Essays

Italian Constitutional Court, Kelsen's Pure Theory and Solving 'Hard' Cases

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Abstract

The legal system is a kernel of rules in which the crucial role is that of the law making body. The most important factor in the promulgation of laws is the ability to challenge any unfair or unjust law by invoking the powers of judicial review. In Italy, which practices a Civil law jurisdiction there is a constitutional court that conducts the judicial review of laws that concern the citizens. The creation of the Italian Constitutional Court is based on the theory of Hans Kelsen, that formulated the need for a higher court to judicially review legislation and invalidate legislative acts with the power to interpret a Bill of Rights. The issue that needs examination is if the Court has sufficient powers to solve the 'hard' cases that are raised by applicants relating to the decisions of administrative bodies delegated by the executive. This article deals with the question in a jurisprudential context by applying legal theory in this political-legal evaluation in the area of social welfare law where the court has been interventionist in interpreting the legislation. This is will clarify its scope and powers and its political-legal role within the framework of the Italian constitution.

I. Building Blocks of the Constitution

The framework for the Italian Constitutional Court was drawn up by the Constitution of 1948 and it became operative in 1956.[1] The inception of the Constitutional Court (from now on 'the Court') was a theoretical and practical step that placed public law in a recognised civil law framework, and it was preceded by debates regarding the principles of constitutional governance.[2] The

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[1] The laws that implemented Art 137 of the Constitution are legge costituzionale 9 February 1948 no 1, legge costituzionale 11 March 1953 no 1 and legge 11 March 1953 no 87. Under Art 135, the Constitutional Court is composed of fifteen judges, five are appointed by the Parliament in joint session, five are appointed by the President of the Republic and five are appointed by the supreme ordinary and administrative courts (the Court of Cassation, the Council of State, and the Court of Audit).

[2] S. Cassese, 'The Globalization of Law' 37 *New York University Journal of International Law & Policy*, 973 (2005); G. Falcon, 'Internationalization of Administrative Law: Actors, Fields and Techniques of Internationalization: Impact of International Law on National Administrative Law' 18 *Revue Européenne De Droit Public*, 217 (2006).

conception of a Constitutional Court raises the issue whether it has the power of interpreting the Constitution and its scope in deciding the 'hard' cases which generally raise the issue of an abuse of power. This is an examination that can be accomplished by first evaluating Hans Kelsen's theory of law that led to the creation of constitutional courts in European countries, between the wars, and the principles that they apply in interpreting the law with the discussion of the Court review of Italian welfare rights legislation.

The Court has adopted the model of review that followed the example of Austria, where the creation of the Constitutional Court was influenced by Kelsen's concept of an apex court in the national jurisdiction.[3] It also borrowed from the constitutional law principles of the American Supreme Court which has the reviewing powers to interpret the Constitution.[4] The objective of the Court is set out in Art 134 of the Constitution which provides that it

> 'shall pass judgement on: – controversies on the constitutional legitimacy of laws and enactments having force of law issued by the State and Regions; – conflicts arising from allocation of powers of the State and those powers allocated to State and Regions, and between Regions; – charges brought against the President of the Republic, according to the provisions of the Constitution'.

There was a debate about the 'comparative' element in the structure of the Court prior to the promulgation of the statute that created the court for the judicial review of legislation. The choice in favour of a special court, endowed with the power to decide several constitutional disputes and to invalidate legislation that was inconsistent with the Constitution was a hybrid power that did not translate into an identical Kelsenian model.[5] In terms of comparative

[3] The name of Hans Kelsen recurs in the records of the Constitutional Assembly only once, and not on the problem of judicial review: see G. D'Orazio, *La genesi della Corte costituzionale* (Milano: Comunità, 1981), 81. See also F. Basile, 'La cultura politico-istituzionale e le esperienze "tedesche" ', in U. De Siervo ed, *Scelte della Costituente e cultura giuridica* (Bologna: il Mulino, 1980), I, 45; S. Volterra, 'La Costituzione italiana e i modelli anglosassoni, con particolare riguardo agli Stati Uniti', ibid, 117.

[4] Indeed, when the Americans wrote their democratic constitutions (state and federal) at the end of the XVIII century, they could see only examples of republics declining in despotic or oligarchic government, and Italy is one of the sources of those examples. On the influence of the Italian republican tradition on American political thought and constitutional foundations see J.G.A. Pocock, *The Machiavellian Moment. Florentine Political Thought and the Atlantic Republican Tradition* (Princeton: Princeton University Press, 1975). More generally, on the constitutional ideas of this period see G. Wood, *The Creation of the American Republic 1776-1787* (New York: W.W. Norton, 1972).

[5] Theory traditionally distinguishes between the American model of judicial review of legislation, which is diffuse, concrete, and binding as between the parties, and the Austrian model (*Verfassungsgerichtbarkeit*) which is centralized, abstract, and binding universally. See M. Cappelletti, *Judicial Review in the Contemporary World* (Indianapolis: Bobbs-Merrill, 1971); in this special issue see A. Gamper and F. Palermo, 'The Constitutional Court of Austria: Modern

powers the Court

> 'was not endowed with many 'accessory' competences: for instance, the Court – unlike many other European constitutional courts – does not have any say as far as elections are concerned. As for review of legislation, both abstract and concrete forms were established'.[6]

The decision to create the Court was concurrently with the extension of devolution to the Regions which were entrusted with legislative powers, and a specific precedent was the High Court of Sicily that had been created in 1946 by the special regional Statute for Sicily ('*Statuto speciale*'). This regional Court was invested with the power to control the validity of laws according to the Statute and its preamble impacted on the future Italian Constitution.[7]

The Austrian Constitutional Court was developed by the 20th century's preeminent legal philosopher Kelsen who framed its basic provisions to adjudicate cases that impacted on the Constitution.[8] The Austrian Constitutional Court's centralized review provided the ordinary judges with two important powers which are (a) the decision whether or not to raise a constitutional question, and (b) the constitutional review of secondary legislation. This does not formulate an absolutely centralized model of constitutional review, but rather a model with some features of diffuse review.[9] The framework was influenced by the German positivist and organic approach to the study of law and as a consequence,

Profiles of an Archetype of Constitutional Review' 3(2) *Journal of Comparative Law*, 64 (2008). See A. Pizzorusso, 'Italian and American Models of the Judiciary and of Judicial Review of Legislation: A Comparison of Recent Tendencies' 38 *American Journal of Comparative Law*, 373 (1990); P. Pasquino, 'Constitutional Adjudication and Democracy. Comparative Perspectives: USA, France, Italy' 11 *Ratio Juris*, 38 (1998).

[6] P. Passaglia, 'Rights-Based Constitutional Review in Italy' available at https://tinyurl.com/yc6oseel (last visited 30 June 2018).

[7] M. Olivetti, 'Foreign Influences on the Italian Constitutional System', paper submitted to the 6th World Congress of the International Association of Constitutional Law, on *Constitutionalism: Old Concepts, New Worlds,* Santiago do Chile, 12-16 January 2004*,* for the workshop *Foreign Influences on National Constitution*.

