CORTE COSTITUZIONALE

Report on the activities of the Constitutional Court in 2020

Giancarlo Coraggio President of the Constitutional Court

Palazzo della Consulta – 13 maggio 2021

Report on the activities of the Constitutional Court in 2020

Giancarlo Coraggio President of the Constitutional Court

Introduction

Mr President, Distinguished Representatives of the Institutions, Ladies and Gentlemen,

1. Let me first of all express the heartfelt sympathy of the Court for those mourning the loss of their loved ones. The pandemic has been a challenging test for our country, which has nevertheless shone through with dignity. Her citizens, discrediting die-hard clichés, have shown themselves ready to accept the heavy, but inevitable, sacrifice of their rights with a widespread and conscious sense of civic duty. And the institutions too, albeit with a degree of strain on the health services, have found the strength and the capacity to face up to this dramatic and extraordinary event.

I am thinking in particular of the commitment shown by the schools, which, by adopting distance learning (admittedly an emergency solution, but accepted with a spirit of sacrifice by teachers and pupils alike), were nevertheless able to go on providing, as far as possible, a vital education service. However, some serious economic and territorial inequalities unfortunately emerged.

The Constitutional Court has played its part in the nation's collective effort: the extensive and effective use of IT systems has allowed hearings and deliberations in chambers to take place without interruption, with the judges and the parties participating remotely. The emergency has called for a qualitative leap which has driven us to resolutely pursue the introduction of proceedings in teleconferencing and to make extensive use of both old and new means of communication, such as the app, the website, and podcasts, as well as in the form of "Meetings" with the world of culture. And lastly, the Yearbook: a new publication available in print and on line, which, following the example of other courts, relates the activities of the previous year.

This has become possible thanks to the commitment of the Secretary General and all the staff – to whom we extend our heartfelt thanks – who, albeit in 'agile' forms of work, have ensured that the institution has continued all its work in a great and constant spirit of cooperation, Ad a key factor was, of course the willingness of colleagues to maintain, even at a distance, the constant and fruitful dialogue that distinguishes the Court.

It is this strong sense of collegiality that has allowed the Court to be unaffected even by the succession of three Presidents and the arrival of three new judges during the year. In this regard, I would like to mention that in 2020 the Court said goodbye to its first woman President, Marta Cartabia, who led the Institution through the months of the pandemic and

its first devastating effects. 2020 was also the last year at the Court of President Mario Rosario Morelli, who has spent a lifetime between the Supreme Court of Cassation and the *Palazzo della Consulta* defending fundamental rights. We also said farewell to Vice-President Aldo Carosi, whose great financial and accounting expertise has so enriched the Court over the years. But this year also saw the arrival of two more women judges: Professor Emanuela Navarretta and President Maria Rosaria San Giorgio, in addition to President Angelo Buscema. I wish them as rich and fruitful a period of office as that of their predecessors.

As the Court is fully operational, not only was the number of decisions essentially similar to that of 2019, following the trend of the last five years, but the time taken to conclude proceedings was also reduced, from approximately one year to eight months for incidental cases.

All this has led to a reduction in the number of pending cases; it must be said, however, that this result was also due in part to the lower number of referrals compared with the previous year (despite a rise on the figures for 2017 and 2018). This was presumably the consequence of continued operational difficulties that the health emergency caused for the lower courts.

2. As regards trends concerning proceedings, I shall limit myself to a few statistical considerations, referring to the attached data.

2020 also saw numerous incidental proceedings (approximately 58% of the total). The majority concerned referrals from the ordinary courts,

and the number of questions raised by special courts continues to increase, especially from the Court of Auditors regarding the reconciliation of accounts.

There has also been a reduction in disputes between central government and the regions, which are at their lowest since 2006. However, there has been a rise in the number of disputes between State institutions.

As for direct appeals, there is still a remarkably large number of cases brought by the State against regional laws and vice versa, which – as has been remarked in all the reports of the last few years – is rooted in the legal uncertainties created by the revision of Title V of Part II of the Constitution. These uncertainties have not yet been solved, despite the Court's twenty-year commitment to clarify the distribution of the respective competences.

