

# Between International Integration and National Autonomy in Favour of Concrete Cases: The Italian Constitutional Court's 'Internationally Oriented Automatism's Prohibition' Doctrine

Riccardo Perona

Le rôle du Canada à l'égard de la protection des droits de la personne au sein des Amériques

Canada's Role in Protecting Human Rights in the Americas

El papel de Canadá en la protección de los derechos humanos en las Américas

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Article abstract

*This paper deals with a peculiar doctrine of the Italian Constitutional Court, the "prohibition of legislative automatism," which is used, in some judgments, in an internationally oriented form. My argument is that this doctrine can be seen as an effective legal and constitutional instrument operating in the "multi-level" scenario and namely in the framework of international systems and treaties of human rights protection. Indeed, it provides a good degree of flexibility and a good balancing point between international integration and national autonomy in light of the need to reach an adequate and "fair" solution in the concrete case and, therefore, in favour of the enhancement of human rights protection at the practical level.*

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# Between International Integration and National Autonomy in Favour of Concrete Cases: The Italian Constitutional Court's 'Internationally Oriented Automatism's Prohibition' Doctrine

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RICCARDO PERONA\*

## ABSTRACT

*This paper deals with a peculiar doctrine of the Italian Constitutional Court, the "prohibition of legislative automatisms," which is used, in some judgments, in an internationally oriented form. My argument is that this doctrine can be seen as an effective legal and constitutional instrument operating in the "multi-level" scenario and namely in the framework of international systems and treaties of human rights protection. Indeed, it provides a good degree of flexibility and a good balancing point between international integration and national autonomy in light of the need to reach an adequate and "fair" solution in the concrete case and, therefore, in favour of the enhancement of human rights protection at the practical level.*

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## KEY-WORDS:

*International integration, national autonomy, prohibition of legislative automatisms, fairness, concrete case, Italian Constitutional Court.*

## RÉSUMÉ

*Cet article concerne une doctrine précise de la Cour constitutionnelle italienne, « l'interdiction des automatismes législatifs », qui est utilisée dans certains jugements sous une forme particulière d'orientation internationale. Ma thèse est qu'une telle doctrine peut être vue comme un instrument juridique et constitutionnel efficace, qui se réalise*

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selon un scénario de droit « multiniveaux » et, en particulier, dans le cadre de systèmes et traités internationaux de protection des droits de la personne. En effet, cette doctrine offre un bon degré de flexibilité et un point d'équilibre raisonnable entre l'intégration internationale et l'autonomie nationale, au regard de la nécessité d'une solution adéquate et « équitable » du cas concret et, par conséquent, en faveur du renforcement de la protection des droits de la personne sur le plan pratique.

#### MOTS-CLÉS :

*Intégration internationale, autonomie nationale, interdiction des automatismes législatifs, équité, cas concret, Cour constitutionnelle italienne.*

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## INTRODUCTION: PROHIBITION OF LEGISLATIVE AUTOMATISMS AND "MULTI-LEVEL" SCENARIO

International organizations membership inevitably raises, from a theoretical and doctrinal perspective, sovereignty-related issues. Today, given the relevance that international treaty law has assumed, this has become even more evident.

The novelty of this "new world" is chiefly palpable when one looks at international organizations of a large scale and of a wide scope. In the human rights protection field, the European and the American conventions on human rights are among the most representative cases of the issues at stake.

These range from the relationship between legal sources belonging to different legal orders to the rule of law and other similar concepts that were historically shaped in reference to the "national" dimension of legislation.

By contrast, in what countless studies<sup>1</sup> today call the "multi-level" nature of legal systems—which is, actually, partly a descriptive and partly a hypothetical concept of our reality—diverse aspirations coexist, such as a desire for the unity and the integration of these legal systems, but also a concern for the preservation of the diversity of the national standards.

In this context, it is up to the jurists to study and to further develop concrete legal instruments to reconcile unity and diversity, in order to ensure an equilibrate balance between justice and fundamental rights protection in every case.

In this framework, this paper deals with a peculiar doctrine of the Italian Constitutional Court, the "prohibition of legislative automatism," that is used, in some judgments, in an internationally oriented form. My argument is that this doctrine can be seen as an effective legal and constitutional instrument operating in the "multi-level" scenario and namely in the framework of international systems and treaties of human rights protection. Indeed, it provides a good degree of flexibility and a good balancing point between international integration and national autonomy in light of the need to reach an adequate and "fair" solution

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1. See *infra* note 15.

in the concrete case and, therefore, in favour of the enhancement of human rights protection at the practical level.

In this context, my argumentation firstly includes a description of the general traits of the mentioned doctrine, which is part of the broader doctrine on the “reasonableness principle” and is sometimes open, as we said, to international sources (I). Secondly, I will offer an overview of the relevance of international sources in the “multi-level” scenario. I will explain, in particular, how the Italian Constitutional Court conceives the relevance of international sources (and courts’ decisions) within the domestic legal order (II).

