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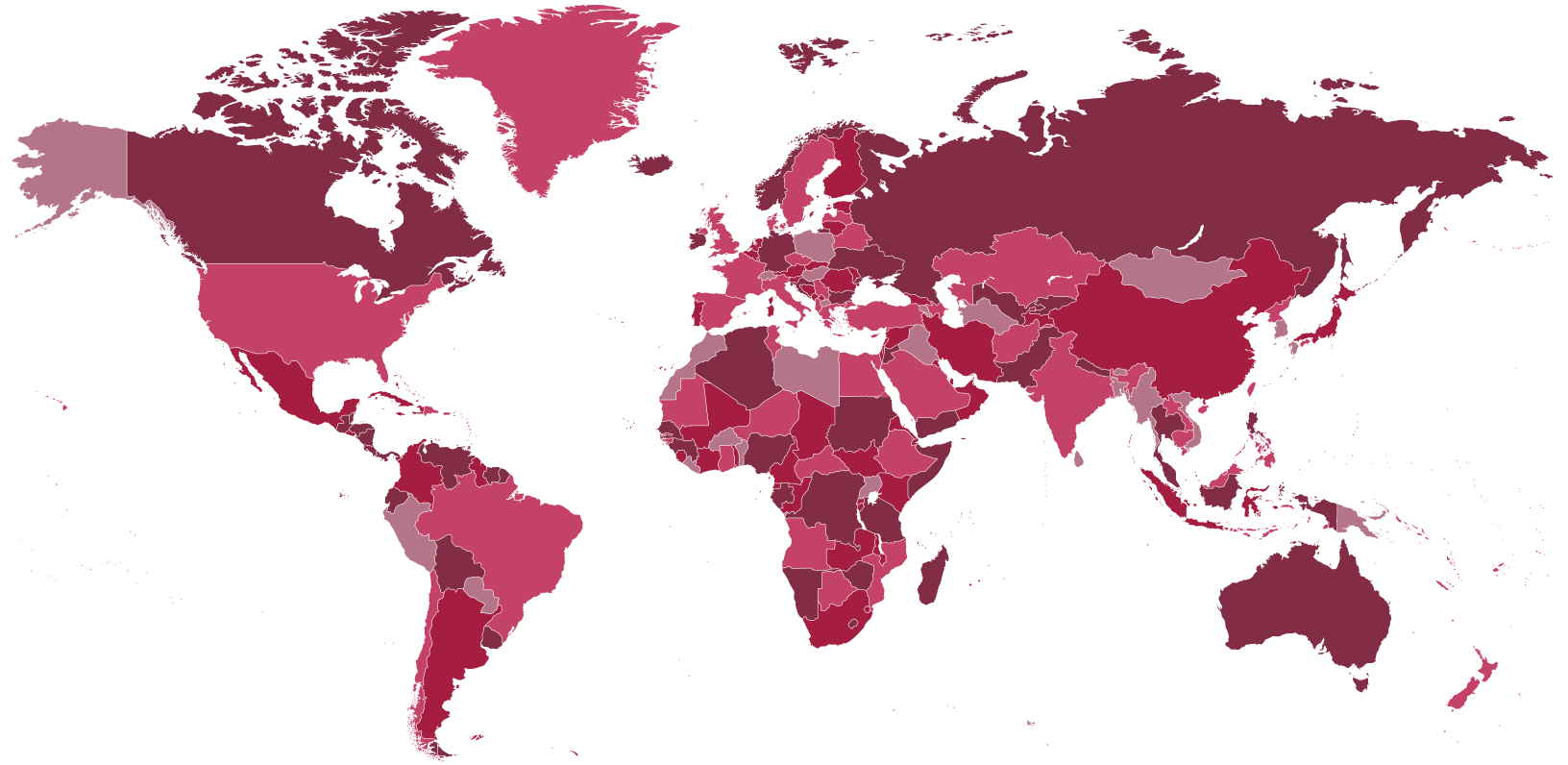
Table of Contents

