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Legislative unresponsiveness in the current stage of the Italian constitutional justice: a brief overview**

TABLE OF CONTENTS: 1. Parliamentarian inertia in the Italian constitutional system: searching for a different approach. – 2. The main features of judicial review of legislation in the present phase of the Italian Court. – 3. The landmark "Cappato" rulings and the creation of a new judicial reasoning technique. – 4. Beyond order 207/2018: the innovative role of parliamentary inertia in the Court's decision-making in the field of criminal law. – 5. Conclusions.

1. *Parliamentarian inertia in the Italian constitutional system: searching for a different approach*

Parliamentarian inertia, «never sufficiently decried»[1], represents a well-known issue in pluralistic States and is a recurring feature in the Italian legal system. The inability to implement decisions "at an acceptable pace" is usually connected to the dysfunctions of parliamentary democracies. Nowadays, the ever-increasing range of people's needs and the significant fragmentation of political systems have a negative impact on the efficiency of parliaments[2].

With regard to the Italian political context, this phenomenon, arguably exacerbated by the weakness of its political and institutional structures, has deeply affected the relationship between the Italian Parliament and the Constitutional Court[3]. Since 1956, when the Constitutional Court was established, constitutional justices have indeed dealt with a "timid"

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[1] As a famous definition of justice of the Italian Constitutional Court Franco Modugno highlighted. See F. MODUGNO, *La giurisdizione costituzionale*, in *Giurisprudenza costituzionale*, 1978, 1239.

[2] See P. PASSAGLIA, *Right-based constitutional review in Italy*, in *Consultaonline.org*, 2013, 12; B. CARAVITA, *Quanta Europa c'è in Europa?*, Torino, Giappichelli, 2020, 71; M.G. RODOMONTE, *Il bicameralismo incompiuto. Democrazia e rappresentanza del pluralismo territoriale in Italia*, Milano, CEDAM, 2020, 225 FF.

[3] F. LANCHESTER, *Teoria e prassi della rappresentanza politica nel ventesimo secolo*, in S. ROGARI (ed.), *Rappresentanza e governo alla svolta del nuovo secolo*, Firenze, Firenze University Press, 2006, 25.

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representative organ[4]. The latter has revealed itself to be neither capable of developing solid and autonomous law-making nor swift at accepting the Constitutional Court's suggestions. As a consequence, the judicial body has progressively changed its judgements and the perception of its own position within the constitutional framework[5].

Especially in the first phase of the judicial review of legislation, the action of the Constitutional Court was regarded by both scholars and other institutional actors as more than supplementary[6]. By dismantling the illiberal acts mainly inherited from the fascist regime, the Court played a primary role in the process of democratization and the implementation of new republican values[7]. Hence, the first stage is commonly defined as "the great stand-in period"[8] (*grande supplenza*)[9], due to the Court's willingness, in the absence of Parliament[10], to take charge in the consolidation of constitutional principles[11].

A quick glance at the various interpretations of the issue seems to prove that legislative unresponsiveness in Italy has mostly been analysed from a systemic point of view. More clearly, doctrinal approaches to the topic may be summarily divided into two different stances: the first stance, which can be called "critical/descriptive", highlights the deficiencies and shortcomings in Italy's constitutional architecture[12]. Researchers who adopt this standpoint mainly interpret the different decisional instruments utilized by the Court. They specifically focus on the techniques which aim at compensating for the negative impact of inertia on the guarantee of

[4] See also L. ELIA, *L'esperienza italiana della giustizia costituzionale. Alcuni nodi critici*, in M. OLIVETTI-T. GROPPI (eds.), *La giustizia costituzionale in Euffffropa*, Milano, Giuffrè, 2003, 148.

[5] As highlighted by Silvano Tosi, see S. TOSI, *Intervento*, in G. MARANINI (ed.), *La giustizia costituzionale*, Firenze, Vallecchi, 1966, 230 FF.; A. SIMONCINI, *L'avvio della Corte costituzionale e gli strumenti per la definizione del suo ruolo: un problema storico aperto*, in *Giurisprudenza costituzionale*, 4-2004, 3066 FF.; C. TRIPODINA, *Il "potere politico" della Corte costituzionale e i suoi limiti*, in R. BALDUZZI-M. CAVINO-J. LUTHER (eds.), *La Corte costituzionale vent'anni dopo la svolta*, Torino, Giappichelli, 2011, 21.

[6] L. ELIA, *Intervento*, in *Corte costituzionale: interpretazione e difesa della Costituzione*, in *Rassegna parlamentare*, 1969, 190 FF.; S. RODOTÀ, *La svolta "politica" della Corte costituzionale*, in *Pol. del Dir.*, 1970, 41.

[7] C. MEZZANOTTE, *Il contenimento della retroattività degli effetti delle sentenze di accoglimento*, in VV.AA., *Effetti temporali delle sentenze della Corte costituzionale anche con riferimento alle esperienze straniere*, Milano, Giuffrè, 1989, 40 argues that in that phase the Court's activity was characterized by a "combative" attitude, which reflected an orthodox view of the constitutional values' implementation.

[8] On that regard, see L. ELIA, *Le sentenze additive e la più recente giurisprudenza della Corte costituzionale (ottobre 81-luglio 85)*, in *Scritti in onore di V. Crisafulli*, Padova, CEDAM, 1985, 306 who clarifies that, in a strictly technical sense, the modus operandi of the Court in the early stages cannot be considered as "substitutional" as the Court used the ordinary tools of constitutional review of legislation; since the first legislature, the Parliament's lack of willingness to engage a continuative activity of implementation of constitutional provisions has emerged; on this matter see P. CALAMANDREI, *La Costituzione e le leggi per attuarla*, in VV.AA., *Dieci anni dopo: 1945-1955*, Roma-Bari, Laterza, 1955, 25.

[9] For insights on the chronological framework regarding the Italian Constitutional Court's phases, see the authoritative historical reconstruction developed by V. BARSOTTI-P. CARROZZA-M. CARTABIA-A. SIMONCINI, *Italian Constitutional Justice in Global Context*, Oxford, Oxford University Press, 2016, 37 FF.

[10] T. GROPPI, *The Italian Constitutional Court: towards a 'Multilevel System' of Constitutional review?*, in *Journal of comparative Law*, III (2), 2008, 108; see also A. PREDIERI, *Parlamento 1975*, in ID. (ed.), *Il Parlamento nel sistema politico italiano*, Milano, Edizioni di comunità, 1975, 69.

[11] P. FALZEA, *Aspetti problematici del seguito legislativo alle sentenze della Corte costituzionale*, in A. RUGGERI-G. SILVESTRI (eds.), *Corte costituzionale e Parlamento: profili problematici e ricostruttivi*, Milano, Giuffre , 2000, 124.

[12] G. BOGNETTI, *La Corte costituzionale tra procedura e politica*, in VV.AA., *Giudizio "a quo" e promovimento del processo costituzionale*, Milano, Giuffrè, 1990, 224; G. SILVESTRI, *Effetti normativi ed effetti temporali delle sentenze della Corte costituzionale: due aspetti dello stesso problema,* in VV.AA., *Effetti temporali delle sentenze della Corte costituzionale anche con riferimento alle esperienze straniere*, Milano, Giuffrè, 1989, 45; P. VIPIANA, *La legislazione negativa*, Torino, Giappichelli, 2017, 168 FF.

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fundamental rights[13]; the second stance, which has been mainly characterized by a "propositive" enquiry method, suggests solutions to foster legislative responsiveness[14].

Studies related to the first thread usually examine the type of judgements which involve the relationship with the legislature. A particularly complex form is the so-called *doppia pronuncia*, which, in substance, consists of an informal declaration of unconstitutionality[15]. Structurally, this kind of judgement is characterized by the apparent logical contradiction between the Court's reasoning and the decision to reject the question. The Court denounces the act for not complying with constitutional parameters, but then forgoes its annulment, and instead calls upon the Parliament to correct the defective law. The following threat which is made to the legislator is fairly straightforward: if the Assembly fails to heed the judicial warning in a reasonable amount of time, the Court will strike down the law in a subsequent judgement concerning the same issue. In this way, the Constitutional Court performs an unusual kind of self-restraint. It does not provide the challenged act with a label of constitutional conformity but, «planting a foot on either side of the constitutional fence»[16], the Court impels both Chambers to act.