The core point of our reasoning lies in the combination of these two elements—the automatism’s prohibition doctrine and the relevance of international sources—in what I will call the internationally oriented automatism’s prohibition doctrine of the Constitutional Court. Since it is a recent phenomenon, I am approaching it through a case study, addressing two judgments of the Court concerning a particular provision of the Italian Criminal Code (III).

In light of the analysis of such judgments, I will conclude that the internationally oriented automatism’s prohibition doctrine constitutes a concrete legal and constitutional instrument to reach an adequate and “fair” solution in the concrete case and, therefore, to accomplish the enhancement of human rights protection at the practical level.

## I. FRAMEWORK (I): UNREASONABLE LEGISLATIVE AUTOMATISMS

### A. The General Reasonableness Principle in the Constitutional Case Law

The doctrine of legislative automatism’s prohibition has been developed by the Italian Constitutional Court in the framework of the broader “reasonableness principle.”<sup>2</sup>

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2. See Gustavo Zagrebelsky & Valeria Marcenò, *Giustizia costituzionale* (Bologna: Il Mulino, 2012) at 195 ff; Jörg Luther, “Ragionevolezza (delle leggi)” in *Digesto delle discipline pubblicistiche*, XII (Torino: Utet, 1997) 341; Andrea Morrone, *Il custode della ragionevolezza* (Milano: Giuffrè, 2001). In general, on the role of reasonableness and rationality in law and public law in particular, see Tracy R Hickman, “The Reasonableness Principle: Reassessing Its Place in the Public Sphere” (2004) 63:1 Cambridge LJ 166; Giorgio Bongiovanni, Giovanni Sartor & Chiara Valentini, eds, *Reasonableness and Law* (Dordrecht-Heidelberg: Springer, 2009); Dov M Gabbay, Patrice Canivez, Shahid Rahman & al, eds, *Approaches to Legal Rationality* (Dordrecht-Heidelberg: Springer, 2011).

The origins of this principle as a standard of constitutional adjudication are to be found in the Court's interpretation of article 3 of the *Costituzione* (hereafter Constitution), and especially of its first paragraph, which states the principle of formal equality before the law: "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."<sup>3</sup>

In interpreting this provision, the case law has gone very far over the years, covering "boundless, vague and mysterious expanses."<sup>4</sup> Such "expanses," that are actually hermeneutical developments are made possible by the reasonableness standard since it allows for a wide and generous interpretation of article 3(1) in the judgments, which leads to a meaning abundantly exceeding the literal scope of the constitutional provision.

The legal literature has offered various theorizations in order to explain the case law involving article 3.<sup>5</sup> In general, when the Court uses the reasonableness principle, it does not evaluate the political choices on which the legislation is based: on the contrary, the Court's scrutiny simply involves the legitimacy of the legislation. As depicted in a well-known judgment, the reasonableness standard,

far from implying the use of absolute and abstract evaluation criteria, is held by weights on the proportionality of the means chosen by the legislator in its unquestionable discretion, with respect to the objective needs that are to be satisfied or to the purposes it seeks to pursue, given the concretely subsisting circumstances and limitations.<sup>6</sup>

Although the grammatical convolution of this definition is in itself sufficient evidence of the complexity of the concept, this principle seems to show, mainly, two meanings and applications in the case law.

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3. We refer to the translation available on the official website of the Italian Senate, online: <[www.senato.it/documenti/repository/istituzione/costituzione\\_inglese.pdf](http://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf)>.

4. This well-known assessment of the case law was already proposed in 1969 by Carlo Lavagna in his speech *Ragionevolezza e legittimità costituzionale*, lastly published in Carlo Lavagna, *Ricerche sul sistema normativo* (Milano: Giuffrè, 1984) at 636.

5. See the Italian literature, *supra* note 2.

6. C cost 1130/1988 (here and in all the text the expression C cost followed by a double number indicates a judgment of the Italian Constitutional Court identified by its number and year).

(I) First, the reasonableness standard requires non-contradiction between legislative rules (and between the respective *rationes legis* and the principles inspiring them). Such non-contradiction implies the equal treatment of equal situations. Therefore, the scrutiny involves the legislative classifications and shows a “triadic” structure: in light of article 3(1), seen as a sort of “vertex” of a metaphorical triangle, two rules—the scrutinized one and the *tertium comparationis*—are compared, while reasonableness is considered to be granted when two reasonably equal situations are not treated differently.

