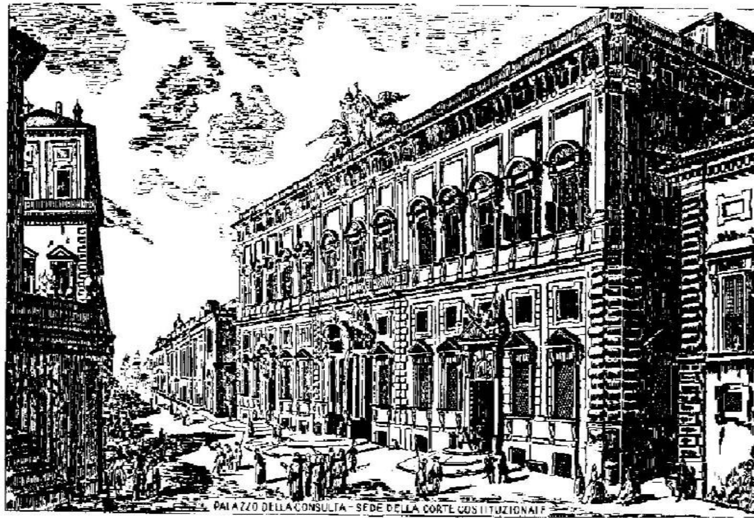
CONSTITUTIONAL COURT



CONSTITUTIONAL CASE LAW
OF 2018

Special meeting of the Constitutional Court
held on 21 March 2019
presided over by Giorgio Lattanzi

Palazzo della Consulta

The Constitutional Court

Special Meeting of 21 March 2019

Report by President Giorgio Lattanzi

1. ***The Court and the Nation***

This past year marked the seventieth anniversary of the entry into force of our Constitution, and for the Court it was a special year for a number of reasons. To participate in the festivities, the Court emerged from its seat at the *Palazzo della Consulta* in order to talk about the Constitution and tell people about it, and it undertook "visits:" the "visit to the schools," and the "visit to the prisons".

"Visits" was a metaphor indicating the encounter of the Judges of the Court with the schoolchildren of all the various regions, and with incarcerated persons in several different prisons.

It was an unprecedented initiative.

The idea behind it was to propagate the culture of the Constitution, and to spread awareness both of its values and of the protections it provides for all. We chose prisons, in addition to schools, in order to signify that the Constitution belongs to all and is for all, including those who are incarcerated, with the related duties and responsibilities, but also with rights and the related protections.

Primarily, what we did was to narrate the Constitution: how it was born amidst the rubble of a disastrous war, after fascism and the racial laws; who were the founding fathers and what were their goals and projects; how the Constitution was a part of the nation's evolution, including through the work of the Constitutional Court; how it continues to be current, and how its parts are interrelated, forming a complex mechanism, the modification of which would be risky.

But the real meaning of our initiative emerged as our "visits" proceeded. It became clear as we went on that the talks we were giving were no mere rhetorical lectures, and that the Constitution is not a law like other laws, only on a higher level, but is actually a different thing, the legacy of its founders, which it falls to all of us, and, above all to young people, to preserve.

Several specific episodes of our "visits" remain impressed in my memory.

There was a moment in Rebibbia that moved me deeply, when all the prisoners stood up and sang the national anthem, some with their hands over their hearts. I had told them that the Constitution is, for any person, including one in prison, a source of protection – a shield. Later, when I returned to Rebibbia to visit the women's prison, a Romanian prisoner attempted to get my attention in the library. Later she came up to me and said: "Thanks to you, I have understood that we have a shield and we didn't know it. I know now that the Constitution is important for us, too".

I later learned from the prison warden that that woman had given up a leave in order to meet me.

Our "visits" were very engaging, for ourselves as well as for the students and prisoners who came to meet us. Although they were initiated in honor of the seventieth anniversary of the entry into

force of the Constitution, we intend to continue them throughout this year and, I trust, into the future as well.

The experience has been extremely positive. For the Court it has been not only a new development and a new source of knowledge, but also a shift in its way of being. The Court has understood that it must emerge from the courthouse. It must meet people and be met by them, understand people and make itself understood by them, not least of all because making itself known and understood means making the Constitution known and understood, as well.

The Court has understood that, in order to communicate with the nation, it is not enough to circulate its decisions by publishing them in the usual forms and entrusting them to an expert readership. It has understood that it is important to find other forms of communication, to reach everyone and to make them aware of decisions that could have a profound impact on their lives. For this reason, the Court is gradually improving its external communications, and frequently accompanying its decisions with public statements that can render them more easily understood by all.

We publish these statements on our website, which we are in the process of restructuring to make it easier to navigate, together with other documents that provide information on the activities of the Court and its judges, including written content, photos, and videos.

In the same vein, it is worth mentioning other initiatives: the students who sit in on Court hearings, and organized tours of the courthouse, for example. More specifically, the photographic exhibition “The Face of the Court” (*Il volto della Corte*) opens today, and will accompany the opening of the *Palazzo della Consulta* to the public on 24 March, for the FAI spring days. It will remain on display until the end of the month.

The Court has carried out a number of other activities in addition to its judicial duties. In particular, as in past years, it hosted a variety of conferences and seminars. Moreover, in conjunction with the Judiciary School (*Scuola della magistratura*) and with the councils of heads of special jurisdictions (*consigli di presidenza delle giurisdizioni speciali*), it organized classes for judges and magistrates on constitutional adjudication.