Moreover, studies which focus on the type of decisions known as *additive di principio* have assumed a certain importance. While in the judgement previously described the Court was extremely reluctant to intervene, in this case it undertakes a less cautious strategy, by nullifying the questioned statute[17]. However, as this mere annulment cannot restore constitutional legality, the Court hereby introduces a new principle into the legal framework which both common judges and the legislator are required to follow. More clearly, the CC's goal is to achieve a more balanced stand between guaranteeing constitutional integrity and not

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[13] C. MORTATI, *Appunti per uno studio sui rimedi giurisdizionali contro comportamenti omissivi del legislatore*, in *Il Foro italiano*, 1970, 162 FF.; A. PIZZORUSSO, *Art. 136*, in G. BRANCA-A. PIZZORUSSO (eds.), *Commentario alla Costituzione. Garanzie costituzionali*, Bologna-Roma, Società editrice del Foro italiano, 1997, 176; among the various types of judgements created by the Court, it is undeniable that the utilisation of the "additive" judgements have been particularly controversial since the beginning; on that subject see C. LAVAGNA, *Sulle sentenze "additive" della Corte costituzionale*, in VV.AA., *Scritti in onore di G. Ambrosini*, vol. II, Milano, Giuffrè, 1970, 1131 FF.; L. ELIA, *Le sentenze additive e la più recente giurisprudenza della Corte costituzionale (ottobre 81-luglio 85)*, in VV.AA., *Scritti in onore di V. Crisafulli*, Padova, CEDAM, 1985, 302 FF.; N. PICARDI, *Le sentenze "integrative" della Corte costituzionale*, in VV.AA., *Aspetti e tendenze del diritto costituzionale. Scritti in onore di C. Mortati*, IV, Milano, Giuffrè, 1977, 597 FF.; see also V. CRISAFULLI, *La Corte costituzionale fra norma giuridica e realtà sociale: bilancio di vent'anni di attività*, in N. OCCHIOCUPO (ed.), *La Corte costituzionale tra norma giuridica e realtà sociale*, Bologna, Il Mulino, 1978.

[14] A. PREDIERI, *Considerazioni sul tema*, in VV.AA., *Effetti temporali delle sentenze della Corte costituzionale anche con riferimento alle sentenze straniere*, in VV.AA., *Effetti temporali delle sentenze della Corte costituzionale anche con riferimento alle esperienze straniere*, Milano, Giuffrè, 1989, 152 FF.; S. BARTOLE, *Elaborazioni dottrinali e interventi normativi per delimitare l'efficacia temporale delle sentenze di accoglimento della Corte costituzionale*, in VV.AA., *Effetti temporali delle sentenze della Corte costituzionale anche con riferimento alle esperienze straniere*, Milano, Giuffrè, 1989, 127 FF.

[15] R. PINARDI, *La Corte, i giudici ed il legislatore*, Milano, Giuffrè, 1993, 80 FF.; A. CERVATI, *Tipi di sentenze e tipi di motivazioni nel giudizio incidentale di costituzionalità delle leggi*, in VV.AA., *Strumenti e tecniche di giudizio della Corte costituzionale, Atti del Convegno svoltosi a Trieste, 26-28 maggio 1986*, Milano, Giuffrè, 1988, 127; A. PISANESCHI, *Le sentenze di costituzionalità provvisoria e di incostituzionalità non dichiarata: la transitorietà nel giudizio costituzionale*, in *Giurisprudenza costituzionale*, 1989, 631.

[16] W.J. NARDINI, *Passive activism and the limits of judicial self-restraint: Lessons for America from Italian Constitutional Court, Seton Hall Law Review,* 30, 1999, 4.

[17] C. SALAZAR, *Dal riconoscimento alla garanzia dei diritti sociali*, Torino, Giappichelli, 2000, 262-263 points out how the development of this new technique by the Court was unavoidable due to the Court's "lost of patience" with Parliament's lack of promptness; G.P. PARODI, *Il giudice di fronte alle sentenze additive di principio nella prassi recente*, in *romatrepress.uniroma3.it*, 2019, 387 FF.; G.P. DOLSO, *Le additive di principio: profili ricostruttivi e prospettive*, in *Giur. cost.*, 1999, 4113; M. D'AMICO, *Un nuovo tipo di sentenza costituzionale?*, in *Giur. cost.*, 1993, 1810.

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interfering in the Parliament's legislative sphere of competence[18]. Rather than establishing an exhaustive set of norms by itself, the guardian of the Constitution lets the Parliament's discretionary power decide how to thoroughly implement the provision[19].

Many studies related to the second approach emphasize the need to modify article 136 of the Italian Constitution. Article 136 provides basic rules concerning declarations of unconstitutionality (*sentenze di accoglimento*), by establishing that «the norm ceases to be effective on the day after the publication of the decision»[20]. It also determines that the Parliament must be promptly informed of the invalidation in order to let it, if deemed appropriate, take action with follow-up decisions «in the proper constitutional forms»[21].

A long-standing scholarly debate centers on the idea that constitutional discipline in relation to temporal effects is too rigidly fixed[22]. The argument is that this lack of flexibility and the absence of a well-structured procedure of coordination between the Court and the Parliament impairs the efficiency of the judicial review. As this problematic issue is commonly raised in other constitutional systems, a comparative analysis often offers inspirational solutions. The Austrian Constitutional Court can delay the invalidating effect of any of its decisions for up to one year in order to let the Assembly adopt a provision accordingly[23]. Also, the German Constitutional Court provides itself with an even more sophisticated technique. *BundesVerfassungsgericht* can declare acts "incompatible" (*unverain*) with the fundamental law (GG) without nullifying them, for the purpose of avoiding legal gaps[24]. These types of

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[18] T. GROPPI, *The Italian Constitutional Court: towards a 'Multilevel System' of Constitutional review?*, in *Journal of comparative Law*, III (2), 2008, 108; E. CATELANI, *Tecniche processuali e rapporto Corte costituzionale e Parlamento. Spunti in margine alla dichiarazione di illegittimità costituzionale di meccanismo*, in *Quad. cost.*, 1994, 153; A. CERRI, *Giustizia costituzionale*, Napoli, ESI, 2019, 204 considers this kind of judgement as the expression of both a pragmatic and a balanced approach.

[19] See R. PINARDI, *Il mutato atteggiamento della Corte costituzionale di fronte all'inerzia del legislatore quale causa di una maggior "diffusione" del giudizio sulle leggi in via incidentale*, in E. MALFATTI-R. ROMBOLI-E. ROSSI (eds.), *Il giudizio sulle leggi e la sua "diffusione": verso un controllo di costituzionalita di tipo diffuso?*, Torino, Giappichelli, 2002, 624. A. GUAZZAROTTI, *L'autoapplicabilità delle sentenze additive di principio nella prassi dei giudici comuni*, in *Giur. cost.*, V, 2002, 3435 FF.; E. ROSSI, *Corte costituzionale e discrezionalità del legislatore*, in R. BALDUZZI-M. CAVINO-J. LUTHER (eds.), *La Corte costituzionale vent'anni dopo la svolta*, Torino, Giappichelli, 2011, 339; C. SALAZAR, *Guerra e pace nel rapporto Corte-Parlamento*, cit., 279 FF. states that this kind of judgements are characterized by «open normative standards»; see also A. RUGGERI, *Esperienze di normazione ed esperienze di giustizia costituzionale a confronto: un rapporto tra giudici e Corte a geometria variabile?*, in E. MALFATTI-R. ROMBOLI-E. ROSSI (eds.), *Il giudizio sulle leggi e la sua "diffusione"*, cit., 524-525 and E. LAMARQUE, *Il seguito delle decisioni interpretative e additive di principio della Corte costituzionale presso le autorità giurisdizionali*, in *Riv. trim. dir. pubbl.*, 3-2008, 766-767.

[20] Italian Const. art. 136 § 1.

[21] Italian Const. art 136 § 2.

[22] Many scholars suggest indeed a constitutional amendment in order to make the discipline regarding the effects more flexible. Among others, see the authoritative opinions of two former Presidents of the Italian Constitutional Court Francesco Saja and Livio Paladin in VV.AA., *Effetti temporali delle sentenze della Corte costituzionale anche con riferimento alle esperienze straniere*, Milano, Giuffrè, 1989.

[23] B. CARAVITA, *Corte "giudice a quo" e introduzione del giudizio sulle leggi, I, La Corte costituzionale austriaca*, Padova, CEDAM, 1985, 134 FF.

