Transparency versus national security: the method of the constitutional law (working paper)

by

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1. INTRODUCTION: THE CONFLICT BETWEEN NATIONAL SECURITY AND TRANSPARENCY

In any juridical system, the principle of the transparency of the acts carried out by the public authority traditionally runs up against the limitation of national security, often defined as being the national interest[1].

In fact, in the different experiences being examined, the protection of national security – deemed, as shall be seen here, to be an overarching national interest also in the jurisprudence of the Supreme Courts – may require sacrificing the needs of transparency in public authorities' actions.

This is obvious when considering information regarding the state's military defence from attacks both foreign and domestic, certain missions carried out by diplomatic authorities, or foreign policy actions. Disclosing information on the activity carried out by the public authorities responsible for these matters certainly comes at a price: for example, the failure of operations in progress, the vulnerability of those who are performing them, or breach of national defence.

In these cases, the derogation from the principle of transparency is upheld, according to the juridical systems of reference, by the operativity of the state secret (Italian system), or the state secrets privilege (the United States and Israeli systems, for example), the invocation of which is generally allocated to the body at the top of the Executive power, as it is charged with

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Paragraphs 2.1, 2.2, 2.3, 2.4, 2.4.1 and paragraph 4.1 of this work summarize in an English version the following essay: G. ARCONZO, I. PELLIZZONE, *Il segreto di stato nella giurisprudenza della Corte costituzionale e della Corte europea dei diritti dell'uomo*, in *Rivista telematica giuridica dell'Associazione italiana dei costituzionalisti*, 1/2012. Therefore I owe special thanks to Giuseppe Arconzo for encouraging me in this work.

[1] Among Italian scholars, this limit is emphasized by G. MIGLIO, *Il segreto politico*, in *Il segreto nella realtà giuridica italiana. Atti del Convegno nazionale. Rome, 26-28 February 1981,* Padova, 1983, 165ff.

fundamental policy choices in matters of military defence and foreign policy[2]. These institutions – state secret and state secrets privilege – are certainly patterned similarly, since at any event, by virtue of the decision originating from the Executive power, it is a matter of forbidding the account or transmission of records and documents by the public authority to the judicial authority, for reasons of national security (since this work focuses on the Italian system, for the sake of convenience, when speaking about secrecy for the safeguarding of national security, the term "state secret" will be used, unless specific observations are being made about the American system).

As in all environments in which the public authority can legitimately exercise its power, the absence of transparency, because it paralyzes both political and juridical oversight, translates into a lack of accountability to citizens, and into a lack of protection – including judicial protection – in the case of injuring individual and collective rights. In fact, even when foreign policy and military defence of the state are in play, abuses – committed by public powers to the detriment of individuals – may of course very well occur.

More generally – but this is also true for the case of state secret – the lack of transparency in a democratic system is a contradiction in terms, since, in this system, the people must be able to oversee power[3].

In a democratic system, state secret, since it is a form of derogation from the principle of the transparency of public power, may have a reason to exist if it is justified – not only in theory but in concrete terms as well – by balancing the needs of safeguarding the public interest with protecting national security[4] and, at any rate, must be considered an exceptional act.

Furthermore, these two constants do not allow us to overcome the problem of the remedies to be employed in the circumstance – which may very well occur – of the distorted use

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[2] For the Italian experience, see M. RAVERAIRA, *Segreto nel diritto costituzionale*, (heading) in *Digesto delle discipline pubblicistiche*, Torino, 1999, 22ff. Cf. among the many that have dealt with the issue on a comparative level, S. SETTY, *Judicial formalism and the state secrets privilege*, in *Western New England University School of Law Legal Studies Research Paper Series*, 12-4/2012, 1ff, which address the United States and Israeli system; and S. SETTY*, Litigating Secrets: Comparative Perspectives on the State Secrets Privilege*, *Brook. L. Rev*. 75/2009, 201 ff.

[3] Thus, see, among many, S. RODOTÀ, *Elogio del moralismo,* Bari, 2011, 15, which stresses that "public figures have a lower expectation of privacy, so that the careful eye of every citizen, in a condition of overseeing the concrete exercise of public power, may rest upon them," and U. SCARPELLI, *La democrazia e il segreto,* in *Il segreto nella realtà giuridica italian*a, cit., 638-639. Highly significant in this regard is the statement by Norberto Bobbio, for whom the democratic form of state is implemented through "*government of public power in public."*: cf. N. BOBBIO, *Il futuro della democrazia*, Torino - Einaudi, 1995, 85ff.

[4] Transparency is functional to a better guarantee of rights and of national security, according to S. COLIVER, *Principles on national security and the right to information*, in http://spaa.newark.rutgers.edu/images/stories/documents/Transparency_Research_Conference/Papers/Coliver_Sandra.pdf; otherwise, with particular regard to the Italian legal order, A. MORRONE, *Il* nomos *del segreto di Stato*, in G. ILLUMINATI (ed.), *Nuovi profili del segreto di Stato e dell'attività di* intelligence, Torino, 2010, 7ff insists on the risks derived from the simplification with which the disclosure of information is associated with democracy. With reference to this risks, it should be specified that the principle of transparency may be understood as the principle by which individuals may ask public administration for information on acts it has implemented, and thus represents, from this standpoint, something less than disclosure, which stands apart from information requests.

of secrecy, claimed by public administration solely to avoid oversight of its own doings, and thus to sidestep its own responsibilities. The impacts of abuse of this kind are quite serious, involving subjects whose rights were injured by the public authority's illegitimate behaviour, as well as individuals who are parties to judgments regarding cases illegitimately covered by state secret, and whose right to their own defence is limited by the presence of secrecy.

In these cases, national security needs in fact paralyze oversight over the validity of the grounds falsely adopted to support secrecy, and thus thwart the protection of individual rights.

In constitutional law, the consequences derived from a deviation in relying on state secret, invoked for reasons other than safeguarding national security, should also be considered with reference not only to the negative consequences for the protection of individual rights, but also the negative consequences for relations between different constitutional powers.

In fact, in this regard, it must be considered that the Executive's decision to claim state secret entails a limit – albeit justified by the needs to protect a supreme interest like national security – upon the judicial power's exercise of its own functions. This limit may be more or less marked, depending on whether the constitutional system sets limits on invoking secrecy, and ensures oversight through which to verify that these limits are complied with, and above all that the state secret truly serves to protect the needs of national security. In the absence of any oversight of this kind, it may well be said that, generally, the principle of the separation of powers is dangerously tarnished, considering that behind state secret, the Executive power could mask very serious abuse.

The proper orientation of relations between Executive and Judicial powers is the viewpoint from which, in the great majority of cases, the Italian Constitutional Court performs its oversight when ruling in the matter of state secret[5]. In fact, the Italian Constitutional Court holds the power to pass judgment over conflicts arising from allocation of state powers, through which it is called upon, by bodies holding the power, to exercise, definitively, a constitutional responsibility for verifying whether their constitutional endowment is harmed by the illegitimate action or omission of other constitutional bodies[6]. In the case of state secret, the judicial power can thus turn to the Constitutional Court for it to annul the Executive power's decision and, at the same time, the Executive power can turn to the Constitutional Court for it to annul the judicial power's measures based on records legitimately covered by state secret, and hence unusable in inquiries or trials.

[5] Unless it is called upon to rule on the constitutional legitimacy of the regulations of law governing state secrecy. This took place in ruling no. 82 of 1976, ruling no. 76 of 1977, and order no. 344 of 2000. In all the other cases, however, the Court expressed its opinion in judgments for conflicts arising between state powers – which is to say, between the judicial and the executive powers – in that they were damaged in their constitutional attributions.

[6] Cf. art. 134 Cost. and, for the definition of state power, art. 37 and art. 38 of law no. 87 of 1958. On this, see A. CERRI, *Corso di giustizia costituzionale*, Milano, 2008, 337 ff.

However, the perspective of rights is not taken on by the Italian constitutional judge, who is not expected to pronounce judgment as a consequence of a direct appeal of individuals, and thus cannot rule on petitions brought by those who deem themselves injured due to an illegitimate claim of state secret.

Therefore, for this perspective, reference will have to be made to other experiences, particularly significant among which would appear to be the United States Supreme Court, as well as supranational courts, and in particular the European Court of Human Rights. By all means, the problem of abuses in relying on state secret has been noted, even recently, by all these courts, which have had to deal with the problem of striking a balance between fundamental rights and the public interest of national security, under quite serious threat for a number of reasons, first and foremost as a consequence of the phenomenon of international terrorism, as became clear after 11 September 2011.