2. *Some brief statistical data*

Turning now to the topic of the Court’s judicial activities, I am obliged, as usual, to start with somewhat tedious statistical data. I will, however, provide as few statistics as possible, citing only those necessary to give an overall picture of the work carried out by the Court and to draw some conclusions about the questions and cases that have been the objects of our rulings and on the trends of incoming matters. Extensive additional data may be found in the volumes that accompany this report and on the Court’s website.

In 2018, the Court handed down 186 judgments and 64 orders, for a total of 250 rulings. There were 359 cases conclusively decided and 301 questions before the Court, resulting in a reduction of pending proceedings from 376 at the end of 2017 to 318 at the end of 2018.

Of the 250 rulings handed down in 2018, 142 of them were decisions on constitutionality initiated through the incidental procedure of review, and 91 were decisions on constitutionality initiated by direct application, while 6 involved conflicts on the allocation of powers between public bodies, and 9 involved conflicts on the allocation of powers between branches of the State.

The total number of rulings was slightly lower than those of recent years (281 in 2017, 292 in 2016, and 276 in 2015), but the number of judgments remained essentially unchanged (the 186 judgments of 2018 were on par with the 188 of 2017, 179 of 2016, and 168 of 2015).

2018 saw a decrease in referrals and applications. In particular, there were 199 referral orders and 87 direct applications. These numbers continue to reflect the trend of recent years (there were 198 referral orders in 2017, 279 in 2016, and 348 in 2015, while 92 direct applications were submitted in 2017, 78 in 2016, and 104 in 2015).

3. ***A few thoughts on review by direct application***

The flow of cases brought by direct application – those, that is, which concern conflicts on the allocation of powers between the State and the Regions – continues at a more or less steady rate. It is positive that this rate is significantly lower than the high numbers of such cases brought in 2012 and 2013, when they surpassed those brought by the incidental procedure of review. This is most likely due to the clarifying work the Court has done over the more than fifteen years since the revised version of Part II, Title V of the Constitution entered into force.

The major uncertainties brought about by that reform, which was not always precise in delineating the spheres of competence, have been largely resolved by constitutional case law, which was obliged, on the basis of the Constitution, to fill the gaps left by the legislator in the constitutional reform. It is plausible to suggest, therefore, that the reduction in litigation between the State, the Regions, and the Autonomous Provinces derives, at least in part, from the fact that clear criteria for resolving such disputes can now be found in constitutional case law. This case law establishes principles which, once developed and consolidated, may simply be applied to new issues that arise. This has surely made disputes brought by direct application less problematic than they were in the years immediately following the constitutional reform.

The ongoing economic crisis, moreover, continues to generate tensions relating to the financial profiles of regional autonomy, which can only fully exist when the Regions have the financial resources necessary to carry out the functions assigned to them, and on the condition that these resources are allocated according to timelines and methods that allow for an accurate projection of expenditure (Judgment no. 101 of 2018).

The Court has also reiterated that measures to rein in public spending that apply to the regional system must be temporary (Judgment no. 103 of 2018).

At the same time, concerning regional budgets, the Court has highlighted, time and again, the important link between the principle of financial reporting and that of democratic representation, and observed that the function of budgets and of the duty to "provide an account" essentially lies in ensuring that the individuals charged with the electoral mandate will inform citizens of the ways in which financial resources are used and of the outcomes of that use (Judgments no. 184 of 2016 and 228 of 2017). In keeping with this, in Judgment no. 49 of 2018 the Court struck down Regional Law no. 16 of 2017 of Abruzzo, approving the general financial statement of 2013, in its entirety, for violating Article 81 of the Constitution. The judgment observed that "the transparency of the accounts is an indefectible element for bringing the citizens closer, in the democratic sense, to the work of the Administration, since it allows for an objective and informed evaluation of how the electoral mandate is being carried out, and holds the administrators responsible, which is a necessary precondition for retrospective oversight of the use of public funds".

That judgment also recalled that laws approving financial statements have the function of describing the state of debt and of any institutional liabilities that apply to future financial years. This description, the Court pointed out, “provides the multi-year debt situation, allowing for possible scrutiny both in relation to European obligations, and in relation to intergenerational equity, a tool which serves to determine the costs and benefits pertinent to future generations with regard to the investment policies adopted in practice”.

I consider it important to stress here that the topic of intergenerational equity, which has received a great deal of attention from scholars of fundamental rights in recent years, has come up frequently in the judgments of the Court, most recently, and with particular urgency, in Judgment no. 18 of 2019.

4. ***Some reflections on the incidental procedure of review***

The incidental procedure of review, used in cases involving questions raised by ordinary judges, merits more detailed consideration.

It bears noting that here, too, constitutional litigation remains contained within acceptable numbers. This is positive both because it has allowed the Court to reduce the duration of proceedings (currently measuring just over one year from the date the referral order is published in the Official Journal), and because a plausible explanation is that constant and generalized reference to the Constitution allows ordinary judges to conform the laws to it, whenever the common rules of interpretation permit.

Nonetheless, the interpretive power of courts cannot exceed its innate limits, even for purposes of orienting the system to adhere to constitutional principles, since, when there is an insurmountable obstacle coming from the text of the law, or from the legal/logical context thereof, only the Constitutional Court may intervene.

The very logic of the separation of powers itself demands that adjudicating whether a law in force is constitutional or unconstitutional falls exclusively to the Constitutional Court, rather than ordinary judges, except where the disagreement is merely apparent, and can be resolved through interpretation.

