015 and the consequent Judgment 250/2017).

Consistent is also the attempt to detect the intention of the legislator, which emerges, for the Italian case, already in Judgment 223/2012, as well as in Judgment 173/2016, Judgment 124/2017 and, more incisively, in Judgement 178/2015, while, among the Spanish rulings, it is decisive in Judgment 119/2014, where it is used to uphold the constitutionality of Art. 4.3 Law 3/2012. To the contrary, in the Spanish Judgments, the legal reasoning on the industrial relations system and collective bargaining does not discuss the intention of the legislator, in line with the unconditional acceptance of the legislative prerogatives.

The only relevant exception to the supervisor-role is observed in the Italian Judgment 178/2015, where the Italian Court with a ruling of supervening unconstitutionality has, in fact, actively balanced the conflicting elements: the right to conduct collective bargaining procedures and the general interest to a balanced public budget. However, even though the Italian scholarship has discussed this ruling very critically[538], the decision of postponing the Judgment's effect on the grounds of a careful evaluation of the public financial situation is nothing new to the Italian Court[539].

The assessment of whether the Court directly conducts the balancing or rather supervises the balancing carried out by the legislator can concretely contribute to understand whether a Constitutional Court borders into an area, which is beyond its competences. The political character of a constitutional judicial decision is avoided if the Court acts as a supervisor and not as a direct balancer. Indeed, addressing this profile first allows to assess the proper legal reasoning without bias, which may affect also the analysis of the arguments developed by the Court. One for all: if the Court does not apply the proportionality test, it runs the risk to trespass into the political role.

The assessment of the technique used by the Court, and the respective criteria, has emphasised the peculiarities of each approach and has enabled to identify the most sensitive moments of each legal

[538] For instance, severe is the criticism by Mocchegiani 2015.
[539] See Modugno 2007 and Zoppoli 2017 on the specific case.

reasoning. Moreover, while the Italian judgments are, at times, discontinuous, as far as concerns the structure of the argumentation, the Spanish judgments are consistent, in substantial terms.

The technique traditionally applied by the Italian and Spanish Constitutional Courts to decide upon the constitutionality of ordinary norms is considerably different. In extremely synthetic terms, while the Spanish system has endorsed the German test of proportionality, even though the Spanish Constitution does not explicitly provides for such a method, the Italian Constitutional Court has developed the principle of reasonableness as main hermeneutic criterion and it has, quite consistently, applied it over the years. While the Italian case is, approximately, in line with its tradition, the Spanish judgments rather confirm a recent trend, which sees the same Court not applying rigorously the principle of proportionality. More precisely, in Judgment 119/2014 and in Judgment 8/2015 the test is not applied at all.

The Italian Court extensively refers to the principle of reasonableness, as the main criterion to determine the legitimacy of the challenged norms and to assess the violation of fundamental rights. The principle of reasonableness is strictly linked with the fundamental labour rights at issue, to the point that the scrutiny over the violation of such rights would be impossible without applying the reasonableness criterion, that has the merit of moving the analysis beyond the mere "absence of arbitrariness" from the public powers. Consistently, inter alia, the Court expressly refers to it as the cornerstone of the pension system.

Even though the principle of reasonableness, as applied in the selected cases, does include some steps which are common to the proportionality test, as the relationship means-aim, a systematic analogy with the principle of proportionality can hardly be observed[540]. To the contrary, *proportionality* seems to be used just as a synonymous to strengthen the concept of reasonableness, but it does not enjoy ontological autonomy[541].

Although there is coherence as to the criterion applied, in terms of logical flaw of the legal reasoning, a real consistency among the seven Italian judgments has not been observed. In this respect, the most remarkable cases of the Italian Court are those where the Court introduces and describes the

[540] Cartabia, 2013, is one of the main authors that argue that the two principles are substantially very similar.
[541] Of a different view, Morelli 2015.

argumentative structure it is going to apply to decide over the constitutionality of the challenged norm, even if the theoretical structure and the actual reasoning are not always coherent and consistent (e.g. Judgment 70/2014 or the attempt in 173/2016). The absence of a structured test is accepted by authoritative scholars, inasmuch as the constitutional argumentation, which refers to binding legal norms, has a "dialectic way of arguing, not linked by deductive chains and certain procedural rules"[542].