The purpose of this work is to describe the role of Italian constitutional jurisprudence in the matter of state secret, in order to cast light – also through comparison with the United States legal systems, and with the jurisprudence of the European Court of Human Rights – on its strong and weak points. More generally, the work aims to comprehend what oversight and remedies should be put in place to deal with the negative impacts, due to reliance on state secret, on upholding the constitutional system, in terms of protecting rights and maintaining the proper attitude in relations between the Executive and the Judiciary.

Therefore, the work will not address Parliament's political oversight over the Executive's choice in terms of state secret[7], since, as a merely political oversight, it lies outside the underlying problem that is the object of this analysis: the limitations on judicial protection for subjects whose rights have been injured by public powers that unduly invoke state secret.

- PART ONE –

2. THE ITALIAN LAW ABOUT STATE SECRET

Italian law governs state secret in some detail; the regulations of reference are to be found in law no. 124 of 2007[8]. This law, which systemically governs various aspects concerning

[7] With regard to Parliament's political oversight, see, with reference to Italy and the United States, F. FABBRINI, *Extraordinary renditions and the state secret privilege: Italy and the United States compared*, in *International Journal of Public Law*, 2/2011, 341ff, which holds this oversight to be unsatisfying in both cases; similarly, with reference to the United States, see A. FROST, *The State Secret Privilege and Separation of Powers*, Fordham L. Rev., 75/2007,1931.

[8] Law no. 124 of 03 August 2007, *Intelligence System for the Security of the Republic and new Provisions governing Secrecy*, articles 39-42. For comment on this law, see, for all, T. F. GIUPPONI, F. FABBRINI, *Intelligence agencies and the State secret privilege: the Italian experience*, in ICLJ, 2010, 3, 443ff.

the function of the intelligence services and state secret, has in particular reformed the rules of the criminal trial with which the public authority can claim state secret before the judicial power.

The regulation this analysis starts from provides that: "*The records, documents, information, activities and every other thing the disclosure of which may be used to damage the integrity of the Republic (including in relation to international agreements, the defence of its underlying institutions as established by the Constitution, the State's independence vis à vis other states and its relations with them, as well as its military preparation and defence), shall have State-secret status.*"[9]

When the judicial authority sees a public official invoke state secret against it, it must make this known to the Prime Minister, who must, where applicable, provide his or her confirmation by no later than 30 days thereafter (in the event of non-action, secrecy is considered not to exist). And, from the time secrecy is invoked, the judicial authority is required to suspend all activities aimed at acquiring the information subject to secrecy; of course, the suspension obligation continues to exist and be binding upon the judicial authority if the Prime Minister confirms the secrecy[10].

Moreover, the regulations in force have introduced an explicit provision of the judicial authority's power (actually deriving directly from the Constitution[11]) to call upon the Constitutional Court, through the instrument of conflict over the allocation of powers, to carry out oversight – merely formal, as shall be seen – on the legitimacy of the secrecy confirmation made by the Prime Minister[12]; it is also established that state secret can never be invoked at the Constitutional Court, which, in turn, is required to guarantee compliance with the secrecy constraint[13].

As Italian doctrine has stressed, the regulations described above, like those prior to the 2007 reform[14], are the result of the statements made by the Italian Constitutional Court, in the

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[9] Cf. art. 39, paragraph 1, of law no. 124 of 2007. Also based on art. 39, secrecy has a 15-year duration, since once that time has elapsed after it is applied, interested parties may request access to the documents covered by state secret. However, this period can be extended by the Prime Minister for a maximum of 30 years.

[10] Cf. art. 202 of the code of criminal procedure, paragraphs 2 and 5.

[11] Cf. in particular ruling no. 86 of 1977, which had already not ruled out the possibility of conflict arising from allocation of powers. In addition to this decision, cf. rulings no. 110 of 1998, no. 410 of 1998, ord. no. 404 of 2005, all prior to the 2007 law and regarding conflicts arising from allocation of powers.

[12] Cf. art. 202 of the code of criminal procedure, paragraph 7.

[13] Art. 202 of the code of criminal procedure, paragraph 8.
The Court, in its judgments, was thus able to gain access to documents subject to secrecy, with the precautions necessary to prevent their disclosure.

[14] Cf. Law no. 801 of 24 October 1977, *Establishment and regulations of the intelligence and security services and discipline of State secrecy.* Alongside the identification of what may be defined as the constitutional statute of state secret in the ruling 86 of 1977, the Italian Parliament also approved a reform law, law no. 801 of 1977, which cancelled the regulations of the code of criminal procedure dating back to the Fascist era, while upholding, in several aspects (protecting national security, prohibiting the invocation of secrecy with regard to facts subversion of the constitutional order, allocating the power to the Prime Minister, and notifying the Chambers of the grounds for the secret), the Constitutional Court's recommendations.

rare but important pronouncements in which it has found itself dealing with conflicts between the Judicial and Executive powers arising due to the latter's invocation of state secret[15]. It bears mentioning that, with a symbolic formula, the Constitutional Court has been defined as "secrecy judge"[16], due to its jurisprudence with respect to the choices adopted by Parliament pertaining to the legislation governing state secret.

2.1. THE LEADING CASE OF 1977: NATIONAL SECURITY AS A CONSTITUTIONAL FOUNDATION, AND LIMIT OF STATE SECRET

The first, fundamental decision by the Constitutional Court on the matter – and still today the benchmark of constitutional jurisprudence[17] although some of its statements on the limits of state secret have been partially voided of content – is ruling no. 86 of 1977[18].

The 1977 decision was pronounced as part of a question of constitutional legitimacy raised starting from a criminal judgment for the offence of subversion of the constitutional order. The case, known as the "White Coup" and conceived by Edgardo Sogno, aimed to provoke the passage to a presidential republic[19]. More specifically, during the trial held in Turin and then in Rome starting in 1974, the judicial authority was supposed to examine documents regarding the relationship between the accused and some Italian and foreign intelligence bodies. However, the competent military authority had sent only a portion of the required documents and had, with regard to the missing documents, claimed state secret. The trying magistrates then raised the question of constitutional legitimacy before the Constitutional Court, asking it then to verify that the criminal trial regulations in the matter of state secret were constitutional.

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[15] See, among the many in this sense, I. F. CARAMAZZA, *Il segreto di stato, atto III, Con la risoluzione dei sei conflitti di attribuzione la Corte costituzionale completa la relativa disciplina*, in *Rassegna Avvocatura dello Stato,* 2009, 13; C. BONZANO, *Il segreto di Stato nel processo penale,* Padova, 2010, 9ff; G. ARCONZO, I. PELLIZZONE, *Il segreto di stato,* cit., 23ff.

[16] Thus, cf. P. BARILE, *Democrazia e segreto,* in *Quad. Cost.,* 1987, 40.

[17] After ruling no. 86 of 1977, see rulings no. 110 and no. 410 of 1998, as well as ruling no. 487 of 2000, regarding a case in which the secret regarded documents requested from the Bologna judicial authority, pertaining to investigatory activities carried out by secret service and police officers against a foreigner suspected of terrorist acts; ord. no. 404 of 2005, in which state secret was invoked with regard to the premises constituting the park at Villa La Certosa, the then Prime Minister's summer residence, where the competent judicial authority intended to carry out verifications of possible unauthorized construction activities; ruling no. 106 of 2009 on the extraordinary rendition of Abu Omar, imam of a Milanese mosque; ruling no. 40 of 2012, on surveillance activity regarding Italian and foreign (European) journalists and magistrates, performed unlawfully by certain officers of the Italian secret services. In none of these cases did the Constitutional Court declare the illegitimate state secret classification.

[18] For the sake of completeness, ruling no. 82 of 1976, since it preceded the 1977 ruling, bears mentioning. In this decision, the Court discussed the merit of the question of the constitutional legitimacy of the regulation requiring the Justice Minister's authorization to proceed against the subject that had opposed the existence of a military secret in the case of a secrecy order deemed unwarranted by the judge. The question was declared groundless.

[19] On the affair, see A. CAZZULLO, E. SOGNO, *Testamento di un anticomunista. Dalla resistenza al golpe bianco: storia di un italiano*, Milano, II ed., 2010.

It should be borne in mind that the regulations of the code of criminal procedure then in force prohibited judges from questioning public officials on the state's military or political secrets. At the same time, it was forbidden to use evidence for which public officials had invoked secrecy[20]. The judge that had found the invocation of state secret groundless could only make this known to the Appeals Court's director of public prosecutions (*Procuratore generale della Corte d'Appello*), who was charged with the task of informing the Justice Minister – the only authority qualified to authorize the use of information for which secrecy had been claimed[21]. On the other hand, no form of oversight could be activated with reference to the Justice Minister's decision. Given this regulatory framework, the competent judges were supposed to succumb to the ministerial decision.