The nature of the Court, including the balanced criteria that determine its composition; the unique features of constitutional adjudication, in which a dialectical debate is carried out that is as thoughtful as it is enriched by the diverse sensibilities of the judges, and with the utmost collegiality; and the public nature and *erga omnes* effect of the Court’s rulings are just a few of the factors that make centralized review the irreplaceable keystone of constitutional review. This should prompt the adoption, whenever possible, of criteria that favor access to constitutional justice and allow for review on the merits of matters brought through the incidental procedure.

In this regard, in 2018 the Court had the occasion to confirm its most recent line of reasoning, holding that the duty of ordinary courts to find a constitutional interpretation of a law is fulfilled when a court provides reasoning explaining why, in its view, the letter or regulatory context of the law do not allow for it, while it goes to the merits of the question, and falls to the Constitutional Court, to verify whether or not this interpretation is plausible (see, among others, Judgments no. 15, 77, and 91 of 2018).

It bears noting, including for purposes of supporting centralized review, the importance that review of the requirements for admissibility of incidental matters, albeit necessary, not turn into an improper tool for decreasing litigation, but rather attempt to facilitate constitutional adjudication, as has happened in the areas of the system that are the least likely to raise incidental matters (Judgment no. 196 of 2018).

A reflection on the role of centralized review would not be complete if it only took procedural issues into consideration. It also poses more general questions about the role of the Court vis-à-vis

the legislator, the European courts, and ordinary courts. This report will provide a more detailed look at three topics pertaining to these factors. The first concerns the relationship between constitutional review and legislative discretion, as it was laid out in 2018, not only according to more traditional lines of reasoning, but also with innovative decision-making tools. The second touches on the related topic of the margins of Court intervention in criminal matters, an area that has always enjoyed particularly broad legislative discretion. Finally, the third concerns the evolution of the relationship between constitutional review and the work of the supranational courts of Strasbourg and Luxemburg, and includes references to the impact this has on the ordinary jurisdiction.

5. *The Constitutional Court and the legislator*

One characteristic of constitutional jurisdiction, which, in principle, is not shared with international courts, is that it is constantly immersed in the flow of domestic legislation. In other words, it must grapple with the unceasing work of the legislator. For this reason, the meaning of constitutional provisions interacts constantly with the society's evolving sensibilities, of which the law is the ultimate point of reception, and this lends a constructive dynamism to the constitutional jurisdiction.

The fact that it falls to the legislator to bring the constitutional design to life, in full compliance with its guarantees, goes hand in hand with the Constitutional Court's duty to offer indefectible protection, not only when unconstitutional provisions have been produced, but also when the Constitution imposes a duty to legislate, with greater or lesser legislative discretion, in one or more areas of the life of society, in which the legislator unduly refrained from legislating.

This means that constitutional rulings are very often not the endpoint of a given matter, but rather the midpoint of a regulatory development that is only completed when the legislator acts to conclude it.

Naturally, legislative discretion extends not only to how to govern in a given area, provided that there is no Constitutional obligation to do so in a particular way, but also to the decision whether or not to act and the timeline of such action. Thus, the Court is bound to act with significant caution in its dealings with the legislator at this level, since it must always distinguish constitutional obligations, before which discretion must yield, from what falls under the prerogatives of the Parliament. In those cases in which the Constitution dictates the adoption of a certain regulatory scheme, with the effect that the regulatory void is, in itself, unconstitutional, discretion about *if*, and, in some cases, *when* a legislative choice must be made, does not apply.

Traditionally, the Court interacts with the Parliament on this level through so-called "warnings," which it uses to signal the presence of areas of concern or suspected unconstitutionality, detected in the course of proceedings, and to request appropriate action by the legislator to remedy the situation.

This technique would be more frequently used and successful if the Parliament drew upon it to start the due legislative reforms, but unfortunately this is not always the case. And it is important, to this end, that all the rulings of the Court, including those finding the questions inadmissible or unfounded, are carefully considered not only with reference to the holding, but also to the reasoning. Indeed, a "warning" may be issued even in merely procedural pronouncements, as happened, for example, in Judgment no. 43 of 2018, in which the Court merely ordered the remission of the case to the referring court.

That case concerned the guarantee that a convicted person not be subjected to a second conviction, after the definitive conclusion of the first trial, when the sanctions are criminal in nature under Article 7 of the European Convention on Human Rights (ECHR), that is, even in cases in which one or both of the penalties are categorized as administrative under the national system and are not subject to said guarantee. It bears noting here that the Italian system is structurally based on the independence of criminal trials from administrative proceedings, and, because of this, the prohibition of *bis in idem* is not suited to apply to these scenarios, contrary to the ECHR provision.

It was clear that avoiding violations of the European Convention in these cases, by ensuring a sufficient material and temporal link between proceedings (which the Strasbourg Court has said will prevent a *bis in idem* situation), is a structural matter. Therefore, only the legislator would be able to adequately resolve it, with a system-wide reform.

This judgment was an example of a "warning" in the strict sense, because the Court detected an unconstitutional element in the system, the removal of which required legislative action.

But "warnings" are not all of this kind, and they, in turn, need to be correctly interpreted.

Sometimes a "warning" accompanies a ruling that the challenged laws are not unconstitutional, but which notes prospectively that the trajectory being followed by the legislator is one that calls for vigilance, in order to avoid giving rise to future constitutional defects.

This was the case with Judgment no. 33 of 2018, which dealt with the selection of the "foundational offenses" for which Article 12-*sexies* of D.L. no. 306 of 1992 provides so-called extended confiscation, that is, the confiscation of assets the origins of which cannot be accounted for by the convicted person and which are disproportionate to his or her income.