[8] See eg the competences of the Constitutional Courts in Central and Eastern Europe countries: L. Favoreau, 'Constitutional Review in Europe', in L. Henkin and A.J. Rosenthal eds, *Constitutionalism and Rights: The Influence of the United States Constitution Abroad* (New York: Columbia University Press, 1990), 52-53. For a general overview of the competences of the Constitutional Court see A. Cerri, *Corso di giustizia costituzionale* (Milano: Giuffrè, 2001); A. Ruggeri and A. Spadaro, *Lineamenti di giustizia costituzionale* (Torino: Giappichelli, 2004); E. Malfatti, S. Panizza and R. Romboli, *Giustizia costituzionale* (Torino: Giappichelli, 2003). Among the publications in English see A. Baldassarre, 'Structure and Organization of the Constitutional Court of Italy' 40 *Saint Louis University Law Journal*, 649 (1996); A. Pizzorusso, 'Constitutional Review and Legislation in Italy', in C. Landfried ed, *Constitutional Review and Legislation: An International Comparison* (Baden-Baden: Nomos Verlagsgesellschaft, 1989), 111; D.S. Dengler, 'The Italian Constitutional Court: Safeguard of the Constitution' 19 *Dickinson Journal of International Law*, 363 (2001).

[9] See A. Pizzorusso, 'Italian and American Models of the Judiciary' n 5 above; P. Pasquino, n 5 above.

it adopted a systematic and conceptual attitude towards the legal order rather than a problem-oriented view; and focused on interpreting the law, rather than on analysing the conditions of legal change and reform.[10] These transformations engendered a new framework setting out a methodological shift which implies that the legal analysis is no longer to be understood in the purely formal terms of conceptual jurisprudence. This has to be evaluated by means of a genuinely interdisciplinary approach, combining insights drawn from the fields of history, sociology, political science, economics, comparative law and the law of institutions.[11]

The organisation and functions of legal institutions have brought into the debate the various strands of jurisprudence that critique Kelsen's *Pure Theory of Law*. They are relevant because of the process of development of the Italian administrative law and the conceptual basis of which in the Italian state has been subjected to critical examination.[12] This requires the examination of the principles of Kelsen's theory and its impact by reference to the difficult cases that come before the Court for review which are based on legislative provisions. The comparative approach deals with Kelsen's idea of an apex court and the rights thesis that is developed by jurists such as Hart and Dworkin, who are concerned with the legal exercise of power and the rights of the citizens.

The Court's framework in Italy and its procedure waives the more accepted concept of judges hearing with deference to the executive. The Court is more proactive in evaluating legislation which is about maintaining and restricting

[10] The Germanic influence was predominant in Italian legal thought from the end of the 19th until the middle of the 20th centuries and the crucial role played by Massimo Severo Giannini in bringing about a fundamental shift in paradigms with the consequential decline in influence of the German 'dogmatic' approach to jurisprudence. See S. Cassese, *Culture et politique du droit administratif* (Paris: Dalloz, 2008); see also P. Grossi, *Scienza Giuridica Italiana. Un Profilo Storico. 1860-1950* (Milano: Giuffrè, 2000).

[11] This was the first time in its history that Italian legal scholarship devoted attention to history and to politics, making use of quantitative data and analyzing administrative practices. Legal change became an important area of study, while the traditional private law approach lost its central role. However, the study of administrative law remained one of the last enclaves of nationalism within the legal academy. Even with the new focus on comparative perspectives, the French and German legal traditions were still the most important points of reference. The work of Massimo Severo Giannini (1915-2000), a talented jurist and public law professor at the University of Rome Sapienza Law School was heavily influenced by his broader cultural interests: M.S. Giannini, *Lezioni di diritto amministrativo* (Milano: Giuffrè, 1950); Id, *Diritto amministrativo* (Milano: Giuffrè, 3rd ed, 1993). The complete works of Giannini are now collected in 10 volumes, published between 2000 and 2008; see also S. Cassese ed, *Massimo Severo Giannini* (Roma-Bari: Laterza, 2010). Some articles on the Italian administrative system by Benvenuti were published in Germany in the 1950s and 1960s: see, eg, F. Benvenuti, 'Die italienische Verwaltung und der Entwurf eines Gesetzes uber das Verwaltungsverfahren' 49 *Verwaltungsarchiv*, 1 (1958). See also M. Nigro, *Giustizia amministrativa* (Bologna: il Mulino, 2002).

[12] At the end of the 20th century, a comprehensive Treatise of Administrative Law was published: S. Cassese ed, *Trattato di diritto amministrativo* (Milano: Giuffrè, 2003). A few years later a dictionary of public law was also published: S. Cassese ed, *Dizionario di diritto pubblico* (Milano: Giuffrè, 2006).

the power of Parliament under a working Constitution.[13] In this paper there is discussion of Kelsen's theory of law that provides the platform for the creation of a Constitutional Court and there is consideration of other arguments by other jurists. The main issue is how judges solve hard cases and if the Court's review of social welfare law in Italy illustrates its scope and powers and its relationship with the executive.

II. Founding Principles of Judicial Review

The idea of a Constitutional Court emerged in the writings of the Austrian jurist, Hans Kelsen, and was a component of a vision of constitutions as the higher law operating within a refined and stratified system of private and public law.[14] According to Kelsen, the court approximates to a default legislator which has not been elected into power but which does have a political function. He has also tried to explicate a legal foundation of constitutional review for the court to act as a bulwark against the executive's acts which are not in conformity with the provisions of the Constitution.[15]

This is because the Court has the role of protecting political rights and its independence can only be sufficiently guaranteed when judges can claim a special authority on the same level as legislators. The competence to review requires judges to be educated and trained to become scholars and judges of constitutional law.[16] The Court has the function of developing the case law of judicial and administrative tribunals and the legislative norms of administrative bodies and even courts as to their judicial procedure. Kelsen's *Pure Theory of Law* regards legal norms as having two functions: to confer power on subordinate officials to create legal norms, and to indicate, at least in part, the content of those norms. These can be described as two classes of norms: power norms and

[13] Such a choice was not made by the Constitution itself (which only included provisions for a Constitutional Court and for the powers of it) but by the legge costituzionale no 1/1948, approved by the Constitutional Assembly the month after the Constitution was already in force, but the Assembly was prolonged to the formal ending of a Parliamentary session.

[14] See H. Kelsen, 'La garantie juridictionnelle de la constitution' 45 *Revue de Droit Public*, 197 (1928); Id, 'Judicial Review of Legislation: A Comparative Study of the Austrian and American Constitution' 4 *The Journal of Politics*, 183 (1942).

[15] Kelsen elucidates his principles by stating 'that the new order begins to be 'efficacious' when the individuals whose behaviour it regulates actually behave, by and large, in conformity with the new order. If these two facts are associated with the new order, then the order is considered as valid and 'a law creating fact' '. This implies that the validity of the laws will be judged by the efficiency of the laws of the political power. H. Kelsen, *General Theory of Law and State* (Cambridge, MA: Harvard University Press, 1945), 110.