With ruling no. 86 of 1977, the Court came to declare the unconstitutionality of part of the trial regulations on secrecy, as they ran counter to the constitutional interest in justice. The *ratio decidendi* of this important ruling may be summarized in the following manner: the legitimacy of state secret is conditioned upon its function of protecting the state's security, over and above the other principles of a constitutional nature involved in the balance.

After this, the Court, probably aware of the gravity of the negative ramifications for the Constitution itself derived from government abuses in relying on state secret, attempted to provide a definition for "national security," in order to reduce the margins for claiming state secret that exploited this concept's uncertain content. From the effort that has been described, which was only in the least part satisfactory[22], it emerges that the secret can cover "*information concerning the state's military defence, preparedness, or strength, thus involving the supreme interest of the state's security in its international expression, which is to say the state/community's interest in its own territorial integrity, independence, and indeed its very survival*."[23]. It may then be said that state secret is constitutionally warranted only insofar as it constitutes a tool to safeguard national security, which finds implicit constitutional grounds in the document's articles 52, where it establishes the citizen's sacred duty to defend the country, 87, in the part establishing the Supreme Council of Defence, a body whose primary function is to ensure state security through military defence. Lastly, the Court mentioned the Constitution's articles 1 and 5, which establish the democratic nature of the system, its unity and indivisibility – principles to be safeguarded through secrecy as a last resort., 1, and 5.

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[20] The limit of subverting constitutional order upon invoking secrecy had yet to be sanctioned by the Constitutional Court.

[21] Cf. articles 342 and 352 of the code of criminal procedure then in force. On these regulations cf. *La relazione del Guardasigilli Rocco sul progetto definitivo del codice penale*, in M. CHIAVARIO (ed.), *Segreto di Stato e giustizia penale*, Bologna, 1978, 154ff.

[22] In this sense, reference may be made to G. ARCONZO, I. PELLIZZONE, *Il segreto di Stato*, cit., 6.

[23] Moreover, national security, whose protection is guaranteed through activities potentially covered by state secret, may be internal and external, and may be compromised by "any violent action, or action at any rate not in compliance with the democratic spirit that inspires our constitutional arrangement" and, in the most extreme cases, by actions that imperil the state's very existence.

In the 1977 decision, the Court, while finding the constitutional grounds and functions of state secret, identified the limits for resorting to it: it must (i) be justified, in such a way that the decision to rely on it can be subjected to Parliament's political oversight[24]; (ii) it may be invoked only by the leadership of the Executive power, which is to say the Prime Minister; (iii) it may never be invoked for the purpose of protecting government or party majority interests, or to "mask" acts of subversion of the constitutional order[25].

2.2. THE EFFECTS OF RESORTING TO STATE SECRET BEFORE THE JUDICIAL POWER: AN "ALMOST TOTAL" BARRIER TO THE CRIMINAL SUIT

Having made clear the constitutional foundation and the limits of state secret, a brief account of the effects the declaration of state secret has on judges should be provided. From a constitutional standpoint, the Constitutional Court's decisions regarding the relationship between state secret and the criminal trial, as emerged in the conflicts arising from allocation of powers between the judicial authority and the Prime Minister, have taken on importance. For example, the statements made by the Constitutional Court starting from ruling no. 110 of 1998 are highly instructive. The decision regards the conflict that the Prime Minister had brought against the Bologna prosecutor's office (*Procura*), as it carried out and pursued, against SISDE (*Servizio per la informazione e la sicurezza democratica* – Italy's Intelligence and Democratic Security Service) and police officers, inquiries regarding investigation activities performed against a foreign citizen in 1991, even though the pertinent documents were covered by secrecy customarily invoked by the Prime Minister. In particular, according to the Prime Minister, the request to remand some defendants was made based on these very documents. At the outset,

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[24] Justification is therefore not aimed at a oversight by the judicial authority. In fact, as the ruling reads, "*These justifications will normally be adhered to by the judge. However, they may, as is usually the case, facilitate Parliament's political oversight and in this way help ensure, with the means that belong to Parliament itself, the balance between the various powers, thereby avoiding situations that could result in a conflict arising from allocation of powers*." In ruling no. 40 of 2012, the Court specified that the need for justification arose in two different perspectives, depending on whom it addressed: while, as we have already seen, the justification obligation for Parliament allows the representative body to perform oversight over the exercise of the secrecy power, the same obligation, vis-à-vis the judicial authority, aims "*rather at justifying in consistent and plausible terms – in the relationships between powers – the 'barrier' to the exercise of the jurisdictional function caused by confirmation of the secret, giving rise to considerations allowing secret information to be ascribed to fundamental interests that may be summarized with the formula of national security.*"This point will be discussed further in paragraphs 2.4 and 2.4.1 below.
The system of parliamentary oversight is currently regulated by articles 30ff of law no. 124 of 2007. Of central importance in this regard is the activity performed by the parliamentary committee for the security of the Republic (COPASIR – *Comitato parlamentare per la sicurezza della Repubblica*).

[25] For an overview of the subject, see A. PACE, *L'apposizione del segreto di Stato nei principi costituzionali e nella legge n. 124 del 2007*, in *Giur. Cost*., 2008, 1101ff.
This limit is adopted in art. 11 of law no. 801 of 1977, and was confirmed in art. 39, paragraph 11, of law no. 124 of 2007. In this regard, with ruling no. 106 of 2009, the Court provided important specifications of a substantial nature. For a broad comment on the decision and its aftermath, see G. SALVI, *Obiettivo 1. Processo penale e segreto di Stato. Oltre Abu Omar*, in *Questione giustizia*, 2010, 71ff.

the Court assumed that state secret cannot undermine the public prosecutor's power to proceed with inquiries and its requests to the judge "*where it has or may acquire by some other means elements under investigation that are entirely autonomous and independent of the records and documents covered by secrecy.*" However, in the presence of secrecy, the judicial authority must not proceed further with inquiries, and must not lodge the criminal suit, only if the secret covers the evidence essential for demonstrating the guilt of the party being investigated[26]. More precisely, the ruling in question establishes a prohibition against using records and documents covered by secrecy not only "*directly, which is to say for the purposes of basing the lodging of the criminal suit upon them,*" but also indirectly, "*which is to say drawing from them cues for the purposes of further acts of inquiry*"[27]. According to the Court, this results in the non-usability of all evidence whose origin derives from records or testimony covered by secrecy[28].

As a consequence of the difficulty of providing practical application, in particular, of the prohibition of indirect use of evidence covered by secrecy[29], the Bologna prosecutor (*Procura*) – in the same trial that had given rise to ruling no. 110 of 1998 – asked for remand based on evidence allegedly not covered by secrecy, which led the Prime Minister once again to claim conflicts arising from allocation of powers, with his arguments upheld by ruling no. 410 of 1998[30]. Nor was the matter closed following the latter decision, because the Public Prosecutor (*Pubblico Ministero*), while recognizing that the essential evidence was covered by secrecy, still made the request for filing with the judge based on the secret documents introduced into the case file as the result of the inquiries. The Bologna prosecutor (*Procura*) then received another petition from the Prime Minister, resolved by the Constitutional Court with ruling no. 487 of 2000. In particular, in the latter decision, the Court stated that the judicial authority must return the records covered by secrecy legitimately claimed – even in the absence of an explicit request – against the authority responsible for keeping them, as they could not be kept in the case file.

Even more restrictive with regard to state secret's effects on pursuing a criminal suit was the recent ruling no. 106 of 2009, in the Abu Omar case. Abu Omar, imam of a Milanese

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[26] Insistent on this aspect is G. SALVI, *Obiettivo 1. Processo penale e segreto di Stato. Oltre Abu Omar*, *Omar*, in *Questione giustizia*, 2010, 71ff.

[27] On this, see G. SALVI, *Obiettivo 1,* cit., 84ff.

[28] In practical terms, non-usability in proceedings requires expunging from the case file the documents covered by state secret, or providing a redacted version, replacing records covered by secrecy with those partially obscured.

[29] In this sense, cf. also T. F. GIUPPONI, *Ancora un conflitto in materia di segreto di Stato: i magistrati di Bologna "impugnano" e il parametro costituzionale "scivola",* in *Giur. It.,* 2001, I, 1219 and 1220; G. ARCONZO, I. PELLIZZONE, *Il segreto di Stato*, cit., 11 ff.