INTRODUCTION



Italy

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I. Introduction

The Italian Constitutional Court (hereafter ICC or "the Court") has characterized its 2022 case law with a consolidation of previously emerged trends. In particular, the Court engaged a relational approach toward the legislator, utilizing a wide range of decisional methods and stimulating its intervention through multiple warnings and recommendations. On a "vertical" dimension, the Court's case law in 2022 was characterized by a fine-tuning of its jurisprudence inaugurated in 2017, affirming an ever-integrated and multi-layered model of protection of fundamental rights. However, the Court reaffirmed some of the basic principles governing the relations between domestic law and EU law.

II. Major Constitutional Developments

The year 2022 has been characterized by the consolidation of recently well-settled trends in the jurisprudence of the Italian Constitutional Court (hereafter ICC). These trends are related both to the ICC's position within the national constitutional system, and the Court's approach towards other constitutional institutions, including the ICC's position in international and supranational dimensions.

As for the first front, the ICC's pushed its recent jurisprudence further in a constant dialogue with State and regional legislators to whom reminders and warnings were addressed in a spirit of sincere institutional cooperation. After the steady growth recorded with the 10 'warnings' issued to the legislator in 2018, which doubled in 2019 to reach 25 in 2020 and 29 in 2021, the figure for 2022 stabilized at 22.

These warnings and recommendations concerned a variety of issues. These included, among others: the representation of both sexes in the electoral lists of small municipalities (see judgment no. 62 of 2022, reported below in section III); the complete phasing out of judicial psychiatric hospitals and their replacement with residential facilities (see judgment no. 22 of 2022, reported below); the new arrangement whereby the attribution of both parents' surnames is the default rule in the transmission of family surnames (see judgment no. 131 of 2022, reported below).

Along with this jurisprudence, the Court consolidated its approach aimed at avoiding any "judicial review free-zone". In fact, the Court accompanied its relational approach toward the legislator with a firm stance with regard to its own role as a guardian of the principle of proportionality. The Court has spared no effort in corrective interventions even where there was no univocal normative solution to fix the legal system: in these cases, the Court often found that any pre-existing normative "point of reference" might be enough to fill the legal void that would have emerged from the mere annulment of a law. This method has been applied in the most diverse sectors of the legal system, including electoral matters (see judgment no. 62 of 2022 reported below) and criminal law.

As for the second front (the international and supranational position of the ICC), 2022 has been characterized by a fine-tuning of an interesting process started in 2017. Back

then, with its decision no. 269 of 2017[1], the Court – with an important *obiter* – decided that when both the Italian Constitution and the EU Charter of fundamental rights were allegedly violated, referring judges were free to access the ICC also before referring the question of the preliminary ruling to the Court of Justice. This conflict rule seemingly acted as a derogation of the general rule traditionally adopted by the ICC, since its seminal decision no. 170 of 1984, in cases of a violation of a provision of the EU endowed with direct effect, namely the immediate and autonomous disapplication of the national rule if needed after a preliminary reference to the Court of Justice. However, the ICC in 2022 clarified that its new approach in cases of "dual preliminarity" does not derogate from the core of the conflict rule inaugurated in 2017. Particularly in its decision no. 67 and 263 (further reported below), the Court recognized once more the exclusive competence of the Court of Justice to interpret and apply the Treaties, for purposes of ensuring its uniform application throughout all the Member States. Moreover, the ICC reaffirmed the central role played by the preliminary ruling procedure, which does not only provide a channel for interconnection between the national courts and the Court of Justice for resolving interpretive uncertainties but also helps to ensure and reinforce the primacy of European law. Within this framework, the ICC reiterated that "disapplication is not dead": on the contrary, disapplication remains an essential tool to be combined with the preliminary reference procedure, both aiming at guaranteeing the full effectiveness of EU law. The ICC adhesively referred to the Court of Justice's stance, explaining that the failure to disapply a national provision that is held to conflict with European law violates "the principle of equality between the Member States and the principle of sincere cooperation between the European Union and the Member States, recognized by Article 4(2) and (3) TEU, with Article 267 TFEU and […] the principle of the primacy of EU law" (Judgment of 22 February 2022 in case C-430/21, RS, point 88).

