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Electronic version
URL: http://journals.openedition.org/revus/2176
ISSN: 1855-7112

Publisher
Klub Revus

Printed version
Date of publication: 10 December 2011
Number of pages: 127-138
ISSN: 1581-7652

Electronic reference

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In 2010 the Italian Constitutional Court confirmed most of its recent jurisprudential trends. In some cases the Court dealt with totally new issues (i.e. same sex marriage and affirmative actions in electoral laws), but its most significant pronouncements were not characterized by unexpected overulings. The Court was frequently involved in the field of constitutional compatibility of laws on immigration from various point of views: not only the protection of civil rights, but also the division of competences between the State and Regions. In this latter field the Court’s role was particularly worthy of attention.

Key words: affirmative actions in electoral laws, same-sex marriage, European law, ECHR law and national law, illegal immigration

Considering the year 2010 as the basis of this report, the Italian constitutional Court dealt with 376 questions of constitutionality of laws, presented through indirect or direct appeals. Indirect appeal (211 cases in 2010) happens when a doubt of constitutionality of a legislative provision in the course of applying that provision induces a non-constitutional judge to raise the question to the constitutional Court.

In 141 cases the Court was accessed through direct appeals by the Regions (or Autonomous Provinces) doubting the constitutionality of national laws or by State doubting the constitutionality of regional laws. Moreover, in 12 cases the Court was called to decide on a dispute about the allocation of powers brought by a Region or an Autonomous Province against the State or vice versa. Finally, in 11 cases petitions regarding allocation of powers were brought by one branch of the State against another.

In the same year, out of 376 published decisions, 210 were judgments and 166 were decrees. The Court pronounces a judgment when a decision is reached with regard to the constitutional question. When the question is inadmissible – most of the times for procedural reasons – the Court pronounces instead a decree.

As far as the timing of the decisions is concerned, the most relevant data is the time elapsed between the day of the publication of the introducing act and the day of the discussion of the matter at the hearing. The average time during the year 2010 was 205 days in case of indirect appeal, and 269 days in case of direct appeal. The average time gap between the introduction and the treatment of the matter is constant.

1 The total amount is in line with the most recent trends: in 2009 the Court dealt with 342 questions (the lowest number in the last 20 years), in 2008 with 449. The most active year of the Court in the last 20 years was the year 2000, with 592 questions brought to the Court. Statistics are drawn from the annual reports of the constitutional Court's research service.

tly decreasing. To confirm this trend, there is no need to go back to the times of the Court’s “judicial arrears”: in the middle of the 80’s the gap between the introduction and the decision of a constitutional question could be of several years. In the last three years the Court’s reaction speed has been only slightly slower than today’s: as mentioned above – in 2010 – as far as the questions introduced by means of indirect appeal are concerned, the average time was 205 days. In 2009 it has been of 228 days, and during the previous years respectively of 259, 277 and 319 days (2008, 2007 and 2006).

As for the decisions introduced by means of direct appeal, the duration of the Court’s treatment is not following a similar constantly decreasing tendency: during the year 2009 the Court dealt with a noteworthy amount of judgments on matters introduced through direct appeal, significantly above the average of the previous years. In this frame, the average time between the introduction and the treatment of a cause during 2010 (269 days) appears in line with the average of the last five years, if the year 2009 is not considered.

In view of this general statistics regarding the jurisprudence of the year 2010, it is possible to start a substantial analysis of the jurisprudence of the Italian constitutional Court during the same year. Performing a complete chronicle of the constitutional jurisprudence’s development in 2010 goes beyond the object of this report. In order to give an account of those developments, I will report on the most significant pronouncements of the constitutional Court, following a chronological order, and combining – if necessary – the judgments given by the Court on the same matter. Since an important segment of the constitutional jurisprudence’s developments resides in the case law about immigration laws, a specific section (§ 2) will be devoted to the matter.

1 CONSTITUTIONAL HIGHLIGHTS

1.1 Gender equality in regional elections

On January 14th, 2010 the constitutional Court rejected the question on the electoral law of the regional council of Campania raised by means of direct appeal by the Government. The law in question was the first case, in the Italian constitutional experience, of regional electoral legislation properly promoting gender equality. Art. 4, paragraph 8, L. R. Campania n. 4/2009 gave any elector the chance to express one or two preferences: the expression of two preferences was only valid in case the two preferences were given to candidates (included in the same list) of different genders. In case both preferences were given to candidates of the same gender, the second preference would be considered invalid.