[30] It bears pointing out that law no. 124 of 2007, under art. 41, paragraph 2, gives the public prosecutor (*Pubblico Ministero*) the power to make an initial assessment of the existence of the circumstances covered by secrecy. Where the assessment is positive, and thus entails asking the Prime Minister for confirmation, it is still not binding on the judge. The judge, in fact – as specified by ruling no. 40 of 2012 (point 7 of the consideration in law) – is the only subject called upon to verify "*whether the circumstances covered by secrecy should be held as actually existing for defining the trial, especially with a view to the (possible) demonstration of the non-existence of the facts, of the defendants' non-involvement in them, or of the existence of possible causes of justification*."

mosque investigated by the Italian judicial authority for acts of terrorism, was forcibly taken from Italian soil by United States intelligence services, which brought him to Egypt where he was interrogated, also by violent methods. The Abu Omar kidnapping was a clear case of extraordinary rendition[31]. The Milan prosecutor (*Procura*) with jurisdiction over the territory, upon learning of the kidnapping through the office's inquiries, also dealt with information on the kidnapping offence, and consequently brought criminal suit against the Italian and United States intelligence services that took part. The Prime Minister, during the trial for the Abu Omar kidnapping, in maintaining that the Milan prosecutor had used records and documents covered by state secret, claimed conflicts arising from allocation of powers before the Constitutional Court. For its part, the prosecutor (Procura), since during the inquiries and the trial state secrecy had also been invoked for records and documents that were initially usable, claimed conflicts arising from allocation of state powers against the Prime Minister, sustaining that state secret cannot be retroactively valid, and that the Abu Omar kidnapping was a fact subversion of the constitutional order[32]. So, according to the Court the evidence acquired independently of records covered by state secret are never usable when they deal with the object of the secret. In the case in question, it was a matter of blanket wiretapping of the phones of SISMI (*Servizio d'Informazioni per la Sicurezza Militare* – Military Intelligence and Security Service) agents: this means of gathering evidence, although used without the prosecutor (*Pubblico Ministero*) taking cues from secret acts that had come into the office's possession, in fact led to the acquisition of evidence that was unusable, since it regarded relations between domestic intelligence and foreign services, which is to say a matter covered by state secret. The Prime Minister's petition was thus upheld and the records of the judicial authority were annulled by the Court.

Therefore, although at the level of principle the Constitutional Court had, in particular in 1998, denied that state secret could constitute an "absolute barrier" to the criminal suit, the developments of constitutional jurisprudence then took a direction of particular rigour against the judicial authority, to the point that in 2009, it was found that state secret functioned as a barrier to any evidence, even gathered independently of intelligence learned from records initially not subject to secrecy. In this setting, it appears that the conditions for bringing the criminal suit are difficult to achieve; moreover, the principle of transparency, which is fundamental for the judicial protection of individuals (in this case it was a question of verifying who was guilty of a kidnapping, and then, where applicable, agreeing upon compensation for

[31] Cf. F. FABBRINI, *Extraordinary renditions*, cit., 255ff.

[32] The case concluded with a ruling that no action could be taken against the five agents in the Italian services, by virtue of state secret deemed such as to cover elements essential for the trial, as well as the three agents in the United States' services, while 23 American and 2 Italian defendants were convicted; cf. Milan Court of Appeals, sect. III, 15.12.10 (dep. 15.3.11), Pres.; Silocchi, Drafter: Manca, def. Adler and others, in www.penalecontemporaneo.it

the damage), took a secondary position to that of the need to maintain state secrecy and, in the final analysis, to guarantee the "supreme interest" of national security.

2.3. SECRECY IS NOT BREACHED ALTHOUGH THE RECORDS IT REGARDS HAVE ALREADY BEEN DISCLOSED

A problem connected with the effects of secrecy on lodging the criminal suit, which is highly significant for understanding how far transparency can yield before state secret, regards the effects of applying secrecy to records already disclosed outside state administration, and therefore already known to public opinion. In this case, in fact, the requirement of safeguarding the security asset, the duty to defend the country, and the principles of the unity and indivisibility of the Republic might not come into play, given that the information is already in the domain of the judicial authority, and in certain cases even public. Since the information has already been disclosed and there is no turning back, the balance between the interests of justice and state security could become meaningless.

The problem emerges in particular in ruling no. 106 of 2009, regarding the Abu Omar case[33]. As already discussed, during the inquiries regarding the affair of the seizure of Abu Omar, state secret had not been raised on the records originally seized by the Milan prosecutor at SISMI headquarters. These records had thus been legitimately entered into the preliminary investigations file. However, SISMI had subsequently sent a note to the Milanese prosecutor (Procura), partially obscuring the same documentation that was the object of seizure following the state secret classification[34]. By virtue of this note, the Prime Minister brought a petition for conflicts arising from allocation of powers, demanding annulment of all the acts carried out by the public prosecutor (*Pubblico Ministero*) and by the judge, which were based upon the documents later transmitted with omitted portions.

The Constitutional Court, which upheld this petition, made the important statement of principle, according to which the state secret classification cannot have retroactive effect. This

[33] For the sake of completeness, mention should be made of the Constitutional Court's ord. no. 344 of 2000, declaring inadmissible for trial reasons the question of constitutional legitimacy raised on art. 256 of the code of criminal procedure "*in the part in which it allows claiming state secret also with regard to records with no connotation of secrecy in that they are already contained and acquired in the case file, or at any event records that, in being transmitted to the judicial authority at the same time, lose their characteristics of secrecy, or where it does not establish that the secret earlier customarily and properly raised may become ineffective in the event that the record covered by it has lost its character of secrecy*"; as well as the order by the court of Milan (*Tribunale di Milano*), criminal sect. IV, 01 July 2010, in *Giur. Cost.*, 2010, 5229ff, pronounced in the Abu Omar trial, declaring irrelevant and manifestly groundless the question of constitutional legitimacy regarding art. 39 of law no. 124 of 2007, in the part in which it permits the delayed state secret classification. On the decision, see A. MASARACCHIA, *Può il mero silenzio della l. n. 124,* cit., 5231ff, which makes some critical considerations on its outcome. According to the Milan court, the question was already decided with a finding of groundlessness by ruling no. 106 of 2009.

[34] Specifically, the seizure of the records from SISMI had taken place in July 2006; the secrecy, on the other hand, was made known with a note in October 2006.

should mean that the evidence acquired prior to applying secrecy is not affected by it, and is legitimately used and entered in the argument's file. Nevertheless, without prejudice to the legitimacy of the Prosecutor's behaviour prior to the secret classification, once the classification is made the judicial authority is required to respect it by not using records subject to secrecy[35]. In the case of the Abu Omar affair, in fact, the Court saw, in a rather general note from the Prime Minister in July 1985, the original secrecy order. According to this note, SISMI's relations with other states' intelligence services are in any event covered by secrecy.

At any rate, the result the Court arrived at does not appear entirely satisfactory, in both theoretical and practical terms: in cases where evidence having as its object records and facts subject to secrecy has completely escaped the secrecy constraint, the sacrifice of justice-related interest remains in fact without justification, given that the threat to national security has already taken place. Delayed state secret classification in fact takes on the appearance of an indirect immunity, decided upon *ex post facto* by the authority that confirmed state secret for the investigated or accused parties in the criminal trial[36].On the other hand, the position must be more nuanced where that the disclosure regarded only a part of the elements that the state secret covered. In cases like this, state secret may be consistently confirmed when complete disclosure of information triggers a danger to national security.

2.4. THE OVERSIGHT OF THE ITALIAN CONSTITUTIONAL COURT IN RESPECT TO THE POLITICAL NATURE OF SECRECY

Having albeit briefly outlined the constitutional foundation, limits, and effects of state secret, it appears interesting to set out the most critical profiles of constitutional jurisprudence. As for the outcome of the pronouncements made on the issue, it should be noted that the Prime Minister has always got the best of the judicial authority: the Constitutional Court has in fact, in every one of its pronouncements, rejected the magistrates' petitions aimed at annulling secrecy that were brought by the judicial authority[37], and has always annulled the magistrates' acts based on evidence, covered by secrecy, that was contested by the Prime Minister[38].

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[35] For critical considerations on the point, cf. A. ANZON, *Il segreto di Stato ancora una volta tra Presidente del Consiglio, autorità giudiziaria e Corte Costituzionale*, in *Giur. Cost.*, 2009,1028-1029.

[36] Thus, see also G. ARCONZO, I. PELLIZZONE, *Il segreto di Stato*, cit., 13; in a similar sense, cf. V. FANCHIOTTI, *Il gusto (amaro) del segreto*, in *Giur. Cost.,* 2009, 1035.

