

The Italian Constitutional Court





THE ITALIAN CONSTITUTIONAL COURT

Translation from the Italian original by Clare Tame and Sarah Pasetto.

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Palazzo della Consulta



Marta Cartabia, President of the Italian Constitutional Court



Preface to the 9th edition

This brief publication originates from the need to “dispel the mystery” and “bring closer” to the citizens a fundamental institution of the system of protections established in the Italian Constitution, as explained by President Cesare Ruperto in his Presentation to the first edition, released in 2002.

The publication of a communications tool that allows the Constitutional Court to make itself known also to a non-legal audience and to the general public was a fruitful idea. This slim booklet, written by Valerio Onida and over time enriched with contributions by several others, has been the fertile seed of a tree that, in the meantime, has grown and borne ever more fruit.

Several years have passed since the first edition and the Constitutional Court’s public communication efforts have evolved greatly, also thanks to the potential offered by new technologies. The attention paid by the media to the Court’s work has become more assiduous and incisive, the sign that there is widespread knowledge of the impact of the institution’s decisions in social and individual lives.

In recent years, the Court has opened its Palazzo, receiving ever more numerous groups of students and citizens of all ages, to sit in public hearings, to meet the judges, or even simply to visit the seat of constitutional justice. However, most importantly, the Court has left the building, to know and to let itself be known directly by citizens, undertaking a “viaggio in Italia” (“Voyage through Italy”) for some years now and that is widely documented on the Court’s Internet website.

All these developments have not made any less current the original need to reach all citizens, and especially the younger generations, with material that is comprehensible and easy-to-read, but that at the same time can provide a faithful and exhaustive image of the Constitutional Court and its multiple activities. The experience gained over these years shows that narrating the work of the Constitutional Court also furthers knowledge of the Constitution itself and of the values it lays at the foundation of civil co-habitation. The meaning of the Constitution is spread, and awareness of it is revived. This task, which is a collective task that engages the entire Republic – citizens, social groups and all institutions – cannot avoid calling upon, first and foremost, the Constitutional Court, because constitutional values are not simply transmitted inertly from one generation to the next, but, rather, live and die in the living history of the society that appropriates itself of them continuously, day after day.

Marta Cartabia

President of the Constitutional Court

A recent survey has revealed that the Constitutional Court is the least well known of Italy's constitutional bodies. This is not particularly surprising if one considers that it was only created with the formal enactment of the Republican Constitution in 1948 – that is, less than half a century ago – while other constitutional organs date back to the foundation of the Italian state in the nineteenth century.

Although nearly all Italians are aware of the Court's existence – because they often have a direct or indirect stake in particular cases that involve constitutional questions – very few know precisely what the Court's functions are, or how these are carried out.

In Italy, followers of Italian constitutional affairs may often read in a newspaper or hear on television that *La Consulta* has passed judgement on, or been called on to review, a particular problem. For most people, however, the Constitutional Court may be little more than a series of rapid newsreel images or archive footage of some ceremony or event, with the judges of the Constitutional Court meeting in open court, dressed in long black togas with laced collars and sleeves, and seated around a long horseshoe-shaped bench. This booklet is designed to provide readers with key information on this institution.

La Consulta

La Consulta is the term often used to refer to the Constitutional Court, and is taken from the name of the Court's official residence at the *Palazzo della Consulta* in Piazza del Quirinale in Rome. The *Palazzo della Consulta* is an eighteenth-century building of great architectural beauty. Its physical location is an excellent symbolic expression of the institutional position of the Constitutional Court: it stands on Rome's highest hill, the *Colle del Quirinale* opposite the *Palazzo del Quirinale*, official residence of the President of the Republic – the supreme representative institution of the Italian state, and appointed, like the Court, primarily to act as an impartial guarantor of the constitutional system – and at some distance from the buildings of “political” Rome and “judicial” Rome. Although the Court interacts with the world of politics, it is not itself a political institution in the strict sense. Its function is not to represent citizens by promoting policies or interests that they (or a majority of them) endorse at any given moment, but to guarantee universal respect for the basic law of the Republic, the Constitution. In carrying out this task, the Court also interacts with the Italian judiciary, but is not itself entirely a judicial institution either.



The Salotto verde



From the Papacy, to the Monarchy, to the Republic

From its construction until 1870, the *Palazzo della Consulta* was the seat of the *Sacra Consulta*, an ecclesiastical body with both civil and criminal jurisdiction. On the wall of one of its rooms one can still read the text of sentences meted out by the *Sacra Consulta* for crimes committed within the Papal States.

When Rome became part of the Kingdom of Italy in 1870, and the *Palazzo del Quirinale* became the official residence of the King, the *Consulta* was for a certain period the official residence of the royal heir, Prince Umberto of Savoy (the future King Umberto I) and his wife Margherita, and many of the decorations in the palace date to this period. Subsequently, it became the seat of the Ministry of Foreign Affairs, and, after the transferral of the Ministry to Palazzo Chigi (before it moved to “la Farnesina”), the seat of the Ministry for the Colonies of Italy in Africa. At the end of the Second World War, when Italy’s colonies had been lost, the Ministry was abolished, but its offices continued to occupy the build-





On the left: *La Magnificenza* by Antonio Bicchierai on the ceiling of the Salotto verde



A view of the President's study



The Salotto rosso with Tintoretto's *Le Nozze di Cana*

2. How and Why Constitutional Courts Come into Being

ing until 1955. In 1955, the building became the official seat of the newly formed Court.

A Young Institution

The Constitutional Court is a relatively recent institution. Nothing similar existed in the Italian State before the formal enactment of the Italian Constitution of 1948. In various other European countries, legal provision for similar institutions was made for the first time in the 1920s, based primarily on the theories of the renowned Austrian democratic jurist, Hans Kelsen. Apart from the Italian Constitution, after the Second World War, different forms of “constitutional courts” (or “tribunals” or “councils”) were provided for in the Constitutions of West Germany (1949), France (1958), Portugal (1974), Spain (1978), and Yugoslavia (1963). More recently, nearly all the new constitutions of the countries of Eastern Europe and the former Soviet Union have made provision for similar organs, as have other states outside Europe. Today, a means of guaranteeing the constitutionality of laws appears to exist, in various forms, in 192 of the 196 generally recognized countries of the world.

However, even if constitutional courts are relatively young institutions, the problems which led to their creation, and to which they try to provide answers, go back a long way.

The Omnipotence of Parliament?

According to the European constitutional tradition that developed primarily in Great Britain in the seventeenth and eighteenth centuries and in post-revolutionary France, state institutions are subject to the law, and an independent judiciary is empowered to resolve legal disputes by applying and enforcing the rule of law.

The norms embodied in the rule of law spring from rules articulated and applied by the judiciary, and from statutes enacted by bodies with legislative power, that is, parliaments elected by the citizens and therefore representative of the popular will. The role of the judiciary is not to create or amend statutes, but to apply them, and it is the role of constitutions to recognise and regulate this separation of powers.

In this tradition, the law typically expresses the supreme will of the authority of the State. Parliament enacts laws, exercising complete discretion in drafting them, and is therefore in a sense “omnipotent.” According to a famous comment, the British Parliament “can do anything but make a man a woman and a woman a man”. But are parliaments free to change a constitution? Many nineteenth-century constitu-



The Constitutional Court meeting in public hearing in the Sala delle Udienze (February 2020)



tions were not explicit on this point; some later constitutions established special procedures for their amendment. The fact remained, however, that while acts of administrative authorities were subject to review by the judiciary, for compliance with statutes, no one (not even a judge) was authorized to review the statutes themselves – the highest expression of the “sovereignty” of the State – and to assess their conformity with the constitution.

The American Experience: Judicial Review

In contrast with the European experience, the United States took a different path. The American Constitution establishes a balance between the powers of the federal government and those of the states, and does not contemplate the “omnipotence” of the legislature. The legislature is conceived as a “delegate” of the citizens and, as such, cannot act in contravention of the rights of those same citizens from whom it derives its powers. This constitutional doctrine was set out in *The Federalist Papers*, the first and most celebrated commentary on the American Constitution. As of the early nineteenth century, American courts were invested with the power to review the laws of the states and of the federal government, and to declare them void where they were deemed incompatible with the Constitution. This regarded all constitutional provisions, including those regarding the allocation of powers among the states and the federal government, as well as those protecting the rights of citizens against encroachment by the government, such as freedom from arbitrary arrest and freedom of speech, which were introduced in the Bill of Rights and other amendments to the U.S. Constitution.

In the famous case of *Marbury v. Madison* (1803), the Supreme Court held that the Constitution is itself a law, superior to other laws. Moreover, it stipulated that “ordinary” laws – that is, statutes enacted by the legislature – must respect the Constitution, unless they are void, and every judge has both the power and the duty not to apply them.

The European Experience: a Check on Parliament

In Europe the concept of the supremacy of the law, which was viewed as the expression of the State or popular sovereignty as represented by the Parliament (heir, in a certain sense, to the absolute sovereigns of the past, whose will was subject to no legal limitations), hindered acceptance of the notion that a body other than Parliament could review the laws and refuse to apply a legal provision on the grounds that it was contrary to the constitution. The twentieth century was a period shaken by wars and deeply marked by authoritarian political experiences and the repression of democratic institutions. In the wake of this experience, there emerged a growing awareness that safeguarding the basic rights established in constitutions and the constitutional balance of powers meant being able to exert control even over the highest expression of the will of representative organs, including parliaments, and thus on the laws themselves. It was generally believed, however, that the normal organs of the judiciary were not equipped to carry out this sort of control. Such organs are authorized to apply the laws, but not to judge them. This is because they consist of unelected career magistrates who are not in any way representative and who lack the necessary political sensitivity to carry out this task. Constitutional review of a statute is not the same as review, for example, of the legality of an act of executive power: many constitutional provisions are generic, and to apply a constitution is never merely a technical operation. On the other hand, constitutional review could not be entrusted to the same Parliament that enacts the statutes under review, because “the reviewed cannot review himself.”

Therefore it was decided that the solution would be to create a special tribunal or court, operating pursuant to judicial procedures, and made up of legal experts chosen specifically for this function, elected by Parliament or by other supreme State institutions for fixed tenures, not removable at will, and independent of the political branches. This institution was entrusted with reviewing the constitutionality of statutes and of voiding them if they were unconstitutional. In this way constitutional review was established—that is, a judicial rather than a political activity (given the character of the procedures used), and an activity designed to ensure the observance of constitutional provisions. Although not a political activity in the strict sense of the term, the exercise of constitutional review is an



The constitutional judges in office (February 2019), in the Salotto Verde; from left, second row: judges Antonini and Sciarra, the Vice Presidents Morelli and Carosi, judges Amato, Coraggio, Amoroso, Prosperetti, Barbera, the Vice President Cartabia, the President Lattanzi, judges de Pretis, Zanon, Viganò, Modugno



activity which works in proximity with, and interacts with, the supreme political institutions that exercise legislative power.

An Arbitrator of Constitutional Conflicts

In addition to acting as “judges of the laws,” constitutional courts are often called on to exercise other functions, generally associated with guaranteeing the observance of constitutional rules. These are primarily the functions of resolving controversies between the central State and federated States or territorial communities (e.g., the Regions), thus maintaining a balance between the center and periphery, and of resolving conflicts between different branches of the central State.

The Constitutional Court is also called on in cases where there is a need for an impartial organ to resolve questions for which ordinary courts are deemed insufficiently authoritative to pass judgement.