Most of the disputes concern the coordination of public finance, compliance with the rules on the balancing of budgets and the regulation of financial relationships, especially in sectors such as the employment of personnel and the health service, which have the highest levels of expenditure.

It is precisely in the health sector that the greatest difficulties have arisen, due, on the one hand, to substantial cuts in State funding and, on the other, to not always satisfactory management, even though the resources available are considerable. This is evidenced, moreover, by the

number of disputes relating to the extraordinary government-run administration of regional health services, often lasting several years and therefore of dubious effectiveness.

In effect, a service such as the health system, which is labelled as "national" but is actually managed by the regions, can only be run in an effective way if the central government exercises its powers of coordination, thereby correcting regional inefficiencies. The inadequate performance of this task not only leads to a lack of uniformity but may also reduce the basic levels of healthcare – a situation that the Court had repeatedly to address over the past year (Judgments No. 62, No.72 and No. 130).

It must further be noted that the basic problem of the lack of coordination has also arisen in the context of the current pandemic, although it is clear that its management falls within the exclusive competence of the State in matters of international prevention of disease, as the Court spelled out in its recent Judgment No. 37 of 2021. Indeed, this central competence should have guaranteed the unity of action and regulation that the national dimension of the emergency required, and still requires.

2.1. More generally, while we can only reiterate the now constant call for sincere cooperation between the State and the Regions in matters of common interest or in areas where a plurality of competences coincide, it would appear appropriate to call upon all the institutional

players to reflect on the need to prevent and settle conflicts before initiating judicial proceedings. A large proportion of disputes could be avoided, as shown by the fact that in direct appeals there were a very large number of decisions to terminate (25) or discontinue the matter in issue (10) last year too, which, moreover, follows the trend of the last five years.

It is regrettable that this so often happens shortly before hearings that have already been scheduled, not only because of the significant waste of energy and study on the part of the Court, but also because of its negative impact on the certainty of the laws that had initially been challenged and the fluidity and speed of administrative action based on those laws.

3. Naturally, the nature of the disputes influenced the typologies of the Court's decisions. In 2020, incidental proceedings accounted for the majority of the decisions delivered by the Court: 163 (123 judgments and 40 orders) were decisions in incidental cases, whereas 92 decisions (69 judgments and 23 orders) were handed down in direct appeals, 5 in disputes between the State and Regions (and between Regions), and 14 in disputes between State institutions.

3.1. The figures show a significant trend, namely the steady decline in the number of orders of manifest inadmissibility or unfoundedness in favour of judgments, which are now adopted in over 70 per cent of cases (75 per cent in incidental cases and direct appeals), while not too long ago, for example in 2007, they accounted for less than 40 per cent.

This is certainly due to a better formulation of referral orders and appeals: the training courses for judges, which in 2020 now involved administrative judges as well as ordinary and tax judges, have therefore borne fruit.

However, the Court has also been more inclined to examine the merits of the questions. This is due to the attenuation of the filter of relevance in incidental cases, where the criterion of the concrete influence of the Court's decision in the main proceeding has substantially been abandoned. Moreover, the Court has now overruled its previous case law, which considered the question inadmissible if the referring court had not exhausted every possibility of interpreting the law in conformity with the Constitution: such a strict obligation was deemed to be incompatible with the centralised system of review envisaged by the drafters of the Constitution.

On the first point, among many others, Judgment No. 254 states that the relevance of the question as to constitutionality "does not require that the Court's decision, to which the referring court aspires, will have a concrete impact on the *outcome* of the dispute in the main proceeding […]. Relevance only requires that the challenged provision has a role in the *reasoning* leading to the decision".

On the second point, several decisions have confirmed that where the referring court has plausibly concluded that it was impossible to construe

the law in conformity with the Constitution, the question whether its assessment is correct does not concern the admissibility, but the merits of the question raised (Judgments No. 50, 97, 118, 158 and 168).