[37] Cf. ruling no. 106 of 2009 and ruling no. 40 of 2012. In these last two rulings, the Court stated that "*any jurisdictional oversight is ruled out, not only on the* an sit*, but also on the* quomodo sit *of the secrecy power*."
Order no. 259 of 1986 and order no. 404 of 2005 should be added to these decisions. In both cases, the Court, without going into the merit of the conflict, declared inadmissible the petitions brought by the judicial authority against acts of secrecy for a set of reasons that were little shared by doctrine. On the order of 1986, cf. P. BARILE, *Democrazia e segreto*, cit., 40, which defines the pronouncement to be "of quite dubious correctness at trial"; on the order of 2005, cf. immediately in the text. The link between the two

Considering also the one-way results of the albeit few[39] rulings by the Constitutional Court, some clarity on the oversight power it exercises is needed. What can be subjected to the Court's oversight? When can the court annul the state secret classification? For the outcome of its pronouncements, how much does it count that the Court is deciding in the context of the judgment over the conflicts arising from allocation of state powers, and instead does not have as its purpose that of verifying whether state secret regards facts that illegitimately led to violating a constitutionally guaranteed right?

Since the decision on secrecy is, according to constitutional jurisprudence, a "political" act, the Court deems itself to have no jurisdiction to assess the merit of the choice, which is to say the correctness of resorting to the means (secrecy), as compared with protecting the end (safeguarding security)[40]. According to the words used since 1977, since the decision to resort to state secret is the result of a political choice, it "*can only consist of a broadly discretional activity, and more precisely of a discretionality that exceeds the scope and limits of a purely administrative discretionality.*" Instead, according to the Court, the judicial power's oversight over this decision would constitute an undue substitution of judicial power for political power. To say it in the Court's words, "*contradicting [the principle according to which the judicial power is hindered from overseeing the merit of the political choices] would mean overturning some essential criteria of our constitutional order and, in fact, practically eliminating the secret even before any pronouncement by the judge and, it may well be said, at the very time when the question of admissibility or inadmissibility of the secret was submitted to a judge*"[41].

Having made this clear, it must be noted that the Court, whose oversight power in the matter of state secret is now also established by law no. 124 of 2007, was able to perform oversight over compliance with the requirements identified in the 1977 decision, which is to say that the secret originates from the Prime Minister, that it is upheld by the justification necessary for Parliament's political oversight, and that it is not claimed against information, documents, or things regarding acts of terrorism or subverting the constitutional order. It must at this point be verified whether constitutional jurisprudence on the limits to state secret may be considered satisfactory.

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decisions is also stressed by A. MASARACCHIA, *Lo strano caso del segreto di Stato sulla villa La Certosa,* in *Giur. Cost.,* 2005, 4114-4115.

[38] Cf. ruling no. 106 of 2009 (in truth, in this decision some of them were upheld only partially, but in practical terms this appears unimportant, given that the annulment of the judicial authority's records had already been pronounced); as well as rulings no. 110 of 1998, no. 410 of 1998, and no. 487 of 2000.

[39] It took up the issue in only five cases.

[40] In a sense contrary to qualifying state secret as a political act, see S. LABRIOLA, voce in *Enc. dir.,* Milano, 1989, vol. XLI, 1035; F. PIZZETTI, *Principi costituzionali e segreto di Stato segreto di Stato*, in M. CHIAVARIO (ed.), *Segreto di Stato e giustizia penale*, cit., 97, which distinguishes oversight over the legitimacy of the choice of invoking secrecy from oversight over the existence of a functional link between secrecy and safety in the individual case, attributing the first to the Court and the second to Parliament; more recently, for critical considerations on the qualification of the act that confirms state secret as only a political act, cf. G. ARCONZO, I. PELLIZZONE, *Il segreto di Stato*, cit., 16.

[41] Again ruling no. 86 of 1977.

2.4.1. CONSIDERATIONS ON THE LIMITS OF SUBVERSION OF THE CONSTITUTIONAL ORDER FOR THE USE OF STATE SECRETS AND ON THE REQUIREMENT OF JUSTIFYING THE SECRECY ORDER

In the first place, it appears necessary to examine the limit of the acts of subverting the constitutional order, treated rather specifically in ruling no. 106 of 2009, regarding, as already seen, the Abu Omar case. On that occasion, the Milan prosecutor (*Procura*) had maintained, requesting the annulment of the acts of state secret classification, that kidnapping a subject by force, outside the cases in which the law permits limitations of personal freedom, is an act of subversion of the constitutional order, because it injures the inviolable right to personal freedom.

In refuting this thesis, the Court made a significant specification with regard to the content of the acts of subversion: these events were in fact understood as necessarily preordained to subvert the democratic order or the institutions of the Republic – that is to say to injure the primary asset of the state's international personality. To the contrary, for the Court there is no subversion if the individual fact, although serious, is by its very nature unsuited to "*subverting the overall arrangement of democratic institutions, by disarticulating it.*" On these grounds, not even the reference by the prosecutor's defence to the European Parliament's resolutions that declared extraordinary renditions contrary to the common constitutional traditions of the European Union's states[42] was deemed decisive.

The subsequent Pollari Pompa case, decided with ruling no. 40 of 2012 is also rather significant. This time, the conflicts arising from allocation of powers was raised by the judge at the preliminary hearing in Perugia, and regarded two notes from the Prime Minister containing confirmation of the state secret. The criminal trial regarded former SISMI director Niccolò Pollari, and Pio Pompa, a former SISMI officer who, according to the public prosecutor's (*Pubblico Ministero*) hypothesis, allegedly performed activities aimed at collecting and processing information on the political opinions, contacts, and initiatives of magistrates, state officials, journalists and members of Parliament, and on the activities of associations of magistrates, including European magistrates, and of trade-union movements deemed "of the opposing political side," in order to commit, or to cause third parties to commit, defamation, libel, and abuse of office against them. Activities of this kind, again according to the charge, allegedly led to diverting SISMI's funds. Given the gravity of using SISMI's instruments and funds to carry out activities that not only lay outside the Services' institutional purposes, but were also potentially quite dangerous to the proper function of democracy since they were aimed at striking part of the judicial power, the Constitutional Court simply stated that the facts subject to

[42] The majority doctrine agrees with the Court. See, for all, A. ANZON, *Il segreto di Stato ancora una volta*, cit., 1031. In the opposite sense, see A. PACE, *L'apposizione*, cit., 4059ff, and the same A., *I «fatti eversivi» dell'ordine costituzionale nella legge n. 801 del 1997 e nella legge n. 124 del 2007*, in G. BRUNELLI, A. PUGIOTTO, P. VERONESI (ed.), *Studi in onore di Lorenza Carlassare*, Padova, 2009, 1105ff.

the criminal proceedings in Perugia cannot be considered as supplementing the limit to state secret, since they are positioned "at the boundaries" of subversion, and do not exceed them[43]. However, perhaps in a case like this one, respect for the principle of transparency would have ensured greater protection not only for the interests of justice, but also for the asset of national security.

In the second place, some discussion of the limit of the justification is required. We may wonder in this regard whether the justification of the secret truly has the function of enabling Parliament's political oversight over the Prime Minister's decision, given that although political acts, such as laws for example, do not have to be justified, this does not mean that political oversight is not possible. In truth, the justification appears more properly intended for a juridical kind of oversight, performed by a body that has to assess whether the secret has truly been implemented for reasons of national security (albeit without discussing the correctness of resorting to the secrecy instrument)[44].

Also as regards this element, interesting indications may be obtained from ruling no. 40 of 2012. In this decision, the Constitutional Court, called upon by the Perugia judge to annul the act confirming state secret since it was not justified, in fact specified that the need for justification performed two different functions, depending on whether it was addressed to Parliament or to the judicial power: while justification to Parliament allowed the representative body to perform the function of an oversight of merit as to the decision by the Executive's leadership to apply state secret, justification to the judicial authority aims "*rather at justifying in consistent and plausible terms – in the relationships between powers – the 'barrier' to the exercise of the jurisdictional function caused by confirmation of the secret, giving rise to considerations allowing secret information to be ascribed to fundamental interests that may be summarized with the formula of national security*"[45]. To conclude, the impression is that for the Constitutional Court, justifications of the Prime Minister are sufficient that refer to the need to protect national security as such.

On the other hand, to date there are no rulings regarding decisions of confirming secrecy made by subjects other than the Prime Minister. However, there is cause to believe that

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[43] Maintaining instead that the acts done by Pollari and Pompa were to be considered subversive is N. GARBELLINI, *La* salus rei publicae *alla prova*, in *Quad. cost.*, 2011, 405ff, R. ORLANDI, *Segreto di Stato e limiti alla sua opponibilità fra vecchia e nuova normativa*, in *Giur. Cost.*, 2010, 5226ff.