To sum up, in nearly all contemporary constitutional contexts it is generally recognized that, in the name of the constitution, there is a need for mechanisms of judicial review and impartial arbitration with respect to the supreme activities of the State and its institutions. In countries that have followed the American model, it is the ordinary supreme courts that have these powers, whereas in countries that have followed the European model (including Italy), it is the constitutional courts or tribunals. Supreme or constitutional courts therefore have the task of guaranteeing the observance of the constitution, independently and impartially.

The Constitutional Court meeting in closed session in the Salone Pompeiano (February 2020)



How the Court Was Born

When the Constituent Assembly set about drafting the Constitution of the Italian Republic, it made a fundamental choice in attributing a “supra-legislative” force to the new Constitution, so that “ordinary” laws could not amend it or derogate from it. The rights and obligations ratified by the Constitution, and the rules that guarantee the balance of power among the various constitutional organs, were thereby protected even from laws of Parliament. To safeguard this choice, the Constituent Assembly provided in a section entitled “Guarantees of the Constitution” (Title VI, Part II) for a Constitutional Court. The Court was charged in Article 134 with the task of passing judgement “in cases relating to the constitutional legitimacy of laws, and acts having the force of law, of the State and the Regions; on conflicts regarding the allocation of power among the branches of the State and on those between the State and the Regions, and among the Regions; and on charges brought against the President of the Republic, according to the Constitution,” in cases of high treason and attacks on the Constitution.

This last duty was originally accompanied by the task of passing judgement on government ministers for crimes committed during the execution of their duties. However, this power was exercised only once, in the Lockheed bribery case in 1979, and was subsequently abolished by a constitutional amendment in 1989 which transferred this duty to the ordinary courts.



Another of the Court's functions, added with Constitutional Law 1/1953, is to review the constitutionality of requests for abrogative referenda (*referendum abrogativo*), in which citizens are called upon to vote whether to repeal a statute.

The Slow Implementation of the Court

The Constitution itself provides for the institution of the Court and its basic functions (Art. 134), its composition (Art. 135), and the effects of its decisions on statutes (Art. 136). Further regulation of the Court and its activities was, however, deferred to subsequent constitutional laws and ordinary laws which had to be approved before the Court could concretely be formed and begin to function. In February 1948 the Constituent Assembly approved Constitutional Law No. 1/1948, which stipulates who can petition the Court and in what way. However, it took another five years before Constitutional Law No. 1/1953 and ordinary Law No. 87/1953 completed the regulation of the Court. Following new elections in 1953, further delays were caused by problems in reaching the agreement necessary to elect the five judges nominated by Parliament by the necessary three-fifths majority. The first full membership of the Constitutional Court was only finalized in 1955. At this point the Court was able to establish itself in the *Palazzo della Consulta* and to set up the necessary organizational structures, adopting its internal regulations known as the "*norme integrative*." Thus, seven years after the Constitution came into force, the Court was finally able to function.

The First Hearing and the First Question

The Court's first public hearing (*udienza pubblica*) was held on April 23, 1956. It was presided over by the Court's first President, Enrico De Nicola, who had been the provisional Head of the Republic and, for a few months, the President of the Republic.

The first question regarded the constitutionality of a provision of a 1931 law on public security which required police authorization to distribute leaflets or to put up posters, and which punished any unauthorized distribution or posting. The issue was raised by no fewer than thirty different criminal judges throughout Italy, who questioned the compatibility of the law with Article 21 of the Constitution, which guarantees freedom of expression. Arguments that the law was unconstitutional came from some of the most illustrious Italian lawyers and jurists of the time, including Costantino Mortati, Vezio Crisafulli and Giuliano Vassalli, as well as

President Cartabia meets the press after his election (11 December 2019)



Piero Calamandrei, a member of the Constituent Assembly and an expert in procedural law and constitutional adjudication, and Massimo Severo Giannini, former Head of Cabinet at the Ministry for the Constituent Assembly.

As an initial matter, the Court had to decide the controversial issue of whether its jurisdiction to review the constitutionality of laws extended to acts passed prior to the enactment of the Constitution, such as the 1931 law at issue, or whether it was instead limited to laws approved afterwards, as the Advocate General of the State argued. This issue was of crucial importance given that a large portion of the legislation of the Italian state in force at the time and for many years to come had been enacted during and before the Fascist era. Limiting the scope of constitutional review to post-1948 legislation would have meant *de facto* preventing the Constitution from becoming truly operative in many sectors, thus postponing the realization of many constitutional guarantees indefinitely. The Court ruled that all laws, enacted both before and after the 1948 Constitution, could be reviewed and had to be declared invalid if found to be incompatible with the Constitution. The principles of the Constitution refer not only to the legislature, but to everyone—citizens, public authorities and judges alike. The contested legal provision on public security was thus declared unconstitutional. It was this seminal Decision No. 1/1956 that paved way for innumerable later judgements which “swept away” many provisions in old laws that were incompatible



with the new Constitution, in fields where Parliament had failed to do so on its own.

Some Basic Data

Since 1956 the Court has issued literally thousands of decisions.

In the last three years, between 300 and 500 cases were brought before the Constitutional Court each year; in the same period, the Court decided and published (grouping together similar cases) on average approximately three hundred decisions. The extraordinary work commitment required to carry out the Lockheed bribery trial in 1978 and 1979 created delays in the Court's work on other cases. This backlog was cleared with an exceptional organizational effort, carried out under the presidency of Francesco Saja. The Court has since managed to keep up with the flow of cases filed each year.

At the beginning of the calendar year the President of the Court makes his annual public address and presents a report on the work of the Court during the previous year, giving an account of the most important decisions and statistics on the Court's activities. The reports are printed and are available for the public as are the decisions of the Court and the acts containing the Court's judgements which are published every Wednesday in a special issue of the Official Journal (*Gazzetta Ufficiale della Repubblica*). Today, the texts of the Court's decisions, reports and other documentation can be consulted on the Court's website (www.cortecostituzionale.it), as well as in other specialized publications and databases.

The Composition of the Court

According to Article 135 of the Constitution, the Court is composed of fifteen judges. The system of nominations is a delicate balance designed to harmonize various needs: to assure that the judges are as impartial and independent as possible; to guarantee the necessary level of technical legal expertise; to bring a range of different knowledge, experiences, and cultures to the Court, as well as political sensibilities that are not too far removed from those represented in the political institutions of Italy.

The judges are selected from a restricted category of legal practitioners with a high level of training and experience. These are judges or retired judges from the highest levels of the judiciary (*supreme magistrature*) – that is, the Supreme Court (*Corte di cassazione*), the Council of State (*Consiglio di Stato*), and the Court of Auditors (*Corte dei conti*) – law professors, and lawyers with at least twenty years' experience in legal practice. There is no maximum or minimum age limit, but given the requirement of belonging to the senior magistracy, having a high-level academic qualification or long professional experience, judges tend to be appointed to the Court in their fifties, sixties and seventies.

Each judge is appointed for a nine-year term of office (with no age limit) with a mandate that cannot be renewed or extended; at the expiry of the term of office, a judge retires or returns to his former profession. The term of office is longer than that for any other elective mandate provided in the Constitution. This helps guarantee the independence of the constitutional judges, particularly from the political bodies that name a portion of the Court. If a judge leaves office prior to the end of his mandate, due to death, resignation or removal, his substitute is named for nine years by the same body that originally appointed him. As terms have ended early over the years, the fifteen seats on the Court nowadays generally come up for appointment at different times, with the result that the composition of the Court changes gradually. In this way, the Court's jurisprudence may change over time, but always subject to fundamental underlying continuities.

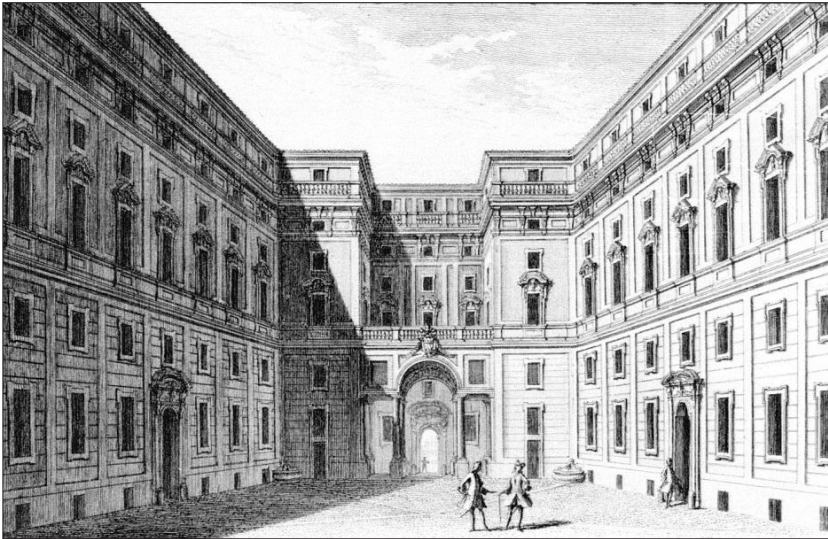
One of the fundamental characteristics of the Constitutional Court is that it is a collegial organ whose decisions are taken collectively, not by a single judge or a few judges.

Who Selects the Judges?

In apportioning the power to nominate the members of the Court, the Constitution strikes a delicate and complex balance among the various needs mentioned above. Five judges – a third of the Court – are elected by members drawn from the three superior tribunals (three by the Supreme Court, one by the Council of State, one by the Court of Auditors), by



The Courtyard of Honour of the Palazzo della Consulta as seen in a print by Bernardo Sansone Grilli



absolute majority vote of the electoral body; if no such majority is obtained, the judges are chosen through a run-off election between those candidates receiving the greatest number of vote. Another five judges are elected by both Houses of Parliament sitting in joint session, by two-thirds majority vote in the first three ballots, and three-fifths in all subsequent ballots. The last five are chosen by the President of the Republic.

The judges selected by the magistracy bring their own particular legal skills and experiences, and are in no way connected with the choices of political bodies.

The judges nominated by Parliament (chosen for the most part from academia and the legal profession, but sometimes from among active judges) are more likely to reflect the experiences and political sensibilities found in the representative assemblies and, often, have been Members of the Senate or the Chamber of Deputies. However, the high number of votes required to elect them means that it is not simply up to the parliamentary majority to choose them; normally agreements must be reached among the different political forces in Parliament. While it is true that particular judges appointed by Parliament are indeed chosen by the majority or the opposition, they must then be accepted by both to reach the requisite number of votes. Reaching such a consensus frequently takes a great deal of time and a series of ballots. For this reason when new judges need to be appointed to the Court by Parliament the elections are often delayed, and the Court continues to function with reduced ranks, that is, with fewer than fifteen judges, but never with less than eleven. The judges nominated by Parliament are not representative of, or directed by, the political forces that put forward their nomination, but are, like all the

The honorary stairway viewed from the courtyard of the Consulta in a print by Bernardo Sansone Grilli



other members of the Court, independent of the political parties and of the Parliament that elected them.

The five judges appointed by the Head of State are normally chosen to achieve some degree of balance with respect to the choices made by the Parliament, so that the Constitutional Court mirrors the political, legal and cultural pluralism of the country as closely as possible.

The variety of legal environments from which the judges are drawn and the range of political forces that nominate them encourage the presence of different experiences and specializations (such as criminal, civil, or administrative law), and different backgrounds and attitudes. What counts most of all, however, is that the judges are all equal within the Court, and each makes his own individual contribution to its work.

There are no groups or “parties” in the Court: each judge puts his own experience and ideas to the service of the Court, regardless of his prior position or the source of his appointment.