The question concerned listing the crime of receiving stolen goods among those that justified confiscation under Article 12-*sexies*. The Court, after ruling that the question was unfounded, felt it had a duty to conclude by expressing its "hope that the selection of the 'foundational offenses' on the part of the legislator takes place, as long as the institution preserves its current physiognomy, according to criteria strictly consistent with it, and is, therefore, reasonably restrictive". It also observed that, "indeed, in order to avoid clear tensions at the level of the guarantees that must accompany measures that are so invasive in terms of assets, it is necessary to underscore the requirement that the offset of prerequisite offenses be based upon types and means of conduct that are, in and of themselves, symptomatic of the unlawful enrichment of the actor that transcends the individual, judicially confirmed acts, in order to be able to truly connect the 'disproportionate' and 'unjustified' assets in the person's possession to additional criminal activity that has remained 'submerged'".

On other occasions, "warnings" serve to highlight the presence, already in the current regulatory fabric, of an issue that has not yet developed into a constitutional defect (nor is it certain that it will), but which, in any case, would be opportune to take into consideration (Judgments no. 6 and 93 of 2018).

Finally, there is no shortage of cases in which the Court has taken care to point out regulatory imbalances that may be caused indirectly by rulings of unconstitutionality themselves, when these alter the coherence of the legislative fabric, or open up gaps that call for legislative intervention.

Judgments no. 149 and 210 of 2018 can be mentioned in this connection.

The former ruled that it was unconstitutional for a prisoner serving a life sentence to be refused access to certain sentencing benefits in cases of convictions for the crimes under Articles 289-*bis* and 630 of the Criminal Code, which caused the death of a kidnapped person, but it then had to acknowledge that a disparity

of treatment could be created for detainees who, in analogous circumstances, were sentenced to temporary imprisonment rather than a life term.

The latter underscored the need for limits to be placed on the freedom of members of the military to form unions, the exercise of which was permitted when the prohibition on it was struck down.

6. *Inadmissibility of a question of constitutionality due to the need for legislative action*

In connection with this last point, it bears mentioning that while, in the past, the Court tended to reject questions as inadmissible when a ruling of unconstitutionality would have rendered necessary a further, "closing" act by the legislator, today it is more willing to adopt this solution.

One question relating to the so-called Pinto Law, for example, which had already been declared inadmissible on account of the obstacles it would pose to reconstructing harmonious legislation if it were accepted (Judgment no. 30 of 2014), was later held to be well-founded in Judgment no. 88 of 2018. In that judgment, the Court took stock of the fact that the legislator had not taken action to amend the constitutional defect, to which its attention had already been drawn, despite the Court's urgent invitation to do so.

This is a case in which a certain provision continued to be applied for a long time, despite the fact that it was found unconstitutional, since the Court, by ruling the question inadmissible, had adjudicated on the referred proceedings, and would only be able to consider the question again in the event it were brought again by another court.

In cases like this, constitutional guarantees are compromised in a way that the warning method fails to address if the legislator does not take action.

More generally, the Court is frequently faced with having to choose between rulings of inadmissibility, which preserve legislative discretion but leave worthy constitutional interests without satisfactory protections, and rulings of acceptance, which sacrifice discretion to protect constitutional interests, but also cause turmoil in the system, leaving an incomplete legislative scheme, which the Court has neither the authority nor the means to fix.

An attempt to resolve this dilemma has been made through a new decision-making technique, adopted by Order no. 207 of 2018, the Cappato Order, which I would call one of "prospective unconstitutionality".

In that Order the Court recognized that Article 580 of the Criminal Code was constitutionally problematic, in the part in which it incriminates persons who facilitate the suicide of terminally ill and suffering individuals who make a free and informed decision to refuse medical care necessary for survival, which goes against their sense of dignity. At the same time, however, the Court determined that regulating the conditions for and ways of exercising the right to definitively reject treatment, with the material assistance of third persons, was both constitutionally necessary and beyond the decision-making reach of the Court, falling, rather, to the legislator.

Thus, for purposes of fulfilling the duty to eliminate unconstitutional provisions, preserving legislative discretion, the Court delayed its consideration of the question for approximately one year, at the same time providing a thorough explanation of the reasons why it considered the challenged provision to be unconstitutional.

In this way, while the reasoning ensured that the challenged provision could not be applied to the situation under review, either in the pending proceedings, which remain suspended, or in other cases, in which the courts would be obliged, in turn, to raise a question of constitutionality, the legislator was simultaneously ensured an adequate period of time to adopt more appropriate provisions.

It would be erroneous to think that, with this decision, the Court had intruded upon the timeline and way of exercising the legislative function to which the Parliament is entitled because, as stated above, where there is a constitutional obligation to regulate in a given area, legislative discretion contracts, even if only to the extent necessary to fulfill the duty to implement the Constitution.

With the Cappato Order, the Court clearly wished to recognize the primacy of the Parliament to define the details of the regulation of the offense in question. Therefore, I firmly trust that the Parliament will follow up on this new form of collaboration, as part of the process of implementing the Constitution, and will not miss the opportunity to exercise the space of sovereignty that falls to it. The achievement of the order of "prospective unconstitutionality" is, above all, an achievement for the representative function of the legislator, which would be lost if it were not exercised in practice.

7. *Constitutional justice and criminal law*

I will now turn to the second topic I wish to discuss, that is, the relationship between the powers of the Court and legislative discretion in the area of criminal law. Here, it seems clear that the order just mentioned, Order no. 207 of 2018, is also a telltale sign of the evolution that this classic area has undergone in recent years. The Court is indeed tending to take more incisive action in constitutional cases, overcoming, through a wide variety of decision-making techniques, the bottleneck of inadmissibility.