[44] In this sense, cf. also P. VERONESI, *La "villa dei misteri": uso e abuso del segreto di Stato*, in *www.forumcostituzionale.it*, pag. 6 of the paper. Cf. also A. PACE, *L'apposizione*, cit., 4054, according to which the Constitutional Court, in the 1977 ruling, did not actually qualify state secret classification as a political act, and according to which the fact that the secret must be justified demonstrates that it cannot be considered a political act.

[45] For critical considerations on the reduced function of justification to the judicial authority, cf. G. ARCONZO, I. PELLIZZONE, *Il segreto*, cit., 16; and, prior to ruling no. 40 of 2012, G. SALVI, *La Corte costituzionale e il segreto di Stato,* in *Cass. Pen.,* 2009*,* 3758ff, which also points out how the proceedings leading up to law no. 124 of 2007 testify to the Court's actual oversight. In a similar sense: C. BONZANO, *Il segreto di Stato,* cit., 281; R. ORLANDI, *Segreto di Stato e limiti alla sua opponibilità*, cit., 5227ff.

in this regard, the Court could only take a rigorous attitude, given the clarity of the regulation (cf. art. 202 of the code of criminal procedure) and of its rulings, which, on the point, have appeared decidedly unambiguous since 1977.

Actually, the problem had been presented to the Court, which then, for trial reasons, did not make a pronouncement, in a case highly indicative of the attitude of deference to the Executive it maintained, and of the dangers of abuses in resorting to state secret, due to the absence of transparency. This is the case decided in order no. 404 of 2005, regarding the Villa La Certosa events. Villa La Certosa, consisting of a residential complex and a surrounding park, was one of the properties of the then Prime Minister who, in carrying out works to enlarge the structures of the Villa, which had for some time been used for summer vacations, had, according to the charges by the prosecutor (Procura), committed some construction violations. Faced with the request by the public prosecutor (Pubblico Ministero) to perform an inspection there, the Minister of the Interior, and then the Undersecretary to the Prime Minister, had claimed and confirmed state secret, alleging that "alternative, maximum security headquarters" had been identified at the Villa and its surrounding park, for the "safety of the Prime Minister, his family, and his collaborators, and for the government's uninterrupted operation," within the scope of a "national antiterrorism planning that, among other things, calls for special procedures to protect the high offices of the state"[46]. The prosecutor (Procura), in the face of this opposition, had raised conflicts arising from allocation of powers before the Constitutional Court; however, before the judgment was made, the Prime Minister granted, for a fixed period, the public prosecutor's (Pubblico Ministero) access to the Villa La Certosa residence. As a consequence of this concession, the prosecutor (Procura) gained access, and in light of this, the Court, although the public prosecutor (Pubblico Ministero) had insisted on the judgment being rendered all the same, declared the conflict inadmissible. Although the preventive solution of the conflict may in certain ways be considered positive, one can only observe that in this way, the state secret was never formally revoked, as the public prosecutor was placed in a condition of accessing the relevant premises on the basis of an act with effects limited in time and space, and that did not call into question the validity of the prior secrecy order[47]; and that at any rate, access was allowed thanks to a "gracious concession" by the Prime Minister, and not because it was juridically legitimate[48].

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[46] In a sense critical of the justifications for the measure applying state secret, cf. P. VERONESI, *La "villa dei misteri": uso e abuso del segreto di Stato*, cit., pag. 5 of the paper.

[47] Therefore, the individual inspection was possible, but "the secrecy constraints on the acquired elements, on the representation and state of the premises and of the construction works" would have remained in force. Cf. R. CHIEPPA, *Una discutibile cessazione della materia del contendere su apposizione di segreto di Stato,* in *giur. Cost.,* 2005, 3994, which also points out how the discontinuance of the matter in issue could not be taken in the absence of cross-examination. Similar criticisms were also raised by F. SORRENTINO, *Inammissibilità del conflitto per cessazione della materia del contendere,* in *Giur. Cost.,* 2005, 3996ff.

[48] Cf. L. ELIA, *Villa "la Certosa": una inammissibilità che non convince*, in *Giur. Cost*., 2005, 3987. For other critical findings, cf. P. PISA, *Segreto di Stato: un caso anomalo,* in *Giur. Cost.,* 2005, 3999ff. On the whole

2.5. CONCLUDING CONSIDERATIONS

At this point, one must wonder whether the particular deference shown, in an almost increasing manner, by the Constitutional Court towards the Executive power is a consequence of the type of judgment in which the court made its pronouncement – which is to say, as has been seen, of the conflicts arising from allocation of state powers. The Court could in fact be induced, out of a sort of fear of placing itself above the political choices in the matter of national security, which are the purview of the Executive, to refrain from adopting – even though it has the power and the tools to do so – decisions to annul the decision of state secret classification, even when illegitimately adopted for formal reasons (as, for example, in the case of Villa La Certosa, in which state secret had been raised by subjects other than the Prime Minister).

There are lesser margins for attitudes of this kind, perhaps due to fears of an encroachment on the Executive's choices, in systems establishing that an authority outside the Executive power may verify, at the petition of the individual parties damaged by the action of the public authority covered by secrecy, whether said secret has masked acts that led to violations of constitutional rights, thus pronouncing decisions that, regardless of the annulment of state secret, restore the right and/or order compensation for the damage suffered.

To try and identify the possible remedies to the albeit partial inadequacy of the Italian Constitutional Court's oversight over state secret, it may be useful to draw a comparison with systems in which scrutiny over applying state secret is made by the judicial power, unlike what occurs for the Italian Constitutional Court which, as discussed, rules, as it were, as an "arbiter," with the task of marking the boundary between the purviews of different constitutional powers.

Therefore, the attempt will be made to take cues also from the jurisprudence of such courts as the Supreme Courts of the United States, which, like the Italian Constitutional Court, operate nationally and are called upon to make decisions in concrete cases in which the injury of individual rights is brought to their attention. Among the other systems that may belong to this oversight model, that of the United States has been chosen, for its rich jurisprudence and the copious studies on the issue. Of particular interest for the purposes of this comparison is that the authority called in the United States upon to rule on the Executive's decision to apply secrecy coincides with the one that should make the judgment blocked or limited by said secret. Due to this circumstance, the perspective from which oversight is performed also embraces the problem of the secret's negative impact on the judicial protection of the right in the concrete case. The work will proceed with no claim to completeness, but seeking to verify whether, in light of the studies done on the matter, in the United States judicial oversight over the

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affair, and in particular the outcomes following the Court's decision, cf. A. MASARACCHIA, *Lo strano caso del segreto di Stato sulla villa La Certosa,* cit., 4067ff.

Executive's decision may or may not be deemed effective, and whether the derogations from the principle of transparency in this system may be deemed truly justified by real security needs.

- PART TWO-

3. THE UNITED STATES' SYSTEM: STATE SECRETS PRIVILEGE AND OVERSIGHT OF THE JUDICIAL POWER

In the United States, the institution of state secrets privilege has been recognized since 1953 – a recognition original in the jurisprudence, and more precisely in the Supreme Court 1953 ruling in *United States v. Reynolds*[49]. Therefore, to describe the central aspects of how the state secrets privilege operates in the United States system, we must begin with describing *Reynolds*. The affair arose from the petition brought by the widows of three civilian crewmembers of a crashed military airplane, who had sued the federal government for damages. For this purpose, the plaintiffs asked to examine the accident report and the testimony of the surviving crewmembers. However, the government opposed this request on the grounds of privilege for needs of national security, which would have been imperilled by the production of these documents. The district and appeals courts had found the government's opposition groundless, ruling in favour of the plaintiffs[50]; however, the Supreme Court[51] found that, in the case of military or diplomatic secrecy, or for other reasons of protecting national security, the Executive may resort to the state secrets privilege in the face of information requests by the judicial power. In this circumstance, the competent court, after a suitability assessment on the validity of not producing documents, is required to accept what the

[49] 345 U.S. 1 (1953). The majority opinion was written by Chief Justice Vinson, with the dissenting opinion of:

[50] About the *Reynolds* case, see among others L. FISHER, *In the name of national security: unchecked presidential power and the Reynolds case*, in *Political science Quarterly*, 122/2007, 396ff, which also describes the aftermath of the *Reynolds* affair – that is, what happened after the documents covered by state secret were declassified in 2000. These documents in fact show how the privilege had been used not to protect national security, but to mask negligent behaviour by the Air Force, which had not provided the latest safety instrumentation for the crew. After reading the report in 2000, the victims' family members filed a number of claims to the Supreme Court's for a writ of error *coram nobis* in 1953, on account of the government's fraud. However, the various district courts ruling from 2003 to 2006 always denied the existence of the *coram nobis*. The A. therefore showed itself quite critical of the courts, which "*appeared to function as an arm of the executive branch."*

[51] It should kept in mind that justices Black, Frankfurter and Jackson did not adhere to the majority opinion, but joined judge Maris's dissent.