The Government challenged the constitutionality of the regional law, arguing that the electoral system would, on the one hand compress the freedom of vote (granted in art. 48 Const.), and on the other hand that it would implement an unreasonable dis-equality between different sex candidates.

The constitutional Court rejected the question also considering the recently amended constitutional framework: art. 51 Const. states in fact that “Any citizen of either sex is eligible for public offices and elected positions on equal terms, according to the conditions established by law. To this end, the Republic shall adopt specific measures to promote equal opportunities between women and men”; moreover art. 117 Const. adds that “regional laws shall remove any hindrances to the full equality of men and women in social, cultural and economic life and promote equal access to elected offices for men and women”.

3 Corte cost., sent. 14 gennaio 2010, n. 4.
4 Other regional laws, already challenged before the constitutional Court, only assured the presence of candidates of different genders in the electoral lists. This was the case of the regional electoral law in Valle d’Aosta, n. 3/1999, as modified in 2007, that provides that every gender shall be represented in every list for at least the 20% of its total members. A general framework of the regional laws in the gender-equality matter is given by Alessandra Concaro, Marsilia D’Amico, Donne e istituzioni politiche. Analisi critica e materiali di approfondimento, Torino, Gappichelli, 2006; Giuditta Brunelli, Donne e politica, Bologna, Il Mulino, 2006.
5 Art. 51 was amended by the constitutional law n. 1/2003, 30 maggio 2003.
6 Art. 117 was amended by the constitutional law n. 3/2001, 18 ottobre 2001.
Considering this constitutional framework, the Court stated two ultimate limits for electoral laws, enacting the constitutional principle of gender equality. The first limit is the constitutional prohibition of electoral laws that substantially modify the composition of an elected assembly. The second limit is the prohibition of electoral laws that give better chances of election to a candidate of one gender at the expenses of candidates of the opposite sex.

Since the regional law introduced a "promotional chance" which is perfectly gender-symmetric, and any elector remains free to express only one preference, the Court considered that those constitutional limits were not exceeded.

Some commentator put a significant emphasis on the Court’s decisions, also because in an earlier judgment the same Court had stated that a regional electoral system providing a legislative counter-balance in the gender representation was not only lawful, but even constitutionally imposed.

Another commentator noted that the Court’s reasoning was somehow weak. Indeed, the Court’s argumentation is based on the consideration that the double-preference system does not compress the freedom of the right to vote, granted in art. 48 of the Italian constitution. Considering that the second preference is valid only if in favor of a candidate of the opposite sex compared to the first preference, it was noted that the system introduces a form of constraint of the voter’s freedom. Moreover, the Court’s ruling was criticized because it did not consider how the regional electoral system affects the principle of equality of votes. The vote of an elector who decides to turn a profit on the double-preference system would in fact have a double weight compared to the vote of an elector who decides not to turn a profit on the double preference. And considering that the decision of the elector not to make a profit on the double-preference could be based on the fact that he/she is inclined to give his/her preference only to female or male candidates, the discrimination is not a gender-based discrimination, but rather a discrimination between the electors who decide to turn a profit on the double-preference system and the electors who do not.

These considerations were not regarded as significant enough to support the constitutional incompatibility of the Regione Campania’s electoral law, but they suggest that the constitutional debate on the issue is very likely to evolve.

1.2 European Union law and national law

The constitutional jurisprudence on the relations between European law and the national legal order slightly evolved during the year 2010. In its judgment n. 28 the constitutional Court finally stated that European law, under the provisions of articles 11 and 117 It. Const., is binding and hierarchically above national ordinary law. For the first time in its whole jurisprudence, the constitutional Court clearly defined the relations between European law and national law in hierarchical terms. Since the first steps in the “European Walk” by the Italian constitutional Court, the European and the national legal orders were in fact drawn as “through and through distinct”. The dualistic approach remained constant in the “European” jurisprudence of the constitutional Court: in its judgment n. 232/1975 the Court stated once again that the legal orders in question were “autonomous and distinct, even if coordinated”. Later, in its judgment n. 170/1984 – its most important recent turning point, that opened to the disapplication of national laws contrasting with EU law – the Court still affirmed that the legal orders were “distinct and mutually autonomous, even if coordinated”.