Lastly, a remarkable development concerned procedural aspects regulating public hearings before the Court. In 2022, starting from the hearing of 21 June 2022, the ICC started to apply a dialectical approach to its hearings. These procedural innovations were implemented through the "Supplementary Rules – Rules of Procedure of the Constitutional Court of the Italian Republic", approved by the Court in May 2022, published in the Official Journal of the Italian Republic on 31 May 2022 and completed by a decree from President Giuliano Amato. According to this new model of managing public hearings, five days before each hearing, judge-rapporteurs may address written questions to the lawyers in their case. Along with this novelty, the traditional initial report of the hearing by the judge-rapporteur has been replaced by a brief introduction, typically lasting no longer than five minutes.

During the hearing, each lawyer or defense counsel is typically allotted 15 minutes to present their defense and respond to the judge-rapporteur's written questions. Any judge – not only the judge-rapporteur – may engage directly with the lawyers, with questions and objections, further enriching the discussion of the case.

III. Constitutional Cases

1. *Judgment no. 236 of 2022*: The ICC Episode in the Lexitor saga

The Constitutional Court, with its decision no. 263, entered the extensive debate that, in Italy and beyond, has been triggered by the so-called Lexitor preliminary ruling of the Court of Justice (C-383/2018). This decision interpreted an EU Directive 2008/48/EC – lacking direct effect – in the sense that it attributes to consumers the right to a proportional reduction of all credit costs, in the event of early termination of the contract by the consumers themselves. However, the Italian legislator provided for an unusual implementation of the Court of Justice Ruling in July 2021: the Parliament stated that the ruling of the Court of Justice had to be followed only in respect of "new contracts" (entered since July 25th, 2021); while for contracts signed before the existing legislation continued to apply, along with "secondary rules contained in the Bank of Italy's regulations". The Constitutional Court declared the unconstitutionality of the implementing law, limited to the part in which it refers to the Bank of Italy's secondary rules. As for the remaining part of the regulation, the Court affirmed that a conforming interpretation of the rule resulting from this decision could be enacted.

2. *Judgment no. 183 of 2022*: Unlawful dismissals from work and political discretion

The Court heard a referral order questioning the compensation payable to workers unlawfully dismissed by small businesses (15 or less employees, 5 or less in agriculture): its limited amount (3-6 months' remuneration) apparently infringed the principles of reasonableness and equality, as well as the right to work (protected by Articles 4 and 35 of the Constitution). The referring court relied on judgments nos. 194 of 2018 and 150 of 2020, which had struck down different compensation criteria for their unreasonable rigidity: according to these precedents, also from the perspective of multilevel guarantees of social rights (including through the European Social Charter), an effective protection of workers from unlawful dismissal demands that judges enjoy a certain degree of discretion in determining the compensation, so that every relevant factor may be taken into account adequately. Again, in this case, the Court finds that the modest amount, as well as the small difference between minimum and maximum, are in violation of the Constitution. Yet, this violation may not be redressed by the Court: a wide range of varied plausible solutions exist, and it belongs to the Parliament to make the relevant choices. Accordingly, the Court rules that the question is inadmissible. That being said, the Court admonishes that the legislation should be reformed soon, and that, should a constitutional challenge be raised again, future rulings could be less deferential.