(II) Second, the reasonableness standard requires the appropriate weighting between (constitutional) principles. This means that the Court considers the “intrinsic (or *ex se*) reasonableness” of the legislation, while applying a proportional and balanced interpretation of the interests involved in a specific case. The legislation is considered reasonable when it provides means that are proportionate (not excessive or inadequate) to the pursued *ratio legis* and not disrespectful of the other’s interests and principles at stake.<sup>7</sup>

## B. Unreasonable Automatism: Concept, Solution and the Example of Irrebuttable Presumptions

The prohibition of legislative automatism is one of the expressions of the reasonable standard in the second of the meanings mentioned above and, particularly, of the reasonableness standard as proportionality standard.<sup>8</sup>

More precisely, an (unreasonable) automatism occurs when a legislative rule applies to a set of situations or a class of individuals but proves to be inadequate or unreasonable in regards to some particular situation or individual among those it applies to. In this hypothesis, the legislation provides a *general equalization* that turns out to determine, at the substantial level, a *particular discrimination*. In short, a provision

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7. Borrowing some Aristotelian concepts (Aristotle, *Nicomachean Ethics*, Book IV), we might say that the general bipartition we suggest corresponds to the distinction between a monistic, “scientific” concept of reason (*episteme*), requiring logical coherence, and a pluralistic, “prudential” concept of reason (*phronesis*), requiring careful consideration of all the involved interests.

8. C Cost 220/1995. For an overview on the issue of legislative automatism, see Zagrebelsky & Marcenò, *supra* note 2 at 209 ff; Leonardo Pace, “Gli automatismi legislativi nella giurisprudenza costituzionale” (2014) 3 Gruppo di Pisa 1, online: <[www.gruppodipisa.it/8-rivista/113-leonardo-pace-gli-automatismi-legislativi-nella-giurisprudenza-costituzionale](http://www.gruppodipisa.it/8-rivista/113-leonardo-pace-gli-automatismi-legislativi-nella-giurisprudenza-costituzionale)>.

will be considered unreasonable if it treats people or situations with different needs in the same way, thus creating a substantial discrimination.

Clearly, a requirement of fairness or equity is what emerges here, at least in Aristotelian terms: that is to say, equity as a “rectification of the law when it is defective because of its universality,” *i.e.* when the peculiarity of the case requires an “undefined” (*aoristos*) solution instead of a rigid legal provision.<sup>9</sup>

In such circumstances, the Court usually states that it is not necessary to eliminate the whole rule, but just to limit its scope, so that it does not apply to some situations—those with respect to which the regulation itself appears unreasonable. Therefore, the provided solution is usually the addition of an *exception clause* that enables the judge to assess “the concrete case,” considering whether it might be more properly resolved by applying the rule or making an exception.<sup>10</sup>

The traditional example of legislative automatism—which helps in clarifying the concrete scope of the doctrine—is the one of irrebuttable or conclusive presumptions (that, given their possibly unfair outcomes, is a matter of constitutional concerns in other countries as well).<sup>11</sup> The Constitutional Court states that such presumptions, “especially when limiting a fundamental right of the person, violate the equality principle,” and are therefore unconstitutional,

if they are arbitrary and irrational, *i.e.* if they do not correspond to general outcomes of experience, summed up in the *id quod plerumque accidit formula* [...]. In particular, [...] the unreasonableness of the irrebuttable presumption can be noticed

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9. See Aristotle, *Nicomachean Ethics*, 1137b, cited in Zagrebelsky & Marcenò, *supra* note 2 at 209 ff. The “undefined” character of law, which becomes a constitutional necessity in this jurisprudence, is for instance contested in Christiane Middelschulte, *Unbestimmte Rechtsbegriffe und das Bestimmtheitsgebot: eine Untersuchung der verfassungsrechtlichen Grenzen der Verwendung sprachlich offener Gesetzesformulierungen* (Hamburg: Kovač, 2007); see also *infra* note 31.

10. Insofar as they “add” an exception clause, the judgments concerning unreasonable automatism are quite similar to that kind of judgments of the Italian Court the legal literature calls “additive.” However, differently from the *stricto sensu* additive judgments, these decisions refer to the judicial discretion, rather than adding a rule or a principle: see Zagrebelsky & Marcenò, *supra* note 2 at 211.

11. The issue of the constitutionality of irrebuttable presumptions has been studied especially in the U.S. with respect to the due process clause. The Supreme Court of Virginia, for instance, stated that every irrebuttable presumption—defined as a presumption, or a law that “makes the proof of one particular fact presumptive evidence of another fact,” which a contrary evidence cannot overcome—is unconstitutional (*Fairfax County Fire and Rescue Services v Newman*, 222 Va 535 at 539, 281 SE (2d) 897 at 900 (1981)). See James J Duane, “The Constitutionality of Irrebuttable Presumptions” (2006) 19 Regent UL Rev 149 at 150.



whenever it is “easy” to formulate hypotheses of real facts that are in contrast with the generalization on which the presumption is based.<sup>12</sup>

When it eliminates an automatism in the form of an irrebuttable presumption, the exception clause added by the Court concerns the admissibility of evidence to the contrary. This means that the presumption is not *per se* abolished, but it is transformed into a rebuttable one. For instance, a provision stated that the incomes of any person that had been condemned for certain crimes (especially related to organized crime) were presumed to be superior to the limit of admission to legal aid: the Court declared it unconstitutional, “insofar as it does not admit evidence to the contrary.”<sup>13</sup>

### C. Automatism and Fundamental Rights: From Constitutional to Internationally Protected Rights

As mentioned by the case law cited above, an automatism has to be reviewed, “especially when limiting a fundamental right of the person.”