This dualistic approach faced significant perplexities in the legal scholarship, but was rather considered as an indispensable character...
of the Court’s jurisprudence\textsuperscript{13}, based more on traditional reasons than on a conscious conviction. This is why the Court’s adjustment towards a hierarchical definition of the relations between national and European law was welcomed (with a bit of wonder) by the legal scholarship, hoping that the Court’s reasoning had not been just “a careless stroke of pen”\textsuperscript{14}.

A further step in the specification of the relations between the European and the national legal orders came from the Court’s judgment on the European Arrest Warrant\textsuperscript{15}. The question was submitted to the constitutional Court by the supreme Court, arguing an incompatibility between the European framework decision and the national law executing the framework decision. The dispute involved art. 18, lett. r) of the national legislation: the provision allowed the Italian national judge to reject the implementation of an European Arrest Warrant, and thus not to surrender a person to the foreign judicial authorities in case the competent Court of Appeal disposed to implement the sanction in Italy. This clause was only valid in case the European Arrest Warrant was addressed to Italian citizens, and this limitation was the point submitted in the constitutional question.

The Court upheld the national rule, both because of the asymmetry between the framework decision and the national executing law, and because of the discriminatory character of the exclusion from the implementation of the refusal of surrender clause of European citizens legitimately residing in Italy. From a first point of view, the constitutional Court’s intervention was based on the fact that the framework decision provides - as an optional reason justifying the refusal of surrender - the possibility to implement the sanction, not only in the country of citizenship, but also in the country of residence. The constitutional Court’s intervention was necessary because of the lack of direct effect of the framework decision, which impeded the common judge to disapply the national legislation in contrast with the framework decision. From a second point of view, the Court judged the exclusion of resident European citizens as discriminatory on the ground of art. 12 EC Treaty (today art. 18 TFEU).

The Court’s decision on the European Arrest Warrant is also worthy of attention because the Court dealt with the problem of the questionability of criminal norms. The object of the indirect appeal was not actually a proper criminal norm, but a s.c. “extra criminal” norm: these are the norms that do not directly provide a criminal sanction, but are capable of affecting the description of the factual components of the norm. If an “extra criminal” norm is declared unconstitutional, the same behavior – first considered as lawful – could become unlawful. Under the (constitutional) principle of non-retroactivity of criminal norms, it would be unconstitutional to apply the Court’s decision to the case where the constitutional question arose. On the one hand, this seems to violate the character of indirect access to the constitutional Court, by virtue of which only a constitutional question that is relevant in a judicial case pending in front of a judge, may be submitted to the constitutional Court. In this frame, the declaration of unconstitutionality of the “extra criminal” norm may not work on the judicial controversy where the constitutional question arose. On the other hand, if the requirement of the effective relevance of the constitutional question in the common judicial controversy were to be interpreted so strictly, it would be impossible to question the s.c. “extra criminal” norms by means of indirect appeal. The results of a strict interpretation are considered unacceptable by the Court on the ground of two legal reasons: firstly, leaving a “free zone” out of the constitutional review is unacceptable; secondly, the declaration of unconstitutionality of a national “extra criminal” norm in conflict with an EU directive without direct effect is the only legal tool available to grant EU law supremacy.

1.3 National law and ECHR

In its jurisprudence during the year 2010 the constitutional Court confirmed its recent historical overruling, brought by the famous “twins decision” 348-349/2007. In its judgment n. 93\textsuperscript{16} the

\begin{itemize}
\item \textsuperscript{13} See Federico Sorrentino, Le fonti del diritto italiano, Padova, Cedam, 2009, 154.
\item \textsuperscript{14} Alfonso Celotto, Venisti tandem? La Corte, finalmente, ammette che le norme comunitarie sono «cogenti e sovraordinate», Giurisprudenza Costituzionale (2010) 1, 382.
\item \textsuperscript{15} Corte cost., sent. 24 giugno 2010, n. 227.
\item \textsuperscript{16} Corte cost., sent. 12 marzo 2010, n. 93.
\end{itemize}
Court declared a national norm contrasting with a provision of the ECHR unconstitutional: the national legislation excluded the right to a public hearing during the proceeding for the application of prevention measures against persons who are considered dangerous for the public safety and morality. The provision was considered inconsistent with art. 6 of the ECHR.