[16] The efficacy of the new order becomes a basic law-creating fact that justifies the legal framework which the judiciary can validate by acceptable the new Constitution even if it has been achieved by extra constitutional means. The Constitution has effectively been changed and the executive's power is legal because it has replaced the *Grundnorm* or the Basic Norm. H. Kelsen, *General Theory* n 15 above, 115.

decisional norms, and both are often combined into what a court decides and what must it decide, or what should it decide in the exercise of its discretion, as an intrinsic part of the judicial process.[17]

The issue arises as to how judges, not being directly elected by the electorate, can deal with issues of rights that are affected by the legislation enacted by the Parliament and which adopts laws. The rule of law implies that a state should not exempt areas of public power from legal scrutiny as a matter of principle, nor should there be absolute barriers to the courts assuming a wider role based on considerations of non-justiciability. Kelsen's concept is that of a Court best placed to review the abuse of power by the executive, in its judicial capacity and to inquire into the powers that run on the discretion of the executive.[18]

Kelsen formulation of a Constitutional Court is that of an institution where the judges are academically suited as law professors who can be relied to review the legislation by the state. It allocates the power that can be reserved to Parliament, administrative agencies acting under the powers conferred by the executive and to the judges.[19] However, Kelsen was trying to frame a concept of the first Constitutional Court in modern times where there was a need for an institution with powers to control or regulate legislation. In the case of post-World War I Austria, the concern was mostly for maintaining federal arrangements by regulating the relationship between the national and provincial governments. This facilitated the creation of an institution which was part of the highest level of political power, and independent of the institutions that actually exercise governmental power directly through law.[20]

[17] ibid 42.

[18] In Germany, Italy, and Spain, negotiations for a constitutional framework produced four main outcomes. First, the contracting parties established parliamentary systems of government, using relatively familiar institutional templates. The other three outcomes ran counter to political centralisation. Constitutions provided for federalism (Germany) or strong regionalism (Italy and Spain), but only after long and contentious debate. The third outcome, the codification of an enforceable body of fundamental rights and liberties, proved to be even more difficult to achieve. Elster has argued that 'norm-free bargaining' – where 'the only thing at stake is self-interest' – is most likely to result in a settlement, whereas 'norm conflicts' frequently lead to 'bargaining impasse' since the parties interact with one another from the standpoint of radically opposed social values. J. Elster, *The Cement of Society: A Study of Social Order* (Cambridge: Cambridge University Press, 1989), 215, 244-247.

[19] 'There was sovereignty of Parliament and no court can question its validity or question an Act in Parliament, which is the supreme law of the land. Before the constitution of 1920 the power of the courts to pass on the legality and hence of the constitutionality of a decision was not restricted'. H. Kelsen, *Judicial Review* n 14 above, 183, 185.

[20] 'Prior to the appearance of the Kelsenian constitutional court, it was widely assumed that constitutional review was incompatible with parliamentary governance and the unitary state. The parliamentary system privileges an ideology, that of majority rule, which is realised through legislative supremacy and its corollaries. American-style judicial review, by contrast, was thought to 'fit' only in polities where legislative sovereignty had been rejected – such as where 'separation' of powers meant 'checks and balances' among co-equal branches of government – or where a judicial 'umpire' of federalism was needed. Generally, forms of non-judicial, constitutional review, took root only in the German federations, Switzerland, and Austria'. K. von Beyme, 'The Genesis

The Constitutional Court, according to John Ferejohn, offers a necessary protection from abuses of power, internal and external, individual and institutional.[21] It was not the designation of the institution as a juridical forum as that would be the appellate courts' function in a national jurisdiction. There is a characteristic of all civil law countries that there are at least two parallel supreme courts: one for civil and criminal cases (Court of Cassation) and the Constitutional Court was an institution that dealt with references arising from cases on laws enacted by the state.

The Kelsenian methodology of the constitutional court would be able to adjudge serious breaches of fundamental rights as recognized in international law. The rulings of the court would be based on the normative laws that are grounded in the universal principles such as the Basic Law in Germany that specifically sets forth in the Constitution the framework under which the state must function. The Court would be the mechanism and tribunal to judge serious crimes and human rights abuses and this could be contrasted with the system of constitutional review in the American 'diffuse' system of constitutional review which operates under the doctrine of Constitutional Supremacy whereby all courts are empowered to address breaches of the Bill of Rights 1791.[22]

Kelsen's conception of democracy is achieved by granting autonomy reliant on popular sovereignty and democracy by ensuring the legislative power must be subject to such conditions of legality that ensure that the content of laws does not conform to the 'tyranny of the majority'[23] The existence of legislative power must be in accordance with basic political rights and liberties and democratic rights of political participation. These secure a successful transformation of natural freedom into the idea of political freedom and the notion of participation in legislation.

of Constitutional Review in Parliamentary Systems', in C. Lanfried ed, *Constitutional Review and Legislation: An International Comparison* (Baden-Baden: Nomos, 1989); A. Stone, *The Birth of Judicial Politics in France* (Oxford: Oxford University Press, 1992), chapters 2, 9.

[21] J.E. Ferejohn, 'Constitutional Review in the Global Context' 6 *Legislation and Public Policy*, 49, 52 (2002).

[22] Lars Vixen argues that the value in Kelsen's theory is that 'democracy is the participation in the process of legislation by virtue of which the people can consider themselves the authors of the statutory enactment'. This coercively regulates their behaviour and the ideal of the autonomous social order is achieved by 'creating such a legal political order, in which individuals enjoy political freedoms in which to participate in the determination of the content of legal norms'. Vixen contends that the social order is the creation in which people who participate may satisfy the subjective preferences of the majority of the people. This offers the possibility to consider them legitimate and identify them as self-governing actions. The Kelsenian approach according to this perspective allows the freedom to remain in distant autonomous entities with individual moral preferences or conceptions of justice, while allowing the people to identify 'with democratically enacted laws even if there is no agreement with the substantive merits'. L. Vixen, *Hans Kelsen's Pure Theory of Laws: Legality and Legitimacy* (Oxford: Oxford University Press, 2008), 104-119.

[23] H. Kelsen, 'Foundation of Democracy' 66 *Ethics*, 27 (1955).

Alec Sweet states that 'Kelsen's model of the juridical state can easily be translated into the language of delegation theory'. This distinguishes features of 'Principal-Agency models is that they link, as in a chain, authoritative acts of delegation from one constitutionally recognised authority to another'. These acts assume a 'highly legalistic form' and they emanate from the 'sovereign people (first-order principals) ratify a constitution, which delegates power to governmental bodies, like legislatures and courts'. It implies that there are statutory normative instruments through which

> 'governments and legislatures who are the agents of the electorate, but second-order principals *vis-à-vis* ordinary judges and administrators delegate certain specific responsibilities and powers to the courts and the administration'.[24]

Thilo Telzlaff argues that the issue of the supremacy of a constitution over the Parliament is dealt with in Kelsen's framework as a problem of general constitutional theory and considered in the framework of statutes. This is because of his formulation that

> 'no legislation is free in this formation of law, but is and should be bound by a constitution. Consequently, he takes the position that both legislator and judiciary deal with law creatively, while at the same time being subordinate to the constitution. The legislator is also applying law according to superior legal norms'.