[24] G. CERRINA FERONI, *Giurisdizione costituzionale e legislatore nella Repubblica federale tedesca: tipologie decisorie e Nachbesserungsplicht nel controllo di costituzionalita* , Torino, Giappichelli, 2002, 156 FF.; N. FIANO, *La modulazione nel tempo delle decisioni della Corte Costituzionale tra dichiarazione di incostituzionalità e discrezionalità del Parlamento: uno sguardo alla giurisprudenza costituzionale tedesca*, in *Forum di Quaderni costituzionali*, 2016, 7 FF.; J. BLÜGGEL, *Unvereinbarerkl rung statt Normkassation durch das Bundesverfassungsgericht*, Duncker und Humblot, Berlin, 1997, 138; M.T. RÖRIG (eds.), *Le pronunce di incostituzionalità e di incompatibilità costituzionale nella giurisprudenza costituzionale tedesca e austriaca*, in *Corte costituzionale-Servizio studi*, available in *www.cortecostituzionale.it*, 2018, 26; B. CARAVITA, *La modifica della efficacia temporale delle sentenze della Corte costituzionale: limiti pratici e teorici*, in VV.AA., *Effetti temporali delle sentenze della Corte costituzionale anche con riferimento alle esperienze straniere*, Milano, Giuffre , 1989, 247; F. PEDRINI, *Gli effetti nel tempo delle sentenze costituzionali: l'esperienza tedesca*, in *Quaderni Costituzionali*, 3-

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decisions are very pragmatic: challenged statutes are granted a time-limited certificate of constitutional "tolerance". The Tribunal's decision usually sets a deadline for the legislator to change the defective act in accordance to the Court's detailed guidelines[25].

Other authoritative voices assert that, in order to make the Constitutional Court's imprecations more efficacious, new mechanisms should be included in the internal rules of the Senate and of the Chamber of Deputies. In fact, both these Chambers have introduced procedural improvements aimed at stimulating quicker consequential lawmaking throughout the years. For example, article 109 of the Chambers of Deputies' Rules of Procedure (hereinafter R.C.) states that the Court's judgements must be transmitted to the relevant Commission and to the Constitutional Affairs Commission. Moreover, it establishes that the Committee may produce a report indicating the proper legislative measures that the Assembly should consider. However, these procedures are practically obsolete. They seem not to have a considerable impact on the Parliament's follow up action[26].

These studies, even with their differences, share a common predilection for the Constitutional Court's perspective, by arguing that its efforts to improve Parliament's responsiveness have been far from decisive. On the other hand, in spite of the complexity of different scholars' points of view, the *fil rouge* of these approaches is the idea that the Court have played a passive role in this dysfunctional framework. Put more clearly, these previous studies appear to imply that the Court perceives inertia as a weakness and as an obstacle to its proper undertaking of its functions.

However, the Italian Parliament's inertia seems to have acquired a new function in the recent constitutional reasoning. In the following part of the essay, the idea that the Court has developed a new way of turning the legislator's omissions into a powerful tool will be highlighted. More clearly, the Court seems to have transformed delays and *lato sensu* failures of the representative organ into an instrument to legitimise its own intervention.

2015. On that matter see also M. D'AMICO, *La Corte costituzionale e i fatti: istruttoria ed effetti delle decisioni*, in *Rivista "Gruppo di Pisa"*, 1-2017, 17; K. SCHLAICH-S. KORIOTH, *Das Bundesverfassungsgericht. Stellung, Verfahren*, Entscheidungen, C.H. Beck, München, 2001, 269; J. LUTHER, *La giustizia costituzionale nella Repubblica Federale di Germania*, in ID.-R. ROMBOLI-R. TARCHI (eds.), *Esperienze di giustizia costituzionale*, Torino, Giappichelli, 2000, 182.

[25] T. GINZBURG, *Judicial review in New democracies*, Cambridge, Cambridge University Press, 2003, 40.

[26] Two empirical studies have shown that, despite the existence of the mentioned internal practices, Parliament cooperation has been constantly unsuccessful. By selecting the Court's decisions which contained suggestions/directives/warnings for the legislator, they examine how many of them have been followed. The first one, conducted by Lucio Pegoraro refers to the period 1975-1985. The latter is slightly more recent, covering the period 1990-1999. Interestingly, they present an almost identical conclusion: only about one-third of Court's admonitions were not disregarded (39 on 114 the former, 50 on 148 the latter). Both of the researches are reported by N. LUPO, *Il Parlamento e la Corte costituzionale*, in VV.AA., *Associazione per gli studi e le ricerche parlamentari. Quaderno n. 21*, Torino, Giappichelli, 2010, 127 who further argued that these positive goals were rarely obtained thanks to *ad hoc* procedures. He also underlines the fact that the efforts carried out by the Presidents of both Chambers, aimed at further facilitating Parliament's reaction, often failed. For example, in 1997 they adopted new internal provisions which provided that new bills must be considered jointly with the Court's judgements on the same matter (if any).

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2. *The main features of judicial review of legislation in the current stage of the Italian Court*

In order to understand what has changed in the Court's approach to parliamentarian inertia, the current stage of the Italian constitutional justice system and its distinctive traits must be portrayed. Indeed, since the second decade of the 21st century, the Court has been called upon to deal with issues with significant systemic implications. As a matter of fact, many commentators claim that the Court has taken on a more politically ambitious role in this time period[27].

The first important turning point occurred when the Constitutional Court made its decision on the electoral system (law. no. 270 of 2005). Unexpectedly, after having declared the issue admissible, it adopted a decision of partial unconstitutionality. By reversing an established tradition of self-restraint on political and electoral issues[28], the Court nullified the core features of the Parliament's electoral law. As a result, this was transformed into a pure proportional system (judgement no. 1/2014)[29]. A few years later, the Court intervened again in electoral matters by partially striking down the new electoral legislation for the Chamber of Deputies (judgement no. 35/2017)[30].

Furthermore, a wide-ranging debate was aroused by the Court's decision on the so-called "Robin Tax" (judgement no. 10/2015). This tax consisted of a supplementary imposition for petroleum and energy companies. In fact, the challenged provision, which was part of many austerity solutions approved under the Monti cabinet, was declared unconstitutional. However, the Court decided to impose a limit on the ordinary retroactive effectiveness of its judgement by establishing that it would have just *pro futuro* effects[31]. More clearly, in order to mitigate the

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[27] D. TEGA, *La Corte nel contesto. Percorsi di ri-accentramento della giustizia costituzionale in Italia*, Bologna, Bononia University Press, 2020; A. MORRONE, *Suprematismo giudiziario. Su sconfinamenti e legittimazione politica della Corte costituzionale*, in *Quaderni costituzionali*, 2-2019; see also T. GROPPI, *Il ri-accentramento nell'epoca della ri-centralizzazione. Recenti tendenze dei rapporti tra Corte costituzionale e giudici comuni*, in *federalismi.it*, 3-2021, 129.

[28] M. SICLARI, *Il procedimento in via incidentale*, in R. BALDUZZI-P. COSTANZO (eds.), *Le zone d'ombra della giustizia costituzionale. I giudizi sulle leggi*, Torino, Giappichelli, 2007, 25 FF.; E. CATELANI, *Giustizia costituzionale tra "anima politica" ed "anima giurisdizionale" e sua incidenza sulla forma di governo*, in *federalismi.it*, 8-2017, 9-10; P. CARNEVALE, *La Corte vince, ma non (sempre) convince. Riflessioni intorno ad alcuni profili della "storica" sentenza n. 1 del 2014 della Corte costituzionale*, in *Nomos. Le attualità nel diritto*, 3-2013, 12.

[29] The provision of a majority premium without providing a minimum electoral threshold and the blocked and long lists of candidates were found unconstitutional. According to the Court, they did not comply with the criterion of proportionality and violated the right to vote (art. 48 It. Cost.)

[30] In this case, the run-off system that the law provided was nullified on the grounds that it infringed the principles of reasonableness.

[31] Although judgement no. 10-2015 presents unique features, rulings establishing variations in the effectiveness of judgements "with regard to the past" (*pro praeterito*) represent a sophisticated judicial operation which are often adopted by the Italian Court. In fact, the derogation from the "natural retroactivity" of the declaration of unconstitutionality is justified on the basis of the actual supervening of the illegitimacy (the so-called supervening unconstitutionality judgements in narrow sense) or can be the result of a discretionary choice of the Court (deferred unconstitutionality judgements). With regard to the latter, the contested provision is declared unconstitutional at a later date with respect to the moment when the defect of unconstitutionality occurred, in order to ensure the gradual development of the legal system, thus tempering the drastic impact of the declaration of unconstitutionality. On this matter see again the authoritative theoretical reconstruction of R. PINARDI, *La Corte, i giudici ed il legislatore*, Milano, Giuffrè, 1993; See also P. COSTANZO, *Corte costituzionale e forma di governo nella svolta del millennio (appunti per una discussione)*, in R. BALDUZZI-M. CAVINO-J. LUTHER (eds.), *La Corte costituzionale vent'anni dopo la svolta*, Torino, Giappichelli, 2011, 211 and F. SORRENTINO, *Considerazioni sul tema*, in

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negative impact of its judgement on the budgetary equilibrium, it sacrificed the applicants' interests[32]. For that reason, this controversial operation of the Court was severely criticized[33].