The Court referred to its procedural agenda, as elaborated in its previous, recent jurisprudence. First of all, the Court confirmed that the ECHR law may be a source of unconstitutionality when national norm, through the interposition of art. 117 of the Italian Constitution17. Second, the Italian constitutional Court confirmed its incompetence to dispute the European Court of Human Right’s interpretation of ECHR norms, of those norms entering – as interpreted by their natural judge (the Strasbourg Court) – the “interposition process” in the constitutional adjudication: the Italian Court warns nonetheless that ECHR norms can serve as parameter of the constitutional decision only if totally compatible with the Italian Constitution. In case the ECHR norms, as interpreted by the European Court, were inconsistent with any constitutional provision, using the interposition of the Convention in the constitutional adjudication would not be admissible.

1.4 The same-sex marriage issue

On April 16th, 2011 the constitutional Court ruled on the same-sex marriage issue for the first time18. The opportunity was given by several trials pending before civil judges who were asked by different same-sex couples to order the public administration to publish the bans. The civil officers had refused to publish the bans because of the sexual identity of the persons asking for it.

The question was complicated by the fact that the ban of the same-sex marriage is uncle-ar – in positive-legal terms – in the Italian family law. The ruling of the constitutional Court raised attention and expectations both in the public opinion and in the legal scholarship19. The Court decided to reject the question, nonetheless some aspects of its motivation are noteworthy.

On the one hand, the Court rejected the question raised on the constitutional compatibility of the ordinary law regulating marriage with the constitutional provision on marriage and the principle of equality. This is probably the reason why many commentators took the Court’s decision as an implicit ban of same sex marriage in the Italian constitutional order, although the question was not raised on the constitutional compatibility of a law introducing the right to marry for same sex couples, but – on the contrary – the question was raised on the constitutional compatibility of the family law, which excludes people of the same sex from the right to marry.

That was, in short, what the Court stated in the first part of its ruling. On the other hand, the decision is noteworthy because in the second part of its motivation the Court included the right to live life together as a couple among the fundamental rights that art. 2 of the Italian Constitution recognizes as inviolable. The Court recognized the exclusive competence of the Parliament to regulate such right. In conclusion, the question concerning the recognition of a fundamental right to live life together as a couple was considered inadmissible (and not rejected) by the Court.

In this part the Court’s judgment was therefore considered contradictory20: it was said that if a right is considered fundamental and inviolable, it should as well be fundamental and inviolable in front of the Parliament’s inactivity, which still

17 Art. 117.1 of the Italian Constitution, as amended in 2001, states that «legislative powers shall be vested in the State and the Regions in compliance with the Constitution and with the constraints deriving from EU legislation and international obligations».

18 Corte cost., sent. 16 aprile 2010, n. 138. The judgment was afterward confirmed by two successive decisions (Corte cost., ord. 7 luglio 2010, n. 276 and Corte cost., ord. 5 gennaio 2011, n. 4)

19 See the preventive attention given by the Italian legal scholarship in the conference proceedings of the seminar «Amicus curiae» that took place in Ferrara, Italy on February 26th, 2010 indeed a few weeks before the constitutional Court’s decision: Roberto Bin et al., La «società naturale» e i suoi “nemici”: sul paradigma eterosessuale del matrimonio, Torino, Giappichelli, 2010.

relegates Italy among the (very few) countries that do not give legal relevance to a stable union between persons of the same sex.

1.5 Vigilante groups

Two separate decisions\(^{21}\) of the constitutional Court faced the question of constitutionality of the legislation regarding volunteers for public safety (s.c. “ronde”). The regulation gave mayors, in accordance with the Prefect, the power to authorize the activity of non-armed groups of volunteers for urban safety, whose role should have been that of reporting potentially dangerous situations to the police. The institution and regulation of volunteers for public safety followed a legislative trend aiming at increasing the role of local authorities with regard to urban safety\(^{22}\), and has been subject to intense critics because of its (apparent) intention of assigning the public monopoly of the legitimate use of force to the private.

Nonetheless the questions of constitutionality arose by means of direct appeal: two Regions firstly argued that the State had no competence in the field of “urban safety and social distress”, main subjects of the regulation; secondly, the same Regions argued that, in case the regulation was intended by the Court within the matter of “public order and safety” – exclusive competence of the central State – the latter had violated the constitutional principle of fair cooperation between State and Regions, having excluded the regional authorities from the deliberative process.