It is clear that an automatism determining a substantial discrimination (by treating equally situations that are different) has to be scrutinized in light of the interests at stake: indeed, only the existence of some interest that has been improperly limited or disregarded by the legislator can provide a point of view to assess the discrimination itself. *Inter alia*, this confirms that the automatism prohibition is an expression of the second meaning of the reasonableness principle described above: in other terms, the Court has to evaluate whether the legislator has considered and reasonably balanced all the constitutionally protected interests that are relevant in the case—especially when fundamental rights are involved and might be affected. In this regard, “the Court is called to assess whether the automatisms established by the legislator reflect a reasonable balancing between all the constitutionally relevant interests and rights.”<sup>14</sup>

Over the last years, however, the Court has been increasingly expanding its doctrine. Indeed, not only has it been eliminating automatisms that affected constitutionally protected rights, but also those affecting

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12. C cost 139/2010, quoting C cost 225/2008, 41/1999, 333/1991, 139/1982.

13. C cost 139/2010.

14. C cost 202/2013.

rights and interests that are mainly protected by *international instruments*. Obviously, this goes hand in hand with the growing importance of such kinds of legal sources in the so-called “multi-level” legal scenario.

## II. FRAMEWORK (II): INTERNATIONAL CONSTRAINTS. OVERVIEW ON THE CONSTITUTIONAL RELEVANCE OF INTERNATIONAL SOURCES

From a (national) constitutional law perspective, the matter concerns the relevance under domestic law of international and supranational constraints, like those provided for by international treaties or by courts' decisions within organizations like the European Union (EU) or the Council of Europe.<sup>15</sup> In Italy, there are two constitutional provisions to be considered in this respect.

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15. On the issues of “multi-level” legal systems, “dialogue between courts” and fundamental rights protection in the global world, as well as on the role of the “global constitutional law” or “constitutionalized international law” in this landscape, the literature is almost unlimited. Given that these topics mostly exceed the limited scope of this paper and its national constitutional law perspective, see only, as relevant studies, Marta Cartabia, “Unità nella diversità: Il rapporto tra la Costituzione europea e le Costituzioni nazionali” (2005) *Diritto dell'Unione europea* 590; Yuval Shany, *Regulating Jurisdictional Relations Between National and International Courts* (Oxford: Oxford University Press, 2007); Stephen Gardbaum, “Human Rights and International Constitutionalism” in Jeffrey L Dunoff & Joel P Trachtman, eds, *Ruling the World? Constitutionalism, International Law, and Global Governance* (Cambridge: Cambridge University Press, 2009) 233; Mattias Kumm, “The Cosmopolitan Turn in Constitutionalism: On the Relationship Between Constitutionalism in and Beyond the State” in Dunoff & Trachtman, *ibid*, 258; Miguel Poirares Maduro, “Courts and Pluralism: Essay on a Theory of Judicial Adjudication in the Context of Legal and Constitutional Pluralism” in Dunoff & Trachtman, *ibid*, 356; Sabino Cassese, *I tribunali di Babele. I giudici alla ricerca di un nuovo ordine globale* (Roma: Donzelli, 2009); Nico Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (Oxford: Oxford University Press, 2010); Jean L Cohen, *Globalization and Sovereignty. Rethinking Legality, Legitimacy, and Constitutionalism* (Cambridge: Cambridge University Press, 2012); Ornella Porchia, “La dinamica dei rapporti tra norme interne e dell'Unione nel dialogo tra giudici nazionali e Corte di giustizia” (2013) 8:1 *Studi sull'integrazione europea* 71; Arthur Dyeve, “European Integration and National Courts: Defending Sovereignty Under Institutional Constraints?” (2013) 9:1 *European Const L Rev* 139; Marcelo Neves, *Transconstitutionalism* (Oxford: Hart Publishing, 2013); Jan Komárek, “The Place of Constitutional Courts in the EU” (2013) 9:3 *European Const L Rev* 420; Paul Schiff Berman, *Global Legal Pluralism. A Jurisprudence of Law Beyond Borders* (Cambridge: Cambridge University Press, 2014); Chiara Amalfitano & Massimo Condinanzi, *Unione europea: fonti, adattamento e rapporti tra ordinamenti* (Torino: Giappichelli, 2015); Chiara Amalfitano & Massimo Condinanzi, *Unione europea: fonti, adattamento e rapporti tra ordinamenti* (Torino: Giappichelli, 2015); Roberto Romboli, ed, *Aggiornamenti in tema di processo costituzionale (2011–2013)* (Torino: Giappichelli, 2014) 370. The issue of the relevance of international legal sources within the Italian legal order has been quite revolutionized by C cost 238/2014, although especially as far as international customary law was concerned; the topic lies out of the scope of the present paper, though I would like to make a reference, for an account in English on the matter, to Anne Peters, “Let Not Triepel Triumph—How to Make the Best out of Sentenza No 238 of the Italian