Indeed, the limited number of judges, the collegial method used and the exclusive nature of the commitment to the work of the Court (during the term of office judges cannot carry out any other professional activity, and much less political activity), the length of the mandate and the long-standing habit of working together mean that the dynamics of the Court are closely bound up with the personalities of its members. At the same time, since the decisions of the Court are always collectively made, they must always be considered the fruit of a collaborative process that integrates the individual contributions of all the judges.



The Rights, Obligations and Prerogatives of Constitutional Judges

In order to ensure the judges' independence (as well as the appearance of their independence), and their dissociation from the interests involved in Court proceedings, members of the Constitutional Court enjoy special prerogatives during their term of office, but are at the same time subject to special obligations.

Constitutional judges cannot be called on to respond officially for the opinions expressed or votes cast in the exercise of their duties, and cannot be subjected to criminal proceedings or deprived of their freedom without the prior authorization of the Court. The Court supplies the judges with all the support necessary to carry out their work. Finally, the judges enjoy a salary which is stipulated by law to be commensurate with that of the President of the Supreme Court, the highest-level career magistrate.

On the other hand, a constitutional judge may not engage in any other professional activity. This means that those who were magistrates or university professors (if not already retired) must interrupt their career for the duration of their mandate (they are considered "*fuori ruolo*"), and only return to their former position after leaving office. Those who were active lawyers cannot practise during their term, or remain members of the bar. All forms of paid activity, with the exception of receiving copyright royalties, are prohibited. Constitutional judges are not only debarred from belonging to political parties, but they may not take part in any political activity.

For the same reason, and as a matter of long-established practice, members of the Constitutional Court refrain from publicly expressing opinions, unless in an academic context, or from giving public interviews on political issues or on questions pending before the Court.

The need for the constitutional judges to keep the Court's inner workings confidential does not release the institution from the duty to make the meaning and scope of its activities known to the general public. As for all decisions taken by judicial bodies, those of the Constitutional Court too are subject to the obligation to provide a reasoning, so that it will always be possible to know and consider the reasons underlying them. However, to ensure that the inevitably highly technical nature of the Court's work does not prevent a non-legal audience from gaining adequate understanding of its decisions, for some time now, the Court has produced "press releases" on its most important decisions, which it circulates on social and traditional media.

In addition, pursuant to longstanding tradition, the President of the Constitutional Court meets members of the press every year to present what could be called an "institutional stocktaking" of the Court's activities. During a special hearing, the President expounds the contents of the

most important decisions of the year in question, illustrating emerging trends in case law and answering questions by journalists.

Especially in recent years, particular attention has been paid to the Court's use of new technologies, with the restructuring of its website and the use of social media.

Thanks to the Court's opening to civil society, especially with the "Viaggio in Italia" ("Voyage through Italy") initiative, there are many more opportunities for the Court's President and judges to publicly express their views, as well as to explain and clarify the meaning of the Court's most important decisions, all the while observing the duty to refrain from putting their personal opinions before the choices made by the Court.

At the end of his mandate a judge ceases all his functions within the Court and cannot be re-elected. A retiring judge is conferred the title of "judge emeritus," and is entitled to a pension (or to the consolidation of the services rendered as judge with that of the profession in which s/he returns) and to end-of-service compensation.

The Presidency of the Constitutional Court

The Court elects its President from among its members for a three-year renewable term of office (until 1967, the term was of four years and was also renewable). However, since no judge can remain a member of the Court after the expiry of his nine-year mandate, it is often the case that the President – who is normally chosen from amongst the most senior colleagues in terms of his tenure on the Court – ends his term of office as judge, and hence as President, before three years have passed. This accounts for the relatively short length of the terms of many Presidents of the Court, so that during the Court's sixty years of existence there have been forty Presidents.

The President is elected by the judges in a secret ballot, by absolute majority (that is, eight votes in the case of a full Court), and if necessary, a run-off election between the two judges with the most votes after the second ballot. To prevent the outcome of the vote of each individual judge from being known outside the Court, the ballot papers cast in the election are immediately destroyed following the vote. However, recently, the practice of publishing a press release, reporting the name of the President thus elected and the number of votes cast in his or her favour, has been adopted.

The autonomy enjoyed by the Court in the choice of its President reinforces its collegiality. The President has precisely the same authority as the other judges in the decisional process, except that his vote breaks any tie when the judges are evenly divided. He is *primus inter pares*, whose powers basically consist of assigning the role of case rapporteur among the various judges, drawing up the Court calendar of cases to be heard at each sitting, and convening and directing the work of the Court. He also officially rep-



resents the Constitutional Court (enjoying the fifth highest- ranking State office after the President of the Republic, the Presidents of the Houses of Parliament and the President of the Council of Ministers), and supervises its administrative activity (which is managed on a day-to- day basis by a Secretary General).

One or two Vice-Presidents, appointed by the President of the Court, stand in for the President in the event of his absence for any reason. The President's Office (*Ufficio di Presidenza*) has authority to regulate various organizational and administrative tasks, and committees of judges are set up to deal with specific administrative functions (such as the preparation of regulations, and management of the research service, the library, and personnel).

The Administrative Organization of the Court

While the procedures used to carry out the Court's activities are regulated by both constitutional laws and statutes, the Constitutional Court – like the President of the Republic and the two Houses of Parliament and, in several respects, the President of the Council of Ministers – organizes its own activity autonomously and possesses the bureaucratic structures necessary to do so.

The Court has its own official headquarters and an independent budget supplemented by funds assigned by the State budget (52.7 million euros in 2016) and published on the Court's website (www.cortecostituzionale.it). The Court independently decides on its expenditures, and its internal organs are free from any external financial auditing or other interference.

The Court has its own administrative support structures for a range of activities, managed in accordance with its own internal regulations, including a records office, the *ufficio ruolo* which assists the President in the allocation of cases to reporting judges, a research service, a library, and departments for accounting, purchasing, contracts, and personnel management. The overall administration of the Court is carried out by the Secretary General; this is a non-career position appointed by the Court from among senior magistrates, directors of public administration and other experts. Moreover, each judge is assisted in his work by up to three personally chosen assistants. These are research assistants selected from the magistracy or academia whose job it is to prepare research and documentation on the issues to be discussed by the Court. Judges also have a secretarial staff that provides administrative support. Altogether, the Court has a permanent staff of approximately 300 people. The Court enjoys autonomy in setting the legal and economic terms of employment for its staff, and is authorised to adjudicate any labor-related claims they may raise. Such self-government is a privilege that the Italian system has traditionally also accorded to the constitutional bodies.

Review of the Constitutionality of Laws

Having described the machinery of the Constitutional Court, let us now examine in detail the functions of the Court, which are outlined in general terms by the Constitution and by constitutional laws.

The first and, historically, the most important task of the Court is to rule on controversies or disputes “regarding the constitutional legitimacy of the laws and acts having the force of law issued by the State and the Regions” (Art. 134, Italian Constitution). The Court is called on to review whether legislative acts have been enacted in accordance with the procedures stipulated in the Constitution (“formal constitutionality”), and whether their content conforms to constitutional principles (“substantive constitutionality”). Legislative acts cover not only statutes enacted by Parliament, but also delegated legislative decrees (*decreti legislativi delegati*, enacted by the Government pursuant to authority delegated by Parliament), decree-laws (*decreti-legge*, emergency decrees adopted by the Government which expire unless converted into permanent law by Parliament), and laws issued by the Regions and the Autonomous Provinces, which have their own legislative power in the Italian constitutional system. By contrast, enactments that are subordinate to statutes, such as administrative regulations, are not subject to direct constitutional review by the Court, but are instead subject to review for conformity with statutes by the ordinary courts. Insofar as statutes must conform to the Constitution, and regulations must conform to statutes, such regulations should also conform to the Constitution, without there being any need for constitutional review of the regulations themselves by the Court.

Who Invokes the Jurisdiction of the Court?

One of the most discussed issues regarding the Court in its capacity of “judge of the laws”, has been the question of “access” to the Court. As is generally the case with all judges, the Constitutional Court is not free to decide autonomously which questions to examine, but must be called on to do so through specific procedures. Who is authorised to apply to the Court to pass judgement on the constitutionality of a law? An individual citizen, the Head of State, the Government, parliamentary minorities, or a court?

The Constituent Assembly did not resolve this issue immediately, but instead deferred the matter to a subsequent Constitutional Law, approved by the Constituent Assembly in February 1948 (Constitutional Law No. 1/1948). Article 2 of the law stipulated that – in addition to Art. 127 of



the Constitution, which authorizes the Government to contest regional laws alleged to be incompatible with the Constitution before the Constitutional Court – the Regions can in turn contest laws of the State deemed prejudicial to their own autonomy guaranteed by the Constitution, within a relatively short time after the publication of these laws. This provision has now been integrated into the new text of Art. 127 of the Constitution, with the amendment of Title V of Part II, introduced by Constitutional Law No. 3/2001.

In such cases constitutional proceedings are designed to resolve disputes between the State and Regions regarding the limits of their respective powers, and thus to defend the autonomy of the Regions from encroachment by the central government, and to protect the legislative power of the State against the misuse of power by regional legislatures. All this occurs within the framework of a “regionalized” government, where the Constitution is responsible for allocating power among the State and the Regions, and the Constitutional Court serves as a referee in any controversies that arise between these entities.

Above all, the Constituent Assembly made a fundamental choice as regards the general system of the judicial review of the constitutionality of laws; it stipulated that a law could not be directly challenged before the Court by any party, but that questions of a law’s constitutionality could only be raised by judges in the course of applying that law. Thus, any judicial authority – from the justice of the peace of a small town, to the tax commission of a Province, up to the Supreme Court, or even an official arbitrator – who must resolve a dispute that requires the application of a legal provision, where there is a doubt as to that provision’s constitutionality, has both the power and the duty to certify that question to the Constitutional Court.

The judge cannot simply decide the case as if the law did not exist, that is, by ignoring it, even if he is convinced of its unconstitutionality, but neither is he required to apply that law “mechanically”: if he is unable to confer upon the law an interpretation that enables it to conform to the Constitution, he must instead put the question of constitutionality to the only organ with authority to resolve it—that is, the Constitutional Court. Thus, there are as many ways of access to the Court as there are judges, at all levels. To sum up, one can say that a judge is not obliged to apply a law where there is a doubt as to its constitutionality, but that only the Constitutional Court can free him definitively from the obligation to apply that law by declaring it unconstitutional and thus allowing him to decide the case without taking that law into account.

This type of constitutional review is referred to as “incidental,” insofar as the question of a law’s constitutionality arises as an “incident” to ordinary legal proceedings, and is certified to the Court by the judge presiding over those proceedings.

Ordinary Judges as “Gatekeepers” of Constitutional Judgement

In an ordinary case, the question of the constitutionality of a law can be raised by either of the parties (including the defendant or prosecutor in a criminal case, the plaintiff or defendant in a civil case, the claimant or administration in an administrative case), or can simply be raised *sua sponte* by the presiding judge, that is, without its being specifically requested by any party. If one of the parties requests that the question be referred to the Constitutional Court, the judge is not obliged to do so automatically. Rather, he must engage in a two-step analysis.

In the first place he must offer a reasoned decision as to whether the proposed question is legally relevant in the case at bar; that is, whether the law, the constitutionality of which is in question, is necessary to decide the case: otherwise the question is deemed irrelevant. In the second place, he must determine whether, in his opinion, the challenge has any merit. If the question of the constitutionality of the law appears to be clearly without foundation, the judge must reject the request for constitutional review by the party on the grounds of “manifest unfoundedness.” Where this is not the case, the judge is not permitted to resolve the question himself, and must refer it to the Constitutional Court.