3. *Judgment no. 149 of 2022*: ne bis in idem in the fight against violations of intellectual property

With this decision, the Court declared a provision of the Italian criminal code unconstitutional as it did not set forth an obligation to discontinue proceedings when the defen-

dant had already been adjudicated for the same behavior in administrative proceedings which might potentially lead to the imposition of a punitive sanction (according to the *Engel* criteria of the Strasbourg Court). The constitutional challenge originated from a case where a defendant in a criminal trial, concerning an intellectual property offense, argued that he had already been punished by an administrative body for the very same infringement of copyright law, albeit qualified differently in law. The Court limited the effects of its decision to the specific field of offenses against intellectual property at issue in the main proceeding. The Court applied the criteria set forth by the ECtHR in *A and B v. Norway* and found that the legislation in force in Italy did not establish a sufficient connection in substance and time between the two sets of proceedings envisaged for essentially identical offenses.

4. *Judgment no. 131 of 2022*: Once again on the child's surname

In this case, the Court heard once again a challenge to a provision regulating the transmission of family surnames to children. After declaring unconstitutional the prohibition to transmit also the mother's surname, as long as parents agree to do so (judgment no. 286 of 2016), the Court was now called to assess the constitutionality of the prohibition to give only the mother's surname, in cases where both parents agreed to do so. The Court, with an unusual decision to refer a case to itself, extended the scope of its ruling to the constitutionality of the default rule, i.e., to the transmission of the father's name as a default rule.

The Court found this default rule to be in contrast with the child's inviolable right of personal identity and with the principle of equality between parents and struck down the contested provisions as unconstitutional. The new rule emerging from the Court's decision requires the assignment of both parents' surnames to children, in the order agreed upon by the parents themselves, except where they agree to give only one of their surnames.

Once again, the Court issued a firm warning to the legislator, signaling an urgent need for broad legislative reform in this matter, taking into account the need to regulate the effects of its decision on successive generations and siblings.

5. *Judgment no. 79 of 2022*: On adoption and family ties

With its decision no. 79 the Constitutional Court declared Article 55 of Law No. 184 of 1983 to be incompatible with Articles 3, 31, and 117(1) of the Constitution insofar as it requires the rules laid down in Article 300(2) of the Civil Code for the adoption of adults to be applied to the adoption of children "in special cases", i.e., adoption of minors permitted under different conditions from those required for so-called full adoption. This form of adoption is meant to promote the effectiveness of a relationship that has been established with the child or to make the adoption accessible to children whose full adoption is extremely difficult, if not legally impossible.

The rule provided for in Article 300(2) of the Civil Code precluded the recognition of family ties between children adopted in these "special cases" and the family of the adoptive parents.

The Court affirmed that the non-recognition of family ties with adoptive parents' relatives is tantamount to disregarding a child's identity, which derives from belonging to the new network of relations that are important to a child's family life.

6. *Judgment no. 67 of 2022*: Disapplication is not dead

In this case, the Court considered two referral orders from the labor division of the Supreme Court of Cassation concerning a provision excluding third-country nationals legally residing and working in Italy, when the members of the family unit did not reside in Italy from benefiting a family unit allowance, which was offered to Italian and European citizens living in Italy. The Supreme Court of Cassation had already referred a question on the same matter to the Court of Justice of the European Union with a reference for a preliminary ruling. The Court of Justice held that the provision violated EU law and the principle of equality of treatment. Nonetheless, the Supreme Court of Cassation referred the case to the Constitutional Court, on the assumption that it could not disapply the provision, given that EU law did not provide a complete framework to fill the gap that would be left by the disapplied provision. The Constitutional Court disagreed with this assumption and held the questions inadmissible as irrelevant. The Constitutional Court affirmed that the Supreme Court of Cassation was, indeed, able to simply disapply the provision, leaving in place the domestic provisions governing the family unit allowance, which would no longer be withheld from third-country nationals residing and working legally in Italy, when members of the family units reside temporarily abroad.