The first is article 11, stating that “Italy agrees, on conditions of equality with other States, to the limitations of sovereignty that may be necessary to a world order to ensuring peace and justice among the nations. Italy promotes and encourages international organizations furthering such ends.”<sup>16</sup>

Originally voted to grant the Italian admission to the United Nations (UN), such provision later became the constitutional ground on which the European Community law was accepted. Today, the Constitutional Court agrees to recognize the direct applicability (or effect) of EU norms<sup>17</sup> with the only limit to the direct effect derives from the respect of the fundamental principles of the Italian constitutional order.<sup>18</sup>

Article 11 was then complemented, in 2001, by the amended article 117(1), stating that “Legislative powers shall be vested in the State and the Regions in compliance with the Constitution and with the constraints deriving from EU legislation and international obligations.”<sup>19</sup> This provision has assumed increasing relevance in the case law and it has been used, in particular, to grant the respect of the European Convention of Human Rights (ECHR): so, the Court usually states that a domestic norm in contrast with the ECHR, as interpreted by the European Court of Human Rights (ECtHR), is unconstitutional, as it violates the ECHR itself as “interposed norm.”<sup>20</sup> Such doctrine has

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Constitutional Court for a Global Legal Order” *EJILTalk!*, *Blog of the European Journal of International Law* (22 December 2014), online: <[www.ejiltalk.org/let-not-triempel-triumph-how-to-make-the-best-out-of-sentenza-no-238-of-the-italian-constitutional-court-for-a-global-legal-order-part-i/](http://www.ejiltalk.org/let-not-triempel-triumph-how-to-make-the-best-out-of-sentenza-no-238-of-the-italian-constitutional-court-for-a-global-legal-order-part-i/)>; Giovanni Boggero, “The Legal Implications of Sentenza No 238/2014 by Italy’s Constitutional Court for the Italian Municipal Judges: Is Overcoming the Tripelian Approach Possible?” (2016) 76 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 203.

16. See the translation, *supra* note 3.

17. See the case law starting from C cost 170/1984.

18. This is the so-called *controlimiti* (counter-limits) doctrine, similar to the *Solange* doctrine of the German Constitutional Tribunal. On the conflicts between courts underlying the quest for harmony in today’s legal pluralism, see Neves, *supra* note 15.

19. The original text was so amended by the *legge costituzionale* 3/2001. See the translation, *supra* note 3.

20. C cost 348 and 349/2007. The relevance of the ECHR is however “sub-constitutional” and limited by all the constitutional provisions and not only by fundamental principles as in the *controlimiti* doctrine, what matches with the different scope of articles 11 and 117(1) of the Constitution (C cost 227/2010). Moreover, although some judges tried to affirm, given the new article 6(3) of the *Treaty on European Union* (TEU), the possibility of directly applying, under article 11 of the Constitution, the ECHR norms (*Consiglio di Stato* C cost 1220/2010; TAR Lazio 11984/2010), this has been excluded by the Constitutional Court (*ex plurimis* C cost 80/2011). On its part, the Court of Justice of the European Union (CJEU) confirmed that, despite article 6(3) TEU, the ECHR has no direct effect (case C-571/2010, judgment of 24 April 2012, *Servet Kamberaj* at

been then extended to include the unconstitutionality of domestic norms in violation of international instruments different from the ECHR.<sup>21</sup>

On the heels of this evolution, as we said, the automatism's prohibition doctrine has shown some updating as well, as the Court started to review them insofar as they violate internationally protected rights.

So, the case law is combining the automatism's prohibition doctrine, focused on the need of considering the plurality of the factual circumstances, with the increasing resort to international law and, especially, internationally protected rights. This expresses, in our opinion, a concrete example of how legal technicalities work in the framework of the "multi-level" landscape. In this respect, a case study might be helpful to study the phenomenon.

### III. CASE STUDY: AUTOMATISMS AND INTERNATIONALLY PROTECTED INTERESTS IN ONE COMBINED

#### A. Article 569 *Codice Penale* (CP) and the Doubts on Its Constitutionality

Our case study concerns the constitutional vicissitudes of article 569 of the *Codice Penale* (CP) (Italian Criminal Code), which states that, if a person has been condemned for crimes against someone's family status, she/he loses her/his parental authority.

According to some judges, that contested this provision before the Constitutional Court,<sup>22</sup> the *ratio legis* of the norm is to protect the interest of the underages whose family status has been compromised by the crime; however, in some particular cases, the "automatic" loss of the parental authority might bring further prejudice to the underages themselves.

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para 59). See Porchia, *supra* note 15 at 80; Giuseppe Bianco & Giuseppe Martinico, "The Poisoned Chalice: An Italian View on the Kamberaj Case" (2013) European Law and Regional Integration Working Paper No 18, online: <[www.ucm.es/data/cont/docs/100-2013-10-14-documento39685.pdf](http://www.ucm.es/data/cont/docs/100-2013-10-14-documento39685.pdf)>.