The constitutional Court agreed only partially with the Regions’ claims. In fact, the Court stated that, as far as the provisions on “urban safety” are concerned, the norm should be interpreted restrictively: the State legislative intervention is legitimate only within the boundaries of crimes’ prevention and repression.

As for social distress, the Court stated that the literal meaning of the law did not give the chance of applying a constitutionally oriented interpretation: the State’s intervention invaded the regional competences and was therefore unconstitutional. The judges expressly stated that their decisions left the questions concerning the citizens’ right of association unaffected, as far as its purpose was that of performing a report activity as provided in the discussed norms, and not that of directly dealing with felonies.

1.6 Exclusion of the legal aid for members of the Mafia is unconstitutional

The Court declared art. 76, paragraph 4-bis, D.P.R. 115/2002 unconstitutional\(^{23}\), in the part where it presumed that subjects sentenced for drug dealing or for association to the Mafia may not have access to legal aid. The legislative provision was based on an irrefutable presumption which excluded that criminals involved in very lucrative activities may be in the economic conditions set by the law as a requirement to benefit from legal aid. The Court declared the norm unconstitutional because it imprints a permanent and indelible stigma on the targets of the provision, with a compression of the fundamental right of defense, stated in art. 24 of the Italian Constitution. Moreover, the norm is considered to be unreasonable, because it does not distinguish different roles and grades of association within the criminal phenomena: only the apical roles can benefit from significant economic resources, as opposed to the “gregarious roles”, which were nonetheless included in the regulation.

2 LAWS ON IMMIGRATION AND THE CONSTITUTION

2.1 Illegal immigration as a criminal aggravating circumstance is unconstitutional

In its judgment n. 249\(^{24}\) the Court declared the provision included in the criminal code by the decree-law n. 92/2008 unconstitutional.

\(^{21}\) Corte cost., sent. 24 giugno 2010, n. 226; Corte cost., 22 luglio 2010, n. 274.


\(^{23}\) Corte cost., sent. 16 aprile 2010, n. 139.

\(^{24}\) Corte cost., sent. 8 luglio 2010, n. 249.
provision inserted a new general circumstance, aggravating the criminal sanction for a crime, in case it was committed while the author was illegally on the State’s ground. Firstly, the Court stated that all men are entitled to the inviolable rights recognized by art. 2 of the Constitution, that those rights are recognized independently from the inclusion of a single person in a political community, and that a different treatment in relation to those rights is inadmissible on the mere ground of citizenship.

Therefore, the Court announced a strict scrutiny on the issue: the aggravating circumstance was in fact founded on a “personal and social condition”, which is considered a qualified parameter for measuring the principle of equality by art. 3 of the Constitution. Therefore, the regulation needed to pass a positive scrutiny of the rule of reason: it was not enough to recognize the legislation was not clearly unreasonable.

Having said this, the Court affirmed that the regulation was inspired by a substantial rationale, assuming the higher social danger of the irregular immigrant as a general and irrefutable presumption. This presumption was mirrored in legal terms by a more severe criminal treatment of the irregular immigrant, if compared with non irregular immigrants or Italian citizens, even though the facts committed were exactly the same.

This way of legislating was considered as an inadmissible “perpetrator’s criminal law” (law that punishes a subject according to what he/she is rather than to what he/she does), incompatible with the principle of offensiveness of the criminal offense, stated in art. 25 of the Italian constitution.

The regulation was moreover considered contradictory, if compared with other national criminal provisions in force: the aggravating circumstance did in fact not apply to European citizens irregularly residing on the State’s territory. This confirmed that the criminal treatment was not connected to the behavior of a non-citizen violating the laws on immigration, but to the personal status of the guilty.