Finally, the propulsive action that the Court nowadays plays with regard to highly controversial and ethical issues should be mentioned. For many years, the Court had generally maintained a prudential restraint in the field of civil rights. Even when both ordinary and supranational courts repeatedly reported the urgent need for legislative recognition of rights[34], the Court refrained from granting the so-called "new rights". On the contrary, in this new phase the Court has even more assumed the role of institution willing to take a leading role in giving voice to divisive issues[35].

VV.AA., *Effetti temporali delle sentenze della Corte costituzionale anche con riferimento alle esperienze straniere*, Milano, Giuffrè, 1989, 160. Recently, the above-mentioned significant needs underlying the issue have been made explicit by the Court in the reasoning of decision no. 246/2019. In this judgement, while acknowledging the contrast between the contested provision and the constitutional parameters invoked (articles 117 § 3, 118 § 1 and the principle of loyal cooperation), the Court deemed it appropriate to modulate the effects, by establishing that the illegitimacy cannot concern ongoing administrative proceedings. Indeed, despite the statute under scrutiny causing an illegitimate "degradation" of the involvement of the Regions with regard to a subject included in the legislative concurring powers (Art. 117 §3), the Court considered it a priority to guarantee the continuity of the action of the extraordinary commissioner for the emergency (§ 8 judgement no. 246/2019).

[32] M. RUOTOLO, *Ambiguità della Corte o arbitrio del giudice? Il "seguito" abnorme e contraddittorio della sentenza n. 10 del 2015 della Corte costituzionale*, in *Giur. cost*., 3-2015, 1075 FF.; Instead F. POLITI, *"Questo potere che la Corte si è dato": quando Corte costituzionale e Cassazione giocano "di sponda" sul potere della prima di modulare gli effetti nel tempo della dichiarazione di incostituzionalità*, in *Giur. cost*., 3-2019, 1537 FF.; R. ROMBOLI, *Natura incidentale del giudizio costituzionale e tutela dei diritti: in margine alla sentenza n. 10 del 2015*, in *Quaderni costituzionali*, 3-2015. Besides, the Constitutional Court itself tried to mitigate the negative impact of this unusual decision-making, by arguing that the individual rights of the applicants would be partially guaranteed at least with regard to the future (judgement no. 10/2015 § 7).

[33] Among many, see A. PUGIOTTO, *Un inedito epitaffio per la pregiudizialità costituzionale*, in *Forum di Quaderni costituzionali*, 2015, 1, who claims that the Court's approach manifested in this decision represents an "epitaph" for the incidenter system.

[34] For example, a long judicial confrontation between the European Court of Human rights and the Italian Constitutional Court on the lack of legal recognition of same-sex unions in Italy took place. On that regard, see, among others, the ECtHR's *Oliari and Others v. Italy* (Application nos. 18766/11 and 36030/11) and the Italian Court's judgement no. 138/2010.

[35] For instance, important judgements have been delivered in matter of artificial fertilization (law no. 40/2004). The legislative framework was significantly reshaped by the Court with "surgical precision" (judgements nos. 151/2009, 162/2014, 96/2015). See also the highly debated decision no. 170/2014 (on divorce and sex-change). On these topics, see C. MASCIOTTA, *La tutela dei diritti fondamentali tra Corte costituzionale e Corte edu alla prova di questioni eticamente controverse*, in *Rivista "Gruppo di Pisa"*, 3-2016, 4 FF.; S. PENASA, *L'insostenibile debolezza della legge 40: la sentenza n. 96 del 2015 della Corte costituzionale tra inevitabili illegittimità e moniti "rafforzati"*, in *Forum di Quaderni costituzionali*, 2015; L. TRUCCO, *Procreazione assistita: la Consulta, questa volta, decide di (almeno in parte) decidere*, in *Consultaonline.org*, 2009; D. CHINNI, *La procreazione medicalmente assistita tra "detto" e "non detto". Brevi riflessioni sul processo costituzionale alla legge n. 40/2004*, in *Consultaonline.org*, 2009; A. RUGGERI, *Questioni di costituzionalità inammissibili per mancanza di consenso tra gli scienziati (a margine di corte cost. n. 84 del 2016, in tema di divieto di utilizzo di embrioni crioconservati a finalità di ricerca)*, in *Rivista di Biodiritto*, 2-2016, 245; A. D'ALOIA, *Quel che resta della legge 40*, in *Rivista di Biodiritto*, 2-2014, 1; Also L. VIOLINI, *La Corte e l'eterologa: i diritti enunciati e gli argomenti addotti a sostegno della decisione*, in *Osservatorio AIC*, 2014. Furthermore, it should be mentioned the ongoing evolution of the Court's case-law with regard to married couple's rights to confer both parents' surnames to children. After the judgement no. 61/2006, in which the Court simply had underlined the inadequacy of the applicable legislative provisions establishing the automatically transmission of the father surname, without annulling it, the Court has progressively modified its self-restraint attitude on this issue. With judgement no. 268/2016, the Court adopted a declaration of unconstitutionality, by pointing out how the provisions in force reflected rooted patriarchal traditions and outdated cultural assumptions no longer corresponding with the social consciousness. Therefore, with decision no. 18/2021 the Court decided to go further, by calling into discussion the whole normative architecture on surname's conferment. In doing so, the Court asserted that, despite the positive modifications introduced, the legislation still reflects discrimination based on the parents' sex, which cannot be longer tolerated. On that regard, see N. ZANON, *Corte costituzionale, evoluzione della "coscienza sociale", interpretazione della costituzione e diritti fondamentali: questioni e interrogativi a partire da un caso paradigmatico*, in *Rivista AIC*, 4-2017; M.G. RODOMONTE, *L'eguaglianza senza distinzioni di sesso in Italia. Evoluzioni di un principio a settant'anni dalla nascita della Costituzione,* Torino, Giappichelli, 2018, 87 FF.; about the pending case awaiting final decision, which originated with decision no.

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Hence, from the observation of these recent tendencies, relevant changes can be highlighted in the Constitutional Court's conduct. Firstly, it appears to adopt a more flexible approach to procedural rules.

For example, the *incidenter* proceeding often assumes the function of direct access to constitutional justice. The Court's scrutiny on admissibility requirements has indeed evolved into a less rigorous check[36]. The well-known judgements on electoral cases were scholarly regarded as an example of *fictio litis*[37]. This expedient demonstrates that the indirect way to the Court has often become a path to bring individual claims and collective issues before the Court[38].

Similarly, the decision on the Robin Tax shows the Court's intent to "bend" the rules on temporal effect in order to accomplish its purposes. As the Court highlighted in decision no. 10/2015, derogations to the retroactive effects of acceptance judgements must be subject to strict proportionality rule. Moreover, they can be justified only by the compelling need to guarantee fundamental rights, which would otherwise be irremediably compromised. The Court claims its duty to protect constitutional values by looking at them as a whole. That means that the set of constitutional interests requires a non-fragmentary and comprehensive defense. More clearly, a declaration of unconstitutionality must not produce a far greater condition of constitutional violation. From the Court's perspective, the need to ensure a reasonable balance between all the instances at stake would legitimize a pervasive modulation of the effects.

What, then, would be the new core features of the "Fifth phase" of the constitutional review of legislation in Italy? First of all, constitutional justice as a subject has entered with vigour into the arena of public debate. In a climate of general crisis and deep distrust of traditional representative institution, judicial review of legislation has become a pivotal forum within which new rights can be demanded. In particular, when the Assembly does not manifest any interest in modifying laws which are not aligned with the evolution of social consciousness or constitutional principles, the *incidenter* system plays a subsidiary role. The underlying stimulus behind this is the idea that the fundamental rights of citizens and constitutional principles cannot be left unguarded. The Court's awareness of this issue seems to have inevitably changed its approach to both the relations with the Parliament and its procedural rules.

18/2021, see C. INGENITO, *Una nuova occasione per superare "l'anche" nell'attribuzione al figlio del cognome dei genitori. Riflessioni a margine dell'ordinanza n. 18/2021 della Corte Costituzionale*, in *federalismi.it*, 11-2021.

[36] R. PINARDI, *La Corte e il suo processo: alcune preoccupate riflessioni su un tema di rinnovato interesse*, in *Giur. cost.*, 3-2019, 1897 FF.