From the Spanish perspective, if coherence is a value for the constitutional case law, Judgments 119/2914 and 8/2015 should be praised. Indeed, not only the second ruling completely confirms the conclusions of the Judgment 119/2014, the two judgments are coherent also from the perspective of the legal technique applied: the Spanish Court does not apply the proportionality test in any of the cases. Both rulings are grounded upon a dialectic legal reasoning, which does not consider in a substantial manner the three criteria: suitability, necessity and balancing in a strict sense. Indeed, even if in Judgment 8/2015 the Court does mention these criteria, in practice, it fails to apply them.

In the Spanish case, the Court has not even attempted to correct the – potential – "mistakes" that the legislator may have made in balancing the conflicting values and interests[543], mainly because it has rejected *ab origine* that the legislator has made any mistake. As a consequence, a comprehensive analysis of the Spanish Court's legal reasoning that draws on the constitutional literature on balancing can be hardly conducted, exactly because the Court keeps away from the traditional categories.

The proportionality test shall envisage the assessment of the necessity of the norm, which precisely consists in evaluating if the norm represents the most appropriate option among the possible alternatives, as well as its suitability, that is its effective ability to achieve the aim pursued, and balancing in a strict sense.

Regrettably, the Spanish Constitutional judgments discussed do not allow to comment on the appropriateness or effectiveness of the proportionality test, inasmuch as in these occasions the Iberian Court has not applied the test at all. Indeed, while in Judgment 119/2014 it has not even mentioned the said criteria, in the following Judgment it has *just* mentioned them. Without effectively conducting the proportionality test.

[542] Mengoni 1996, 124.
[543] As it should have done according to, among others, Gonzalez 2003.

Therefore, this Spanish Court's legal reasoning could be potentially equated to the Italian one, where a more dialectic legal reasoning is developed and, in principle, there is no reason to contest an approach as such, as long as it is supported by a logical structure and argumentative coherence, independently from the *form* of the legal reasoning. However, in practice, the Spanish Court not only does not apply a systematic technique, but it also fails to build a strong logical flow, independently from the extent of rigidity of the technique. That is even truer in Judgment 8/2015, where the Court hides behind a formal reference to the proportionality criteria, which confirms that if a dogmatic approach is not adopted the proportionality principle becomes an "empty category"[544].

One of the main elements of uncertainty in the Spanish Court legal argumentation derives from the fact that, while in some cases the Court asserts of being assessing reasonableness and/or proportionality of the norm's justification, in others it refers to the reasonableness and/or proportionality of the norm itself (still referring to reasonableness and proportionality in an approximate fashion). While the Italian judges have clearly evaluated the norm's justification, as one of the steps of the reasonableness scrutiny.

Consistently, while as far as concerns the principle of reasonableness in the Italian judicial tradition the Italian case law addressed does provide useful insights to understand the content of this principle, the Spanish cases do not contribute in any way to frame the hermeneutic criterion – allegedly – applied in the Spanish system.

Interestingly, the criterion of "essential content" is partially used by the Spanish Court, even though not with the intent to frame the core meaning of the fundamental labour rights concerned, but rather to establish the limits of this essential nucleus. However, where it is used, the concept of essential content of fundamental labour rights is understood as *the sole* boundary that the legislator cannot exceed, not as the latest one. Indeed, the Court does not seem to agree upon the existence of a peripheral zone of fundamental rights, which goes beyond the essential content.

The Spanish Court has mostly applied the essential content by adopting (maybe unconsciously?) the following understanding of this criterion: "'essential' in the sense that it concerns the elements which are paramount to legally recognize the right at issue, both in its meaning and in its justiciability"[545].

[544] See, González Beilfuss 2015.
[545] Parejo Alfonso 1981.

However, given the uncontroversial indeterminacy of the concept of essential content, in any case the Court should also properly design the legal reasoning, with strong and logical connections, whether via proportionality test or not, in the sense that (as already emphasised in Chapter 2) "the more a right is scarified, and therefore the more we get close to touch the essential content of it, the more justified the restricting provision must be"[546].

Beyond any doubt, a scheme for the legal reasoning, explicitly described by the Court, helps the reader (legislator, scholars or civil society) to understand the judgment, to what extent the various elements have been considered by the Court and, hence, to increase its persuasiveness, as well as – if necessary – to accept an inevitable limitation of fundamental labour rights. Among the judgments addressed in this thesis, some of the Italian cases have tried to provide such a systematization, while, however, never applying the proportionality test. On the other hand, the Spanish case law, where one would have expected such clarity to stem directly from the application of the proportionality principle, does not help in this sense, because the Court has not applied the test at all. As a consequence, this concluding reflections have to dispense with a "best practice".