2.2 Illegal immigration as a crime is not unconstitutional

With its successive ruling, the Court rejected several constitutional questions on the s.c. “clandestinity crime”. The criminal sanction for the irregular entrance or stay on the territory of the State was introduced by the 2009 “security package” (Law n. 94/2009). The Court’s reaction was considered as a “heterozygous twin” of judgment n. 249 on the aggravating circumstance (see paragraph above). The Court rejected both the objections focusing on the core of the legislative rationale and the objections focusing on secondary aspects of the regulation. As far as the first are concerned, the Court judged that the power to recognize a certain fact as unlawful falls within the discretionary authority of the legislator. According to the Court, the constitutional limit to the exercise of this discretionary authority is only the prohibition to take clearly unreasonable or arbitrary choices. Apparently in contrast with its twin judgment, the Court went far from applying a strict scrutiny to the case: on the contrary, the legislator was considered free to rule under a rational basis scrutiny, when it identifies criminally relevant facts. The criminal discipline was, in this case, not considered as a “perpetrator’s criminal law”, because the offence was built on the ground of a commissive felony (the irregular entrance) or an omissive felony (the failure to exit the State’s territory).

The complex individuation of a “legal asset” (bene giuridico, Rechtsgut), which the regulation was lawfully pursuing, was solved by the Court as follows. The regulation of immigration falls within the core of the State’s sovereignty: moreover, the prosecution of the violations of those rules, presiding the control of the State’s territory, is a constitutional and international obligation. The State’s authority leaves the possibility of choosing between administrative and criminal sanctions.

25 The legislative formulation was different in the decree-law and in the law of ratification of the same decree: the first was worded as follows: “if the fact is committed by a subject who is illegally staying on the national ground”; the second was worded in slightly different terms: “having committed the fact while staying illegally on the national ground”.

26 Corte cost., sent. 8 luglio 2010, n. 250.
As far as the violation of the principle of equality was concerned, the Court rejected the appealing judge’s objections: the regulation, according to the Court, does not equalize different situations (that of a person immigrating with the purpose of committing crimes, and that of a person immigrating without that purpose). Every judge is empowered to graduate the criminal sanction, using his common powers in the enforcement of criminal laws.

As far as the objections focusing on secondary aspects of the regulation are concerned, the Court affirmed that the legislator is allowed not to provide for a general clause, establishing the lawfulness of the irregular immigrant behavior, in case it was committed under a “reasonable justification”. A similar general clause was in fact provided in case a non-citizen did not comply with the order of expulsion (see paragraph below).

The constitutional Court found that the same legal effect was provided by the principles of the criminal code, and by the general principle of *ad impossibilia nemo tenetur*.

### 2.3 Prosecution of the non-compliance with expulsion order requires a justification clause

The Court partially upheld art. 14, paragraph 5-quater, of the Dlgs. 25th July 1998, n. 186 (Immigration Act), as it was modified in 2009. The norm prosecuted the non-compliance with an expulsion order addressed to the foreigner who had already been the addressee of a similar order.

The difference between the criminal treatment of the first non-compliance and the second non-compliance consists of two “details”: the criminal sanction is more severe in the second case, and – only in the second case – the foreigner has no chance of proving that his/her behavior is based on a legally significant justification. The justification clause is conversely explicitly foreseen by paragraph 5-ter of the same law, regulating the criminal sanction after the first non-compliance with the expulsion order.

The Court found it clearly unreasonable to consider the same factual situation first suitable to offer a legal justification (in case the non-compliance happened for the first time) and then not suitable to offer the justification anymore, even though the factual and legal circumstances are perfectly comparable.

However, the Court’s statements do not require every criminal sanction in matter of immigration to dispose a general “justification clause”: in its judgment n. 250 (see above) the Court explicitly denied such a constitutional obligation. The legal scholarship did not hesitate to investigate this (apparently) incoherent jurisprudential path, which substantially accords a wide margin of discretion to the legislator, whose only limit is the unreasonableness of providing the justification in some cases and excluding it in perfectly identical cases.

### 2.4 Immigrants’ rights in regional legislation (Tuscany)

In its judgment n. 269, the Court rejected the Government objections on several specific provisions of a regional law providing a regulation “on the welcome, the sympathetic integration and the protection of foreigners in the Region Toscana”. The central Government argued that the regional legislation exceeded the legislative competences disposed by the Constitution: the regulation provided the extension of its rules to “new” European citizens (as far as compatible with the current legislation and without prejudice to more favorable rules), and the extension was suspected to interfere in the matter of “relations with the European Union”, exclusive competence of the central State. The Court rejected these objections: the regional legislation is limited to the regulation, in favor of new European citizens and of those rights European citizens were already entitled to, by virtue of EU obligations. Those rights include public performances regarding health, education, employment, housing... All these issues include some regional competence, either exclusive, concurrent or residual.