To use an expression coined by Piero Calamandrei, ordinary judges serve as “gatekeepers” of constitutional adjudication, with the power to open or close the door that allows access to the Court.

Initially, it was feared that such a power on the part of judges would effectively impede access to, and the intervention of, the Court; that is, that the “door” would prove too “narrow.” Experience has shown, however, that far from keeping the door closed, ordinary judges open it with great frequency.

The Court and Ordinary Judges: A Permanent Dialogue

Far from leaving the Court without work, giving the ordinary judges the function of filter or gatekeeper for questions of constitutionality has generated a significant volume of constitutional litigation. Indeed, in legal proceedings, statutes are considered not only in the abstract, but also in relation to their possible applications and consequences in concrete cases.



What is discussed before the judges is not so much the abstract nature of the rule of law, as the concrete nature of human events. The problems of constitutionality are thus multiplied given the infinite variety of situations to which the laws apply.

Moreover, the Constitution is not simply a compilation of detailed legal provisions; it is a text that expresses the underlying principles that inspire the entire Italian legal system. Thus, the constitutionality of a law is rarely a question of a simple conflict between legal provisions and constitutional norms, but of the way in which constitutional principles are rendered concrete in particular legal rules and their application in the real world.

For example, a great many questions (indeed, the greater part of them) are raised by invoking the constitutional principle of equality cited in Article 3 of the Constitution. In order to establish whether or not this principle has been upheld, one must ask whether a particular legal rule, in its application or effect, conforms to the general but important principle that every individual has equal value and that legal distinctions among them must be reasonable. There is rarely a distinct line separating, on the one hand, legitimate distinctions adopted by the legislature in efforts to achieve ever-changing policy objectives from, on the other, constitutionally-prohibited discrimination.

Furthermore, the meaning of different legislative provisions and the way in which these interact are not always clear. There are often a variety of ways to resolve legal problems, and it is the job of the judges to do so by interpreting and applying the laws appropriately and in the light of constitutional principles. It is not unusual for judges, when uncertain as to how to interpret particular statutes, to refer to the Constitutional Court questions that could be avoided by interpreting the laws in accordance with constitutional principles. However, it is not unusual for the Court – the task of which is not to interpret statutes, but to review their constitutionality – to respond by indicating the most correct interpretation, or inviting the judge to do so himself.

This ‘dialogue’ between the Constitutional Court and the thousands of ordinary judges, which represents the greater part of constitutional jurisprudence, is made possible by the system of incidental review of laws adopted by the Constituent Assembly.

The Court and Legislative Discretion

When, therefore, Parliament makes a questionable or controversial legislative choice, which a judge, called on to apply it, refers to the Court for

a review of its constitutionality, the Court must strike a delicate balance between its duty to engage in judicial review (to guarantee the observance of constitutional principles, even against the wishes of a parliamentary majority), and respect for the legislature's right to make political choices which it considers to be in the best interests of the country, and which the Court has no power to obstruct even if it considers them unwise.

The Court is not a third legislative chamber, to which one can petition to contest or amend legislative choices made for political reasons by elected representatives. The Court's job is to maintain "boundaries." If the legislature remains within the limits of the Constitution (which leave ample room for legislative freedom of action), the Court has no power to condemn its actions, even if these appear to be inadequate or mistaken. If, however, the legislature goes beyond those limits, it is the Court's job to condemn the law or to bring it back within those limits, in order to avoid a violation of the Constitution.

The Time Factor

The "incidental" system of constitutional review means that statutes cannot simply be brought immediately and directly before the Court for review by anyone who claims they are unconstitutional. There must be a pending case in which a judge needs to apply the statute and therefore cer-



The Palazzo della Consulta in a famous etching by Giovanni Battista Piranesi



tifies the question of its constitutionality to the Court. It sometimes happens that the precise meaning of a law becomes clear only over a great deal of time, as it is successively applied in concrete cases. Years may pass before a particular legislative provision of dubious constitutionality is considered by the Court, simply because no judge has had occasion to apply that law. Therefore, an outdated but rarely applied law might be declared unconstitutional decades after its enactment, and even decades after the Constitution came into effect and the Constitutional Court began its work. An example is Article 569 of the Criminal Code of 1930, which automatically imposed the ancillary punishment of loss of parental authority – today, responsibility – upon parents who were found guilty of crimes against the state of family. The provision was declared unconstitutional only with Judgement No. 31 of 2012 and Judgement No 7 of 2013, in which it was stated that the automatic infliction of the ancillary punishment prevented judges from realistically evaluating the interests of minor children in maintaining a balanced and continuous relationship with both of their parents.

The Decisions of the Court

When the Court reaches a decision on the merits of a certified question regarding the constitutionality of a legal provision, it issues a decision that either sustains or rejects the challenge. A decision sustaining the challenge, which declares a legal provision unconstitutional, is known as a *pronuncia di accoglimento*; a decision rejecting the challenge is known as a *pronuncia di rigetto*.

In some cases, the Court does not reach a decision on the merits of the constitutional question and instead finds the question “inadmissible” for any of several reasons. For example, a question is inadmissible if the certifying judge has not indicated the reasons why resolution of the matter is relevant in the case over which he is presiding, or if he has proposed it in an inherently contradictory way, or if the question does not involve an act having the force of law. In the case of a direct appeal in disputes between the State and the Regions, a constitutional question may be inadmissible if the deadline for lodging an appeal has passed, or if the petition fails to adequately identify the specific object of the appeal. This type of declaration is not unusual, especially in response to certified questions, given the large number of questions raised, as well as a common tendency among judges to certify questions that ultimately turn on interpretations of law rather than questions constitutionality.

At other times, the Court does not reach a decision because, in the meantime, some legislative innovation may have rendered the Court's decision superfluous. In such circumstances, the case file is returned to the judge who originally certified the question, so that he can decide whether to re-propose the question in the light of the new law.

Declarations of Unconstitutionality and Their Effect

When the Court sustains a constitutional challenge (that is, issues a *sentenza di accoglimento*), it declares a law unconstitutional. In this case the law in question automatically loses effect from the day after publication of the Court's decision in the *Gazzetta Ufficiale*, in accordance with Article 136 of the Constitution. That means that the law can no longer be applied by any judicial organ. The Court's declaration is definitive and generally applicable, in that its effect is not limited to the case in which the question was certified. Parliament may enact another provision to take its place, but cannot enact a provision which is identical to the one declared unconstitutional. Parliament can override a declaration of unconstitutionality only by amending the Constitution, thus rendering constitutional the legal provision which was formerly unconstitutional. To do so, Parliament must follow the special procedures prescribed for constitutional amendments laid down in Article 138 of the Constitution. And in no event may an amendment alter the fundamental principles on which the Constitution is based, such as the Republican form of the State (Art. 139), or the inviolable rights of the individual (Art. 2).

It is often the case that a declaration of unconstitutionality affects only a portion of a law which is deemed incompatible with the Constitution, leaving the rest of the law intact. In order to reduce the risk of a "legislative vacuum" produced by a declaration of unconstitutionality, the Court carefully describes in its judgment the portion of the law that is abrogated, and sometimes even identifies the provision that will replace it, extrapolating either from the Constitution itself or from the body of national law. These methods have led to talk of "manipulative" or "additive" judgements in the sense that the Court somehow rewrites the law, or adds new elements – always drawn from the Constitution or from other laws – into the existing law in order to make it compatible with the Constitution.

It should be noted that a declaration of unconstitutionality has general effect beyond the case in which the question was certified. Not only does such a decision establish a new legal standard that applies to future events, but it also precludes the application of the unconstitutional provision to



past events. To protect established expectations, such a decision has no effect on situations where the effects of the invalidated provision are already entrenched as, for example, when they can no longer be contested in court because a final judgement has been issued, or because a statute of limitations has expired. By contrast, if the Court invalidates a substantive criminal provision that proscribes certain conduct, not only is the law annulled, but final convictions arising from that provision, and for which a sentence is still being served, cease to have effect.

Decisions Rejecting a Constitutional Challenge

When the Court rejects a constitutional challenge (that is, when it issues a *sentenza di rigetto*), it declares the certified question “unfounded,” and the law remains in force. In contrast to declarations of unconstitutionality, however, declarations of rejection do not have a general, conclusive effect, insofar as the same claim can be raised subsequently in another case, perhaps using a different line of legal reasoning or argumentation, and the Court could agree with such a suggestion of unconstitutionality on the basis of the new argument or simply by rethinking its prior position.

The Court does not frequently contradict its own judgements, but this sometimes occurs insofar as both the composition of the Court and – within certain limits – the interpretation and application of contested constitutional provisions, change over time. For example, the law that made adultery by a wife punishable as a criminal offence was judged not unconstitutional in 1961 (Judgement No. 64/61), but was subsequently declared unconstitutional in 1968 in that it violated the principle of the moral and legal equality between spouses established by Articles 3 and 29 of the Constitution (Judgement No. 126/68).

Moreover, the case law of the Constitutional Court – like that of any decision-making body the composition of which changes gradually over time – has an underlying continuity of theory and practice which is gradually enriched and refined by an incremental process that clarifies, adjusts, and elaborates the details of constitutional principles. Changes in constitutional case law are also linked to those changes taking place within society and legal culture which reveal changing attitudes and needs. The Constitutional Court, which operates in a concrete historical context, is not immune to the effects of such change, but this does not mean that it is necessarily subject to the whims of public opinion, as this would contradict the role of judicial review as a safeguard of the Constitution.

Interpretative Decisions

The Court frequently rejects claims that a legal provision is unconstitutional not because such claims are unfounded as a constitutional matter, but because the presiding judge has incorrectly interpreted the legal provision, and where a different interpretation would render the provision constitutional. This occurs in the case of so-called “interpretative” decisions (*sentenze interpretative*) where a given legal provision lends itself to differing interpretations, and is premised on the Court’s established principle that the law must, whenever possible, be interpreted in conformity with the Constitution.

Interpretative declarations thus endorse a “constitutional” interpretation of a given law, but they are formally binding only on the judge who certifies the question. Other judges are free to interpret the law differently. Generally speaking, however, the judiciary tend to conform to the interpretation of the Court if this will prevent the law from taking on an unconstitutional meaning. According to case law recently handed down by the Court of Cassation, if the Constitutional Court has ruled out a given interpretation, judges (other than the referring judge) are not formally precluded from applying that interpretation to the law. However, it is recognised that the interpretive decision gains authority, including in relation to the unfoundedness of the question of constitutionality of the law. Therefore, usually, should judges deem it impossible to adopt the alternative interpretation given by the Court, they may raise the question of constitutionality anew; and the Court may then sustain the constitutional challenge to the law, recognising that the case law of the ordinary courts does not accept the interpretive solution that would save it from unconstitutionality.

This is part of the Court’s permanent dialogue not only with the judiciary but also with the legislature. At times the Court addresses itself to the legislature in the form of a “warning” or *sentenza di monito* which contains suggestions and guidance for resolving legislative issues in closer accord with the Constitution.

Disputes Arising Between the State and the Regions, and Between Regions

There is another way, apart from certifying questions, to refer a law to the Constitutional Court for constitutional review. In the case of constitutional controversy arising between the Regions and the State, the Government can appeal directly against a regional law, and a Region can



appeal directly against a national law or a law enacted by another Region. In these cases, a judgement follows the same rules, has the same range of possible outcomes, and produces similar effects to those discussed above.