21. The first time the Court reviewed a norm insofar as it allegedly violated article 117(1) via the interposed norm of an international instrument different from the ECHR was probably with C cost 236/2012.

22. We incidentally note that in Italy, the possibility to contest a statute before the Court belongs to the judge or court that has to apply it in a process (interlocutory procedure of constitutional review).

When the matter was firstly referred to the Constitutional Court in 1988, the claim was rejected.<sup>23</sup> Recently, however, the Court overruled its decision and declared the unconstitutionality of article 569 CP in two judgments.

## B. The First Unconstitutionality Ruling

The first relevant ruling is *Corte Costituzionale* (C cost) 31/2012. In this judgment, the Court scrutinizes article 569 CP: insofar as it states that the person who has been already condemned for family status alteration losses *de jure* her/his parental authority.

In particular, the case is brought to the attention of the Constitutional Court by a Criminal Court called to judge a mother that registered her son as a natural or an illegitimate child while he actually was a legitimate child. This action constitutes, under the Criminal Code, a crime against the family status of the child, namely the crime of family status alteration. Therefore, under article 569, the mother should lose her parental authority independently from the circumstances of the case (in which the child might instead still benefit from her cares).

The Constitutional Court declares that article 569 CP is unconstitutional insofar as it imposes the loss of the parental authority in all cases of family status alteration, "so preventing the judge from every possibility of considering the underage interest in the concrete case."<sup>24</sup> In other terms, the Court adds an exception clause, allowing the judge to consider the concrete circumstances of the case and decide whether to apply article 569 CP or making an exception to it.

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23. C Cost 723/1988.

24. This judgment has been broadly commented by the legal literature in Italy: see Maria Antonietta Federici, "Alterazione di stato e decadenza dalla potestà genitoriale" (2012) 8:4 *Giurisprudenza italiana* 1873; Marco Orlando Mantovani, "La Corte costituzionale fra soluzioni condivise e percorsi ermeneutici eterodossi: il caso della pronuncia sull'art 569 CP" (2012) *Giurisprudenza costituzionale* 380; Silvia Felicetti & Maria Rosaria San Giorgio, "Reato di alterazione di stato e perdita automatica della potestà genitoriale" (2012) 4 *Corriere giuridico* 569; Giuseppe Di Chiara, "Alterazione di stato e decadenza dalla potestà dei genitori" (2012) 4 *Dir pen proc* 415; Silvia Larizza, "Alterazione di stato: illegittima l'applicazione automatica della decadenza dalla potestà dei genitori" (2012) 5 *Dir pen proc* 595; Donatella Chicco, "Se proteggere un figlio diventa una condanna: la Corte costituzionale esclude l'automatismo della perdita della potestà genitoriale" (2012) 5 *Famiglia e diritto* 437.

The Court's reasoning can be summed up as follows:

- a) the concept of parental authority is strictly connected and functional to the safeguard of the underage's interest, which is therefore involved while discussing about a norm establishing the loss of the authority itself;
- b) the interest of the underage is "complex" and protected both at the international level (*Convention on the Rights of the Child*, New York, 20 November 1989; *European Convention on the Exercise of Children's Rights*, Strasbourg, 25 January 1996; *Charter of Fundamental Rights of the European Union*) and at the domestic level (family law reform; adoption law);
- c) the automatism provided by the scrutinized norm unreasonably prevents the possibility to consider such interest in the concrete case and, in particular, to assess whether it is actually protected or maybe, in some particular case, prejudiced by the loss of the parental authority. In light of this reasoning, the Court states that article 569 CP is unconstitutional and in violation of article 3 of the Constitution.

## C. The Second Unconstitutionality Ruling

After the above-mentioned judgment, the legal literature expected new unconstitutionality rulings referring to article 569 CP, insofar as it imposes the loss of the parental authority not only as a consequence of the commission of the family status alteration crime, but of other crimes as well.<sup>25</sup>

Indeed, with *C cost 7/2013* the Court extended its unconstitutionality ruling to the hypotheses in which article 569 CP imposes the loss of the parental authority as a consequence of the crime of family status suppression.<sup>26</sup>

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25. Larizza, *supra* note 24; Chicco, *supra* note 24.

26. For notes by the Italian literature on this judgment, see Vittorio Manes, "La Corte costituzionale ribadisce l'irragionevolezza dell'art 569 CP ed aggiorna la 'dottrina' del 'parametro interposto' (art 117, comma primo, Cost.)" *Diritto penale contemporaneo* (28 January 2013), online: <[www.giurcost.org/decisioni/2013/0007s-13.html](http://www.giurcost.org/decisioni/2013/0007s-13.html)>; Giuseppe Di Chiara, "Soppressione di stato, perdita di diritto della potestà dei genitori e irragionevoli automatismi" (2013) 4 *Dir pen proc* 419; Silvia Larizza, "Interesse del minore e decadenza dalla potestà dei genitori" (2013) 5 *Dir pen proc* 554; Paolo Pittaro, "La condanna per il reato di soppressione di stato non può comportare automaticamente la perdita della potestà genitoriale, dovendosi valutare le esigenze del minore nel caso concreto" (2013) 3 *Famiglia e diritto* 309.