It infers that he draws exclusively from the concept of the supremacy of a constitution over the elected body of the Parliament which may entitle judges to act de facto as the executive power.[25]

The normative logic of constitutionalism that restricts legislative sovereignty by recognising the rights of individuals and the prerogatives of provinces requires the establishment of a means of enforcing these rules. Kelsen's concept of constitutional review provides a means of defending constitutional law as a higher law, while retaining the general prohibition on American model judicial review. The Constitutional Court that Kelsen has formulated was adopted by Italy, and its purpose is designed as a model for resolving the constitutional cases and not for the ordinary disputes which are for ordinary courts in the national order.

[24] A.S. Sweet, 'Constitutional Courts and Parliamentary Democracy' 25 *West European Politics*, 77 (2002).

[25] T. Telzlaff, 'Kelsen's Concept of Constitutional Review Accord in Europe and Asia: The Grand Justices in Taiwan' 1 *National Taiwan University Law Review*, 75, 79 (2006).

III. Morality and Law in Judicial Reasoning

Kelsen's approach to theory of the control based on 'efficacy' of the legal framework would need some analytical tools to test the constitutionality of legislation. This concept ascribes to the substance of the laws rather than the framework of laws that are hierarchical and must be obeyed. The rejection by Kelsen of law as an abstraction of the teleological 'ought' argument based on the effect of the religious, moral and sociological perspectives that comprise the normative system.[26] This is the subject of debate and relevant towards understanding the composition of the law, so that the assessment can be made that law is promulgated and should have the moral authority when it is subjected to judicial review.

Herbert Hart does not accept the 'efficacy' of the law based on the *Grundnorm* that underpins Kelsen's approach to the constitution. He disputes that this is a correct method of evaluating change on two counts which are, firstly, the idea that law necessarily requires a sanctions regime, and secondly, a normative social phenomenon that could be explained purely in terms of social facts that regulating behaviour is not a valid presumption of constitutional law. In rejecting the 'pure theory of law', he developed the notion that every legal system had a 'rule of recognition' that takes account of circumstances in which the law exists.

However, Hart answers the factual point of Kelsen's theory by stating that a constitution is legal by endorsing the tests provided by the rule of recognition, and so is validation of the legal system. The application of a legal rule can be accepted if it satisfies all the criteria provided by the rule of recognition which are

> 'those rules of behaviour which are valid according to the system's ultimate criteria of validity must be generally obeyed, and ... its rules of recognition specifying the criteria of legal validity and its rules of change and adjudication must be effectively accepted as common public standards of official behaviour by its officials'.[27]

Hart argues that there are 'primary rules of obligation' which the law enforces towards individuals but there are also another tier of secondary rules that may be required to provide in order to implement all the primary rules. If these rules seem to be in effective then there is an opportunity for the legislators to improvise by means of the secondary rules. These second tier of rules become very important when the courts decide to resolve any issues arising over their interpretation by

[26] Kelsen rejected the doctrine of natural law because 'it obliterates the essential difference which exists between scientific laws of nature, the rules by which the science of nature describes its object, and the rules by which ethics and jurisprudence describe their objects, which are morality and law'. H. Kelsen, 'The Natural-Law Doctrine Before the Tribunal of Science' 2 *The Western Political Quarterly*, 481 (1949).

[27] H.L.A. Hart, *The Concept of Law* (Oxford: Oxford University Press, 2nd ed, 1994), 116.

the judges. The secondary rules of a legal system may include 1) rules of recognition, 2) rules of change, and 3) rules of adjudication.

The difference in the approach of Hart from Kelsen is where he considers the rule of recognition as the common denominator of all rules and provides a test for validity that arises out of a convention among officials whereby they accept the rule's criteria as a standard governing their behaviour. These can be deduced from the social practices of officials acknowledging the legitimate rule of conduct, and capable of being obeyed as a valid law; by conferring validity to all else and in unifying the laws as part of the legal system. Kelsen stated his reasoning that 'there is only a *prima facie* duty to obey grounded in and thus limited by fairness and there is no obligation for us to obey unfair or pointless laws'.[28]

In considering the law's validity Hart accepts the premises of conformity with the new order. For both scholars the issue under consideration is of the application of laws origination from a constitution based on a factual consideration of their application. There are no moral justifications that Hart considers applicable for a test of the validity as he is not a natural law theorist and there are no moral imperatives that he brings to his analysis for the acceptance of the legal framework.

However, Ronald Dworkin rejects the theory put forward by those jurists who pose the factual question such as an efficacy of change or a rule of recognition. He rejects the notion that there can be any general theory of law or any particular legal system that can identify law without recourse to its objectivity. This he states is because a theory of law should be based not on the appearance of norms but on 'how cases should be decided'.[29]

He does not begin with an account of political organization, but with an abstract ideal regulating the conditions under which governments may use the organisation of force over the citizens. The laws cannot be applied retrospectively after they are promulgated. And Dworkin raises the practical issue by stating that the law is whatever the political sovereign promulgates at the time it is enforced. There are two features of courts's rulings and the making of rules which are when there are the important cases debated and where their rulings are contentious. The controversy suggests to him that the validity of the law cannot rest on official enactment and its diversity infers that there is no single individual rule that validates all relevant reasons, either moral or non-moral rules for judicial decisions.

Dworkin argues as follows:

> 'Our discussions about law by and large assume, I suggest, that the most abstract and fundamental point of legal practice is to guide and constrain the power of government in the following way. Law insists that force not be

[28] H.L.A. Hart, 'Are There Any Natural Rights?' 64 *Philosophical Review*, 175 (1955).
[29] R. Dworkin, *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1977), 1.

> used or withheld, no matter how useful that would be to ends in view, no matter how beneficial or noble these ends, except as licensed or required by individual rights and responsibilities flowing from past political decisions about when collective force is justified'.[30]

The exposition of this rule is based on the ground which provides the legal system with its validity. The issue is what vests the legal authority of the government to exercise power over the citizens. There has to be a basis for the state to be able to exercise its control and coercion and the efficacy is not the rational test based on law and morality, and on this argument they are related in an epistemic rather than in any ontological way.

Dworkin states:

> 'A conception of law must explain what it takes to be law provides a general justification for the exercise of coercive power by the state. A justification that holds except in special cases when some competing argument is especially powerful'.[31]

The judiciary's task is to utilize in the best possible manner the achievement of the two main purposes. These are firstly, to produce decisions that will present the law as the best fit for any problems that arise, and secondly, to decide in the light of precedence to establish the 'essence of law' is integrity. This is in accordance with the theory that in common law systems judges do have a discretion in decision making.