On the other hand, the Court has confirmed that "the obligation to interpret the law in conformity with the Constitution no longer exists, giving way to the incidental review of constitutionality, when the wording of the provision does not allow such an interpretation" (Judgment No. 221 of 2019; see also Judgments No. 118, 231 and 253 of 2020). In order to protect both the autonomy of the legislator, and therefore the fundamental principle of the separation of powers, and the centralised nature of review, ordinary courts may not, therefore, attempt to interpret the law in conformity with the Constitution when its wording precludes such an interpretation, but must raise the question of constitutionality (also) in order to ensure the certainty of the law.

In the same vein, Judgment No. 116 affirmed that the obligation to interpret in conformity with the law may also be waived in the event of a contrary interpretation by the appellate court, even if this is not consolidated as 'living law', because in such cases the referring court's constitutionally oriented decision would probably have to be overturned: in this case too, therefore, "the question as to constitutionality is the only way to prevent the continued application of a rule held to be unconstitutional".

3.2. As always, the questions addressed by the Court in 2020 covered a broad range of subjects, but there is no doubt that particular importance was given to the areas where the values expressed in the Constitution are placed under greater pressure by the changing ethical and social context. Indeed, it should not be forgotten that, in most cases, the fundamental norms established in the first twelve articles of the Constitution, and, in general, those contained in Title I, are specifically concerned with 'values'; and these very values are often the object of supranational legislation and jurisprudence: work and its protection in the event of dismissal (Judgment No. 150), parental responsibility, and the protection of minors (Judgments No. 102, 145, 127, and 230), the rights and duties of same-sex couples, biological and legal parenthood, and medically assisted procreation). We might also recall matters concerning individual rights that arise in the light of complex, stratified, and at times inconsistent, legislation on the execution of sentences in and outside prison, which the Court constantly strives to bring into line with constitutional requirements and, in particular, with Article 27 (Judgments No. 18, 32, 74, 97 and 113).

4. It is especially in these areas that the problem of the Court's relationship with the legislator comes to the fore. This problem has always been a sensitive aspect of the review of constitutionality, on which, not surprisingly, renowned members of the Constituent Assembly placed much weight.

Deference to legislative discretion is a fundamental aspect of the Court's judicial activity, which is required to respect the prerogatives of Parliament, as "'interpreter of the general will […], called upon to strike a balance […] between the fundamental values that are in conflict, taking account of the views and calls for action that it considers to be more deeply rooted at any given moment in time within the social conscience'" (Judgment No. 230 on the recognition of same-sex parenthood).

This is why the Court would previously intervene on legislation by means of additive judgments – thereby introducing a new rule – only in cases traditionally known as the so-called *rime obbligate*, meaning that there was only one solution capable of removing an ascertained element of unconstitutionality. On the contrary, when various solutions could have been envisaged to fill the gap created by a decision striking down an unconstitutional law, the Court would rule the question inadmissible, merely formulating so-called warnings, i.e., invitations or exhortations for the legislator to act.

This approach has gradually changed over the last few years – and the year 2020 was particularly significant in this respect – insofar as the discretionary nature of the solution to be adopted after a declaration of unconstitutionality was no longer considered to be an impediment to additive intervention.

4.1. The undoubted importance of this change is, however, mitigated by the restraint and the conditions that the Court has imposed upon itself.

The terms of this line of case law are clearly expressed in Judgment No. 252 (handed down in relation to the validation of personal and house searches authorised by the Public Prosecutor via telephone). In this case the Court held that, "faced with the infringement of constitutional rights, the admissibility of the question [...] depends not so much on the existence of a single solution in conformity with the Constitution, but rather on the existence in the legal system of one *or more* constitutionally adequate solutions, all of which are compatible with the regulatory framework in a manner consistent with the logic pursued by the legislator [...] and are therefore able to immediately remedy the lack of constitutional protection that has been found, without prejudice to the power of the legislator to intervene adopting different choices [...].It is necessary, in fact, to avoid legislative gaps immune from constitutional review within the system: 'when there is a gap in the legislation which cannot be remedied by interpretation' – all the more so, if fundamental rights are involved – the Court is in any case required to afford a remedy [...]".