7. *Judgment no. 63 of 2022*: Principle of proportionality of penalties

In this decision, the Court declared that the sentence of five to fifteen years imprisonment, envisaged by the Consolidated Law on Immigration for anyone who has helped someone enter Italian territory illegally by plane using false documents, is manifestly disproportionate and incompatible with Articles 3 and 27(3) of the Constitution. The Constitutional Court held that such a dramatic increase in the ordinary penalty envisaged for the basic offense of facilitating illegal immigration (imprisonment from 1 to 5 years) may be justified in other instances, concerning different aggravating circumstances, e.g., when the migrant's life is endangered or the migrant is subjected to inhuman or degrading treatment during transportation; but is wholly unreasonable with respect to the circumstance at issue.

8. *Judgment no. 62 of 2022*: Gender equality in local elections

In its judgment no. 62 of 2022, the Court stated it is unconstitutional for municipalities with fewer than 5,000 inhabitants not to require their electoral lists to have candidates of both genders. The decision reiterated that having both genders on municipal electoral lists is a minimum guarantee of equal opportunities for access to elected office. This obligation applies to municipalities with

under 5,000 inhabitants, which represent 17% of the Italian population. However, the regulations on presenting lists provided no sanctions for non-compliance, while the decision of the Court states that the exclusion of non-compliant lists from elections is an appropriate legal consequence, although the legislator may subsequently introduce different consequences.

9. *Judgment no. 54 of 2022*: Maternity allowances, third-country workers and EU law

This judgment follows up on a reference for a preliminary ruling by the Constitutional Court to the Court of Justice of the European Union (CJEU) and on the CJEU's answer. The challenged provision stipulated that the eligibility of third-country nationals for (childbirth and) maternity allowances was conditional upon the holding of a long-term resident's EU residence permit. The question was whether this was compatible with EU Directive 2011/98, as it excluded some third-country workers from said allowances. Resuming its proceedings, the Constitutional Court enforces the CJEU's ruling and annuls the provision: both national (Articles 3 and 31 of the Constitution) and EU law (relevant in the light of Article 117 of the Constitution) are infringed by a system irrationally more restrictive towards some third-country nationals who still hold a valid EU (albeit non-long-term) residence permit, and who can be in the greatest need of social protection. It is worth recalling that some lower Italian appeal courts had found that the EU directive was not only applicable, but also endowed with direct effect, and therefore had decided their cases without raising constitutional challenges. Instead, the Court of Cassation referred the question to the Constitutional Court, whose ruling, summarized above, quashes the challenged provision once and for all.

10. *Judgment no. 28 of 2022*: Principle of proportionality of penalties of financial nature

The referring court challenged a provision establishing that the amount of the fine replacing short custodial sentences cannot be below 250 € per day, arguing that such a provision could lead to the imposition of disproportionately harsh penalties for offenders of limited financial means. The Constitutional Court struck down the provision, holding it to be incompatible with the principle of equality enshrined in Article 3 of the Constitution, as well as the principle of proportionality of penalty based on Articles 3 and 27(3) of the Constitution, which the Court considered applicable also to financial penalties. In this respect, the Court underlined that the offender's financial means are an important factor to consider when assessing the severity of a fine and its proportionality to the seriousness of the offense. The Court held that the impugned provision led to the imposition of fines that are much higher than what most people in Italy today can afford based on their income and assets. This ends up "transforming the fine in lieu of prison into a privilege for wealthy offenders alone", in clear breach not only of the principle of the proportionality of penalties but also of the equality principle.