Jeremy Waldron agrees with the work of Dworkin and offers a supporting argument for the reasoning behind judicial decisions. He states:

> 'Are judges good at morality? Are they better at moral reasoning than other political decision makers? Is the quality of their moral reasoning a reason for assigning final decisions about rights to the judiciary rather than to legislatures?'.[32]

> 'In short, judges seem to take moral issues seriously, in a way that does not seem to be true of the noisy, chaotic, self-interested, and majoritarian proceedings of our legislatures'.[33]

The basic difference is that in Hart's thesis judges are left to adopt a decision that must be based on the paradigms of executive's policy, while in Dworkin's model the 'rights thesis' is endorsed. This defines that in hard cases 'judicial' decisions enforce existing political rights' and that there is no discretion that is

[30] R. Dworkin, *Law's Empire* (Cambridge, MA: Harvard University Press, 1986), 104.
[31] ibid 225.
[32] J. Waldron, 'Judges as Moral Reasoners' 7 *Journal of Constitutional Law*, 2 (2009).
[33] ibid 4.

permissible in arriving at the ratio of a judgment. Dworkin proposes the legal principles which confer rights are themselves a constituent of law and are decisive factors in hard cases. This is because the judge is obliged to weigh the competing rights claimed by plaintiff and defendant against each other whilst also checking the extent to which each relevant right fits in with an interpretation of the law.[34] The implication is that a judge remains objective in giving reasons for his decision and he invents a hypothetical judge, 'Hercules', who is endowed with an interpretive power which is 'superhuman skill, learning, patience and acumen precisely to equip him for the demands of his labours'.[35] This raises an interesting debate in which the judges may be held responsible merely because they are capable of making these difficult rulings.

An example of a case in which the judge has to attain such Herculean heights is the 'hard case' that Dworkin refers to in citing *Everson* v *Board of Education*.[36] He argues that if this case was being decided by judge 'Hercules' then he would first seek to find out what the objectives of the constitution and the principles enshrined in its framework are. In writing his ruling the judge would

> 'develop a theory that justifies the constitution as a whole and this will be by testing various constitutional doctrines against the reality of its existing rules and practices'.[37]

The super human judge would take into consideration the political philosophy to decide the legal/political implications of particular rights such as religious freedom in the above case where they are expounded as the principles under the US Constitution's First Amendment rights referred to in the above case. In hard cases Hercules would enquire in this instance 'does the principle the plaintiff is appealing have any gravitational force?'. That is, where a principle has been determined in a previous case, 'are we pulled towards accepting it in this case because of the 'fairness of treating like cases alike'?'.[38]

Kelsen's theory of hierarchical unity of norms and their singularity and

[34] R. Dworkin, 'Hard Cases' 88(6) *Harvard Law Review*, 1057-1109 (1975). An English judge Lord Reid states that 'the judge does not just protect the status quo and there is a general warrant for judicial law making'. L. Reid, 'The Judge is the Law Maker' 12 *Journal of the Society of Public Teachers of Law*, 22 (1972).

[35] ibid 1083.

[36] *Everson* v *Board of Education* 330 US 1 (1947). This was a landmark decision of the Supreme Court which applied the First Amendment to State law. Prior to this decision the words, 'Congress shall make no law respecting an establishment of religion' imposed limits only on the federal government, while many states continued to grant certain religious denominations legislative or effective privileges. This was the first Supreme Court case which made the Establishment Clause of the First Amendment binding upon the states through the Due Process Clause of the Fourteenth Amendment. Justice Black stated 'The expenditure of tax raised funds thus authorised was for a public purpose and did not violate the due process clause of the 14th Amendment'.

[37] R. Dworkin, n 34 above, 1083.

[38] ibid 1083-1084.

exclusivity has not been accepted by Joseph Raz who contends that the claim

> 'that two norms are connected together in a chain of validity is insufficient to ensure that they form part of the same legal system and that it is possible, conversely, for two laws to belong to the same legal system even if there is no common basic norm authorising the creation of both'.[39]

Raz rejects the assumption that there is an unbroken chain of validity leading to the basic norm which determines the structure of a pyramid shaped legal system. This is a rejection of Kelsen's premises and is in accordance with natural law tradition which is that the normativity of law can only be deduced in the same evaluation as that of morality, or religion in terms of explaining the validity of actions. However, Raz contends that it does not explain if the functional 'ought' is an objective 'ought', and what is the basis of the criteria that makes a legal obligation distinct from a moral obligation. The critique that he develops arrives to the same conclusion that the theory of the efficacy of a normative order is wrong.

In another critique of Kelsen's theory of law Zoran Jelić states:

> 'The Kelsenian structuralist world view is a set of normative relations reduced to a world of normative functions or artificial constructions alienated from the man and not related to the social reality. On the contrary that would necessarily understands a certain degree of efficacy for the purpose of regulating conflicts of interests and establishment of peace in the social community, that it supposes an optimism measure of agreement between the norm and the social reality'.[40]

This is interpreted as presenting a distinction between a 'being' and an 'ought'. However, Jelic states that it is a misconception and is defined as a fact-based assessment upon the incorrect identification of the norm with the notion that it is identifies with validity of norm by its efficacy. For example, the anti-normative approach to the social process that Kelsen has catalogued is an essential element of the Marxist legal theory in general.[41]

Karl Marx rejected the structure of a civil society on the basis that

[39] J. Raz, 'Kelsen's Theory of the Basic Norm', in J. Raz ed, *The Authority of Law: Essays on Law and Morality* (Oxford: Clarendon Press, 1979), 127-145.

[40] Z. Jelić, 'An Observation of the Theory of Law of Hans Kelsen' 1 *Law and Politics*, 551 (2001).

[41] Kelsen argued that Marxist jurisprudence attempts to replace scientific jurisprudence by an abstract theory of law which he interprets as the 'so-called historic materialism', that corresponds to the 'economic interpretation of social reality' is evident 'in the widespread tendency to reject any normative interpretation of social phenomena, even if they undoubtedly fall within the realm of morality or law'. H. Kelsen, *The Communist Theory of Law* (New York: Praeger, 1955), 7.

> 'legal relations as well as forms of state could neither be understood by themselves, nor explained by the so-called general progress of the human mind, but that they are rooted in the material conditions of life – and that the anatomy of civil society is to be sought in political economy',

ie in economic forces.[42] However, law is a fact. Therefore, it must be studied by means of causative and by realistic methods that impact on the lives of people. In comparing the deductions of positive and analytical jurisprudence it can be deemed that whilst Hart tried to navigate a middle way between formalism and realism, and is concerned in the functionality of law, Dworkin has attempted to reach beyond that dichotomy and views the judge as an interpreter of the law.

The implication is that Dworkin believes that 'Hercules' will not allow policy to create gravitational force for it is the relevance of principle that decides such cases. If there is any principle used to settle the hard case it must also reflect 'Hercules' constitutional theory, for the law must be treated by the judge as a logical process. This means that ultimately, the judge as interpreter of the law will be drawn to single conclusion in each case.

However, the empirical studies conducted into judicial approaches reveal that judges do have policy that brings an element of subjectivity into decision making. Federico Thea relates the findings from studies carried out on the influence on judges in case decision making. This

> 'clearly demonstrates that traditional legalistic views, which categorically deny any influence of political or ideological attitudes in the judicial decision-making process, are fundamentally flawed'.[43]

Furthermore, he provides

> 'relevant evidence of the influence of judges' beliefs and political attitudes in their decisions, but it also led the way to further research on the impact of political attitudes in judicial decision-making, as well as to consider other possible variables, such as the judges' personal background, and to develop alternative theoretical frameworks'.[44]

The historical perspective is that in hard cases it is not possible for the judges to accept a pure model of formalism. However, there is space for disagreement among the jurists that while judges may accept that they will argue there is one correct answer to a hard case, they may still dissent about what is the outcome

[42] K. Marx, *A Contribution to the Critique of Political Economy* (Chicago: Kerr, 1904), ii, cited in J.M. Kelly, *A Short History of Western Legal Theory* (Oxford: Oxford University Press, 2007), 309.