It is certainly true that the choice of what conduct is punishable, and with what punishments, remains entrusted to the Parliament, under the reservation to the legislator enshrined in Article 25 of the Constitution, given that, in light of the importance of the supreme good of personal freedom, only the legislator can choose which scenarios are so serious as to leave no choice but to impose criminal sanctions.

The suitability of the Parliament to carry out this task is chiefly rooted in its representative nature, which makes it well-suited to channeling the request for protection of the primary legal interests coming from citizens into the decision-making process, rendering it reasonable by means of public debate, and evaluating it in light of the principles enshrined in the Constitution.

These considerations have made the Court's case law particularly respectful of legislative discretion in the area of criminal law, and it often has been unable to address a question of constitutionality on the merits because a potential ruling of unconstitutionality would result in a multitude of options for reconstructing the system, among which the Court cannot choose in place of the legislator.

Nonetheless, it was growing increasingly inconceivable that, in the precise area where the fundamental rights of the person come to bear against the public power to punish, the Court should have to step back from review of unconstitutional provisions which offend personal freedom. In this scenario, a renewed sensitivity demanded the discovery of suitable mechanisms within the constitutional justice system for eliminating provisions that violate the Constitution, while, at the same time, preserving legislative discretion to the greatest extent possible. It must remain clear, however, that the former goal constitutes the basic reason for constitutional adjudication.

It is moreover important to keep two aspects of this issue separate and distinct. It is necessary to give due consideration to legislative discretion, in fact, both in cases where the Court strikes down unconstitutional choices relating to punishment, but cannot fill the resulting gaps, and when a ruling of unconstitutionality would extend the reach of a criminal provision, or of the harshness of a punishment, with detrimental effects for the person, that is, in cases where the outcome would be worse.

In the latter situation, it is clear that the power of the Parliament, in choosing which conduct to punish and the related punishments, cannot be placed in opposition to the primacy that the Constitution assigns to fundamental rights and personal liberty. Therefore, while this primacy does mean that the Court must act to strike down provisions that violate these rights, it certainly may not be invoked when doing so would render punishments more severe.

Thus, the Court's additive powers cannot allow it to make autonomous choices that create or extend susceptibility to punishment, or the punishments themselves. This is partly because, on principle, and without prejudice to the developments implied by Italy's membership and participation in the European Union and international agreements, these choices are not the object of constitutional obligations.

The relevant considerations are different, however, when it comes to so-called additive rulings *in malam partem*, in cases in which the aggravating effect on criminal liability in particular cases does not result from creative choices made by the Court, to the detriment of legislative discretion, but is, rather, a tool for ensuring its reasonable and uniform expansion, where this is prevented by provisions that are flawed due to their narrowness, as happened in the case of the so-called more favorable criminal law provisions (Judgment no. 394 of 2006).

Analogously, more severe punishments cannot be rejected in cases where this is necessary to preserve the primacy of the Parliament, which may be undermined by the abuse of urgent decree-laws (Judgment no. 32 of 2014) or by the improper exercise of the legislative mandate (Judgment no. 5 of 2014).

In these situations, constitutional review does have the effect of introducing more severe forms of punishment into the system, but only because this permits it to connect with Parliamentary discretion, protecting it from abuse or extending it to reach areas from which it had been illegally excluded in practice.

This trend in constitutional case law became more deeply rooted over the course of 2018.

Judgment no. 143 of 2018 declared inadmissible a question intended to remove a certain category of crimes from a milder statute of limitations scheme, which the referring court held to be in contrast with European Union law. However, the question was ruled inadmissible on the basis of certain defects in the referral order, and not because the request fell outside the scope "manipulative" powers of the Court in the area of criminal law and *in malam partem*, which were intentionally left unaffected.

Judgment no. 236 of 2018 later held that the fact that a ruling of unconstitutionality has a substantial *in malam partem* effect does not prevent the Court from making such a ruling when this effect is merely an indirect consequence of the unconstitutionality of a procedural provision. This is precisely what happened when certain crimes, which had previously been unconstitutionally assigned to the jurisdiction of the justice of the peace, were shifted to the jurisdiction of courts, with the consequence that the more favorable treatment available only for crimes reserved for justices of the peace no longer applied. This is a new articulation of the familiar principle by which there are no obstacles to the functioning of the constitutional jurisdiction in the area of criminal law, even with *in malam partem* effects, when these result not from

“manipulative”/reconstructive action by the Court, but rather appear to be necessary consequences of a ruling of unconstitutionality, as the system shifts toward realignment.

On the contrary, where there is no constitutionally mandatory solution capable of closing the gap left by the holding of unconstitutionality, with *in bonam partem* effects, and this places limits on the Court’s ability to intervene or makes it impossible for the Court itself to rewrite a complex regulatory scheme, the Court has, in its most recent cases, made a greater effort to provide a substantive answer for constitutional doubts, as it has done with the recently-adopted new tool of “prospective unconstitutionality” orders.

For some time, the Court has not shied away from scrupulous review of the constitutionality of punishments and, in particular, of their extent, since, as Judgment no. 233 of 2018 reiterated, intrinsic unreasonableness and manifest disproportionateness in criminal punishment, evaluated in light of the constitutional purpose thereof, support a finding of unconstitutionality.

The real problem has always been which punishment to impose, in place of the one unconstitutionally prescribed by the legislator.