A different appeal mechanism applies when a controversy arising between the State and a Region or among Regions regards not a law, but instead some other sort of enactment (such as a regulation, administrative act, or judicial act). The Region that alleges an encroachment on its constitutional autonomy is authorized to challenge the authority of the State (represented by the President of the Council of Ministers) or another Region. The national Government, in turn, may challenge the authority of a Region (represented by its President) on the ground that its act (as distinct from a statute) exceeds the limits of regional powers or intrudes on the powers of the State.

In such cases, the Court decides where the contested power lies, or how it should be exercised without intruding on the jurisdiction of other branches, and may, ultimately, annul the act found to be illegitimate.

Separation of Powers

Within the category of cases arising out of the separation of powers (*conflitti di attribuzione*) the Court is also called on to arbitrate “among the powers of the State,” when those organs claim that the powers assigned to them by the Constitution have been encroached upon by another branch of government. In the past, these conflicts were not subject to judicial resolution, but were left to political solutions. Because the Constitution is designed to ensure that an arbitral body impartially applies the rules governing the allocation powers, such disputes have also been entrusted to the Constitutional Court.

A conflict may arise, for example, between a judicial organ and a house of Parliament, regarding the immunity guaranteed to Members of Parliament by the Constitution; between the Minister of Justice and the Superior Council of the Magistrature regarding their respective powers over magistrates; between the Government and a public prosecutor regarding the use of classified documents (*segreto di Stato*); between a Minister and a house of Parliament that has passed a vote of no confidence against him; or between the sponsors of an abrogative referendum and the Office of the Supreme Court that reviews compliance with referendum procedures.

Even the Constitutional Court can find itself in conflict with another body, when its own powers are challenged. In such a case, because there

is no third party to serve as a referee, the Court simultaneously operates as both party and judge in the dispute.

Decisions Regarding the Permissibility of Referenda

Constitutional Law No. 1/1953 conferred an additional power upon the Court, beyond those discussed above, in that the Court must pass judgement on the permissibility of any referendum requested, pursuant to Article 75 of the Constitution by at least 500,000 voters or five Regional Councils, for the total or partial abrogation of a law or an act having the force of law of the State (*decreto legislativo*, or *decreto-legge*).

Initially, it was thought that the role of the Court in connection with referenda was limited to verifying whether the law subject to referendum belonged to one of the four categories of law not covered by Article 75 of the Constitution, that is, taxation laws, budgetary laws, laws authorizing or ratifying international treaties, and laws of amnesty and general pardon. However, in Judgment No. 16/1978 the Constitutional Court, called on to rule on the permissibility of a group of eight referenda, established that in addition to these four explicit grounds for disallowing a referendum, there are others which may be inferred from constitutional principles and from the very nature of referenda. For example, the Court has disallowed requests for referenda in which a single question incorporates several distinct items to be abrogated, thus precluding voters from independently exercising their judgment with respect to each component of the referendum. Likewise, the Court has blocked requests for referenda aimed at abrogating laws the content of which is in some way bound by the Constitution, or which cannot be amended without revising the Constitution itself. A referendum is not permitted if it amounts to an attempt to introduce new legal provisions by rewriting a legislative text rather than an attempt to simply eliminate existing provisions. Nor may a referendum seek to repeal laws required by international or Community obligations, to avoid giving rise to international responsibility on the part of the State without parliamentary approval.

The Court must rule on the permissibility of a referendum after the Central Office of the Supreme Court rules that the request complies with procedural requirements. There is no need for any party to file a petition with the Court to trigger its jurisdiction. The referendum is put to a vote only if the Court approves it.

The law stipulates that petitions for referenda, presented by September 30 each year, shall be examined by the Central Office by December 15, and by the Constitutional Court by the following January 20, so that a



vote may be held between April 15 and June 15. This is why, when requests for abrogative referenda are filed, the Court convenes a special session in January, with a particularly accelerated proceeding.

The decisions of the Court on referenda have often been at the centre of public and political debate, not only on account of the subjects of the proposed referenda, but also because of the potential impact that these may have on political and parliamentary life.

Criminal Proceedings

Given their special political implications, criminal proceedings against the Head of State or Members of the Government for crimes committed in the course of the exercise of their functions are traditionally entrusted to a special organ, or at least to special legal procedures. The Italian Constituent Assembly adhered to this tradition, establishing that the Constitutional Court should adjudicate such criminal charges. The fifteen members of the Court are supplemented in such cases by sixteen Italian citizens (lay judges or *giudici popolari*, since they are not necessarily chosen from among jurists) selected at random, specifically for the trial, from a list of forty-five people over the age of forty chosen every nine years by Parliament sitting in joint session.

Only once in its history has the Court been called on, with this full complement of thirty-one members, to preside over a case of this type: in the 1978-1979 Lockheed corruption trial, in which two former Ministers were charged.

In the wake of this experience, which blocked the other activities of the Court for a considerable period of time, it was decided that it would be better to reduce the special criminal jurisdiction of the Court to charges against the President of the Republic. For Ministers, jurisdiction was transferred to the ordinary criminal courts, subject to special procedures (Constitutional Law No. 1/1989).

A Year of Cases

Let us take the year 2019 as an example. The following references and applications were made to the Court: 248 referral orders (specifically: 22 from the Supreme Court of Cassation, 1 from the appeals courts of assizes, 18 from courts of appeal, 1 from the Regional Tribunals of Public Waters, 75 from ordinary courts, 2 from juvenile courts, 12 from judges for preliminary investigations (*giudici delle indagini preliminari*), 1 from judges of pre-trial hearings (*giudice dell'udienza preliminare*), 8 from supervision courts, 5 from supervision judges, 2 from enforcement courts, 14 from justices of the peace, 6 from the Council of State, 3 from the Administrative Proceedings Council for Sicily Region, 41 from regional administrative tribunals, 15 from the Court of Auditors – 2 from the divisions sitting in their jurisdictional capacity, 1 from the appeals jurisdictional divisions, 6 from the regional jurisdictional divisions and 6 in the context of judgments to verify the conformity of the general State accounts with the relevant Budget Law –; 6 from regional tax commissions, 11 from provincial tax commissions; 1 from military courts; 2 from arbitration chambers; 2 from the National Bar Council). Moreover, 117 questions of constitutionality were submitted by way of direct appeals (86 by the State against regional or provincial legislation and 31 by regions or autonomous provinces against State legislation); 14 cases were brought regarding allocation of powers (8 between branches of the State and 6 between the State, the regions and the autonomous provinces). Also, 1 request for an abrogative referendum was brought.

In the same year, the Court published 291 decisions (204 judgments and 87 orders). Of these rulings, the Court issued 171 decisions of constitutionality raised by way of incidental referrals, 95 decisions of constitutionality submitted by way of direct appeals, 18 decisions of constitutionality regarding allocation of powers (5 between branches of the State and 13 between the State, the regions and the autonomous provinces); and 7 orders correcting errors of material fact. No rulings were issued on the admissibility of abrogative referenda.

The number of questions of constitutionality decided is normally greater than the number of decisions issued, as may be seen in those rulings having operative parts divided into several headings. Moreover, it is not infrequent for the Court to decide several questions raised in different references or applications in rulings that, for this very purpose, are joined.

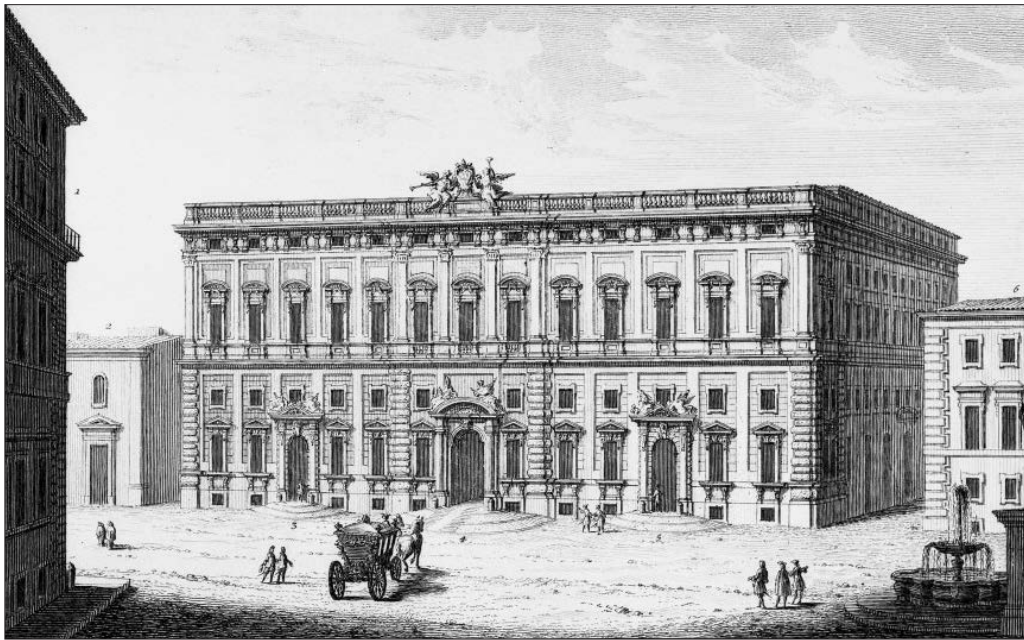
Therefore, the Court's pace of work is such as to keep pace with the incoming questions of constitutionality. This generally avoids significant backlogs from accumulating.

How Is a Constitutional Decision Made?

How does the Court reach a constitutional decision, and what course does a case follow from the time it is referred to the Court to the publication of the Court's decision?



The Palazzo della Consulta in a 18th century print by Giovanni Domenico Campiglia



Let us take one of the many questions of constitutionality raised by a judge. The judge raising the question must notify the parties involved in the proceedings and the President of the Council of Ministers (or the President of the Region with respect to regional laws), as well as the Presidents of the Houses of Parliament or the President of the Regional Council involved. The question is then submitted to the clerk's office (the *cancelleria*) of the Constitutional Court. This legal notice (the *ordinanza*) is published in the *Gazzetta Ufficiale*. A special office of the Court then examines the question in detail and researches legal precedents.

Who Can Participate?

The publication of the *ordinanza* in the *Gazzetta Ufficiale* marks the beginning of the period in which the parties involved in the legal proceedings which gave rise to the issue, as well as the President of the Council of Ministers (or the President of the Region, in the case of a regional law), can present their arguments to the Court. The parties may file written briefs until shortly before the Court officially starts to consider the case. These briefs become part of the case file that is distributed to all of the constitutional judges, together with the written opinion in which the ordinary judge certified the question to the Court.

The law provides that the President of the Council of Ministers can take part in the proceedings before the Court. This is not because the Government necessarily has a stake in the outcome of the underlying cases, but rather because at issue is the validity of a law which will be automatically voided if declared unconstitutional, and the Government is considered the representative of the unity of the State's body of law (as the President of the Region represents the unity of the Region's body of law). The President of the Council is represented in the Court by the Advocate General of the State. The Advocate General typically alerts the Court to any grounds on which the constitutional challenge should be considered inadmissible, or ultimately meritless. As a rule, he generally argues in defence of the law, but on rare occasion he agrees that the law is unconstitutional, or refrains from intervening in order to avoid taking a position.

One should note that when a judge certifies a question, the Court always decides the issue, even if no party makes an appearance. The only requisite for the Court to proceed is that the certifying judge file the legal notice. The same is not true in cases where the Court's jurisdiction is invoked directly by petitions from the State or Regions, or branches of the central State. In such cases, it is essential that there be a petitioner who pursues the case.