[43] F.G. Thea, 'The Role of Judges in Political Struggles' 2 *Queen Mary Law Journal*, 57, 60 (2012).

[44] ibid 61.

itself. The disagreement with Dworkin's rights thesis of adjudication is by the contention that each judge will base their reasoning on their own individual legal and constitutional theory. This will conceptualise into different concepts about what the law is, and, in specific cases, allow some judges to acknowledge a rule or principle to be established which other judges will not acknowledge.

IV. Resolving the Hard Cases

In Germany, Italy, and Spain the constitutions declared rights prior to establishing the state institutions and allocating the governmental functions.[45] As a consequence academic lawyers and some judges consider rights to possess a form of 'supraconstitutional' status which is reinforced by rules governing constitutional amendment, that tends to treat non-rights provisions as more elastic, and rights provisions as more rigid and immutable. Thus, although the constitutional law is viewed as positive law in these countries, parts of that law – rights – can be interpreted as expressing (or codifying) natural law.

The structure of these provisions constitutes implicit delegations of enormous law-making discretion to constitutional judges. Although a few rights are declared in absolutist terms, the most important being 'equality before the law' provisions, found in all countries with a Constitutional Court, the great majority of rights are expressly limited. There are only some rights that are expressly formulated as 'limited' rights.[46] The Court has had to decide hard cases in its jurisprudence of the Italian social welfare law by invoking the 'adding-principle' (*sentenza additiva di principio), which* is an important methodology through which it rules on the cases by reference to a law. It serves as a means for judicial review by which the Court has rejected the constitutional review for violation of competences principles of the most important legislation.

The *sentenza additiva di principio* instrument has led the Court to develop a method of softening the harshest effects of direct and 'expensive' intrusive rulings which it developed with the inference. The Court announces that by giving a directive or principled guidance, to the legislature on how to amend the law it regulates according to certain standards in order to make it constitutionally lawful.[47]

[45] A.S. Sweet, n 24 above, 83.

[46] In Italy, Art 21 para 1 provides that 'the press shall not be subjected to any authority of censorship', while Art 21 para 6 provides that 'printed publications (…) contrary to morality are forbidden', and Art 21 Para 7 states that parliament has the responsibility to 'prevent and repress all (such) violations'.

[47] The Court has issued judgments which are based on the necessity to respond to specific practical needs rather than drawing on abstract theory. These various types of judgments arise from the necessity, recognized by the Court, to consider the impact its decisions have on the legal system and on other branches of government, in particular Parliament and the judiciary. This result was made technically possible by the theoretical distinction between '*disposizione*'

The impact of this rule of interpretation has been felt in the health sector where national legislation on disability has been reviewed upon which the Court has contributed in the definition and specification of the inherently ambiguous concept of health care minimum standards. This implies that health care is not absolute but can be declined in relation to economic and financial needs and minimum and essential levels of medical treatments have to be ensured referring to human dignity expressly provided by the Italian Constitution.[48]

This determination that the Court is a deferential judge of social rights because it invokes questions of theoretical importance that has a bearing on its role as the interpreter of the law and the various methods it has adopted to construe the statutes. These relate to (1) reforms to national social welfare law that have been made as a response to the global financial crisis; (2) the extent and manner in which the courts have reviewed challenges to such reforms of social welfare law; (3) the outcomes of such legal challenges; and (4) what, if any, areas of social welfare policy have been protected from reform despite the economic crisis.[49]

The evaluation has to be considered in the economic, social and political framework of the European Union welfare law and against a backdrop of general reduction of welfare entitlements which form part of the 'public law of austerity'. The Italian legal tradition is more in favour of privatization and liberalization compared to other countries in Europe and this is because of the similarities and differences between American and European modes of regulation and antitrust laws.[50] The new legal framework in Italy in 2001 by a constitutional amendment for regulating 'services of general interest'[51] came in the aftermath of the global financial crisis and crucial questions relating to the role of the state both

and '*norma*', or legal 'texts' and 'norms'. The 'text' represents a linguistic expression that manifests the will of the body that creates a particular legal act and a 'norm', is the result of a process of interpreting a text. T. Groppi, 'The Italian Constitutional Court: Towards a 'Multilevel System' of Constitutional Review?' 3 *Journal of Comparative Law* 100, 105 (2008).

[48] M. Cappelletti, 'Discrimination for Sexual Orientation in Poland: The Role of the Judiciary', in L. Pineschi ed, *General Principles of Law - The Role of the Judiciary* (Cham: Springer, 2015), 248.

[49] S. Civitarese, 'Austerity and Social Rights in Italy: A Long Standing Story' *UK Constitutional Law Blog*, 17 December 2015.

[50] G. Amato, *Antitrust and the Bounds of Power. The Dilemma of Liberal Democracy in the History of the Market* (Oxford: Hart, 1997); Id and L.L. Laudati, *The Anticompetitive Impact of Regulation* (Cheltenham-Northampton: Edward Elgar, 2001); M. D'Alberti, 'Administrative Law and the Public Regulation of Markets in a Global Age', in S. Rose-Ackerman and P.L. Lindseth eds, *Comparative Administrative Law* (Cheltenham-Northampton: Edward Elgar, 2010), 63; R. Caranta, M. Andenas and D. Fairgrieve, *Independent Administrative Authorities* (London: British Institute of International and Comparative Law (BIICL), 2004).

[51] G. della Cananea, 'The Regulation of Public Services in Italy' 68 *International Law Review Administrative Science*, 73 (2002) and G. Napolitano, 'Towards a European Legal Order for Services of Economic General Interest' 11 *European Public Law*, 565 (2005). See also D. Gallo, *I servizi di interesse economico generale. Stato, mercato e welfare nel diritto dell'Unione europea* (Milano: Giuffrè, 2010).

referring to the management of the troubled markets and to the danger of a sovereign debt default have been raised before the Court and are now the subject of ongoing review and analyses.[52]

Stefano Civitarese suggests that the

> 'profound asymmetry between social security (contributory) and social welfare benefits (means tested or universal) is a long standing problematic feature of the Italian system, and it has possibly increased since 2008, dramatically unveiling the historical lack of policy for family/children, housing and social exclusion in general'.[53]

This is positioned between the departments of social security (pensions, unemployment allowances) and social welfare allocation of competences between the state and regions which is inherent in the Italian form of devolution.[54] The decentralisation in social assistance by the state allows for the payment of funds to be transferred to the regions that 'makes it virtually impossible for them to cope with the task of implementing social right constitutional commitments'. The

> 'expenditure for social policies (eg new families benefits, people in dire need of personal assistance, the homeless) was also reduced from € 1.884.346.940 in 2004 to € 262.618.000 in 2014'.[55]

Civitarese argues that the Constitutional Court

> 'favours a conceptual and normative framework where the legislature enjoys a significant margin of discretion for the determination of *how* to implement constitutional provisions regarding welfare rights. (…) The Parliament would not have full discretion on *whether* to implement such rights (…) and also due to the concrete and not abstract manner of review which characterises the functioning of the ICC when dealing with fundamental rights, it is extremely unlikely that the Court engages with the Parliament in scrutinising a welfare statutory framework *per se*'.