From this arises a twofold commitment; on the one hand, to promptly and effectively protect the constitutional right or value at stake; on the other, to seek guidance, while filling the resulting gap, within the current legal framework. In other words, the solution must be drawn from within the system and, if possible, from provisions that already

exist, in order to ensure consistency with the logic followed by the legislator (Judgment no. 113).

4.2. It is precisely in relation to this requirement that, in the absence of points of reference in the law, and in cases of complex and detailed interventions, that the Court has felt obliged to give precedence to the "natural" intervention of the legislator, resorting to the procedural technique of a "prospective" declaration of unconstitutionality: the Court holds that the challenged provision is unconstitutional, but refrains from declaring it as such, and adjourns the case for a new hearing, thus giving the legislator time to address the matter.

This is precisely what happened after a case of aiding and abetting suicide (Order No. 207 of 2018 and subsequent Judgment No. 242 of 2019), through Order No. 132, issued in an incidental proceeding on the rules establishing custodial sentences for the offence of defamation by the press. The Court first observed that the balance struck by the provisions of the Criminal Code and those of the law regulating the press had become inadequate, also in the light of the case law of the European Court of Human Rights. It thus required a legislative reform "so as to struck a proper balance between the protection of the freedom of the press [...] and the need to afford effective protection to the reputation of those abused by that freedom on the part of journalists". It went on to add that "such a delicate balance lies with the legislator, which is responsible for establishing a framework which, on the one hand, should avoid any

undue constraints on journalism, and, on the other, should adequately protect the reputation of the individual against unlawful – and sometimes malicious – attacks carried out while exercising said activity".

5. Among the causes of this change, and certainly not the least, are the scant results obtained from the 'warnings' to the legislator, which for the most part, have not been followed up – indeed with the remarkable exception of the warning contained in Judgment No. 152, aiming to guarantee greater funds for persons with total invalidity on a disability allowance starting from their eighteenth birthday.

The true reasons, however, are deeper and systemic.

The growing number of interventions by national and supranational Supreme Courts –certainly not limited to our country – can be defined as historical. They play an increasingly incisive role both on the institutional shaping of legal orders (such as the European Court of Justice) and the recognition and protection of individuals' fundamental rights (the natural reference is, here, the European Court of Human Rights). Similar attitudes may be found in countries comparable to Italy in terms of system and tradition such as France and Germany, not to mention the de facto regulatory work now carried out, for some time, by the Supreme Court of the United States.

Like other courts, the Italian Constitutional Court too has found itself working in a context marked by greater complexity and urgency, due to the multiplication of demands claiming to be rooted in new fundamental

rights, perceived – rightly or wrongly – as inalienable, and that can no longer be delayed.

Recognition of these rights involves a delicate task, which requires, on the one hand, a careful selection of legal situations deserving protection, so that not every demand is automatically transformed into a right and on the other, that the "new right" fits harmoniously into the pre-existing context. Rights, like the values that express them, do not live in isolation, but limit and condition each other, since their exercise entails an equal number of duties and burdens for individuals or society.

This is a task that the legislator should take upon itself. However, but in the absence of its intervention – an absence sometimes justified by the turbulent evolution of society –, the Court cannot stand by, especially when the rights of minorities are at stake. Their protection falls within the natural field intervention of courts as guarantors of a truly inclusive democracy.

In fact, many claims have been recognised as rights up to now. One example regards the issues concerning medically assisted procreation in the wake of Judgment no. 162 of 2014, whereas other judgments have highlighted the need to protect the best interests of children as far as this is possible. But there have also been instances of denial, relating to issues such as the right to die, or the right of access to procreative techniques by same-sex couples on Italian territory (in aforementioned Judgment No. 230).