With the amendment to the Supplementary Rules made on 8 January 2020, the Court opened up constitutional proceedings by introducing three important innovations. First, in line with its case law, it clarified that in incidental proceedings, in addition to the parties to the pending proceedings and to the President of the Council of Ministers (and the President of the Regional Council, if a regional law is involved), others, third parties, may also intervene, provided that they hold a qualifying interest that is directly and immediately relevant to the case in question.

In addition, in line with the practice followed in other countries, the Court introduced *amici curiae*. It is now provided that all non-profit social groups and all institutional bodies bearing collective or diffuse interests relating to the issues under discussion may present brief written opinions, to offer the Court elements that may be useful to the comprehension and evaluation of the case before it.

Through the same amendment, the Court also introduced the possibility of calling renowned experts, where it considers it necessary to gain information on specific subjects.

The Constitutional Court in Session

At this point the Court can proceed with its work. On the basis of a yearlong court calendar, the President selects which cases will be discussed at each sitting, selects the constitutional judge who will report on each case (the *giudice relatore*), and stipulates the docket or case list for each sitting.

Cases may be dealt with in two ways. There can be a public hearing (*udienza pubblica*), which is a court session open to the public, where the



reporting judge (*giudice relatore*) presents the question as proposed, and the lawyers representing the parties involved in the proceedings present their arguments before the united Court. At the end of the public hearing, the Court meets again, in closed session, to decide the case.

Cases can also be dealt with directly in closed session, without prior public discussion and on the basis of the written record. This simplified procedure is used when there are no parties to the proceedings before the Court (apart from a brief filed by the Advocate General of the State or counsel for the Regional President), or even when there are parties to the proceedings, if the President of the Court considers that the question can be rejected as clearly meritless or inadmissible (e.g., on the basis of prior decisions on the same subject). The final decision, however, is always taken collectively by the Court.

In both public hearings and closed session, the Court convenes in plenary session with fifteen members (or, as recalled above, with the minimum of eleven members, if some positions are vacant or judges are absent). It is never subdivided into panels composed of only a subset of the judges. An exception is when it convenes to decide on claims filed by the Court's staff; only in these cases, the panel consists of only three judges, selected beforehand.

The relatively small number of judges permits the Court to work in plenary session. As a rule, this enables the Court's case law to develop more coherently than if it were subdivided into panels.

A Rapporteur for Every Case

The President appoints a judge as rapporteur or *giudice relatore* for each case from among the constitutional judges, normally excluding the President himself. Thus, in every hearing and every closed session, different judges alternate as rapporteurs for the discussion of the various cases being examined.

There are no fixed rules for the criteria used by the President to select the rapporteur apart from the need to distribute the work evenly among all the judges, taking into account the seriousness of each case. In practice, the President generally assigns a case to the judge who has already acted as rapporteur on cases dealing with similar problems, and who has relevant training, previous experience or specialisation (in fields such as criminal law, criminal procedure, civil law, labour law, tax law, or administrative law). These are, of course, only rough criteria, since cases may pose similar issues deriving from the application of constitutional principles even if they arise in different sectors of the law. Furthermore, there are fields of

law where constitutional questions are raised quite frequently, and which all judges must deal with at some point. For more complex and delicate cases, the choice of rapporteur may be guided by more specific criteria of the President's own choosing.

The choice of rapporteur is important because it is this judge who will, after having examined all aspects of the case thoroughly, propose how to frame and resolve the question. This choice does not necessarily determine the outcome of the case, since the opinion of the rapporteur is not always adopted as that of the Court.

Moreover, the rapporteur is not the only one to know the question in advance of the hearing and to have studied it in detail. The job of preparing the material for each case to be discussed falls to the assistant of the reporting judge, who assembles a research packet including the legal provisions at issue, relevant precedents of the Court, significant opinions by ordinary judges, and useful academic writings. The packet is distributed to all the judges, allowing each of them to prepare for the case in detail.

In more important and complex cases, the material distributed to the judges may be supplemented by research on the legislation and case law of countries similar to Italy, or of international courts, where similar questions have been dealt with. This is because constitutional principles embedded in different legal systems are often based on common ideas or approaches (a sort of constitutional common law), and thus the problems of constitutionality that arise in different countries may be similar. The Italian Constitutional Court can draw valuable suggestions for its own decisions from the experience of other constitutional tribunals.

Public Hearings

The Court meets in public session in a special room of the *Consulta*, normally every two weeks, on Tuesday morning at 9:30 a.m. Behind the horse-shoe-shaped bench sit the judges with the President at the centre, with the most senior members near the centre and those nominated more recently towards the wings. All judges wear a black robe modeled after the *robone*, the traditional garment of 1500s Siena. For solemn occasions, the judges also wear a golden medallion and the *tocco*, the traditional headpiece. At a separate bench, to the side, sits the head of the clerk's office (*cancelliere*), in a black robe. It is his task to draft the written record of the hearing. This does not contain the content of the individual oral statements, except where this is expressly requested, but simply takes note of who makes statements. Next to the clerk of the court sits the court usher (*messo*) dressed in a red cape, who calls the cases in the order decided by the President.



Facing the judges' bench is the bench of the lawyers (also dressed in black robes) who appear to address the Court. They must be lawyers admitted to appear before the "higher jurisdictions," who have been admitted to the specific Bar. They speak in the order specified by the President, after the rapporteur judge presents his report. As a rule, the judges only listen and do not pose questions to the lawyers, who present their arguments without interruption. In cases in which an ordinary judge has certified a constitutional question, the Advocate General of the State representing the President of the Council speaks last. Objections or rebuttal arguments are not normally allowed.

Behind the lawyers sit journalists and the assistants of the constitutional judges. Behind them there is seating for the public, mainly groups of university or high school students, who get a close-up view of how the Court works. Sometimes groups of those individuals with a stake in one of the cases being discussed attend the public hearing.

Closed Session

The judges deliberate on how to resolve the cases before them in closed session (*camera di consiglio*), and in total secrecy. The Court normally meets in closed session from 9:30 a.m. to 1:00 p.m. and from 4:00 p.m. to 7:00 p.m., every other week, in conjunction with its public hearings.

It is here that the Court, under the direction of the President, debates the issues to be resolved, frames possible solutions, reaches decisions, and approves opinions. If one considers that in a year there are approximately 18 weeks of closed sessions, from Monday afternoon to Friday, and for every day of sittings the judges meet for up to 6 or 7 hours, one can calculate the amount of time that they spend together in discussion every year!

One can therefore understand the sort of longstanding rapport that grows up among the fifteen constitutional judges, in an environment the rites and rules of which are reminiscent of those of a monastery. After several months, the level of reciprocal understanding (of their respective ideas and of their ways of thinking) tends to become rather intense. Since each judge serves for nine years, one can appreciate that the experience of working in the Constitutional Court leaves a deep impression on the judges, converting the group of fifteen into something more than the sum of its parts: the Court becomes virtually a person in its own right, made up of fifteen people.

During this week of group meetings, the judges normally deal first with the cases discussed in open court, turning next to those dealt with in closed session.

Discussion may last no more than a few minutes in cases where the rapporteur proposes a solution that does not meet with objections, and is therefore immediately adopted by the Court. Or it may last entire days, depending on the complexity or controversial nature of the question at issue. The judges work with the record and the research material before them, but it must be emphasised that the discussion is not based on a draft opinion already prepared by the rapporteur (as occurs in other Courts). Debate begins with a preliminary statement made by the rapporteur judge, which highlights any possible problems regarding the threshold admissibility of the question at issue. The report may end with a detailed proposal, or with a list of various possible solutions, depending on the choice of the rapporteur.

At this point the other judges may join in the discussion, starting with the question of admissibility and then turning to the merits of the case. If the question is of relatively minor importance, it is likely that only a few judges will speak; otherwise, all will offer their thoughts. In the case of more formal discussion, the judges speak in order of age, starting with the youngest, while the President speaks last. The discussion can continue, if requested, with further observations, objections, and requests for clarification. A judge may request that the discussion be postponed until a later date, or there may be a need to acquire new material in order to examine the matter in more depth. The discussion does not necessarily follow a fixed plan. Much depends on the requests made by the judges, as well as the President's direction of the debate, although he often defers to the desires of his colleagues. The rapporteur can reply to other judges' comments, or wait until the end of the hearing to conclude the debate and offer a final proposal (which does not always coincide with the proposal he presented at the beginning). It is here, above all, that one can measure the efficacy and utility of the group discussion, which can generate objections to the case as presented by the rapporteur as well as suggestions for different grounds on which to base the decision.

One must consider that the final decision of the Court consists not only of the formal judgement itself (such as a declaration of unconstitutionality, a declaration that the certified question is unfounded, or declarations that the question itself is inadmissible), but also, and sometimes above all, of the grounds for the decision spelled out in the opinion of the Court. There may be agreement on the ultimate result, but dissent with respect to the grounds for that result. The latter are important primarily because they constitute – more than the judgement itself – the nucleus of the precedents referred to in cases that the Court is called to decide in the same or similar matters in the future; and also because a single judgment might be support-



ed by reasoning that produces different effects. For example, a decision that rejects a constitutional challenge on the grounds that the impugned provision is constitutional is very different from one that declares the same question unfounded because the challenged law should be interpreted in a different way from that indicated by the judge (the so-called “interpretative judgements” mentioned above). Therefore, settling on the grounds for a decision is sometimes more important than deciding whether or not the law is unconstitutional. This may account for the determined and protracted nature of some discussions in closed session.

Majority Decisions?

Like any other group of thinking heads, the Constitutional Court can find itself divided. With fifteen judges, some dissent is likely, despite the fact that all the judges rely on the same Constitution and that their long hours of collaboration favor the formation of common views. Accordingly, the Court, like other collegial bodies, must arrive at decisions by majority vote. A formal vote is held only when there is a lack of unanimity (for example, in support of the rapporteur’s proposed resolution) or even a clear majority of similar viewpoints, or if a judge requests such a vote. The President calls the vote, thus bringing deliberations to a close.

The practices of the Court may vary depending on the styles and attitudes of the President and the other judges, but the basic goal is to achieve the broadest possible consensus among the judges. For this reason, discussions are sometimes extended to look for compromise solutions, or at least solutions that avoid sharp divisions within the Court. The compromise can often consist of a decision that does not resolve the question definitively, for example by declaring a certified question inadmissible rather than rejecting it on the merits. Less dramatically, the Court might simply narrow the sweep of the reasoning in its opinion. This practice is probably driven in part by the current lack of a vehicle, such as dissenting opinions which are published in Germany and Spain, for judges to register their disagreement with the majority view.

The general practice of the Court is to accept or reject the rapporteur’s final proposal. Sometimes, if a preliminary question emerges (e.g., regarding the admissibility of the certified question) the Court first takes a vote on the rapporteur’s proposal regarding this issue and then, if necessary, on the rapporteur’s proposal on the merits of the case. If the rapporteur proposes a series of options, ranking them in order of preference, the Court considers these proposals in the order suggested by the rapporteur. This agenda-setting power is perhaps the most significant power in the hands

of the rapporteur, whose personality can at times contribute to the formation of a majority in support of his proposal.

All judges present during the deliberations must vote for or against any proposal put to the vote; they may not abstain. Furthermore, all the judges present at the beginning of the discussion on a case, either at the public hearing or in closed session, must take part in deliberations until the end and cannot, as is often the case in political assemblies, “leave the room” to effectively abstain from voting. Finally, the composition of the Court cannot change during the discussion of a case.