Again, the Court states that the norm is unconstitutional insofar as it prevents “the judge from every possibility of considering the underage’s interest in the concrete case.” However, the argumentation does not exactly reflect that of C cost 31/2012. Indeed, two constitutional norms are now considered to be autonomously violated:

- a) the first is, as in the former judgment, article 3 of the Constitution: the Court expressly refers to the *ratio decidendi* of C cost 31/2012 and extends it to the present case (so, the automatism is considered to be unreasonable because, in some cases, it might prejudice the underage interest);
- b) the second constitutional norm invoked in the judgment is article 117(1) Cost: indeed, according to the Court, article 569 CP violates many international norms protecting the best interest of the underage, namely the *Convention on the Rights of the Child* (New York, 20 November 1989) and the *European Convention on the Exercise of Children’s Rights* (Strasbourg, 25 January 1996)—already mentioned in the ruling of 2012—, as well as the *Guidelines of the Committee of Ministers of the Council of Europe on Child-Friendly Justice*, adopted by the Committee of Ministers on 17 November 2010 at the 1,098th meeting of the Ministers’ Deputies.

#### D. Continuity and Discontinuity Between the *Rationes Decidendi* of the Two Rulings and What Remains Anyhow: The Internationally Oriented Automatism Prohibition Doctrine

In light of the above, it appears clear that the mentioned judgments are both similar and different in some aspects.

In both cases, the Court states the unreasonableness of the legal automatism provided by article 569 CP, considering that it might undermine a relevant interest: the underage’s best interest.

Moreover, the Court finds that the protection of this interest is granted, *inter alia*, by international sources. In this respect, treaties, conventions and legal instruments belonging to different international systems of human rights protection are considered, as well as the constraints they imply for the domestic legislation.

In this way, the Court combines the relevance of the plurality of factual situations to be protected with the reference to the international landscape.

Nevertheless, the *ratio decidendi* is not exactly the same in the two decisions. In C cost 31/2012 the two aspects—prohibition of legislative automatism in favour of concrete cases and resort to international sources—converge, constituting a unique reason for the ruling of unconstitutionality under article 3 Cost. Neither article 11 nor article 117(1) are invoked, although the international protection of the underage's interest is clearly depicted in the judgment. In C cost 7/2013, on the contrary, the unreasonable automatism (in violation of article 3) and the prejudice to the underage's interest (in violation of international sources and article 117(1)) become autonomous reasons for the unconstitutionality ruling.

In my opinion, this division of the argumentation in two parts, operated by the second judgment, does not seem to be imposed by logical and legal reasons: so, it might result in an unnecessary duplication. At the same time, the absence of any formal reference to article 117(1) (or article 11) in the first ruling is not due to a real irrelevance of international constraints, but rather to technical reasons.<sup>27</sup>

Indeed, on the one hand, the automatism is unreasonable as far as it brings prejudice, in concrete cases, to an interest recognized at the international level. On the other, the violation of international sources occurs precisely as a consequence of an automatism undermining the interest enshrined in those sources.

If this is the case, however, we can draw two conclusions.

Firstly, it seems possible to say that there is actually just one, complex reason to affirm that article 569 CP is unconstitutional: a reason lying in the normative conjunction between article 3 and article 117(1) (and/or article 11) Cost.<sup>28</sup>

Secondly, what practically remains beyond any analytical consideration is the essential common core of the *rationes decidendi* of the two judgments, which is pretty clear: the conjugation of the automatism prohibition doctrine in an internationally oriented sense in favour of a fair solution of concrete cases and, therefore, in favour of the practical enhancement of fundamental rights protection.

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27. Neither article 117(1) nor article 11 were cited by the judge contesting article 569 CP before the Court: according to the norms on the constitutional review process in Italy this prevented the Court from the possibility of explicitly considering these provisions, although, as we said, it cited the international obligations anyhow.

28. *Contra* see, however, Manes, *supra* note 26 at 5.



## CONCLUSION: A CONCRETE LEGAL INSTRUMENT IN THE 'MULTI-LEVEL' SCENARIO IN FAVOUR OF CONCRETE CASES

The lastly mentioned common core brings us to the conclusions of our work. Clearly, different perspectives and “trends” come here into account. On one side, the aim of the Constitutional Court is to safeguard the national discipline and corresponding political decision to the extent that is possible. On the other, the tendency is to correct it where necessary, what is done in two concurring directions: (i) ascending toward what is universal and abstract, thus expressing a need of standardization at the level of the principles that transcends national boundaries and stands in favour of the universal protection of human rights and the common respect of the international sources enshrining them; and, at the same time (ii) descending toward what is particular and concrete, thus expressing a need of differentiation in light of the specific case.