The Court certainly cannot choose the appropriate punishment itself, in an invasion of legislatorial prerogatives. Instead, it has acted to identify constitutionally obligatory solutions taken from within the folds of the fabric of existing legislation. This was possible, for example, in Judgment no. 236 of 2016, which dealt with the crime of change of status. Nevertheless, it is not always possible to attain such a result by gleaning the unequivocal (and only) punishment that the Constitution imposes at the time, in light of the regulatory structure in the relevant area, and on the basis of the placement of the provision within the system, of its relationship to other, similar crimes, of its special status compared with general provisions, and so on. It does happen, albeit infrequently, that the Court must acknowledge that there are many potential alternatives, none of which appears to be constitutionally mandated.

An important new development in the constitutional case law of 2018 can be seen in Judgment no. 222, which declared a fixed ancillary penalty (which was, therefore, not modifiable by courts) unconstitutional, and did not draw back when it was observed that the punishment needed to substitute it, in order to avoid a gap in protection, was not necessarily one that was “mandatorily” established.

The Court held that it could substitute the original, unconstitutional punishment with one of the (non-univocal) solutions already present in the system, without prejudice to the legislator’s ability to later intervene to adopt whatever different punishment it considered most appropriate.

The result of this is that the Court’s scope of action has become much broader than in the past, since it is surely simpler to uncover, among the many possible options, the regulatory adaptation that is nearest to the logic of the system, rather than a single one that is required by the Constitution. At the same time, legislative discretion is not compromised, not only because its free future exercise is preserved, but also because, in any event, the Court must choose a substitute regulatory scheme, so to speak, from among the ones that have been constructed by the legislator itself.

This method was used most recently in Judgment no. 40 of 2019, a drug case in which the Court, despite acknowledging that a different choice by the legislator was clearly possible, drew on the fabric of existing legislation to select the punishment to substitute for the disproportionate and excessive one established by the provision found to be constitutionally flawed due to its “violation of the principles of equality, proportionality, and reasonableness under Article 3 of the Constitution, as well as of the principle of the rehabilitative purpose of punishment under Article 27 of the Constitution”.

It bears adding here that this decision followed a Court-issued warning (Judgment no. 179 of 2017) that went ignored by the legislator.

In any case, in the area of substantive criminal law, the overarching requirements of certainty and accessibility of criminal provisions cannot be overlooked, and these militate against the use of other kinds of rulings that provide less certainty, like those of rulings that are "additive" of principle, in which the fundamental task of piecing the regulatory fabric back together is entrusted, in the absence of legislative action, to ordinary courts.

In 2018, the Court reaffirmed the centrality of the ordinary jurisdiction as an essential element of the very form of the State, the powers of which must be protected even when this concerns acts having force of law that directly violate it, and against which it is, therefore, possible to react by means of conflicts on the allocation of powers between branches of State (Judgment no. 229 of 2018, on interference by the executive branch in investigation activities by imposing a duty on judicial police to report on them to their hierarchical superiors).

The Court added that legislative harmonization of interests on which judicial authorities have already taken measures is only immune from constitutional scrutiny, absent any other considerations, when it is able to balance all of the interests in a reasonable and proportionate way, including as they have emerged during proceedings (Judgment no. 58 of 2018, on weighing the needs for protection of health, safety, and worker protection, which had already formed the basis of an act by the judicial authorities, and the clashing interests of company operations and economic development at the Ilva plants in Taranto).

Concerning, in particular, the power of ordinary courts, it bears keeping in mind that the principle of separation of powers, just as it works to allow for judicial independence in the application of laws, also requires that criminal law, which is subject to the principle of legality, be described in a way that is mandatory and determined exclusively by the legislator. This is because, as Judgment no. 115 of 2018 states, the only task that may be entrusted to the courts is to identify the meaning of the regulatory provision within the scope of the options authorized by the text, and which a person can glean from reading it.

This last judgment, which dealt with the Taricco matter, and the clash between the principle of legality in criminal law matters and the introduction into our legal system of European legal rules that lacked sufficient certainty, brings us to the final topic this report will address, that is, the relationship between the Constitutional Court and the European courts.

8. *The Constitutional Court and the Court of Justice of the European Union*

A stable structure of the system of sources, governed by clear criteria for resolving contradictions, is more a goal to be pursued than one that has been already achieved.

Complicating factors can arise, both from contact between the national and European systems, through a process of integration that is still ongoing, and from adaptation to international rules, the uniform application of which is entrusted to specific judicial bodies, as is the case for the European Convention on Human Rights.

It is not merely a matter of taking stock of the fact that the same legal material may lead different courts to solutions that do not always overlap, due to the particularities of each system. It also bears noting that each actor, in the context of the multi-level protection of rights, wishes to be the one to dictate the rules of engagement. Thus, even the guidelines that legal practitioners (and ordinary courts in particular) must follow to resolve a legal issue where national and European sources converge can become a source of friction.

To this end, it must be borne in mind that the insertion of European and international law into our system is permitted and governed by the Constitution. The constitutional vocation to build a

peaceful and just future among nations has opened up the legal system to the important enrichment that supranational law has been able to offer (see, most recently, Judgment no. 194 of 2018, recalling Judgment no. 120 of 2018, which acknowledged that the European Social Charter has the ability to trigger Article 117(1) of the Constitution). Thus, if it remains certain that the ultimate criteria for administering the sources of law are to be found in the Constitution, it also bears emphasizing that it is precisely the openness of the constitutional design to integration with other state communities, in the name of rights, which ensures that the outcome of the definition of the legal system's boundaries cannot ignore the positions taken by the European courts.