Therefore, the question whether a Constitutional Court can conduct a proper suitability and necessity test without going beyond its competences remains unanswered, as well as the doubt whether a faithful application of the proportionality test would be too invasive of the legislative prerogatives. However, the Italian case provides some cause for reflection also as far as concerns the proportionality test feasibility, especially with regard to the evaluation of both suitability and necessity of the norm. Particularly, where the Court, first, demands for technical documents from the legislator (Judgment 70/2015) and, second, acknowledges the existence of such documents in relation to following reforms (Judgment 250/2017). Indeed, the Court just states that these documents were provided and that they contained relevant data, but it does not go that far to assess them and discuss their internal consistency and reliability, which may be due to two reasons. First, the Court does not want to enter the legislative merit, which may concern choices of economic policy and/or interests to be enforced in a priority way. Second, the Court does not have enough technical means to conduct such an evaluation. In this second

[546] Prieto Sanchis 2000.

case, it is questionable whether it would be appropriate to advocate for providing the Court with the technical expertise to carry out a strictly economic assessment. Indeed, the main problem would remain anyway: whatever technical document inevitably draws on political choices, which are not absolute and objective. This is especially true when we are dealing with issues of economic policy.

The identification of the elements subject to the balancing exercise has been useful to understand what role is recognised to the economic crisis argument and to constitutional interests and principles of an economic nature, by the Constitutional Judges. In this respect, two main profiles have emerged. First, the opportunity of accepting a balancing between fundamental rights and interests or principles of an economic nature. Second, to what extent the arguments that have justified a limitation to the fundamental labour rights concerned are linked to the economic crisis and to what extent, instead, the economic crisis has just a marginal role, in a way that the Court's argument may be – potentially – applicable also in positive economic phases.

The Italian cases differ from the Spanish ones, among others, because of the terms that are balanced against the fundamental labour rights concerned. This is due to the fact that, while the Italian norms are mostly intended to contain public spending, the Spanish ones are adopted on the wave of the policy of flexibilisation of the labour market. Anyway, in both cases, the constraints imposed upon the fundamental labour rights at issue (which occur in most of the judgments) are justified on the grounds of constitutional norms that express public interests of an economic nature, and not proper fundamental rights. Before reviewing whether, overall, the Courts have truly admitted a balancing between these items, let us recollect the key relevant theoretical elements that have emerged in this thesis.

As elaborated in Chapter 2, balancing can be conducted (and has to be conducted) only between principles which cannot be hierarchically ordered in absolute terms. These fundamental principles (expressed also as fundamental rights) cannot be hierarchically ordered in absolute terms because they express funding values of the legal system. Since no value can be considered completely overriding, in order to decide a case of conflict between principles that express values, those principles have to be discussed from a balancing perspective. In short, the theories reviewed lead to argue that only principles that express values have to be confronted on equal terms. Therefore, "constitutional balancing" is needed only if we recognise that fundamental rights and principles are expression of founding values, which

begs the question: does the principle of balanced budget (enshrined in Art. 81 Constitution), for the only facts of being called "principle" and being enshrined in a Constitutional Article, belong to this dynamic? And, therefore, can it really be balanced against rights and principles which are the normative expression of values?

The problem raised by Luciani (balancing is possible only among equals)[547], and contested by other authoritative scholars[548], is solved precisely by referring to the main theoretical justification that underlies the balancing method and by looking at the very substance of constitutional rights and principles, that is if they are expression of founding values. Therefore, the "equal balancing" suggested by Luciani, should not be understood in absolute terms, which in fact would empty its meaning, but it should be understood from a value perspective: the terms are equal, and therefore can be balanced, if they are both expression of values (independently from whether they are named rights or principles). This approach, in the opinion of whom is writing, excludes the possibility to balance fundamental labour rights with the principle of balanced budget (as widely discussed in relation to the Italian case law), inasmuch as the latest is not the expression of a founding value, but rather it crystalizes a precise – and questionable – choice of political economy. In other words, if we accept that constitutional rights and principles are balanced against, we also have to accept the assumption behind such balancing: that rights and principles belong to this dynamic – only – as long as they are the normative expression of values.