[37] J. FROSINI, *Constitutional Court of Italy (La Corte Costituzionale Della Repubblica Italiana)*, in *Max Planck Encyclopedia of Comparative Constitutional Law*, 2017, 12.

[38] *Ibidem*.

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3. *The controversial landmark "Cappato" rulings and the creation of a new judicial reasoning technique*

A recent case, commonly known as the "Cappato case", appears to perfectly summarize the new characteristics of this current "era". But more importantly, it sheds light on the apparent new function of inertia in the Court's reasoning.

The decision deals with the delicate issue of assisted suicide. As procedural and substantial facets are deeply intermingled in this case, the concrete background is worth mentioning. The case involved a popular Dj known as Fabo who after becoming tetraplegic as a result of a car accident went to a private clinic in Switzerland which provides service in the field of assisted suicide. The car which took Fabo across the Italian border into Switzerland was driven by Marco Cappato, a member of the Italian Radical party and a leading figure in the campaign for the legalisation of assisted suicide in Italy.

After the patient had ended his life, Cappato went back to Italy and reported himself to the police for having provided material assistance to Fabo. Indeed, according to a long-run interpretation of Italian law, it is a criminal offence to accompany by car a person who wants to commit suicide to such a clinic. For Cappato, in fact, the decision to report himself to the police was a conscious choice, aimed at bringing the case to trial and consequently the issue before the Court. The final goal was to dismantle the criminalisation of assisted suicide due to its asserted incompatibility with the constitutional values of liberty and self-determination[39].

However, the Court's response was different from that which had been expected. In the supreme Court's view, sanctioning the provision of material assistance to suicide is not unconstitutional *per se*[40]. In fact, the concept of protecting vulnerable people is rooted in the Italian Constitution and in its fundamental vocation to ensure social solidarity[41].

Nevertheless, there are situations that were conceivably unimaginable «at the moment art. 580 of the penal code was written»[42]. The Constitutional Court refers to specific conditions such as those of patients like Dj Fabo: «(i) patients suffering from an incurable disease (ii) that causes him or her severe and subjectively intolerable pain and distress, and is (iii) kept alive by life-sustaining treatments, but (iv) retains full mental capacity»[43]. Patients facing these difficult

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[39] The law at stake was indeed adopted in 1930, under the fascist regime, before the entry into force of the republican Constitution, on that regard see S. SEMINARA, *L'art. 580 c.p. e il diritto a morire,* in F.S. MARINI-C. CUPELLI, *Il caso Cappato. Riflessioni a margine dell'ordinanza della Corte costituzionale n. 207 del 2018*, Napoli, ESI, 2019, 311 FF.; according to the Court of Assize of Milan, a univocal interpretation of article 580, conflicting with the Constitution, could be identified, although a comparison with previous trials on the same matter might have led to different conclusion, to the absence of a unique hermeneutical approach; on that profile see A. MASSARO, *Il "caso Cappato" di fronte al giudice delle leggi: illegittimità costituzionale dell'aiuto al suicidio?*, in *Diritto penale contemporaneo*, 2018, 3 FF.; G. BATTAGLIA, *La questione di legittimità costituzionale dell'art. 580 c.p.: una tappa (necessaria?) del caso Cappato*, in *Quaderni costituzionali*, 2-2018, 495 FF.

[40] M. DONINI, *Il caso Fabo/Cappato fra diritto di non curarsi, diritto a trattamenti terminali e diritto di morire. L'opzione "non penalistica" della Corte costituzionale di fronte a una trilogia inevitabile*, in F.S. MARINI-C. CUPELLI, *Il caso Cappato. Riflessioni a margine dell'ordinanza della Corte costituzionale n. 207 del 2018*, Napoli, ESI, 2019, 115.

[41] Ord. no. 207/2018 § 4.

[42] Ord. no. 207/2018 § 8.

[43] See F. VIGANÒ, *The Italian Constitutional Court on Assisted Suicide*. Available at: https://www.criminaljusticenetwork.eu/it/post/the-italian-constitutional-court-on- assisted-suicide (accessed: 3 august 2020).

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conditions already have the possibility to end their lives, by refusing medical treatments (including the life sustaining ones such as hydration and artificial feeding). This is the only option they have under the legislation in force (law. no. 219/ 2017), which does not allow healthcare professionals to provide any form of euthanasic intervention or assisted suicide[44].

According to the judges, this legislative obstacle would harm patients' personal perception of "dignity" and, in particular, "dignity in death"[45]. More clearly, the criminalisation of assistance in suicide could result in the person suffering from the above-described extreme conditions forcing himself/herself to end life in a way conflicting with his/her personal beliefs. Therefore, it stated that the current art. 580 did not comply with the combined provisions of articles 2, 3, 12 and 32 of the Italian Constitution.

Interestingly, the Court decided to delay its decision of unconstitutionality by adopting a sophisticated type of "wait and see" approach. By delivering a procedural order, it granted ten months to the Parliament to discuss the issue and correct the legislative framework. The new cooperative decision was named as a "foreseen unconstitutionality" judgement[46]. The Court's choice was based on two main points: 1) a comprehensive legislative intervention was deemed necessary. The law-enforcement would therefore avoid legal gaps, which could allow for abuses in a delicate area such as that involving the rights of vulnerable people; 2) the issue of unconstitutionality was "frozen" by the Court. Indeed, by fixing a new hearing in order to give time to the legislator, it prevented the norm from producing effects[47]. The option of a mere

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[44] R. BARTOLI, *L'ordinanza della Consulta sull'aiuto al suicidio: quali scenari futuri?,* in F.S. MARINI-C. CUPELLI, *Il caso Cappato. Riflessioni a margine dell'ordinanza della Corte costituzionale n. 207 del 2018*, Napoli, ESI, 2019, 6; To understand more in depth the spirit of the "new" legislation and its core features see, among others, U. ADAMO, *Il vuoto colmato. Le disposizioni anticipate di trattamento trovano una disciplina permissiva nella legge statale,* in *Rivista AIC*, 3-2018, 112-113; A. LO CALZO, *Il consenso informato "alla luce della nuova normativa" tra diritto e dovere alla salute*, in *Rivista "Gruppo di Pisa"*, 3-2018; C. BARBISAN, *La legge n. 219 del 2017, Norme in materia di consenso informato e di disposizioni anticipate di trattamento*, in *Rivista di BioDiritto*, 1-2018, 14.

[45] C. CUPELLI, *Il caso Cappato: autodeterminazione e dignità nel morire,* in F.S. MARINI-C. CUPELLI, *Il caso Cappato. Riflessioni a margine dell'ordinanza della Corte costituzionale n. 207 del 2018*, Napoli, ESI, 2019, 87.

[46] The definition is usually attributed to the then-president of the Constitutional Court Lattanzi, see G. LATTANZI, *Corte costituzionale-Riunione straordinaria del 21 marzo 2019, Relazione del Presidente Giorgio Lattanzi*, in *www.cortecostituzionale.it*, 2019, 12.

Nevertheless, other significant expressions have been created in order to define the new decisional technique, mostly emphasizing the complexity and the biphasic nature of the decision, see M. BIGNAMI, *Il caso Cappato alla Corte costituzionale: un'ordinanza ad incostituzionalità differita*, in F.S. MARINI-C. CUPELLI, *Il caso Cappato. Riflessioni a margine dell'ordinanza della Corte costituzionale n. 207 del 2018*, Napoli, ESI, 2019, 1; R. ROMBOLI, *Il «caso Cappato»: una dichiarazione di incostituzionalità «presa, sospesa e condizionata», con qualche riflessione sul futuro della vicenda*, in *Il Foro italiano*, 6-2019, 1892; G. SORRENTI, *Etwas Neues unter der Sonne: un'ordinanza sospensiva dell'annullamento, per necessario coordinamento con il legislatore. In margine a Corte cost., ord. n. 207/2018, questione Cappato*, in *Quad. dir. pol. eccl.*, 3-2018, 711; G. REPETTO, *Interventi additivi della Corte costituzionale e ragionevolezza delle scelte legislative in un'ordinanza anticipatrice di incostituzionalità*, in *Giur. cost.*, 2018, 2464; C. SALAZAR, *Morire sì, non essere aggrediti dalla morte. Considerazioni sull'ordinanza n. 207/2018 della Corte costituzionale*, in *Quaderni costituzionali*, 3-2019, 568; C. TRIPODINA, *Le non trascurabili conseguenze del riconoscimento del diritto a morire "nel modo più corrispondente alla propria visione di dignità nel morire*, in *Forum di Quaderni costituzionali*, 2019, 1; S. PENASA, *Il "seguito" dell'ordinanza 207: mutamento (nella continuità) di paradigma costituzionale e (necessaria) leale collaborazione tra poteri*, in *Forum di Quaderni costituzionali*, 2019, 3; G. SERGES, *E se il caso Cappato fosse risolto con un accoglimento interpretativo transitorio? Prime riflessioni interlocutorie sulla possibile delimitazione degli effetti temporali delle pronunce interpretative della corte costituzionale, in Costituzionalismo.it*, 3-2019, 38; F. DAL CANTO, *Il "caso Cappato" e l'ambigua concretezza del processo costituzionale incidentale*, in *Forum di Quaderni costituzionali*, 2019, 1. Other authors highlight the threefold essence of the decision, by pointing out how it embraces the features of an acceptance judgement as well as those of a dismissal or inadmissibility judgement; see A. RIDOLFI, *Un nuovo tipo di doppia pronuncia: la via italiana alla Unvereinbarerkeiterklärung? (osservazioni su Corte costituzionale, ord. n. 207/2018 e sent. n. 242/2019)*, in *Nomos. Le attualità nel diritto*, 3-2019, 3 and A. NATALINI, *Brevi note a margine di una storica ordinanza "trifronte"*, in F.S. MARINI-C. CUPELLI, *Il caso Cappato. Riflessioni a margine dell'ordinanza della Corte costituzionale n. 207 del 2018*, Napoli, ESI, 2019, 243.