One area in which these demands emerge with particular intensity, but which, at the same time, require careful balancing, is that of social relations: the considerable pressure in this regard in all modern societies must be measured against the financial limits imposed by the constitutional requirement of balancing of accounts, which was introduced almost ten years ago.

Health care is just one example. The Court has traditionally denied the existence of an "unlimited" right to health, precisely in view of the overwhelming financial repercussions this would entail. At the same time, it has also stated that the principle of sound management of resources cannot be stretched so far as to reduce the basic level of care, which thus becomes incorporated as a fundamental right. Specifically, Judgment No. 62 of 2016 reiterated that, "once identified through legislation, the absolute core of minimum guarantees for giving effect to the (fundamental) right to public services cannot be subject to absolute and general financial constraints […].It is the guarantee of inviolable rights that must condition the budget, whilst, conversely, the need for budgetary equilibrium cannot condition the requirement to provide such services".

6. A further important aspect regarding the case law of the Court is the relationship between the sources of law. As before, there have been frequent references to – and examinations of – European and Conventional standards. The Constitution, in fact, allows and indeed

requires that full and effective protection of fundamental rights should also draw upon other Constitutions and the work of interpretation carried out by constitutional courts.

This openness is not limited to the European scenario, as demonstrated by Judgment no. 102, which, in declaring unconstitutional the automatic suspension of parental responsibility in the case of conviction for the abduction of children abroad, states that the New York Convention on the Rights of the Child, "like the majority of international covenant law, binds […] the legislative power of the State and the regions within the meaning and within the limits of Article 117, paragraph 1, of the Constitution".

6.1. While it has long been accepted that the unsolvable conflict between domestic and Conventional norms – which work as 'interposed' provisions of Art. 117(1) of the Constitution – requires the Court's intervention, it has, however, been stressed that the latter norms require systemic rather than piecemeal assessment, and must be brought into harmony with constitutional values and principles (Judgment No. 121 on fair compensation for exceeding the reasonable length of a trial).

6.2. As far as EU law is concerned, it is well known that Judgment No. 269 of 2017 brought a change to the long-standing line of case law on the irrelevance of questions of constitutionality concerning internal rules in conflict with Community norms with direct effect. In 2020 the Court confirmed its power, and indeed its duty, to rule on questions relating to

rights equally protected by the Constitution and by the Charter of Fundamental Rights of the European Union or other European standards, "where it is the ordinary court itself, in the context of an issue of constitutionality, which refers, as interposed rules, to provisions of the European Union relating, in substance, to the same rights protected by Constitutional provisions" (Judgment no. 11).

It is in this perspective that Order No. 182 (on childbirth and maternity allowances for persons from third-party States) specified that "the assimilation of Constitutional protection with that enshrined in the Charter provides [...] a rich array of judicial remedies, enriches the instruments for the protection of fundamental rights available and, by definition, excludes any preclusion".

As this order's referral for a preliminary ruling shows, the Court continues its "sincere and constructive cooperation" with the European Court of Justice and the ordinary courts in order to achieve "an integrated system of protection" (Judgment No. 254 on collective dismissal) and to safeguard fundamental rights. But in doing so the Court must remain fully aware of the inalienability of the centralised system of the review of constitutionality, which alone can guarantee the elimination of legislation in conflict with the Constitution and lies, therefore, "at the heart of the constitutional structure", as recalled by the same judgment No. 269 of 2017.

In fact, it must be recalled that it is the Constitution itself that allows international and European sources to enter our legal system, and it is in the Constitution that the fundamental rules of engagement for their effects and application are to be found.

7. 7. This dual perspective sums up, therefore, the essence of the Court's work over the past year. On the one hand, the effort to guarantee the coherence and certainty of our legal system; on the other, a constant openness to external input to enrich the framework of rights set out in the Constitution. A Constitution which, while certainly not showing signs of ageing, cannot fail to benefit from stimuli coming from other realities, and especially from those close to us due to their historical cultural, social and ethical similarity. At the same time, this Constitution is able, for its part, to guide and enrich shared constitutional traditions and the work of other national and supranational Courts.