The issue that comes before the Court is

[52] G. Napolitano, 'The Role of the State in (and after) the Financial Crisis: New Challenges for Administrative Law', in S. Rose-Ackerman and P.L. Lindseth eds, n 50 above, 569.

[53] S. Civitarese, n 49 above.

[54] By observing the *Piano Sanitario Nazionale 2006-2008* (2006-2008 National Health Plan), the Italian state perceived that the State is committed to the legal guarantee of the universal right to health (Repubblica Italiana, 2006). In 2008 legge 23 December 1974 no 724 was revoked and the basis of the institutional relationships between the State and the regions has changed considerably following the reform of Part V of the Italian Constitution (legge costituzionale 18 October 2001 no 3), which increased the powers of the regional Authorities, enlarging their competence for the organisation of health services.

[55] S. Civitarese, n 49 above.

> 'what services or benefits should each social welfare policy guarantee in order to fulfil the promise of social rights and this is always a matter of seeking a possible gap or omission in the implementation of the constitution'.[56]

It is possible to discern the two main interrelated strands in the evolution of the Court's case law regarding social rights since the 1980s. These are firstly, the Court acts

> 'proactively to secure the protection of certain rights directly modifying the legislation or delivering precise instructions to the legislature as to how to amend the law'.[57]

Secondly, the Court has acknowledged the existence of certain

> 'constitutional social rights despite the lack of explicit mention in the constitution, as it is the case for social housing and about one hundred of them between 1984 and 1989 often determined sensible budgetary consequences'.[58]

The

> 'designated symbol of the welfare state is the right to health, which has a provision devoted to it in the Italian Constitution (Art 32) which combines an individual right with the interest of the community, establishing the absolute nature of free health care for the poor'.[59]

The case law shows that the Court has interpreted this welfare provision and the extent it will modify the application of the statute based on its 'additive' reasoning and regard to the human dignity criterion in Art 3 of the Italian Constitution.

In Judgment 15 May 1989 no 252 the Court stated that social housing is like any other social right which

> 'tends to be realised proportionally to collective resources; only the legislator (…) can sensibly decide how to relate means to goals and design concrete adjudicative rules expressive of such fundamental rights'.

The Court's judgment did not declare Art 6, para 1, of legge 27 July 1978 no 392 (Discipline of urban real estate leases), unconstitutional, but dismissed the question of legitimacy on substantive grounds. This was raised, in reference to Arts 2 and 3 of the Constitution, by the *Tribunale di Roma*.

In Judgment 5 July 2001 no 248, in dealing with healthcare requirement

[56] ibid.
[57] ibid.
[58] ibid.
[59] ibid.

under the law, the Court observed that

> 'the need to secure universalism and completeness to the country's welfare assistance clashed and was not in accordance with the amount of financial resources which it is possible to devote annually to the national health system, within the framework of a thorough programme of health and social care measures'.

The Court rejected the constitutional question for violation of the competences principles of the national legislation on disability and gave primacy to human dignity as a protected measure in the Italian Constitution and was the overriding factor in its decision.[60] Judgment 22 October 2008 no 354 provides the best example of guiding principle underlying the approach taken by the Court. This decision confirms previous case law: (§4)

> 'it is necessary to reiterate the course of action previously announced by this court in Judgment 7 luglio 1999 no 309, according to which (A) on the one hand, the protection of the right to health, and particularly the right to benefits may not suffer from constraints encountered by the legislature in the allocation of the financial resources it has available; (B) on the other hand, the needs of public finances cannot affect the irreducible core of the right to health, protected by the Constitution as an expression of the inviolability of human dignity'.[61]

There are other judgments which reveal the Court's acceptance of the limiting of health expenditure, including that of the Regions, despite the constitutional reform of 2001 which gave the regions the possibility of giving their citizens new or improved health care benefits, where their budgets are balanced. Judgment 22 May 2013 no 104 states that (§4.2):

> 'the impugned (regional) legislation, enabling the (Abruzzo) region to bear the coast of supplementary fees, thereby guaranteeing a higher level of assistance, contrary to the objectives of the Recovery Plan, violates the principle of the limitation of public health spending, the principle of public finance co-ordination and ultimately Art 117.3 of the Constitution'.

[60] According to Art 3, '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. 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'.

[61] See decisions, amongst others: ordinanza 11 July 1990 no 455; sentenza 7 July 1998 no 267; sentenza 13 November 2000 no 509; sentenza 5 July 2001 no 252; sentenza 28 November 2005 no 432.

This decision is the direct consequence of the new Art 81 of the Constitution, modified in 2012 to comply with the Fiscal Compact, which provides that: 'The State shall balance revenue and expenditure in its budget, taking account of the adverse and favourable phases of the economic cycle'.[62]

Giovanni Guiglia asserts that

> 'bearing in mind the economic crisis and, implicitly, the commitments entered into by Italy at international and supranational level, that the Court is weighing up interests against the constitutional principles that are at stake, promoting the austerity policies adopted by the state through detailed 'state-centric' measures, at times, going so far as to indicate how regional resources should be used. These measures are justified through an approach holding that the principle of co-ordinating public finances is superior to that of regional autonomy'.[63]

Accordingly, the democratic choices made at regional level, although legitimate on the basis of the constitutional principle of autonomy (Art 5 of the Constitution) as further stated in Art 119 of the Constitution recognise the financial autonomy of the Regions and are subject to new balanced-budget rules. These terms were introduced in Art 81 of the Constitution during the constitutional revision of 2012 (legge costituzionale no 1/2012) and they are clearly based on Italy's international commitments and relate to limitations of public spending and deficit reduction (Fiscal Compact).[64]

Judgment 9 June 2015 no 188 and Judgment 10 January 2016 no 10, concerning reductions in the budgets of local authorities, assert the fundamental principle that of assignment of tasks to these authorities, particularly by the regions, should be accompanied by sufficient financial resources to carry them out. In circumstances when this does not happen the court finds that there has been a violation of Arts 117, 119 and 97 of the Constitution. Furthermore, Guiglia argues, that these two decisions acknowledge that

> 'the significant reduction in resources for the tasks that are carried out on an ongoing basis in sectors of particular social importance is manifestly unreasonable precisely because of the lack of proportional measures to justify the extent of those tasks in any way whatsoever'.

[62] Legge costituzionale 20 April 2012 no 1 has introduced the 'balanced budget' principle into the text of the Constitution itself, modifying the central Art 81 and, additionally, other three provisions of our basic law: Arts 97, 117 and 119.

[63] G. Guiglia, 'Legal Disputes Regarding Social Rights Brought before the Italian Constitutional Court in Times of Economic Crisis' available at https://tinyurl.com/yd7x5u9n (last visited 30 June 2018).

[64] The Fiscal Compact (Treaty on Stability, Coordination and Governance in the European and Monetary Union) was signed on 2 March 2012. It is available at https://tinyurl.com/y9tsxyc8 (last visited 30 June 2018).

In addition to this violation of Art 3 para 1 of the Constitution (the principle of formal equality), there is a violation of the principle of substantive (real) equality provided for in Art 3 para 2 of the Constitution, as a result of the 'serious prejudice to the enjoyment of social rights, caused by the failure to finance the benefits putting those rights into effect' (Judgment no 10/2016, §§ 6.1, 6.2, 6.3).