In this respect, it is remarkable the reflection provided in Judgment 124/2017, which is indirectly applicable also to Art. 81 Constitution. Here the Italian Court assesses the applicability of Art. 97 Constitution, whose first paragraph has been amended in 2012 and now provides for the duty of the public administrations to ensure balanced budget and sustainability of the public debt. However, the Court does not consider at all such paragraph in its legal reasoning, rather it refers to the general principle of *buon andamento* (smooth running) of the public administration (in Art. 97 Constitution, since 1948), which is considered expression of a constitutional value. This passage is particularly interesting as it puts the use of the public budget argument, by the Constitutional Court, into perspective. Indeed, even before the forced constitutionalization of the principle of balanced budget, as understood by the EU legal

[547] Luciani 1995.
[548] Most recently, Bin 2018.

system, the Court used to consider the public finance equilibrium (as generally expressed in the previous Art. 81 and Art. 97 Constitution), as it has always represented a guideline for the Court[549], even without belonging to the balancing-game. In light of Judgment 124/2017, it is legitimate to argue that this function has not changed.

Overall, the Court has been very cautious in the way in which it has included Art. 81 Italian Constitution in the legal reasoning[550], for instance, in Judgment 124/2017 the Court never refers to Art. 81 Italian Constitution, but it only mentions the need to consider the "resources concretely available".

Judgment 178/2015 seems one of the most delicate rulings as far as concerns the use of Art. 81 Italian Constitution. However, also in this case the Court is careful not to elevate the principle of balanced budget to a proper value. In the concluding phase of the Judgment, the Court states that a "coherent financial plan" expresses the "necessity to rationalise the allocation of resources and control of public expenditure (Art. 81.1 Italian Constitution)", thus clearly refusing to link Art. 81 to a constitutional value, while, in the same paragraph, it states that trade union freedom (Art. 39.1 Italian Constitution) is "inextricably connected to *other* constitutional values".

Judgment 178/2015 deserves further attention since, in this case, the problem of the terms to be balanced strongly interlinks with the role of the Court. In fact, in order to take into serious account the public budget the Court opts for a type of ruling that has been highly criticised: the supervening unconstitutionality. However, apparently this is considered legitimate for the Court, as in 1993, Silvestri was already arguing that there is a duty of the Court to limit the retroactivity of the ruling's effect in order to prevent a dysfunctional effect over the public budget, which stems from the "active" – not "political" – role of the Constitutional Court[551].

The Spanish case law assessed does not raise the same issues. Indeed, Law 3/2012 does not concern in any way the implementation of the principle of balanced budget (recently constitutionalised also in the Spanish legal system). As far as concerns the one year probationary period, the right to work is balanced against the freedom to conduct a business, which is beyond any doubt expression of a

[549] Romboli 1993.
[550] As criticised by Anzon Demming 2015, in particular with regard to Judgment 70/2015, and, instead, praised by Cinelli 2015b.
[551] Silvestri 1993, 81.

constitutional value in the Spanish legal system (as in many other modern democracies) and the public administration's duty to pursue a policy of full employment (Art. 40.1 Spanish Constitution). Nevertheless, the Court recognises a major weight to the letter term of the balancing. Indeed, in nearly all of the Spanish rulings addressed, Art. 40.1 Spanish Constitution has a key role in legitimizing the legislator's choices, as fundamental labour rights have been balanced mostly against the general interest of full employment and the legislator's duty to pursue it. To the point that in case of conflict between the public bodies' duty and the right to collective bargaining (Art. 37.1 Spanish Constitution), the right to work (Art. 35.1 Spanish Constitution) is used to strengthen Art. 40.1 Constitution at the detriment of Art. 37.1 Spanish Constitution[552]. With the effect that, not only the general interest to full employment is placed in a higher position compared to the right to collective bargaining, but the same hierarchical relationship is established between the right to work and the right to collective bargaining. With the effect that the individual dimension of labour is not recognised as inextricably linked to its collective dimension and collective bargaining is not recognised as a necessary complement of the right to work, i.e. as a way to guarantee the right to a *decent* work.

While the "equal" value of the right to work and the right to collective bargaining, in constitutional terms, cannot be questioned (even though the fact that they are understood as conflicting elements is anything but uncontroversial), the public bodies' duty to pursue a policy aimed at full employment raises a major issue mainly as to the way in which a Constitutional Court can approach an aim as such in its scrutiny.

Indeed, the Court often stresses on the legitimacy of the aim pursued by the legislator with Law 3/2012, which includes, inter alia, the intent to provide a remedy to the serious unemployment situation. However, even leaving aside the core misunderstanding, that is that labour law does not serve the purpose to create employment[553], we should ask whether the Court, in assessing the legitimacy of the norm in light of its aim, should demand for a demonstration of the causal link between, for instance, the one year long probationary period and the improvement in the employment levels. It would be legitimate for the Court to question such a nexus, as it is challenged worldwide at various levels. One for all, the

[552] The use of Art. 40.1 Spanish Constitution is a novelty for this Court, see Suarez Corujo 2015.
[553] In line with, inter alia, Diaz Aznarte 2015.