[47] Judgement no. 207/2018 § 11.

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exhortative decision was purposely rejected as it would probably have led to the conviction of the claimant.

Scholars' attention has been predominantly focused on the original technique adopted by the Court. Its uniqueness resides in the presence of an admonition carrying an explicit deadline[48]. However, the Court's response to the legislative unresponsiveness is significant likewise. After having verified that no subsequent actions were taken on the day of the new hearing, scheduled on 24 September 2019, it adopted an acceptance declaration with no further hesitation (judgement no. 242/2019)[49].

The motivation given by the Court appears to illustrate the change in the Court's approach to unresponsiveness. Firstly, the Court asserted that the previous adjournment of the hearing followed the same logic of the *doppia pronuncia* method. It adopted an interlocutory decision at first, by encouraging the immediate restoration of the effectiveness of constitutional principles. Secondly, it reaffirmed the ethical and political significance of the issue, which required that constitutional legality prevails over legislative discretion.

According to the Court, "judicial review-free zones" especially in penal matters must be avoided. What emerges is that there was a need for the Court's corrective intervention, despite the inexistence of a univocal normative solution clearly deducible from the constitutional source of law[50]. Apparently, the binding force of the *rime obbligate* limit has been significantly softened. It would be sufficient for the Court to have at its disposal a normative "point of reference" in the legal framework, which in this specific case is represented by law no. 219/2017[51].

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[48] P. CARNEVALE, *Incappare in...Cappato. Considerazioni di tecnica decisoria sull'ordinanza n. 207 del 2018 della Corte costituzionale*, in *Consultaonline.org*, 2-2019, 362; M. MASSA, *Una ordinanza interlocutoria in materia di suicidio assistito. Considerazioni processuali a prima lettura*, in *Forum di Quaderni costituzionali*, 2018, 14; E. GROSSO, *Il rinvio a data fissa nell'ordinanza n. 207/2018. Originale condotta processuale, nuova regola processuale o innovativa tecnica di giudizio?*, in *Quaderni costituzionali*, 3-2019, 546 FF.; U. ADAMO, *La Corte è 'attendista'... «facendo leva sui propri poteri di gestione del processo costituzionale». Nota a Corte cost., ord. n. 207 del 2018*, in *Forum di Quaderni costituzionali*, 2018, 3; M. PICCHI, *Leale e dialettica collaborazione» fra Corte costituzionale e Parlamento: a proposito della recente ordinanza n. 207/2018 di monito al legislatore e contestuale rinvio della trattazione delle questioni di legittimità costituzionale*, in *Osservatorio sulle fonti*, 3-2018, 18-19; C. TRIPODINA, *Sostiene la Corte che morire all'istante con l'aiuto d'altri sia, per alcuni, un diritto costituzionale. Di alcune perplessità sull'ord. 207/2018*, in *Giur. cost.*, 6-2018, 2476 FF.; C. GIUNTA, *Riflessioni sui confini del giudizio di legittimità costituzionale a partire dall' "ordinanza Cappato"*, in F.S. MARINI-C. CUPELLI, *Il caso Cappato. Riflessioni a margine dell'ordinanza della Corte costituzionale n. 207 del 2018*, Napoli, ESI, 2019, 179; D. PARIS, *Dal diritto al rifiuto delle cure al diritto al suicidio assistito (e oltre). Brevi osservazioni all'ordinanza n. 207/2018 della Corte costituzionale*, in *Corti supreme e salute*, 3-2018, 3; A. RUGGERI, *Fraintendimenti concettuali e utilizzo improprio delle tecniche decisorie nel corso di una spinosa, inquietante e ad oggi non conclusa vicenda (a margine di Corte cost. ord. n. 207 del 2018)*, in *Consultaonline.org*, 1-2019, 97. See also the analysis undertaken by G. SALVADORI-A. SPERTI-G. FAMIGLIETTI in VV.AA., *Il Forum-Sull'ordinanza Cappato (Corte costituzionale, ord. n. 207/2018) in attesa della pronuncia che verrà*, in *Rivista "Gruppo di Pisa"*, 2019; R. PINARDI, *Le pronunce Cappato: analisi di una vicenda emblematica della fase attualmente attraversata dal giudizio sulle leggi,* in *Liber amicorum per Pasquale Costanzo*, in *Consultaonline.org*, 2020, 13; U. COREA, *La pronuncia interlocutoria della Corte costituzionale sul caso Cappato, tra "forma" (di ordinanza) e "sostanza" (di sentenza)*, in F.S. MARINI-C. CUPELLI, *Il caso Cappato. Riflessioni a margine dell'ordinanza della Corte costituzionale n. 207 del 2018*, Napoli, ESI, 2019, 65-66; E. ROSSI, *L'ordinanza n. 207 del 2018: un tentativo di reagire a omissioni (incostituzionali) del legislatore?,* in *Forum di Quaderni costituzionali*, 2018, 2.

[49] See V. BARSOTTI-P. CARROZZA-M. CARTABIA-A. SIMONICINI, *Introduction. Dialogue as a method*, in V. BARSOTTI-P. CARROZZA-M. CARTABIA-A. SIMONICINI (eds.), *Dialogues on Italian Constitutional Justice: a comparative perspective*, Routdlege-Giappichelli, 2020, 5-6.

[50] A. RUGGERI, *Rimosso senza indugio il limite della discrezionalità del legislatore, la Consulta dà alla luce la preannunziata regolazione del suicidio assistito (a prima lettura di Corte cost. n. 242 del 2019)*, in *Giustizia insieme*, 2019.

[51] Judgement no. 242/2019 § 5.

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4. *Beyond order 207/2018: the innovative role of parliamentary inertia in the Court's decision-making in the field of criminal law*

This new incisive decision-making style deserves a particular mention in this analysis. Indeed, it may be argued that the Court has established an implicit connection between the Parliament's evasion of one or more warnings and the consequential legitimization of its less constrained intervention[52]. This trend is more visibly expressed in other judgements, all regarding penal laws.

In judgement no. 222/2018 the Court found that the accessory sanctions (art. 216 penal code), automatically imposed as a consequence of the principal penalty of fraudulent bankruptcy, was in conflict with articles nos. 3 and 27 It. Const. According to the Court, the fixed entity of the penalty did not comply with the principles of gradualness and proportionality[53]. Although only the legislator is responsible for establishing the legislative framework regarding the nature and level of criminal sanctions, some insurmountable limits would exist. The Court itself admitted that the same question had been handled differently earlier. The issue of constitutionality on the same matter had been rejected on two occasions on the grounds that the Parliament's discretion had to be safeguarded (judgement no. 134/2012 and procedural order no. 208/2012)[54]. However, the Court stated that its self-restraint approach had to be revised. It should be taken into account that no legislative system-wide reform had been realized. Since none of the Court's severe warnings was heeded, a patently irrational penalty system could no longer be allowed. For that reason, the presence of a legislative "point of reference" was sufficient for the Court to justify its corrective action[55].