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30 Corte cost., sent. 22 luglio 2010, n. 269.
31 L.r. Toscana, 9 giugno 2009, n. 29 (Rules on the welcome, the sympathetic integration and the protection of foreigner in the Region Toscana).
Similarly, the Government’s objections were rejected in the part stating that the rules extending urgent health care to all the persons present on the regional territory, regardless of the regularity of the stay, were unconstitutional. The constitutional Court recalled\(^{32}\) that any foreigner is entitled to all fundamental rights that the Constitution recognizes to every person (and not only to Italian citizens). And the right to health care falls within the hard core of the right to health, which is inextricably linked to human dignity.

### 2.5 Immigrants’ rights in regional legislation (Apulia)

On October 22nd, 2010 the constitutional court pronounced another rejection (after its ruling n. 269, see paragraph above) of a Government’s direct appeal against a regional law\(^{33}\). The law in question, L.R. Puglia n. 32/2009, regarded the “welcome, the civil living together and the integration of immigrants in the territory of Apulia”.

Once again, the Government argued that the regional legislation exceeded its own constitutional competences, ruling on issues of immigration and regulating the legal status of foreigners that the Constitution recognizes as exclusive competence of the central State.

The Government’s interpretation of the regulation asserted that, by virtue of the regional norms, a vast amount of social rights were extended to irregular immigrants: on the contrary, the Court found that the regulation did not include a general extension of rights to irregular immigrants. This was confirmed – according to the Court’s view – by the fact that only some specific rules were also explicitly addressed to irregular immigrants. This required that the general regulation, disposed without any specification, was only addressed to regular staying immigrants.

As far as the rules expressly applying to irregular immigrants were concerned, the Court carried out a specific analysis of their constitutional compatibility. Art. 1, paragraph 1, lett. h) of the regional law stimulated the regional policy to grant all immigrants (regular and irregular) the legal protection’s right, with special reference to the effectiveness of the right to defence.

The Court declared this provision unconstitutional in the part where it intervenes on jurisdiction and legal aid’s tools, both exclusive competence of the State.

As far as the second rule applying to all immigrants was concerned, the Court rejected the question regarding art. 10 of the regional law: the norm disposed that “essential care” services were accessible to all “foreigners, temporary staying on the regional territory”. The constitutional Court rejection of the Government’s objections was based on the fact that the regulation intervened in the health safeguarding matter (concurrent regional competence) and was compatible with the State principles on the same issue.

The Court finally upheld the ruling disposed by art. 1, paragraph 2, lett. h), that committed the Region to implement, in its own field of competences, the “international convention on the protection of the rights of all Migrant workers and members of their families”. The Court declared this part of the regional law unconstitutional under the parameter of art. 117 of the Constitution, because the regulation exceeded the regional competence and entered the State competence in the field of “foreign affairs”.

### 2.6 Social rights and foreigners (with a little help from the ECHR)

In its judgment n. 187\(^{34}\), the constitutional Court declared part of a norm introduced with the 2001 financial law unconstitutional for the third time. The norm limited the access to some social services – inextricably linked with subjective rights – to those foreigners provided with a residence card (today long-term residents).

The service in question consisted in a disability pension: the indirect appeal was upheld on the ground of the violation of the non discrimination principle, as stated in art. 14 of the ECHR, in connection with the right to the peaceful enjoyment of possessions, stated in the first additional protocol. Those conventional rights – through the interposition of art. 117 It. Const. – may serve as parameter in the judicial review.

\(^{32}\) The statement is drawn from a previous and recent judgement, Corte cost., sent. 16 maggio 2008, n. 148.

\(^{33}\) Corte cost., sent. 22 ottobre 2010, n. 299.

\(^{34}\) Corte cost., sent. 28 maggio 2010, n. 187.
The Court’s judgment is noteworthy also beyond the limits of the proper case, because a procedural agenda of the relations between the constitutional and the conventional order, in the field of social rights’ protection, was drawn by the constitutional judges. This could be summarized as follows: the ECHR does not provide any obligation to institute a social welfare system, since a wide margin of appreciation is accorded to every State. Once provided a welfare system, then its regulation should respect the principle of non discrimination. The principle of non discrimination should not be considered as an autonomous principle, but in connection with the rights protected by the Convention.