ILO Committee, reporting precisely on the probationary period introduced by the CAE, has reminded that "no direct link between the facilitation of dismissals and job creation has been demonstrated"[554]. This would mean assessing the suitability of the norm to achieve the aim pursued, which does not seem to be in the Spanish Court's intentions and, on the other hand, if the Court would openly question such a causal link, as done by the ILO Committee, it would plainly enter the merit of political choices. Nonetheless, the aim perpetrated by the challenged provisions, as implementation of Art. 40.1 Spanish Constitution is widely emphasised by the Court and seems to constitute the key argument upholding the legitimacy of most of the norms. In order to escape such a superficial, but decisive, use of the aim of the norm, we should wonder, once again, whether the Constitutional Court should simply focus on the effective infringement of the fundamental labour rights at issue. Otherwise, as for the Spanish case, a legal reasoning mostly based upon the aim of the norm may raise serious doubts over a strategic use of the judicial reasoning[555].

The use of the economic crisis argument by both Courts has also attracted the scholars' attention[556]. The study conducted in this thesis has revealed that, in both the Italian and Spanish case law, the economic crisis argument is widely present and extensively referred to by the Courts, mostly inasmuch as it is expressly mentioned in the legislative texts, which often provide justifications linked to the economic crisis, in various shades.

Nevertheless, it must be emphasised that none of the Courts has openly admitted a balancing between the fundamental labour rights concerned and the economic crisis. A remarkable aspect, that can be observed in some Italian and Spanish rulings, is the relevance of the temporal scope in relation to the economic crisis argument. The transitory and exceptional character of the challenged measure is crucial in the Court's argumentation[557], but only if, among the reasons that justify the contested measure, the economic crisis retains an important role (one for all, Judgment 178/2015 and Judgment 119/2014 and

[554] Report of the Director-General, *Fourth supplementary report: Report of the Committee set up to examine the representation alleging non-observance by Spain of the Termination of Employment Convention, 1982 (No. 158), submitted under article 24 of the ILO Constitution by the Trade Union Confederation of Workers' Committees (CC.OO.) and the General Union of Workers (UGT)*. ILO Governing Body, 321st Session, Geneva, 13 June 2014).
[555] On this line also Wilfredo Sanguineti 2015, which raises the misuse of the proportionality principle, albeit solely as far as concerns Judgment 8/2015.
[556] For all, Fontana 2015; Baylos Grau 2015.
[557] As noticed, among others, by Tega 2014b.

8/2015 as far as concerns Art. 4.3, Law 3/2012). In other words, if the norm is justified mainly on the grounds of the peculiar phase characterized by the economic crisis, its legitimacy is assessed in light of its temporal effects, which suggests that both Courts are inclined to admit a sacrifice of fundamental labour rights in exceptional economic phases. However, while in the Italian Judgment this criterion is self-standing, in the Spanish case, as far as concerns the probationary period, it is coupled with a quantitative data: the unemployment level.

Even though, from a fundamental labour right perspective a reasoning as such may be considered very dangerous as, in fact, it admits a violation of the fundamental right at stake[558], a comprehensive reading of the post-crisis cases selected for the purpose of this thesis suggests that, considering the extensive use of this argument made by the legislator *ab origine*, it may be desirable a proper consideration of this profile by the Court, in order to come to non-generalizable conclusions and develop a legal reasoning that cannot be easily reiterated as regards norms approved without the economic crisis-justification.

Far from arguing that Constitutional Judges have a duty not to consider the national economic context, whether it concerns public budget factors, an economic crisis or the employment rate[559], this thesis has used certain judgments to reflect on the role of the Court as, primarily, warrantor of fundamental – labour – rights[560]. In order to exercise this role properly, the Court should give priority to the evaluation of the violation of fundamental rights and, on the other hand, be very cautious in entering the merit of the normative means chosen by the legislator. Moreover, where a limitation is found justified by a peculiar economic context, this aspect should be elaborated in depth as to circumscribe the violation tightly. In this regard, a consistent application and elaboration of the concept of the "essential content" and "peripheral content" of fundamental labour rights, howsoever called, could support the Court. Subsequently, following the Court's indications, the legislator should be able to guarantee the enforcement of such rights, in light of the available public resources or the industrial national context, by designing normative tools that do not violate fundamental rights.