If the Court is made up of an even number of judges and the vote is evenly split, then the outcome is determined by the vote of the President (or whoever presides over the sitting). This is the only occasion when the President exercises any power greater than that of the other judges. In all other circumstances, his vote is worth the same as that of the others. His influence naturally derives from his authority vis-à-vis his colleagues, but there are no internal hierarchies within the Court, only varying personalities and opinions.

Drafting the Judgement of the Court

The proceedings do not come to an end with the decision of the Court or vote of the Court in its closed conference. The judgement only becomes final when it has been drafted, approved, and signed, and the original has been filed with the clerk’s office.

The phase following the decision is thus very important and is where the grounds on which the judgement is based take shape. It can last anywhere from two weeks to several months.

Normally the judge who has served as the rapporteur on a case is responsible for drafting the opinion of the Court, and is known as the *giudice redattore*, or author of the opinion. Not infrequently, the rapporteur may be in the minority, but the general practice is nevertheless for him to draft the Court’s opinion along the lines of the majority view. On the rare occasions when the dissenting rapporteur prefers not to write the Court’s opinion, the President entrusts the task to another judge from among the majority, unless he chooses to draft it himself.

Reading the Judgement

If the decision of the Court reaches the merits and therefore is memorialized in a detailed opinion, known as a *sentenza*, the author distributes his draft to all the constitutional judges. The judges later review the draft



opinion together during a chamber conference. The author reads aloud the portion of the opinion that contains the legal analysis for the Court's decision (not the background section that sets forth the facts and the parties' arguments).

At the end of the reading, the judges (each of whom has a written copy of the text) voice their comments or objections, beginning with the general structure of the opinion, and then systematically work through each page of the draft. They discuss whether to change, add, or delete arguments, sentences, and even single words, until agreement is reached, or at least an opinion is finalized at least to the satisfaction of a majority. In cases where the majority does not agree with the draft, the author may be asked to submit another draft, or to change or add some portion. In such circumstances, the reading is postponed until a new draft is circulated.

It is therefore clear that the judges collaborate closely and engage in wide-ranging discussions in the course of drafting opinions. Even those judges who are in the minority may ask that the published opinion reflect their concerns to a certain extent. Some opinions are true compromises, while others may simply be free of any statements that may engender particular controversy among the judges. This can sometimes lead—as critical observers are quick to note—to opinions that are less than clear or more laconic, with reasoning that is more elusive than if a broader consensus had been reached.

It is important to realize that each published opinion of the Court is the product of a collaborative effort of all the judges, and not simply the opinion of an individual author. Indeed, the author may have dissented from the majority view embodied in the final opinion. In drafting the opinion, the reporting judge tries to reflect the opinions of the other judges and to encapsulate what emerged from the discussions of the Court. Commentators often err in personalizing the opinions of the Court, by crediting (or blaming) the author with their content, as if the opinions and arguments presented in them were his alone, rather than those of the Court as a whole.

Naturally, given that a single judge writes the initial draft, it retains his stylistic imprint, and the structure of its reasoning will tend to reflect the one he proposed (which, in turn, is always based on the collective will of the Court). Yet it is fairly common for the final text to contain less than what the author originally proposed, because points with which other judges disagreed may have been discarded, or because additional passages, reasoning, or nuances of argument that the author had not originally included, but which arose in the course of group deliberations.

This way of proceeding explains why the Court may spend more time debating the content of its opinion than debating how the case should be decided. In constitutional cases, the court's reasoning may be as essential as the result it reaches.

This two-step decision making process, which involves debate on both the ultimate result to be reached and the written opinion to be issued, means that the final decision of the Court exists, legally, only after the final opinion is adopted, signed and filed with the clerk's office of the Court. Until that time, the Court can revisit its initial decision, altering or even reversing it if, in later discussions, it becomes clear that the decision was incorrect. In drafting the opinion, the author may realise that there are logical or legal difficulties with the decision of the Court, or objections which were not initially taken into account. In such cases he can propose that the decision be amended. The general practice of the Court is to allow its decisions to stand – especially if a vote has been taken, regardless of whether the decision was unanimous or supported only by a majority – unless none of the members of the college object to the modification. If the Court were less rigid, the decision making process might be never-ending.

If, on the other hand, the decision taken is to be issued in the form of an order (which nevertheless should be succinctly yet adequately reasoned, given that it is a measure that establishes the “manifest unfoundedness” or the “manifest inadmissibility” of the question referred), the text written by the judge rapporteur is circulated to all the judges. If none of the judges objects orally or in writing, the order is endorsed by the President and the judge rapporteur within a few days and filed with the Court's registry, thus becoming final and public. However, all of the judges may make comments and propose changes until the text has been made final.

Dissenting Opinions

Constitutional Courts or judicial bodies in other countries allow for their members who dissent from the result reached in a given case, or even only on the grounds for that result, to draft and publish their own written dissenting or concurring opinions together with the decision of the Court. In Anglo-Saxon countries this is a result of a tradition whereby the legal decisions of collegial bodies consisted not of a unitary text, but are the sum of individual opinions drafted by each judge. In countries with other traditions, opinions or votes which differ from those of the majority also find room for expression. The jurisprudence of these courts thus includes not only the view of the majority, but also dissenting or other views. With



the passage of time, a majority of the Court may eventually adopt the views expressed in an earlier dissenting opinion, allowing for the gradual evolution of case law.

To date, such a practice has not been permitted in Italy, where the traditional ideal of a unified and impersonal judicial opinion still prevails—even if in practice the Court’s opinions are the product of a collaborative decision-making process in which not all judges necessarily agree with the majority view. Moreover, strict secrecy surrounds the Court’s deliberations, including differences of opinion that are voiced by judges, proposals made but rejected, and legal arguments not contained in the final opinion. When the newspapers report that the Court was split along certain lines, or that a decision was made by a particular majority, they are doing so solely on the basis of leaks or pure supposition. Officially, one cannot know whether a decision was made unanimously or by majority vote, by how great a majority, or how individual judges voted. For some time there has been discussion, in both academic and legislative circles, and within the Court itself, about whether or not it would be appropriate to introduce the practice of publishing dissenting opinions, and of ways in which this could be done. There is disagreement about the wisdom of such an innovation.

One argument for allowing dissenting opinions is that they would encourage clearer majority opinions, because they would need to respond directly to the arguments presented by the dissenters. Moreover, criticism of the decisions of the Court might move away from simplistic claims that the judges had simply prejudged the issues, and towards reasoned debates focusing on substantive legal arguments. This would dispel the notion that a group of judges may have prevailed based solely on their force of numbers, or based on preconceived ideas.

On the other hand, some fear that dissenting opinions would lead to an excessive “personalisation” of constitutional judgements, to the exposure of individual judges to external pressures, as well as to undermining the authority of the decisions of the Court and a reduced incentive for judges to seek the broadest possible consensus for the decisions of the Court.

Its Sister Courts

Constitutional justice is not a uniquely Italian phenomenon. The Italian Constitutional Court, though it operates within the particular framework of the Italian Constitution, has a form and role that are similar to those of constitutional courts, tribunals and supreme courts that carry out comparable tasks in other legal systems. In addition, in its work, the Court does not overlook the experience of other countries.

For some time now, the Italian Constitutional Court has developed exchange and collaboration relationships with these bodies – in particular, those of other European countries, but also with those of other parts of the world, particularly in Latin America, where Italian legal culture exerts considerable influence. The Court’s most intensive contacts are with other European constitutional courts, not only those which are similar to the Italian *Consulta* in terms of their history and experience (such as the German, Austrian, French, Spanish, and Portuguese courts: with regard to the latter three, the Court has formalized its relationship with a specific quadrilateral agreement which provides for annual meetings between judges and exchanges of documentation).

In Europe, the Conference of European Constitutional Courts has been operating since 1970. Among its activities, it organizes a congress every three years. Recently, the XVII Congress of the Conference was held in Batumi (Georgia) on 29 June-1 July 2017, on the topic of the “Role of the Constitutional Courts in Upholding and Applying the Constitutional Principles”.

The World Conference on Constitutional Justice (WCCJ) operates on a broader level. It brings together more than 100 courts from around the world with the purpose of promoting constitutional justice and the protection of human rights, which are considered key elements of the rule of law and democracy (the IV Congress of the WCCJ was held in Vilnius on 11-14 September 2017, on the topic of “The Rule of Law and Constitutional Justice in the Modern World”).

Relations among bodies with constitutional jurisdiction are also facilitated by the work of the European Commission for Democracy Through Law, more commonly known as the Venice Commission, after the city where its headquarters are located. The Commission was set up under the aegis of the Council of Europe to promote understanding of the legal systems of European countries (especially, at first,



“Quadrilaterale” meeting in Lisbon, Portugal (constitutional courts and tribunals of Italy, Spain, Portugal and France), October 2019



those of the developing democracies of Eastern Europe), and to study problems that arise in the functioning of their institutions. Said Commission reserves particular attention to constitutional justice, and the Italian Constitutional Court, with over sixty years of experience, provides a valuable contribution.

International and Supranational Courts

The Italian Constitutional Court maintains relationships with international courts that work in areas related to those within its own jurisdiction. One such body is the European Court of Human Rights in Strasbourg, which rules on claims by individuals that they have suffered violations of their human rights – guaranteed by the European Convention of 1950 – in individual member states (now 47 European states), which have not been effectively remedied through their national legal systems. Since the rights guaranteed by the European Convention

do not differ greatly from those guaranteed by the Italian Constitution, the jurisprudence of the Court of Strasbourg and that of the Constitutional Court sometimes deal with the same problems (and the case law of the two Courts does not always agree). The basic difference is that the Italian Court deals only with laws, and decides whether they conform to the Constitution, while the Court in Strasbourg deals not with laws, but with concrete violations of rights, regardless of whether these arise from the existence of a law, the misapplication of a law, acts or omissions by national authorities, or other defects in the functioning of the national system. The European Court cannot supersede national authorities, but can only order the State to remedy the violation (if possible), or to pay damages to the injured party.

Since 2007 (Judgements No.s 348 and 349), on the basis of Article 117 of the Constitution (as amended by Constitutional Law No. 3 of 2001), the Italian Constitutional Court declares that laws that contrast with the European Convention of Human Rights, as interpreted by its Court in Strasbourg, are unconstitutional.

A privileged and fruitful relationship links the Constitutional Court and the Court of Justice of the European Union, which has its seat in Luxembourg and deals essentially with acts of the European institutions and breaches of European Union law that may have been committed by Member States.

Today, Union law and the national laws of Member States enter into contact and become intertwined to an increasingly frequent and close degree, as both the Court of Justice and national courts are asked to solve legal issues that are similar, or even identical and overlapping. The Constitutional Court, too, is increasingly called upon to solve issues that are also brought to the Court of Justice of the European Union, especially since the Charter of Fundamental Rights of the European Union (approved at Nice in 2000) assumed the same rank as the Treaties on 1 December 2009. Thus, it may happen that a judge raises a doubt as to the compatibility of an Italian law both with the Constitution and with a right protected at Union level. In these cases, the Court has recently clarified (starting from Judgment no. 269 of 2017) that it is possible to have multiple judicial remedies at both national and European levels. To facilitate coordination of the many Courts involved, the legal system envisages the valuable instrument of the “reference for a preliminary ruling”, which allows national courts, including the Constitutional Court, to enter into contact with the Court of Justice when a specific case involves both



national law and Union law aspects. Recent practice shows how, through better mutual knowledge and international cooperation between Courts, it is possible to strengthen the foundations for the ideals and principles of constitutionalism – individual rights and duties, balance between the powers of the state, judicial protection – to establish themselves and to strengthen in a space that transcends national boundaries.