Executive decides[52]. More specifically, the Supreme Court found, based among other things on a previous English law[53], that the government has the power to invoke state secrets privilege, defined as a "formula compromise," under certain conditions: (i) the power belongs to the government and secrecy must be claimed by it, and surely not by private parties; (ii) privilege, at any rate, must not be "*lightly invoked. There must be formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer*"[54]; (iii) "*the court itself must determine whether the circumstances are appropriate for the claim of privilege, and yet do so without forcing a disclosure of the very thing the privilege is designed to protect*"[55].

The Supreme Court also shows it is aware of the difficulties inherent in the final requirement – that according to which there must be oversight over privilege, and specifies that the search for evidence must stop only when "*there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged*"[56]. To balance this observation, it is however explicitly stated that the Courts must not each time request access to the evidence for which privilege is invoked, even to examine it *in camera*. From this statement, many scholars have gleaned an implicit admission of the impotence of the Supreme Court, which in this way would have indicated to lower courts special deference to Executive power as the direction to be followed [57].

This having been made clear, it is to be pointed out that the doubt on the nature of state secrets privilege has yet to be solved – that is, whether it has a constitutional basis, since it would constitute the explication of the principle of separation of powers and serve to guarantee the state's survival in times of danger, or, in the absence of constitutional norms to this effect, it derives from a rule of common law[58]. In this regard, it should be kept in mind that in *United*

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[52] Cf. M. S. WALLACE, *Discovery of Government documents and the official information privilege*, in *Columbia Law Review*, 1976, 142; A. FROST, *Essay: the State secret privilege and separation of powers*, in *Fordham L. Rev*., 75/2007, 1931.

[53] Cf. on the point e.g. G. WEAVER, R. M. PALLITTO, *State Secrets and Executive Power*, in *Political Science Quarterly*, 120/2005, 97ff.

[54] 345 U. S. at 8.

As to the power attributed to judges to evaluate the appropriateness of relying on secrecy, it should be noted that the United States system differs greatly from the Italian one. In fact, the Italian constitutional court, in ruling no. 86 of 1977, stated that "*on the other hand, the judgment on the means suitable and necessary for guaranteeing the state's safety has an essentially political nature, and therefore, while it is innate to the bodies and the political authorities charged with its protection, it is certainly not consonant with the judge's activity*," and that allowing oversight of state secrecy *"would in principle mean overturning some essential criteria of our constitutional order and, in fact, practically eliminating the secret even before any pronouncement by the judge and, it may well be said, at the very time when the question of admissibility or inadmissibility of the secret was submitted to a judge."*

[55] 345 U. S. at 8.

[56] 345 U.S. at 10.

[57] Thus, see e.g. C. E. WELLS, *26 Const. Commentary*, 2010, 634; G. WEAVER, R. M. PALLITTO, *State secrets*, cit., 98.

[58] Cf. G. WEAVER, R. M. PALLITTO, *State Secrets*, cit., 92f, according to which, however, "*Claims that the state secrets privilege derived from common law and the U.S. Constitution are only mediately plausible*".

States v. Nixon[59], the Supreme Court, having recognized the existence of limits to executive privilege, stated that these limits cannot be automatically applied to the request for evidence for acts pertaining to the military and diplomatic sphere, for which the Courts must show "*the utmost deference to presidential responsibilities*"[60]. Even when it was deduced from the *Nixon* ruling that privilege has a constitutional basis, in any event it must be stressed that there are no doubts as to the legitimacy of an intervention by Congress, with a set of norms regulating the matter, also limiting the modes of exercise of the secrecy power, provided that the privilege is not entirely eliminated.

Having sketched out this extremely brief outline on the origins and nature of the state secrets privilege[61], we now must wonder: what are the effects of state secrets privilege with regard to the judges' request for disclosure?

To put it extremely briefly, state secrets privilege was born as a rule on using evidence, the effects of which may be described as follows[62]: (i) in the case that privilege impedes the use of evidence at trial, if the evidence in question is essential for the case's *prima facie* admissibility, the Court has to dismiss the suit, while, to the contrary, the trial can continue without using the forbidden evidence when the plaintiff is able to produce other evidence sufficient for the purposes of prima facie admissibility; (ii) if the privilege deprives the defendant of the evidence with which the defendant would mount his or her defence, then the Court can guarantee a summary judgment for this defendant; (iii) if the evidence covered by secrecy is not essential for the judgment, the case will still be dismissed when "*the very subject matter of the action is a state secret*"[63].

The problems most debated today with regard to the state secrets privilege in the United States, now at the centre of numerous studies, are connected with its increased numbers and the intensification of its effects on trials in progress. In fact, the authors who dealt with the issue have underlined how, in a more or less accentuated fashion following the events of 11 September 2001, the number of cases in which proceedings have been closed at the invocation of privilege has increased[64]; how, behind this increase, one may glimpse a hint of

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[59] 418 U.S. 683 (1974).
[60] 418 U.S. 711 (1974).
[61] For further discussion of privilege and its limits, see, among others, the authoritative considerations of J. H. WIGMORE, *Evidence trials at common law*, vol. 8, Boston – Toronto 1961, 794ff.; L. FISHER, *In the name of national security: unchecked presidential power and the Reynolds case*, University press of Kansas, 2006.
[62] Cf. A. FROST, *The State secrets privilege and the separation of power*, in *Fordham law review*, 75/2007, 1937.
[63] See *Reynolds* 345 U. S. at 11 n. 26.
[64] In this regard, cf. the data cited by A. FROST, *The State secrets privilege*, cit., 1938ff, which refutes the arguments to the contrary by R. CHESNEY, *State Secrets and the Limits of National Security Litigation*, in *The George Washington Law Review*, 75/2007, 1299ff.
An increase in the studies of the issue is also noted: L. K. DONOHUE, *The shadow of State secrets*, in *University of Pennsylvania Law Review*, 159/2010, 78ff; W. G. WEAVER, R. M. PALLITTO, *State Secrets and Executive Power*, in *Political Science Quarterly*, 120/2005, 9; S. SETTY, *Judicial formalism and the state*

abuse of privilege by the Executive, to mask unlawful activities[65]; and lastly, how the oversight performed by the judicial authority on whether the privilege is suitable for protecting national security is ineffective, due to the deference that the Courts have shown to the Executive power[66].

This deference is more properly defined as the judiciary's dereliction of its oversight duty vis-à-vis the Executive, which ends up masking its unlawfully performed activities[67]. Therefore, the doctrine with increasing frequency invokes the intervention of Congress which, with ad hoc legislation, can limit once and for all the space for claiming privilege, and define the boundaries within which oversight over whether secrecy is suitable for protecting national security cannot be declined by the judicial authority[68].

From this brief analysis of scholars' findings on the Courts' decisions regarding cases in which the state secrets privilege was invoked, it emerges that, in the United States system, the attribution of oversight over the state secrecy decision to the judicial power has not led to greater effectiveness of this oversight, even when, in the judgment limited by privilege, violation of human rights is in discussion, as privilege at any rate quite frequently comes to constitute a true barrier to the trials – a barrier similar to that found in Italy.

4. THE VIEWPOINT OF THE EUROPEAN COURT OF HUMAN RIGHTS

After having described the critical points of the Italian Constitutional Court's oversight over the Prime Minister's decision regarding state secret, and having noted the substantial ineffectiveness of the jurisdictional controls over the secrets privilege in the United States system, it may be interesting to provide an albeit brief description of the potential for judgment by supranational Courts in the matter of secrecy.

The choice has been in particular directed towards the European Court of Human Rights (ECHR), thanks to the cues in this direction offered by the Abu Omar and El Masri cases.

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secrets privilege, cit., 1, according to which "*the state secrets privilege has received a tremendous amount of scholarly attention in the United States in the last decade*".

[65] Cf. for all, L. K. DONOHUE, *The shadow*, cit., 89ff, which shows, through a careful analysis of the cases occurring from 2001 to 2009 how "*the state secret serves not just to protect national security interests, but also to mask officials' unlawful behavior*".

[66] Cf. among many W. G. WEAVER, R. M. PALLITTO, *State Secrets*, cit., 107ff., according to whom it occurred in recent decades, but a sizable increase was seen particularly with the Bush administration; A. FROST, *The State secrets privilege*, cit., 1938ff;

[67] See, for all, J. S. KLARICH, *Case comment: restoring balance to checks and balances: checking the Executive's power under the State secrets doctrine, Mohamed v. Jeppesen Dataplan*, in West Virginia Law Review, 114/2012, 779ff.