The combination the case law shows of these aspects suggests looking for their common matrix.

In my opinion, such matrix might be precisely identified in the *plural dimension* the legal and constitutional experience has assumed in our days. Such need is revealed in a double but conjoined “escape,” now “upwards” and now “downwards,” from the national dimension of the law.

In other terms, what we find here is a paradigmatic example of what has been called the apparently paradoxical meeting of the maximally abstract and the maximally concrete.<sup>29</sup> Besides, it is no coincidence that the need of keeping together the dimensions of particularity and universality lies behind the much-studied issue of the “multi-level” nature of today’s law.<sup>30</sup>

And while the topic of the “multi-level” landscape might be addressed from many perspectives, we might say that the Italian

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29. Gustavo Zagrebelsky, *Su tre aspetti della ragionevolezza in Il principio di ragionevolezza nella giurisprudenza della Corte costituzionale. Riferimenti comparatistici*, proceedings of the Rome Seminar of 13–14 October 1992 (Milano: Giuffrè, 1994) 179 at 187–88; see also Gustavo Zagrebelsky, *Il diritto mite* (Torino: Einaudi, 1992) at 147 ff.

30. For a study on these two “logics” in light of the constitutional culture, although of a specific national system, see Benjamin L Berger, “Children of Two Logics: A Way Into Canadian Constitutional Culture” (2013) 11:2 *Int’l J Const L* 319.

Constitutional Court has developed, with the doctrine we presented, a concrete legal mechanism that can operate effectively in this complex scenario.

Indeed, by applying its doctrine, the Court grants that the domestic regulation is preserved and simply mitigated. At the same time, it allows international constraints to be executed through a limited but effective exception clause, that the judge may apply in light of the circumstances and accordingly to her/his domestic standpoint. The global perspective is therefore taken into account, but at the same time a particular attention is paid to the local dimension, in which the concrete case arises and in which the judge operates.

Obviously, since the automatism prohibition gives quite a broad margin of appreciation to the judiciary, the issue of its discretionary power is raised. Indeed, for some authors, granting the courts a broad margin of appreciation might help the law to develop as does the "evolving morality" of every legal tradition, even in civil law systems; others, however, might see in such discretion a danger and therefore doubt about the desirability of doctrines of this kind.<sup>31</sup> Such risks, however, seem to be the backhand of legal pluralism itself in our times, as it involves the fragmentation of legal sources and the increasing role of the courts and their "dialogue," especially in human rights-related matters.

In any case, a particular attention is required while operating in this complex scenario if we have to avoid that the flexibility of today's law turns in worse results than those of traditional monism.

Being careful, nevertheless, firstly means to ensure that plurality and flexibility do not remain indeterminate concepts. It is up to the jurists (judges and scholars) to avoid renouncing to understand and, possibly, lead today's developments. The elaboration of conceptual schemes is

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31. Such concerns are actually, as it is well-known, frequent and long-standing in the constitutional law debate, although mostly referred so far to the single national experiences. In this respect for the concept of the "evolving morality" (of a specific legal tradition) the judiciary can express is findable in Alexander M Bickel, *The Least Dangerous Branch. The Supreme Court at the Bar of Politics* (New Haven: Yale University Press, 1986). On the problem of judicial accountability, see Guy Canivet, Mads Andenas & Duncan Fairgrieve, eds, *Independence, Accountability and the Judiciary* (London: British Institute of International and Comparative Law, 2006); Daniela Piana, *Judicial Accountabilities in New Europe: From Rule of Law to Quality of Justice* (Farnham: Ashgate, 2010); Hakeem O Yusuf, *Transitional Justice, Judicial Accountability and the Rule of Law* (London: Routledge, 2010), all recently reviewed in David Kosař, "The Least Accountable Branch" (2013) 11:1 *Int'l J Const L* 234.

therefore needed, while it can be very hazardous to let the “global disorder of normative orders” grow.<sup>32</sup> This is, actually, the only way to effectively enhance the protection of fundamental rights in the “multi-level” landscape.

In this sense, the doctrine we studied, although providing the judiciary with great discretion, seems to be sufficiently defined within a clear legal scheme (first of all, the technicality of the narrow exception clause added to the legislation).

In light of the above, it seems to me that the internationally oriented automatism doctrine can be seen as an effective legal and constitutional instrument operating in the “multi-level” scenario and namely in the framework of international systems and treaties of human rights protection. Indeed, it provides a good degree of flexibility and a good balancing point between international integration and national autonomy, in light of the need to reach an adequate and “fair” solution in concrete cases and, therefore, in favour of the enhancement of human rights protection at the practical level.

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32. On the difficulty of finding a grid to understand today's legal trends, see Neil Walker, “Beyond Boundary Disputes and Basic Grids: Mapping the Global Disorder of Normative Orders” (2008) 6:3-4 *Int'l J Const L* 373.