The 2015-2016 judgments referred are of central importance in terms of the financial autonomy of sub-regional local authorities (municipalities and provinces), as they oblige the regions to ensure that the resources allotted to local authorities are sufficient to guarantee that citizens are provided with a social service. Sentenza 10 March 2015 no 70 declared as unconstitutional the system blocking the automatic indexation of those retirement pensions which were three times more than the minimum salary recognised by the National Institute of Social Security (INPS) for the years 2012 and 2013 (decreto legge 'Salva Italia' 6 December 2011 no 201), which would have created a considerable deficit in the state coffers (€ 17.6 billion in 2015 and € 4.4 billion in 2016). In this case, the Court heard referral orders questioning the constitutionality of a rule which limited the annual re-evaluation increase for old-age pensions for larger pensions, allowing the full increase only to pensions up to three times the minimum pension (ie up to € 1.217,00 net per month).

The Court invalidated the legislation on the grounds that it failed to comply with the principles of reasonableness and proportionality and was

> 'limited to a generic reference to the 'contingent financial situation', whilst 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'.

Although the right to an adequate pension was not found absolute, any restriction to comply with budgetary requirements had to be justified in detail and the legislator did not satisfy that requirement.

Guiglia argues that in this way

> 'the Court restricts the discretionary power of the legislature and links their choices to the adoption of solutions in keeping with constitutional parameters, without referring to social rights'.[65]

However, the impact of these judgments was moderated through action taken in the legislature by means of the decreto legge so-called 'Renzi Decree' 21 May 2015 no 65, ratified by legge 17 July 2015 no 109, which was referred to the Constitutional Court because of an alleged violation of the principles set out in

[65] G. Guiglia, n 63 above.

Judgment no 70/2015 and, therefore, of Art 136 of the Constitution, that enforces compliance, including by Parliament, with whatever has been ruled as being constitutional. The Court issued the judgment no 250 of 2017 on this question of constitutionality, dismissing it on the merits.

Judgment 24 June 2015 no 178 clarifies the provisional nature of measures adopted in times of crisis when the Court declared as unconstitutional the Law that led, against the background of the economic crisis, to a prolonged suspension of collective bargaining procedures (freedom of association – Art 39 of the Constitution). The violation of this provision was by infringing on the 'collective interest of containing public spending', was declared proportionate and reasonable by the Court, insofar as the provisional and contingent nature was concerned even in the light of the effects imposed by the new Art 81 of the Constitution, and provided that, in the interests of solidarity, it was applied to all public sectors, thereby avoiding any discriminatory effects.

The Court referred to the 'supervening unconstitutionality' in order to reduce the financial impact, and it accordingly identified a specific time, after the impugned norm came into force, which was when the failure to comply with the Constitution came about. This method was introduced by the Court in the 1980s, and was particularly relevant in this case, insofar as the violation of the Constitution coincided with the publication of the decision. The Court declared that restrictions were first legitimate when enacted, but only on the strength of their transient nature, and subsequently became unlawful when extended and put on a structural footing. Consequently, the declaration of unconstitutionality has no effect for the past, but only for the future such as in eg collective bargaining rounds are no longer prohibited. Consequently, the Court reached the same result as it had in Judgment 9 February 2015 no 10, ruling out the concept of the retroactivity of the decision as unconstitutional.

The additive principle of interpretation by the Court has had an impact because it involves more than merely taking into account the defence of social rights, and the commitment of the Court is founded on the keystone of it being the sole authority for verifying the constitutionality of laws, maximising its influence for the benefit of individuals owing to an extensive catalogue of social and other rights contained in the Constitution, and the fundamental principles that are intrinsically linked to the latter, primarily principles of (individual and social) dignity, supported by the principles of solidarity and equality (Arts 2 and 3 of the Constitution).

The Court and those who implement executive's powers cannot deal with issues arising from the austerity policy when the legal and political background is both fragmented and confused. In such cases involving social assistance the assumption of an interventionist mode would expose the Court to the range of objections revolving around the lack of democratic legitimacy, and this would cause more harm than good in the long term. The perspective of the Court is

based on an objective and minimalist approach that insulates the ad hoc emergency measures protecting social rights of marginal groups, even at the price of sacrificing other values such as local autonomy. While in the alternative when dealing with more structured legislation (pensions and education) and facing emphatically morally hazardous situations, a serious commitment towards social rights on the part of the Court can still make a difference, alleviating some of the harshest consequences of austerity policy, and on this basis the perspective of the Court is objective and balanced.

V. Conclusions

The motivation of the jurist is to construct an integrated view of public law and there has to be a convergence of legal scholarship – both constitutional and administrative – which is increasingly dominated by the institution and practice of judicial review. The result has been the establishment of a Constitutional Court that was created when a rights-based tribunal was considered a requirement in the framework of the state. It provided a source of legitimacy that sourced the Austrian Constitutional Court that was designed to elevate the judges as scholars and jurists who could decide cases by reference to their knowledge as much as the political reality.[66] This requires the reestablishment of some form of unitary and systematic perspective on constitutional law and this can be achieved by resorting to Kelsen's framework.

The Constitutional Court's scope and powers in Italy has to be reviewed in the context of the functions of European judiciaries who have formulated the principal agency relationship with their legislatures. They are the agents in the framework that enables them to conduct such a rigorous interpretation of the various statutes that the judges have the power of application of the laws. The central tenet of the constitutional judges is to regulate the actions of the government and Parliament themselves, and they have the obligation to control the exercise of the legislative authority and all those acts pursuant to the adoption of a statute. If ministers or parliamentarians notice that a judge has formulated a statutory provision in a manner that they did not intend then they can amend the law.

The political parties in Parliament, depending on the relevant rules, have the capability of repealing the constitutional provisions, or restrict the Court's powers, but only if they can reconstitute themselves as the majority in the legislature to amend the Constitution. The legislators or ministers are never principals in their relationship with the constitutional judges and their decisions governing constitutional revision are more restrictive than those consisting the

[66] S. Cassese, G. Napolitano and L. Casini, 'Towards Multipolar Administrative Law: A Theoretical Perspective' 12 *International Journal of Constitutional Law*, 354 (2014).

Court's rulings on legislation. These rules are to the advantage of the continuous dominance of constitutional judges over the interpretation of the constitutional law in enacting statutes by Parliament.

The Italian Constitutional Court has judicially reviewed the rights arising from the welfare state provisions concerning health which is ingrained in the Art 32 of the Constitution, that balances an individual right with the interest of the community. The Court has carried out the application of the statute based on its flexible powers under 'additive' reasoning, taking into consideration the Art 2 respecting the human dignity requirement in the Fundamental Principles of the Constitution.

The conception of the Court should lead to a dynamic legal order rather than a merely static one and here it can discard Kelsen's role for judges in interpreting legislation, and undertake positive reasoning in arriving at its judgments. The legal system reflects the building block in the Constitution and its process is through the acts of officials who refer to norms, statutes and directions. The Court is the forum for reviewing of hard cases that can be adjudged in accordance with the Constitution and by political and legal evaluation of the state and the law.