But the Court's task in this regard is not always easy. It must take these positions into consideration, for purposes of indicating to legal practitioners (chief among them the ordinary courts, which are obliged to conform to them), the criteria they must use for the delicate resolution of potential contradictions.

We work in a "building site" that is constantly "under construction", the results of which are subject to constant remodeling to find the best point of encounter between the changes in perspective that come from European sources and the requirements of constitutional oversight.

In the relationship with the European Union, in particular, the ability of centralized constitutional review to guarantee the most effective protection, with rulings having *erga omnes* effect, must be reconciled with the primacy of European law, which demands that ordinary courts immediately implement provisions that are directly applicable.

However, this can mean that legal provisions that are no longer applied by the various courts in their decision-making remain in force in the national system, undermining legal certainty and the effectiveness of whatever constitutional rights may be involved.

For this reason, the non-application of national laws on the part of ordinary courts, due to their incompatibility with Union law, could prevent the Constitutional Court from becoming aware of legal conditions that go against either Articles 11 and 117(1), or other sections of the Constitution. Such an effect, particularly in the area of the rights and freedoms of the person, is not fully reconcilable with the Court's role as judicial guardian of the Constitution.

Therefore, the Court was happy to see that, in certain rulings of the Court of Justice (Judgment of 11 September 2014, in Case C-112/13, *A v. B and others*; Judgment of 22 June 2010, in the Joined Cases C-188/10, *Melki*, and C-189/10, *Abdeli*), the Court affirmed that Union law does not forbid prioritizing the use of constitutional referrals, as long as the ordinary court preserves its power to refer for a preliminary ruling intact, and, as the case requires, that of non-application of the national law that it considers to be in contradiction with Union laws with direct application.

Thus, for the cases in which there is a quasi-overlap between a constitutional provision and a European one, a frequent occurrence following the entry into force of the Charter of Fundamental Rights of the European Union, the Court has had the chance to affirm, in keeping with the indications of the Luxembourg Court, that ordinary courts are permitted, without violating the primacy of European law, to instigate incidental constitutional proceedings as a matter of priority (Judgments no. 269 of 2017 and 20 of 2019). Then, during the incidental review of constitutionality, a reference for a preliminary ruling may be made to the Court of Justice, if necessary, with regard to the European provision.

The Constitutional Court is well aware of the usefulness of references for preliminary rulings for a fruitful relationship with the Court of Justice, so much so that it feels bound to provide detailed explanations in the event it holds such a move to be unnecessary (Judgments no. 99 and 239 of 2018).

In 2018, references for preliminary rulings were crucial for reaffirming the inviolability of the supreme principles of the State's constitutional system and for having them recognized by the Court of Justice as a vital element of the European edifice itself.

Thus, Judgment no. 115 of 2018 brought an end to a matter that, had it gone differently, could have unleashed a serious conflict between the two systems.

Indeed, under one widespread interpretation, the Court of Justice, with its Judgment in the *Taricco* case on 8 September 2011, was obliging Italy not to apply a particular statute of limitations scheme to certain crimes, where conditions for disapplication were not sufficiently met, and this would have amounted to an inadmissible violation of the principle of legality in criminal matters. Only after a reference for a preliminary ruling made by the Court, through Order no. 24 of 2017, was the Court of Luxembourg put in a position to clarify that the duty not to apply was not intended to pertain to cases in which this would have led to a violation of the principle of legality in criminal matters in the applicable State, that is, the violation of a constitutional principle that Judgment no. 115 determined to be supreme.

9. *The Constitutional Court and the European Court of Human Rights*

2018 was a productive year for achieving a more harmonious definition of the relationship between constitutional review and the jurisdiction of the European Court of Human Rights.

Starting with the so-called twin decisions (Judgments no. 348 and 349 of 2007), the Court has attached particular importance to the interpretations of the European Convention on Human Rights that are handed down by the Strasbourg Court, which lend concreteness to the provisions of the Convention. Moreover, the Constitutional Court, as the saying goes, rules on provisions but adjudicates on the law (Judgment no. 84 of 1996). Thus, the normal point of reference for constitutional review is the "living law", when it has formed.

Thus, when the Court must uncover the meaning of a provision of the European Convention relevant for a constitutional case, it must look to the consolidated case law of the Strasbourg Court, that is, to "living European law," to use a recent term from the Court's phrasebook (Judgment no. 43 of 2018). This is because, in the face of this law, the autonomous interpretive power of national judges must cease, both when it is a matter of defining the meaning of the interposed Convention rule, and when one such rule raises constitutional doubts.

Once the contours of European living law have been established, it is then the task of the Constitutional Court to apply it, even to cases about which the Strasbourg Court has not yet had the opportunity to give a specific judgment. One possible outcome may be that it denies the incompatibility of national law, as it did in Judgment no. 22 of 2018, on the administrative revocation of driving licenses.

The Court provided some guidelines in Judgment no. 49 of 2015, as a natural development and fulfillment of the trajectory begun in the so-called twin decisions, and these guidelines have been applied steadily ever since in the Court's case law. Indeed, when presented with a question pertaining to the European Convention, the Court never fails to investigate the consolidated European case law on the matter (considering only 2018 cases, see Judgments no. 12, 43, 88, and 93, and Order no. 207), to the extent that this task may be considered to logically precede review on the merits, provided that it is useful for fully clarifying the terms.