[558] See, Loi 2016, on Judgment 178/2015.
[559] In line with D'Onghia 2013 and consistently with the Italian judicial tradition of the Constitutional Court, see Romboli 1993.
[560] *The* Constitutional Court role, according also to Wilfredo Sanguineti 2015.

The last profile addressed in the thesis is, precisely, the fundamental labour rights concerned by the selected Judgments. This step recapitulates on the status of the said rights at the latest interpretative (national) stage. None of the Courts conduct what the literature has named a "definitional balancing", however, the legal reasoning provide some indications that contribute to define the fundamental labour rights at issue.

From a methodological point of view, we can observe that the Spanish Court has extensively focused on the definition of the rights at stake in the first part of its legal reasoning, apparently more with the aim to identify their boundaries, than to define their content. While, the Italian Court has concentrated more precisely on the single cases, thus strictly linking, in its argumentation, the considerations over the right at issue at the contested norm, hence, it has focused only on precise aspects of the said rights that may have direct connection with the challenged provisions.

The fundamental labour rights addressed in the Italian post-crisis constitutional case law are: the right to a fair remuneration (Art. 36.1 Italian Constitution), as expressed also by the principle of independence of the judiciary (Art. 104 Italian Constitution); the right to an adequate pension (Art. 38.2 Italian Constitution); the right to collective bargaining (Art. 39.1 Italian Constitution). Moreover, Art. 3.2 Italian Constitution retains a peculiar position, it surely intersects the analysis of all of these rights, as it constitutes the legal basis for the reasonableness criterion, but, especially, it has a pivotal value as regards Art. 36.1 and Art. 38.2 Italian Constitution, given that these two rights are identified by the Court as the proper concretization of Art. 3.2 and the respective principle of substantial equality.

In the Spanish case law, the fundamental labour rights concerned are the right to work (Art. 35.1 Spanish Constitution) and the right to collective bargaining (Art. 37.1 Spanish Constitution).

The assessment of the Italian case law allows to identify two characters that a fundamental labour right's limitation must have in order to be legitimate: it must be temporary (also called exceptional or transitory) and it must be generalized, in the sense that it cannot concern a single category of workers and/or pensioners (e.g. Judgment 223/2012, Judgment 310/2013 and Judgment 175/2018).

The Spanish Court rather focuses on the justification of the challenged norm. Indeed, it reiterates that, given that rights are not absolute, their limitation is accepted only if the provision at issue has a legitimate justification. To the contrary, it refers to the temporal element only as far as concerns the

scrutiny of the CAE's probationary period, which is the only challenged norm with a transitory character. While as far as concerns the right to collective bargaining and, hence, the provisions that amend the collective bargaining system (in a permanent way), it does not consider the exceptional feature of the norm necessary to uphold a limitation of such right.

From a joint perspective, the most significant fundamental labour right is certainly the right to collective bargaining. Both Courts provide insights on the status of the fundamental right to engage in and conduct collective bargaining procedures, in recent times. The Italian case is interesting especially as regards the content of the right to collective bargaining, in terms of effective exercise of the right to conduct collective barging procedures and legitimacy of limitations imposed by legislative acts. While, the Spanish judgments contribute to a reflection on the subjective scope, that is the bodies legitimated to conduct the negotiation and the respective bargaining levels, as well as the role of public authorities in interfering in the content of collective negotiations.

As to the right to collective bargaining, the different application of supranational sources and the practical consequences on the definition of the right at stake are remarkable. On the one hand, the Italian Court, in Judgment 178/2015, has widely used the supranational sources to define the constitutional right to collective bargaining and strengthen its effectiveness in front of the economic arguments. On the other hand, the Spanish Court has made a fragmented and strategic use of some ILO tools only, in order not to elaborate on the fundamental labour right concerned, but rather to validate its limitations (the same misuse of international sources by the Spanish Court could be raised as regards the legal reasoning on Art. 4.1, Law 3/2012).

Interestingly, both the Spanish Court and the Italian Court have applied the essential content criterion, which, in the first case, constitutes a hermeneutic criterion expressly recognised by the Spanish Constitution, while the Italian Court is slowly integrating this interpretative principle in the legal reasoning. The Spanish Court, as far as concerns the right to collective bargaining, seems to adopt the relative theory of the essential content, as it includes in this nucleus the freedom to conduct collective negotiations and the freedom to conclude a collective agreement, but it also points out that this freedom "is not absolute, but, for justified reasons, can be limited by the law" (Judgment 119/2914). On the other hand, while it states that the right to collective bargaining is part of the essential content of the trade

union freedom (Art. 28.1 Spanish Constitution, discussed only in relation to the overall assessment of the industrial relations system), it argues that trade unions do not retain an exclusivity in exercising this collective right. Moreover, and most surprisingly, the right to work includes the right to a stable employment, but the latter is not part of the essential content and therefore it is hierarchically sub-ordered (Art. 35.1 Spanish Constitution)[561].