11. *Judgment no. 22 of 2022*: Security residence for offenders with mental disorders

After the closing of judicial psychiatric hospitals (criminal asylums), offenders with mental disorders – when they are considered *socialmente pericolosi* (socially dangerous), and the danger cannot be controlled in alternative ways – may be restricted in special residential facilities ("residenze per l'esecuzione delle misure di sicurezza", REMS): small units designed to contribute to the gradual social rehabilitation of their inmates while containing their threat to society itself. Under Italian law, the decision to place an individual in a REMS is a judicial order, issued by a criminal court. However, only a fraction of the relevant rules are set out in primary legislation: most are contained in secondary legislation and agreements between the State and local government (regional) bodies. Moreover, hundreds of people are currently on waiting lists for allocation to a REMS, with an average waiting time of approximately ten months, although some of them have committed serious and violent offenses; and, as REMS are part of the general health care system, governed by regions, the national Ministry of Justice has no direct power in the management of REMS. Both points violate the Constitution, which requires that any limitation of personal liberty be disciplined by primary legislation (Article 13); and endows the Minister of Justice with responsibility for all the services relating to the administration of justice (Article 100). However, the Court does not declare the current legislation unconstitutional: such a decision would result in "the abolition of the entire system of REMS" and would leave "an intolerable gap in the protection of constitutionally significant interests". Instead, the Court calls upon the legislator to implement a comprehensive reform in order to ensure an appropriate legislative framework, the establishment and efficient operation throughout the country of a sufficient number of REMS, the enhancement of alternative non-custodial facilities, as well as the appropriate involvement of the Minister of Justice. It is worth noting that this judgment has been preceded by a rare fact-finding order by the Constitutional Court, which led to the disclosure of much data on REMS and their operational problems and also gave impulse to better coordination between the Ministry and Regions.

12. *Judgment no. 18 of 2022*: Censorship of prisoners under enhanced surveillance regime correspondence and right to defense

In this decision, the Court addressed another issue concerning the legal protection of persons subjected to special conditions of detention, stating that Article 41-bis of the Prisons Law, which (according to the interpretation of the Court of Cassation) provides for the mandatory censorship of correspondence between detainees subjected to the enhanced surveillance regime and their lawyers, infringes the right of defense enshrined in the Constitution.

The judgment notes that, according to the settled case law of the Constitutional Court and the ECtHR, the right of defense includes the right to communicate, in confidence, with one's own lawyer, and stresses that detainees serving a custodial sentence also enjoy this right. This is necessary, inter alia, in order to ensure effective protection for the prisoners against any abuses committed by the prison authorities. This right is not absolute and may be restricted, insofar as this proves to be reasonable and necessary in situations in

which other constitutional rights are at stake and provided that it does not make the rights of defense ineffective. The Court holds that the censorship of correspondence between prisoners and lawyers is not an appropriate instrument for achieving this aim, and thus unreasonably impairs the detainees' rights of defense. Since prisoners are entitled to speak in private with their lawyer at any time (on this issue the Court ruled with its decision no. 143 of 2013), censorship on correspondence cannot be deemed a suitable means to prevent the exchange of information between prisoners and the criminal organization to which they belong. Moreover, the provision under review provided that the censorship occurred automatically, even where there were no specific grounds to suspect any unlawful conduct on the part of the lawyer.

IV. Looking Ahead

The year 2023 has started with the publication of multiple seminal decisions concerning the much-debated restrictions enacted to fight COVID-19: we will report these decisions next year, along with other decisions connected to vaccines. In fact, it was maybe because of the central role played by vaccines in public (and, specifically, legal) debate during the pandemic crisis, that constitutional controversies on vaccine-related issues (even unrelated to COVID-19) have significantly increased in 2023. The Court will then deal once again with the constitutional limits to state immunity and reparations for World War II crimes, ruling on the enforcement of its decision n. 238 of 2014, by which the Court has affirmed the jurisdiction of Italian courts on the responsibility of Germany for such reparations.

V. Further Reading

Marta Cartabia and Nicola Lupo, 'The Constitution of Italy: A Contextual Analysis' (Bloomsbury, 2022)

Elisabetta Frontoni, 'The Italian Constitutional Court and the Surname of Children', Roma Tre Law Review, 2022, 2, pp. 97-110.

References

1 Report 2018, p. 160.