In another decision (no. 40/2019), the Constitutional Court dealt with penalties for drug trafficking. More specifically, the minimum statutory penalty of 8 years of imprisonment (for serious offences) was found to be inconsistent and irrational. Throughout the reasoning, the importance of a legislative repeal of the unconstitutional norm was emphasized. Nevertheless, after repeated calls to the Parliament[56], the restoration of constitutional legality could no longer be postponed. Especially in a field where personal liberty is at stake, constitutional legality must be promptly reconstituted. If the legislator remains inert, the Court cannot excuse itself from

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[52] M. RUOTOLO, *L' evoluzione delle tecniche decisorie della Corte costituzionale nel giudizio in via incidentale. Per un inquadramento dell'ord. n. 207 del 2018 in un nuovo contesto giurisprudenziale*, in *Rivista AIC*, 2-2019, 653-654.

[53] On that decision see F. VIGANÒ, *Un'importante pronuncia della Consulta sulla proporzionalità della pena*, in *Diritto penale contemporaneo*, 2-2017, 66 and M. D'AMICO, *Corte costituzionale e discrezionalità del legislatore in materia penale*, in *Rivista AIC*, 4-2016, 18.

[54] A. GALLUCCIO, *La sentenza della Consulta su pene fisse e "rime obbligate": costituzionalmente illegittime le pene accessorie dei delitti di bancarotta fraudolenta*, in *Diritto penale contemporaneo*, 2018, par. 6.2.

[55] However, despite of the relevance of judgement no. 222/2018, decision no. 236/2016 concerning penalties for alteration in birth certification by willfully giving false statement (article 567 penal code) is generally deemed as the true "opening act" of this change in the case-law direction.

[56] Among others, see judgement no. 179/2017; on the latter see C. BRAY, *La Corte costituzionale salva la pena minima (di 8 anni di reclusione) per il traffico di droghe 'pesanti' ma invia un severo monito al legislatore*, in *Diritto penale contemporaneo*, 11-2017, 231 FF.

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performing its guaranteeing role. Drawing upon existent provisions, albeit not constitutionally univocal rules, seems to be again a fair compromise[57].

In order to ensure an efficacious and pervasive protection of fundamental rights, the CC seems to have developed a new type of activism. It would appear to consist of a form of concrete interventionism. The Court would not limit itself to blaming legislative unresponsiveness. Parliament's omissions seem to arise as an objective criterion to legitimise a judicial operation less constrained by traditional procedural limitations. More clearly, pending warnings seem to have become a procedural element within the constitutional processual rules[58].

This approach seems to represent a significant change when compared to other phases of constitutional review of legislation in Italy. Among various techniques, the Constitutional Court has developed a wide range of exhortative judgements throughout the years. They became crucial between the late 1970s and the beginning of the following decade. As mentioned before, the so-called *doppia pronuncia* decisions (or *incostituzionalità accertata ma non dichiarata*,) raised special criticism. By using this technique, the Court temporarily rejects the issue adopting a dismissal decision containing a plea to the legislator to modify the statute. With regard to the relations between the Court and the Parliament, the most significant feature of this kind of judgements is the threat of an imminent declaration of unconstitutionality.

Although the lawmaker generally remained inert, the CC's menace was rarely put into practice. In fact, if a challenge was raised again before the Court, it used to postpone the discharge decision by adopting further judgements with the same logic pattern before nullifying the provision. Many chains of identical decisions taken by the Court in these circumstances testify its reluctance to strike down the challenged statute[59]. Indeed, in spite of the considerations expressed in its reasoning, the Court tends to evermore delay the acceptance decision.

An earlier example of this is decision no. 212 of 1986, whereby the Court asserted that the absence of public hearings in proceedings before the tax Courts did not comply with the constitutional right of fair trial (art. 101 It. Cost.)[60]. However, it decided temporarily not to grant an annulment, by urging the Parliament to fix the legal framework as soon as possible. It also claimed an imminent acceptance of the issue in the event of Parliament's further carelessness. Despite this threat the Court rejected, in ordinance no. 378/1988, once again the challenge due to the «serious implications» that the declaration of unconstitutionality would have determined[61]. The statute was finally declared invalid only in 1989 with decision no. 50. The reason underlying the Court's decision seemed to be the fact that the Parliament started

[57] R. CABAZZI, *Sulle "rime obbligate" in materia penale. Note a margine della sentenza della Corte Cost. n. 40/2019*, in *federalismi.it*, 6-2020, 51 FF.; R. BARTOLI, *La Corte costituzionale al bivio tra "rime obbligate" e discrezionalità? Prospettabile una terza via*, in *Diritto penale contemporaneo*, 2-2019, 151 FF.

[58] D. MARTIRE, *Giurisprudenza costituzionale e rime obbligate: il fine giustifica i mezzi? Note a margine della sentenza n. 113 del 2020 della Corte costituzionale*, in *Osservatorio costituzionale*, 6-2020.

[59] R. PINARDI, *La Corte, i giudici ed il legislatore*, cit., 1993.

[60] N. PALAZZO, *Law-making power of the Constitutional Court of Italy*, in M. FLORCZAK-M. WATOR (eds.), *Judicial Law-Making in European Constitutional Courts*, New York, Routledge, 2020.

[61] Ord. no. 378/1988.

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to discuss a reform bill. For that reason, the CC was less reluctant to pursue its objective as the legal gap that the acceptance would have been less "traumatic". Another clamorous case in which inertia decisively affected the CC's judgements can be observed in its judgement regarding the so-called "health tax" (decision no. 431 of 1987). Although the «widespread inconsistency» of the legal setting was acknowledged in the abstract, the Court did not strike down the statute. It urged the legislator to promptly amend the glaring flaws of the law. Nevertheless, this decision was followed by eight ordinances of dismissal.

Thus, as argued, despite the appearance, the effectiveness of this form of judicial admonition is disappointingly poor [62]. As the law enforcement is deemed necessary to amend the legislative framework, the Court is unlikely to react promptly. As a result, the lawmaker can "sleep soundly". Paradoxically, the Court's attempt to limit its "demolishing" activity results in fostering Parliament's inertia. These significant faults have contributed to rendering this decision-making style increasingly less common, especially over the last decade. Among these latest judgements, the dismissal decision no. 279/2013 can be considered as marking the end of that period characterized by the intense usage of that judicial self-restraint. This decision concerned the issue of endemic overcrowding in national penalty institutions. Since Italy had just been condemned by the ECHR in the well-known pilot judgement *Torreggiani,* the Italian Court could have easily struck down the law, by arguing that the provisions in force failed to ensure the protection of human dignity under any form of detention or imprisonment (Italian Const., article 13 § 4; article 27 § 3). However, despite these ascertained profiles of unconstitutionality, the issue was rejected. Nevertheless, the deeply-felt tension between the effective guarantee of constitutionally protected rights and the respect of institutional boundaries emerges with a strong sense of urgency in the reasoning of decision no. 279. Moreover, the judicial warning seems to convey a relentlessly critical approach to the Parliament's future delays and the idea that the Constitution's gatekeeper was already envisioning less compromise solutions. Not surprisingly, that decision was afterward defined by its own author, justice Silvestri, as «an ultimate act of deference towards the legislator»[63].

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[62] R. PINARDI, *L'horror vacui nel giudizio sulle leggi*, Milano, Giuffrè, 2007. Despite the uniqueness of this type of judgements, many scholars give more emphasis to the legal status of the decision. According to this approach, the idea that the solution adopted by the CC must be regarded just as a more severe kind of "admonitory decisions" or "follow up decisions" seems extremely appropriate; see V. ONIDA, *Giudizio di costituzionalità delle leggi e responsabilità finanziaria del Parlamento*, in VV.AA., *Le sentenze della Corte costituzionale e l'art. 81, u.c., della Costituzione. Atti del seminario (Roma, Palazzo della Consulta, 8-9 novembre 1991)*, Milano, Giuffrè, 1993, 37 FF. who asserts that this form of interaction between the CC and the legislator would represent a «self-feeding substitutionary power»; A. ANZON, *Nuove tecniche decisorie della Corte costituzionale*, in *Giur. cost*., 1992, 3201 FF. depicts the legislator as «unconcerned to the persuasive effect of the CC's ultimatum»; A. PISANESCHI, *Le sentenze di costituzionalità provvisoria e di incostituzionalità non dichiarata: la transitorietà nel giudizio costituzionale*, in *Giurisprudenza costituzionale*, 1989, 632 FF. argues that this form of judgement often leads to a "mortification" of the guarantee of the applicants' individual rights involved in the main proceeding; under a different perspective A. GIUBILEI, *I confini mobili della funzione di garanzia costituzionale: l'incidenza del fattore temporale sulla scelta della tecnica decisoria nelle più recenti pronunce del giudice delle leggi*, in *Rivista "Gruppo di Pisa"*, 3-2019, 100 claims that the consequence of this ineffectiveness can be defined as a "short circuit" of the principle of loyal cooperation between constitutional organs.