It is worthwhile to emphasise that the Italian Judge defines the essential content of Art. 38.2 Italian Constitution, as read in conjunction with Art. 36.1 Italian Constitution, as, first, the conservation of the purchasing power of an acquired right (Judgment 70/2015) and, second, the minimum state benefit (Judgment 173/2016), but, at latest, it confirms that the essential content of the right to an adequate pension corresponds to the preservation of the purchasing power of retirement benefits (Judgment 250/2017). Therefore, the Italian Court has defined the essential content of the right to an adequate pension in an extensive way, as it has put emphasis on the *real* value of retirement benefits, instead of on the nominal value.

This latest example leads us to some final thoughts, as it demonstrates that, even when the legislator stresses on the economic crisis justification, the Constitutional Court may well grasp the opportunity to enforce fundamental labour rights and interpret their content expansively.

Even though these findings cannot be generalized, given that they derive from a strongly circumscribed analysis, they provide food for thought on the general relationship between fundamental labour rights and Constitutional Courts. Indeed, these concluding reflections can be transposed beyond the judgments investigated in this thesis, as they raise a number of issues on the enforcement of fundamental labour rights by Constitutional Courts. Even though it is uncontroversial that the direct use of the economic crisis argument, albeit diversified, as well as its indirect use through Art. 81 Italian Constitution (for the Italian case), has legitimized a restriction of the scope of the fundamental labour rights concerned, the economic crisis context (and argument), that has characterized the challenged norms and the respective rulings, should not disorient the reader and suggest that these judgments are atypical as they belong to a peculiar economic phase, inasmuch as, in the current economic system, such

[561] Several authors have stressed on the mortification caused to this right, as Fernández López 2015.

crises are cyclical (not to say permanent) and, on the other hand, the rhetoric which supports a causal link between the loosening of workers' rights and the increase in employment levels is not intended to fade anytime soon.

A remarkable aspect that has emerged from this work concerns the value of a Constitutional Court that acts as the warrantor of fundamental labour rights, in respect of legislative incursions. Some of the judgments assessed suggest that this function can be exercised by establishing a constructive relationship with the legislator, where the Court indicates the insurmountable limits of fundamental labour rights, but leaves the responsibility to decide how to allocate the available resources and design the legal framework to the legislator.

In theory, whether the Court fulfils the role of warrantor and guidance with a proportionality test or other criteria is irrelevant. Indeed, it is not the principle per se, as a self-standing identity, but rather the use made of it by the Court that makes the difference and allows the legislator to understand the limits of its action and the civil society to comprehend the reasons that may justify a limitation of the scope of fundamental labour rights. However, in practice, in accurately assessing – especially – suitability and necessity of the norm, the Court risks not only to exceed the limits of its competence, but, also, to distract the attention from what should be its main focus: the protection of fundamental rights. This understanding reconciles a respectful attitude towards the legislator's competences with an ample protection of fundamental rights.

Presumably, a more punctual elaboration by the Constitutional Court(s) of the concept of essential content of fundamental labour rights, also in its relationship with the respective peripheral content, would substantially contribute to an effective enforcement of fundamental labour rights. An attentive use of this criterion may provide clear guidance to the legislator in the identification of the *tolerance limit* of each right, in order to, on the one hand, allocate the resources consistently with the constitutional provisions and, on the other hand, conduct, where necessary and appropriate, a correct balancing between fundamental rights and/or principles.

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Annex

About Judgment 194/2018

During the concluding phase of this thesis, the Italian Constitutional Court has released an important Judgment concerning one of the crucial norms of the so-called Jobs Act: Judgment 194/2018. This Annex wants to introduce the recent Judgment and concisely highlight the most relevant profiles.

In Judgment 194/2018, the Italian Court has declared the unconstitutionality of Art. 3.1 of D.Lgs. 23/2015, for the part that establishes the method of calculation of the indemnity for unjustified dismissal. The provision at stake has been adopted at a late stage of the post-crisis phase, however it still implements the policies of flexibilisation of the labour market strongly supported by EU institutions, in the aftermath of the 2008 crisis (as expressly emphasised also in the judicial phase). Moreover, even though the ruling is restricted to a precise norm, it may have a considerable impact on the overall D.Lgs. 23/2015, as well as on reforms adopted at a later stage, which perpetrate the same illegitimacy.