Indeed, it is unthinkable that constitutional review (the results of which, in the event a question is accepted, are not revocable) could be based on isolated, sporadic, or only partly consolidated interpretations, with the concomitant risk that the course of European case law may later contradict

these assumptions. This runs the unacceptable risk of striking down a law as unconstitutional on the basis of a decision the theoretical holdings of which are later revised by the Strasbourg Court itself.

Of course, there is always a possibility that even consolidated case law will evolve, but evolution is much more likely in the case of rulings that do not reflect a consistent approach by the court.

What is at issue in Judgment no. 49 of 2015 (it is important to stress) is not the duty of the Republic to execute the decisions of the Strasbourg Court, which are all, without distinction on this plane, equally binding. Rather, it is a matter of elaborating the prerequisites for inferring, in the context of European case law, the principles of law that penetrate into the national system and pervade the centralized system of constitutional review as interposed rules, or, in exceptional cases, rules that are subject to substantive challenges. This elaboration is a task that transcends Article 46 of the Convention, and is carried out on the basis of criteria proper exclusively to constitutional law, just as it is the Constitution itself, according to the interpretation made by the Court, which defines the position of the ECHR in the system of sources of law.

Two important judicial incidents of 2018 served to confirm the correctness of the approach explicitly ushered in with Judgment no. 49 of 2015 (but already contained *in nuce* in earlier constitutional case law and then constantly followed in that which followed).

In its judgment in the case of *G.I.E.M. S.R.L. and Others v. Italy*, of 28 June 2018, the Grand Chamber of the European Court of Human Rights definitively ruled out the proposition that confiscation of real property that had been subject to illegal site development is a *per se* violation of Articles 6 and 7 of the European Convention whenever it is not imposed together with a criminal conviction.

In so deciding, the Strasbourg Court moved beyond a single precedent (the decision in *Varvara v. Italy* of 29 October 2013), which appeared to hold the opposite, adopting the different interpretation of Articles 6 and 7 of the Convention that the Constitutional Court had offered in Judgment no. 49 of 2015.

If the Court, rather than putting itself in a position of constructive dialogue with the European Court, had stopped short at the narrower interpretation of the *Varvara* case, and had struck down the national law as unconstitutional on that basis, this would have caused serious harm to the protection of the territory, without any corresponding benefit for the personal protections required under the Convention. Indeed, these protections do not rule out the possibility that illegally developed sites may be confiscated alongside a ruling declaring that prosecution for a crime is time-barred, as long as the person subjected to the ablative measure has been proven liable (as became definitively clear in 2018).

This would have created an unprecedented and, to put it mildly, unpleasant situation wherein a finding of unconstitutionality was founded on an erroneous reading of the interposed rule, and, as a result, erroneously handed down in its turn as a final decision.

Likewise, the *ne bis in idem* issue decided by Judgment no. 43 of 2018 confirmed the need to wait for the consolidation of European case law into living law before using it as a basis for constitutional review.

In that case, the Court faced a constitutional question concerning the Convention's prohibition of *bis in idem* (also outlawed under EU law). In 2016, a similar problem had not been addressed on the merits due to a procedural issue (Judgment no. 102 of 2016). But, at the time, the problem would have been even more difficult to resolve, due to the exclusively procedural and binding character that the case law of the Strasbourg Court attributed to the prohibition.

Later, a ruling was handed down by the Grand Chamber (in the case of *A. and B. v. Norway*, of 15 November 2016), which, on the contrary, consolidated European case law by taking it in an explicitly less harsh direction with regard to the signatory states. This was based on the presumption that *ne bis in idem* has substantive features (as well) and is (in part) subject to exceptions, such that it may be considered to be complied with in cases of material and temporal coordination of proceedings.

It is not relevant here to ask to what extent this approach was already contained in European case law. Whatever the answer to that question, it is beyond doubt that there was no way for a national interpreter to have even imagined the strict criteria for assessing the existence of a link between proceedings, which are laid out in a long list of detailed analytical rules, before they were clearly spelled out in the case of *A. and B. v. Norway.*

Therefore, this is another important area in which an ill-timed constitutional ruling, coming before the emergence of the living law at the European level, would not only have been invalid at the level of its premises, but would even have been incapable of truly ensuring that the national system adapted to a conventional rule yet to be fully fleshed out, and the outline of which was not yet discernable.

These important 2018 cases reinforced the idea that the consolidation of the case law of Strasbourg remains an essential point of reference, both for purposes of constitutional oversight, and for purposes of exercising the interpretive powers of the ordinary courts themselves, which come fully into play in the absence of that oversight.

The effects of Judgment no. 49 of 2015, moreover, do not weaken the Convention, but rather reinvigorate it, because they call on all legal practitioners to cooperate with the Strasbourg Court, including in light of the principles of their own legal systems, in order to build a shared home of the rights of the person, the bricks of which are formed in the furnace of the fruitful and diverse experiences of the constitutional states that are party to the Convention.

In light of this, the rulings of the European court, even when they are isolated, never amount to scrap material, which national practitioners may circumvent. Rather, they form the starting point for shared dialogue, by means of which, without making hegemonic claims, we contribute to defining a minimum shared content for individual freedoms, which is better able to prevail since it is the fruit of sincere debate.

In conclusion, the Court is heading into the new year of forming its case law convinced that it has laid the proper foundations to build an increasingly integrated Europe by means of the law, while, at the same time, not giving up on the protection of the supreme principles of our constitutional order. The legacy built by the Court in its over sixty years of operation, enlivened by dialogue with the European and international courts, and nourished by the precious contribution of the ordinary courts, which are ever more imbued by constitutional values, provide the walking stick on which to lean for the journey.