The Court and the Constitution

In any democracy, a basic understanding of the main institutions that sustain a nation is indispensable if those institutions are not to be viewed as distant and irrelevant. Constitutional justice is not an exclusive affair for “insiders,” but is rather one of the basic instruments with which democratic societies organise and govern themselves. It matters for all citizens.

The Italian Constitutional Court is neither a political assembly, nor a detached group of legal technicians that issues declarations on questions of interest only to specialists. Although constitutional judges are not chosen by the voters, they are not removed from the democratic life of the country and its problems, many of which give rise to constitutional questions. In the volatile world of politics, and in the ongoing process of social change and renewal, the Constitution preserves the solidity and stability of some universal points of reference shared by everyone, both majorities and minorities, which the country needs. Indeed, the Constitution has been called “the document that a people gives itself in a time of wisdom, for use in times of confusion.”

The Constitutional Court’s decisions are not those of an arbitrary will imposed on others – a will that the judges would have no legitimate authority to enforce – but instead are designed to guarantee respect for the limits within which those who make and apply the law must operate.

In the continual process of comparing opinions, in the development of case law over time, and in the attention given to the cultural and social needs which constantly and dynamically manifest themselves, the constitutional justice represents a fundamental expression of the spirit and of the ideals that Italy established with the Constitution.

A Brief History of the Palazzo della Consulta

The construction of the *Fabbrica della Sagra Consulta* was decided in Spring of 1732 on the orders of Pope Clement XII, the Florentine Lorenzo Corsini, in order to build a “new and magnificent” palace to replace the smaller and rather dilapidated building that then hosted the Congregation of the *Sagra Consulta*, the organ of ordinary, civil and criminal justice of the Papal States.

The planning and execution of the works were entrusted to the talented Florentine architect Ferdinando Fuga, who was called to Rome as the papal architect. Fuga made a decisive contribution to the planning of the Quirinal Hill and its piazza, because in addition to the *Palazzo della Consulta*, he completed the stables of the Quirinal Palace and added the 360-metre-long wing known as the *Manica lunga*, to the lateral facade of the Quirinal Palace.

The construction of the *Palazzo della Consulta* involved a number of financial and engineering problems. The financial problems were resolved brilliantly, thanks to some “cuts in public spending” and, above all, thanks to proceeds from the lottery, which was reinstated for the occasion, and for which the penalty of excommunication was revoked.

The geological and hydraulic problems caused by an abundance of water and the unstable nature of the terrain were arguably more complex. This was the original site of the thermal baths of the Emperor Constantine at Montecavallo, the ancient name for the Quirinal Hill, which was derived from the third-century statues of Castor and Pollux breaking in horses, originally found in the thermal baths and now standing in the centre of the piazza.

Many of the features that make the *Palazzo della Consulta* so interesting are a result of the fact that the building was designed to accommodate not only the Congregation of the *Sagra Consulta* with its cardinals, but also the *Segnatura de' Brevi*, which issued letters and papal “briefs” (in particular, indulgences and dispensations). All this had to be fitted into a trapezoidal site, where only the larger side of the site, given its size and the evenness of the terrain, could accommodate a main facade. Ferdinando Fuga resolved the problem of space by dividing the palace into two equal parts, and with identical rooms on the *piano nobile*, on the side overlooking the *Piazza del Quirinale*, reached by a stairway of honour facing onto the internal courtyard and formed by two symmetrical flights of steps that lead to the mezzanine floor. In the 1960s this was extended up to the *Salone del Belvedere* on the top floor, where the terrace affords one of the best views of the capital.



Despite these difficulties (it took a year to lay the foundations), by December 1734 the roof was completed, and shortly afterwards a large sculpture in Carrara marble by the Neapolitan Paolo Benaglia, with the papal coat of arms supported by two winged statues, was placed at the centre of the balustrade of the terrace of the Belvedere. Work finished in Spring 1737, and subsequently the statues of *Giustizia* and *Religione*, attributed to the Lombard sculptor Giovanni Battista Maini, were mounted on the main entrance of the main facade (already surmounted by another large papal coat of arms).

Originally the palace was sky blue, to which the present cream-white, chosen some years ago during the restoration of the facade, is certainly much more faithful than the ochre plasterwork, or “terra romana,” which was widely used for official buildings beginning in the nineteenth century. In describing the rooms, frescoes and furnishings of the palace, and in particular those of the *piano nobile*, one needs to keep in mind its different uses over time, in particular during the brief period from 1871 to 1874 when it was the official residence of the royal heirs Umberto and Margherita of Savoy. This period saw some major architectural changes, such as the enlargement of the *salone delle feste* (now the *sala delle udienze* or courtroom) and many new frescoes on the ceilings and walls in the rooms of the former apartments of the cardinals, which were painted by artists already at work in the Quirinal Palace.

The history of the palace is marked by three distinct pictorial periods. The first dates back to its construction and was the work of Antonio Bicchierai and Domenico Biastrini. Unfortunately, the greater part of this has been lost with the exception of some valuable frescoes, in particular the *Magnificenza* on the ceiling of the *salotto verde*, which links the President’s *salotto rosso* with the *salone pompeiano* where the Court meets in closed session.

The second period dates to the Papacy of Pope Pius VI in the late eighteenth century, work of Bernardino Nocchi from Lucca, in part lost due to its having been painted over during the period of the House of Savoy. Almost entirely intact, however, are the paintings by Nocchi in the *salone pompeiano*, including five paintings in tempera on the ceiling, depicting the *Rape of Proserpine*, and the decorations on the walls, grotesque frescoes in the Pompeian style, now recently restored to their original beauty. One should also note the four cardinal virtues on the ceiling of one of the rooms along the lateral facades (each of which is now a judge’s office).

The third pictorial period dates to the Savoy era with the work of Cecrope Barilli, Annibale Brugnoli and Domenico Bruschi. The painting on the ceiling of the President’s office, *Light Defeating Darkness*, is by

Barilli, while *Peace*, on the ceiling of the adjacent *salotto rosso*, is the work of Domenico Bruschi. Floral trophies and coats of arms of the House of Savoy are found throughout the building, and in particular cover the entire ceiling of the *sala delle udienze*, which dates to this period. Simple geometric wall frescoes of the Savoy period have recently been restored after having been covered up during the eighteenth century by the gold coloured damask which gave the courtroom its former name of the *sala gialla*, or “yellow room”. On the three interior walls are as many valuable paintings.

Among the other paintings on display in the palace, there is a beautiful triptych by Giacomo Balla, *Il Maggio*, an early twentieth-century work, and a large nineteenth-century canvas by Giovanni Fattori, *Cavalleggeri in campagna* during the Second War of Independence, the armistice of which, at Villafranca, was signed by Napoleon III and the Emperor Franz Josef using the inkwell now found on the writing desk of the President of the Court.

There are three precious tapestries hanging on the walls of the President’s antechamber: one of sixteenth-century Brussels manufacture, depicts Romulus and Remus with the Roman she-wolf; the other two are of French manufacture from the eighteenth century, depicting the story of King David and King Solomon of Israel.

The bronze bust of the first President of the Court (Enrico De Nicola) and marble busts of monarchical figures of the *Risorgimento* (Cavour, D’Azeglio and Ricasoli), together with paintings, ornamental mirrors, and Murano chandeliers, can be found in the small salons leading off the corridors of the *piano nobile*. Among the precious objects, one should note the cardinal’s sedan-chair and the precious clock in French porcelain in the presidential *salotto rosso*.

Camera dei deputati:	Chambers of deputies (Lower House of the Italian Parliament)
Camera di consiglio:	the Court meeting in closed session
Cancelliere:	Head of the Clerk’s Office
Consiglio di Stato:	the Italian Council of State, highest organ of the Italian administrative courts
Corte di cassazione:	the Italian Supreme Court
Corte dei conti:	the Italian Court of Auditors
Decreto-legge:	emergency decree adopted by the government prior to its conversion into permanent law by Parliament
Decreto legislativo:	legislative decree
Gazzetta Ufficiale:	Official Journal of the Italian Republic
Giudice popolare:	lay judge
Giudice relatore:	constitutional judge who is responsible for briefing the Court on a case, and initially proposing a decision
Giudice redattore:	constitutional judge who is responsible for drafting the decision of the Court
Segreto di Stato:	classified information, relating to matters of national security
Senato:	Senate: Upper House of the Italian Parliament
Sentenza:	legal judgement or decision
Sentenza di accoglimento:	declaration of unconstitutionality, which signifies the “acceptance,” or “ <i>accoglimento</i> ,” of the legal challenge that a law is unconstitutional.
Sentenza di rigetto:	declaration that signifies the “rejection,” or “ <i>rigetto</i> ,” of the challenge that a law is unconstitutional.
Referendum abrogativo:	abrogative <i>referendum</i>
Udienza pubblica:	public hearing



II. Presidents of the Italian Constitutional Court

Enrico DE NICOLA, January 1956 – March 1957
Gaetano AZZARITI, April 1957 – January 1961
Giuseppe CAPPI, March 1951 – October 1962
Gaspare AMBROSINI, October 1962 – December 1967
Aldo SANDULLI, January 1968 – April 1969
Giuseppe BRANCA, May 1969 – July 1971
Giuseppe CHIARELLI, November 1971 – February 1973
Francesco Paolo BONIFACIO, February 1973 – October 1975
Paolo ROSSI, December 1975 – May 1978
Leonetto AMADEI, March 1979 – June 1981
Leopoldo ELIA, September 1981 – May 1985
Livio PALADIN, July 1985 – July 1986
Antonio LA PERGOLA, June 1986 – June 1987
Francesco SAJA, June 1987 – October 1990
Giovanni CONSO, October 1990 – February 1991
Ettore GALLO, February 1991 – July 1991
Aldo CORASANITI, July 1991 – November 1992
Francesco Paolo CASAVOLA, November 1992 – February 1995
Antonio BALDASSARRE, February 1995 – September 1995
Vincenzo CAIANIELLO, September 1995 – October 1995
Mauro FERRI, October 1995 – November 1996
Renato GRANATA, November 1996 – November 1999
Giuliano VASSALLI, November 1999 – February 2000
Cesare MIRABELLI, February 2000 – November 2000
Cesare RUPERTO, January 2001 – December 2002
Riccardo CHIEPPA, December 2002 – January 2004
Gustavo ZAGREBELSKY, January 2004 – September 2004
Valerio ONIDA, September 2004 – January 2005
Piero Alberto CAPOTOSTI, March 2005 – November 2005
Annibale MARINI, November 2005 – July 2006
Franco BILE, July 2006 – November 2008
Giovanni Maria FLICK, November 2008 – February 2009
Francesco AMIRANTE, February 2009 – December 2010
Ugo DE SIERVO, December 2010 – April 2011
Alfonso QUARANTA, June 2011 – January 2013
Franco GALLO, January 2013 – September 2013
Gaetano SILVESTRI, September 2013 – June 2014
Giuseppe TESAURO, July 2014 – November 2014
Alessandro CRISCUOLO, November 2014 – February 2016
Paolo GROSSI, February 2016 – February 2018
Giorgio LATTANZI, March 2018 – December 2019
Marta CARTABIA, December 2019 – present.

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Cover

The main door of Palazzo della Consulta, detail of the well-known
“Veduta della Piazza del Quirinale” by the painter Giovanni Paolo Panini
(who painted it in 1733, before the construction of the building was terminated),
on exhibition in the Coffee House of the Palazzo del Quirinale.

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