[68] Cf. on Congress's efforts – never successful – as late as 2008, and on the need for an intervention in this sense. J. S. KLARICH, *Case comment: restoring balance to checks and balances: checking the Executives power under the State secrets doctrine, Mohamed v. Jeppesen Dataplan*, in West Virginia Law Review, 114/2012, 779ff.

Abu Omar and El Masri, victims of extraordinary renditions[69] (the former carried out, as already seen, in Italy, and the latter in Germany) by, among others, agents from the United States, in fact petitioned the ECHR, after full jurisdictional protection was refused in Italy[70] and the United States[71], due to the invocation and recognition of state secret and of the state secrets privilege[72].

More specifically, Abu Omar raised the violation[73]: (i) of art. 3, in that, after having been kidnapped from Italian soil, he was brought to Egypt where he was subjected to inhuman treatment and torture; (ii) of art. 6, since, once back in Italy, he was unable to enjoy adequate jurisdictional protection, due to state secret; (iii) due to the treatment suffered, and his removal from Italy, his right to respect for his family life was injured.

Similarly, El Masri, a German citizen of Lebanese origin wrongly suspected of being a terrorist, arrested in Macedonia in 2003, brought by force to Kabul, subjected to inhuman treatment and torture, and finally freed in Albania in May 2004, petitioned for violation of articles 3 (prohibition of inhuman and degrading treatment), 5 (right to liberty and security), 8 (right to respect for private and family life), 10 (freedom of expression and information), and 13 (right to an effective remedy)[74].

It will be quite interesting to see how the ECHR will rule in these two cases, in which the secret, invoked for reasons of national security, led – according to the petitioners – to grave violations of human rights, carried out illicitly with the endorsement of the national Executives. These cases above all highlight quite significantly how secrecy can cause great rifts in the sturdiness of democratic constitutional systems, in the name of national security.

Moreover, from a theoretical standpoint, the ECHR's jurisprudence may be interesting, and present innovative aspects, because the judgment in this case focuses on violation of one or more rights by the single Contracting Party to the Convention which invokes the secrecy;

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[69] On this issue, see F. FABBRINI, *Extraordinary renditions and the state secret privilege: Italy and the United States compared*, cit., 318ff and 353ff; F. FABBRINI, *Understanding the* Abu Omar Case: *The State Secret Privilege in a Comparative Perspective*, 2010, in http://www.juridicas.unam.mx/wccl/ponencias/6/96.pdf

[70] Cf. par. 2.2.

[71] See El-Masri v. George Tenet et al., 437 F. Supp. 2d 530, 536-537 (E.D.V.A. 2006), which dismissed the case in that the central object of the trial coincided with the information protected by privilege.

[72] For reflections on these two cases and on the possible role of the European Court, see F. FABBRINI, *Extraordinary renditions*, cit., 353ff, which moreover does not nourish excessive expectations for the judgment of a supranational court, required as it is to respect the states' margin of appreciation which is quite broad when questions as delicate as protecting national security are at stake.

[73] Petition no. 44883/09, *Hassn Nasr e Ghali v. Italia.* Case communicated to the Italian government: 22 November 2011, *Nasr and Ghali v. Italy*.
Information on the case and on the European Court's requests to the Italian government to clarify certain aspects of the question may be found in: http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=44883/09&sessionid=86259959&skin=hudoc-cc-en.

[74] Case communicated to the Macedonian government on 28 September 2010, *El-Masri v. "the former Yugoslav Republic of Macedonia*". For a reconstruction of the facts, see application no. 39630/09, in www.coe.int.

therefore the relationship between the Executive and the Judiciary is not the central issue. In other words, it does not rule directly on the government's decision to use secrecy, since it decides whether, in the individual case, a violation of human rights was committed. Furthermore, at the same time, unlike the national Courts, the European Court, in making the judgment on the violation of the right, must come to terms with the broad margin of appreciation that states necessarily have in making choices aimed at protecting national security.

4.1. SECRECY AND HUMAN RIGHTS IN THE ECHR'S JURISPRUDENCE

This work, as regards the ECHR's jurisprudence, goes no further than reporting the conclusive results reached in the recent study carried out and published on 14 March 2012 with G. Arconzo ("State secret in the jurisprudence of the Constitutional Court and of the European Court of Human Rights")[75].

From this study, it emerged that the secrecy order by the public authorities, curtailing the enjoyment of the rights established in the Convention, may take place without triggering a violation of the European Convention only when meeting the following conditions:

- secrecy may be used only in the manner and in the exceptional cases provided for by clear and detailed regulations[76];
- secrecy must be necessary for the purposes of safeguarding national security[77];
- the decision to apply and/or use secrecy must be subjected to independent juridical oversight by the political power.

In any case, the authorities cannot rely on secrecy for the purpose of facilitating the violation of those rights on whose enjoyment the Convention itself does not permit limitations, and which are protected by articles 2 (Right to life), 3 (Prohibition of torture), 4 (Prohibition of slavery), 13 (Right to an effective remedy), and 14 (Prohibition of discrimination) of the Convention[78] and cannot thwart the right to effective remedy before a judge[79].

From what emerged in the study carried out with Giuseppe Arconzo, the European Court, which is positioned further from the national Executives, is more rigorous than the national Courts – whether constitutional or jurisdictional – in demanding minimum standards of jurisdictional protection also in the cases, allegedly crucial for national security according to the national defences, in which state secret was claimed[80].

[75] Cf. supra note 1.
[76] Cf. e.g. the pronouncement of 2008, *Liberty et al. v. The United Kingdom*.
[77] See the case resolved in 1995: *Vereniging Weekblad Bluf! v. The Netherlands*.
[78] Cf. the case *Imakayeva v. Russia*, decided with the ruling of 09 February 2007.
[79] Ruling *C.G. et al. v. Bulgaria*, of 2008.
[80] G. ARCONZO, I. PELLIZZONE, *Il segreto di stato*, 23ff.

It will all the same be necessary to await the decisions in the two aforementioned cases, to see how far the ECHR will go when fundamental human rights and state secret are at stake, also under the threat of international terrorism. However, the judgement rendered by a Court operating far from national settings, when internal remedies have been exhausted and a certain amount of time has elapsed since the occurrence of the violation of the right, may indeed be more balanced than that of a national Court – all the more so when considering that, also in the ECHR's jurisprudence as this brief description has shown, unbreakable links have emerged between transparency and the protection of rights.

5. CONCLUSIONS

This work has shown how Italian constitutional law admits a derogation from the principle of transparency of the action performed by public powers when secrecy serves to protect national security; more precisely, we have seen that, thanks to the function of the institution of state secret, public power's record may be kept secret even when it is requested by the judicial power in order to perform its functions because it is evidence in a criminal trial.

It has also been shown how the Italian Constitutional Court, as always when a conflict between opposing constitutional interests arises, has used the method of striking a balance between protecting security through secrecy and protecting the prerogatives of judicial power. Moreover, the Italian Constitutional Court, as arbiter between different constitutional powers, has had the opportunity to pronounce its opinion several times to outline the spheres of responsibility of the Executive power and of the Judicial power injured as a consequence of state secret. Although the Constitutional Court has to apply the results it reached by striking a balance between security and the prerogatives of state secret, it has often maintained an essentially highly cautious attitude.

It was then assessed whether oversight is more rigorous in a constitutional system like the United States, where oversight over the Executive's decision to claim secrecy is implemented by the judicial power itself, which, unlike the Constitutional Court, knows the limitation of the right caused by state secret; this assessment brought a negative result. In the United States as well, judicial power has preferred an attitude of deference to the Executive in matters connected with protecting national security.

On the other hand, a more interventionist approach is a characteristic of the jurisprudence of the European Court of Human Rights, which moves on a supranational plane, far from the problems of the individual states' military and foreign policy, and focuses its judgments not on the relationship between constitutional powers, but on the violation of human rights. However, the effects of the European Court's pronouncements are limited, as its decisions entail no more

than the state's compensation for the damage suffered by the individual due to the violation, and not an annulment of state secrecy.

To conclude, the problem triggered by state secret in terms of protecting constitutional rights does not appear to be one of method, given that the national courts have identified theoretically incisive limits on secrecy and have oversight instruments and powers far more substantial than those of the European Court. However, the national courts struggle to stringently exercise these constitutional oversight powers, out of deference to the Executive's choices in matters of "state interest," foreign policy and military defence, for which secrecy has been invoked.