The contested norm has been declared unconstitutional on the grounds of Art. 3 Constitution (right to equal treatment), Art. 4.1 Constitution (right to work), Art. 35.1 Constitution (protection of work), as well as Art. 76 Constitution (on urgent legislative procedures) and Art. 117.1 Constitution (on the legislator's duty to comply with European and international obligations) in relation to Art. 24 Revised European Social Charter (on the right to protection in cases of termination of employment).

In particular, the mechanism of calculation set by Art. 3.1, D.Lgs. 23/2015, is found illegitimate, inasmuch as it gives rise to an indemnity, which results "rigid", as it can be graded only in relation to the seniority criterion, and "uniform" for workers with the same length of service and it does not allow considerations over the illegitimacy of the dismissal. An indemnity as such becomes "a fixed and standardized legal liquidation" (para. 10).

The Court, also in this case, reiterates the legislator's discretionality as far as concerns the legal institute at issue: the remedies for unfair dismissal. Drawing on the constitutional case law, it emphasises that, even though the protection against unfair dismissal has to guarantee a certain restraint of the employer's freedom to terminate the contract, "the Court has expressly denied that the balancing of the values expressed by Art. 4 and Art. 41 Constitution, ground on which the legislator has to exercise its

discretionality, imposes a precise protection regime" (para. 9.2). However, it further recalls the main aims of the legal institute at issue, that is the compensative function (in favour of the worker) and the dissuasive function (directed to employers). The legal reasoning is structured to supervise the balancing conducted by the legislator between the right to work and the freedom to conduct a business (Art. 41 Constitution) and concludes that, with the measure at stake, it has failed "to realize a well-balanced compromise between the interests at stake" (para. 12.3).

The principle of reasonableness is expressly used to measure the extent of sacrifice caused to the workers' interest, by the contested norm. As far as concerns the alleged violation of Art. 3 Constitution (right to equal treatment), first, the Court underlines that the applicants have challenged the temporal scope of the norm, which starts from the date of recruitment of the worker and from the entry into force of the Legislative Decree. Second, it points out that the referring court has argued that the date of recruitment is an "incidental and extrinsic element", which cannot justify a different treatment. Nevertheless, after having recalled that the "flow of the time" may constitute a valid ground of differentiation, the Court concludes that the reasonableness criterion, in light of the principle of equality, is not violated by the contested norm, because of its aim: "to strengthen the job opportunities for those who are seeking employment". According to the Court, the different treatment, based on a temporal criterion and directed only to those employed after the entry into force of the contested Act is consistent with the aim of the norm, inasmuch as this measure may favour only those who are seeking employment. Interestingly, while the Court stresses on the non-unreasonableness of the temporal scope, it specifies that "it is not up to this Court to evaluate the results that the employment policy pursued by the legislator may have achieved". In other words, it explicitly refuses to assess the suitability of the norm in relation to the aim pursued (para. 6).

Nevertheless, eventually, the Court declares the infringement of the principle of equality, on different grounds. Indeed, it declares Art. 3 Constitution violated because of the homogeneous treatment to which workers with the same seniority are treated, independently from the qualitative aspects that have characterised the employment relationship. Indeed, it rejects that the contested norm only provides for a quantitative criterion (para. 11).

At a later stage, the Court newly applies the principle of reasonableness referring to Articles 4 and 35 Constitution, but also to Art.1.1 Constitution, “in light of the particular value that the Constitution recognises to work” (para. 13).

Articles 4.1 and 35.1 Constitution, which protect work in any form and constitute the basic guarantee for the enjoyment of any right at work, are deemed infringed upon by the contested provision, inasmuch as an economic protection that does not constitute neither an effective damage compensation, nor an appropriate dissuasive measure “cannot be considered respectful” of the constitutional norms that protect the same interest, as it fails the worker’s interest to employment stability (para 13).

Last, it is remarkable that the Court has recognised a decisive role to the supranational parameter. Indeed, Art. 3.1, D.Lgs. 23/2015, is found in violation of Articles 76 and 107.1 Constitution because of Art. 24 European Social Charter, which provides for the member states’ duty to guarantee the right to an effective compensation in case of unfair dismissal (as interpreted by the Committee) and, says the Court, is inspired by ILO Convention No. 158 (Termination of Employment Convention) (para. 14). The latter could not be applied directly in the Italian legal system, inasmuch as it has not been signed by Italy.

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