3 CONSTITUTIONAL TRENDS IN 2010

Attempting to draw an overall picture of the trends in the jurisprudence of the Italian constitutional Court in the year 2010 in a few lines could be a dangerous venture. I will therefore only try to compare the latter constitutional trends to the Court’s previous attitudes. In this frame the first impression on the Court’s activity in the year 2010 is that of a qualitative “poor” jurisprudence. More precisely: it is unlikely that any of the 2010 judgments will be recalled as historical pronouncements of the constitutional Court. This trend is probably due to a “qualitatively poor” activity of the Italian legislator: since the legislative products of the last years have not stood out for a strong innovative push, the constitutional jurisprudence tends to follow the same trend.

As far as the “European” and “conventional” jurisprudence of the constitutional Court is concerned, the most significant pronouncement the Court gave in the year 2010 simply confirmed its recent case law. An (apparent) exception to this conservative impression could be recognized in the same-sex marriage issue. For the first time in the Italian constitutional experience the Court’s pronouncement intervened on a typical civil rights’ ground. Though it must firstly be said that the Court’s intervention should not be seen as the result of a legislative activity, but rather of a legislative inactivity. Secondly, the Court’s judgment consisted partly of an inadmissibility response and partly of a full rejection: therefore, it can hardly be considered as a progressive intervention in the field of civil rights.

Another exception to this “constitutional poverty” is far from being only apparent: this is the case of the Court’s jurisprudence on immigration. The constitutional jurisprudence of the year 2010 on immigration laws seems indeed noteworthy for a variety of reasons. From a “quantitative” point of view, this sector of the Court’s case law is probably the richest. Nonetheless, it is from a “qualitative” point of view that the case law about immigration laws is worthy of attention. The Court’s pronouncements do indeed intervene on several important aspects of a constitutional Court’s jurisprudence: not only civil and social rights’ protection, but also institutional relations with “higher” and “lower” levels of government.

As far as the division of competences between State and Regions is concerned, the constitutional Court’s jurisprudence seems to be slightly in contrast with its general trend. After the constitutional amendment approved in 2001, which (apparently) moved toward a federalist idea of the form of State, the (massive) Court’s jurisprudence opted for an interpretative development in favor of the State competences. Through the Court’s jurisprudence, hundreds of competences’ disputes between State and Regions were solved with the individuation of “cross-matters” (such as, for example, free competition’s protection), extending the State competences over the constitutional wording. On the contrary, the constitutional Court’s jurisprudence during 2010 showed an opposite trend: in front of the State’s attempt to absorb the regulation of every aspect of immigration and of the policies for immigrants in its competences, the Court safeguarded regional prerogatives. In its judgments n. 266, 269, 134 and 175 the Court kept a clear distinction between immigration policies.

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35 On the latest legislative trends see Ugo Zampetti, Evoluzione della legislazione e ruolo del Parlamento, Rassegna Parlamentare (2011) 2, 47-68.

exclusive competence) and other policies addressing immigrants, in which the constitutional division of competences may include a regional competence.

**Authors’ Short Biography**

Pietro Faraguna is a post-doc researcher at the University of Udine. He received his Ph.D. in constitutional law from the University of Ferrara. His dissertation dealt with “the enigma beyond the supreme principles of the legal order. Limits and counter-limits to constitutional changes”. In 2009 he was a visiting PhD candidate at the Goethe Universität in Frankfurt a.M. In the first semester of 2008 he completed a specialization school of law in Parliamentary Law at the University of Florence. His recent publications include: Constitutional paradoxes from dis-equality to equality: the Italian case (with a little help from abroad), in Alexander Schuster (ed.), LGBTI Rights in the XXI Century, Udine, Forum, 2011, 75-92; Legge costituzionale (austriaca) vs. libertà di circolazione: la Corte traccia un progetto di modello di gestione dei “controllimiti europeizzati”? in Quaderni Costituzionali, (2011) 2, 437-440; Legge n. 51/2010: legittimo impedimento ministeriale o «immunità in senso lato»?, in Studium Iuris (2010) 12, 1250-1258. Il Mangold-Urteil del BverfG. Controllo ultra-vires si, ma da maneggiare europarechtsfreundlich, in Quaderni Costituzionali (2010) 4, 863-866; Limiti e controllimiti nel Lissabon-Urteil del Bundesverfassungsgericht: un peso, due misure?, in Quaderni Costituzionali (2010) 1, 75-98.