[62] W.J. NARDINI, *Passive activism and the limits of judicial self-restraint: Lessons for America from Italian Constitutional Court*, in *Seton Hall Law Review*, 30, 1999, 4.

[63] G. SILVESTRI, *La dignità umana dentro le mura del carcere*, in *Rivista AIC*, 2-2014, 5.

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By contrast, in the current stage, when a blatant violation of constitutional principles occurs, the legislator would have priority for mending the constitutional "vulnus"[64]. However, in the case of prolonged delay, the Court can invoke its institutional duty to intervene "whatever it takes"[65]. The presence of unheard warnings would acquire the power to transform the long-term absolute *rime obbligate* obstacle into a relative limit[66].

In the Court's action, legislative omissions and the Parliament's "dysfunctions" have become the justifying base of a new judicial review technique. By precisely reporting its previous attempts to stimulate law-making, the Court has established a new method, apparently cooperative but substantially activist.

Whatever one may think of this modus operandi, it can hardly be denied that it also appears to reflect a strategy of self-legitimisation. In fact, the institution has been undergoing difficult times in which the legitimacy of the Constitution's gatekeeper is constantly called into question[67]. Moreover, criticism on judicial supremacy is deeply entrenched in the political system. For that reason, the Court is aware of the fact that more pervasive decisions must be founded on solid grounding. As a consequence, it seems to have found a way to turn Parliament's "failures" into a way to support more drastic decisions without undermining its institutional position. Indeed, the missed opportunities of the representative organ would highlight the indispensability of its subsidiary role. By forging a new decisional method based on the principles of gradualness, proportionality and institutional loyal cooperation, it implicitly would intend to confirm how its conduct is in compliance with the principle of separation of powers.

Recently, the Court seems to have further clarified the essence of this "new" category of acceptance decisions with judgements nos. 132/2020 and 97/2021. Both can be regarded as additional examples of "foreseen unconstitutionality". In the first one[68], the Court stated that punishing the offence of defamatory libel with a prison sentence conflicted with constitutional values (articles 3, 21 and 117 It. Const.). According to the Court, a more adequate balance between journalistic freedom of expression and the protection of individual reputation must be achieved. In its view, this judicial operation pertains to the legislator in the first place, as the

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[64] G. REPETTO, *Recenti orientamenti della Corte costituzionale in tema di sentenze di accoglimento manipolative*, in *Liber amicorum per Pasquale Costanzo*, in *Consultaonline.org*, 2020, 3.

[65] A. RUGGERI, *Rimosso senza indugio il limite della discrezionalità del legislatore, la Consulta dà alla luce la preannunziata regolazione del suicidio assistito (a prima lettura di Corte cost. n. 242 del 2019)*, in *Giustizia insieme*, 2019.

[66] M. RUOTOLO, *L' evoluzione delle tecniche decisorie della Corte costituzionale nel giudizio in via incidentale*, cit., 650.

[67] Even though Max Weber was not the first author to raise the debate on the meaning of "legitimacy", his popular doctrine emancipates the concept from its more restrictive meaning of mere "bureaucratic legality". To Weber, indeed, the idea of legitimacy acquired its dense meaning of «higher normative status». More specifically, being legitimate implies that those who are in power can rely on a condition of unwavering acknowledgement. This concept usually applies to States or groups of people in command. Weber shifted the meaning of this concept to a more "relational" and vertical horizon, describing the interaction between governed and governors; on that matter see M.E. SPENCER, *Weber on legitimate norms and authority*, in *The British Journal of Sociology*, vol. 21, no. 2, 123-134.

[68] A. RUGGERI, *Replicato, seppur in modo più cauto e accorto, alla Consulta lo schema della doppia pronuncia inaugurato in Cappato (nota minima a margine di Corte cost. n. 132 del 2020),* in *Consultaonline.org*, 3-2020, 406; M. PICCHI, *Un nuovo richiamo allo spirito di leale collaborazione istituzionale nel rispetto dei limiti delle reciproche attribuzioni: brevi riflessioni a margine dell'ordinanza n. 132/2020 della Corte costituzionale*, in *Osservatorio sulle fonti*, 3-2020, 1417 FF.; R. PINARDI, *La Corte ricorre nuovamente alla discussa tecnica decisionale inaugurata col caso Cappato*, in *Forum di Quaderni costituzionali*, 2020, 105.

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Parliament can better provide a more comprehensive criminal framework, while the Court's "natural task" should consist of *ex post* review. However, in view of the fact that the Parliament was evaluating different reform bills of the issue at stake, the Court found it advisable to postpone the decision. The Court considered waiting and setting a deadline as the preferable solution, in the spirit of cooperation and in compliance with the limitations established by the Constitution. The "proceduralism" characterizing this new form of judicial review and a cautious approach strongly emerges again in the reasoning.

The same approach was undertaken in relation to the sensitive issue of life imprisonment without parole in judgement no. 97/2021. After decision no. 253/2019, the Court ruled again on the legitimacy of the relevant provisions for mafia-related offences, which deprive any convicted of the right to apply for release on licence or for other adjustments of sentence if the offender is not willing to cooperate with the judicial authorities (section 4 *bis* of the Prison Administration Act). Behind the impediment established by the law under scrutiny lies the presumption of dangerousness and the idea that there would be no progress in term of rehabilitation in order to justify the favourable measure. As a result, according to the statute in force, the lack of cooperation even prevents the supervisory court from examining the applicant's request for release. In the Court's view, the aforementioned legal framework conflicts with many constitutional principles, especially with article 27, which establishes that punishment must always fulfil a rehabilitative function. In this light, the legislative provisions are deemed overly rigid, as other indicators concerning the prisoner's conduct. Similarly, the prisoner's individual history should be taken into consideration to assess his/her personal developments and whether the pre-existing criminal connections with Mafia circles still endure. On the other hand, the decision to cooperate could not give any guarantee of genuine repentance, as already pointed out by the ECtHR in the important decision *Viola v. Italy*, regarding the same issue. However, despite the evident profiles of unconstitutionality highlighted, the Court recommends the legislator to modify the statute by adopting the foreseen unconstitutionality judgement. Indeed, unlike decision no. 253/2019, whereby the less delicate issue at stake (leave of absence bonuses) has made it suitable to deliver a prompt acceptance decision, in this recent case the Constitutional Court advocates an organic legislative reform of the normative framework within a predetermined time.

5. *Conclusions*

Institutional and political relations have always had a decisive impact on the effectiveness of the judicial review of legislation in Italy. Among them, the relationship with the legislature has acquired a particularly considerable influence. Poor legislative responsiveness has been a crucial feature throughout the evolution of the constitutional framework.

By addressing the key issues of the development of the Constitutional Court's decisional strategies and the weaknesses of the parliamentary organ, it is self-evident that these important elements are highly interrelated. Since the Constitutional Court's normative stimuli often fall

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upon deaf ears, alternative and more flexible judicial options have been created. However, despite all these efforts, parliamentary inertia contributes to undermining the Court's guarantee function. To put it more clearly, if the Court cannot rely on its main counterpart, most of its power lacks concreteness. For this reason, legislative omissions have always been subjected to various criticisms.

On the other hand, the fact that the Court is currently manifesting a new approach to the Parliament's lack of responsiveness has been argued. Some landmark judgements in criminal proceedings and the development of the above-mentioned cooperative decision ("foreseen unconstitutionality") suggest that parliamentary inertia can become a solid grounding to justify the Court's interventionism. Indeed, due to the fragile legal basis of the Italian constitutional justice's architecture, the Constitutional Court's legitimacy has been periodically called into question, and more frequently in recent times. As a result, even when the Court has to come to terms with parliamentary inefficiency, it has adopted a more activist judicial strategy without renouncing to self-imposed rigorous procedural limitations.

This concept follows the course of other such interesting theories suggesting that the Italian Court has developed a peculiar form of «strength in weakness»[69]. The fragility of both the political context and the legal framework could have been a weak spot for the Court's action. However, the Court has been able to transform this fragility into an innovative cornerstone of a new form of "legitimate" activism.

As von Bogdandy and Paris underlined, «if one had to visualize the style of the Italian Constitutional Court, one might say that it is a poker-player. Poker games last awhile, and it is essential to observe how the other players react to your move. The Italian Constitutional Court does not put its cards, its core arguments, on the table in a single move, but rather announces only one of them, possibly not the strongest, and waits for the reaction of its competitor»[70]. By highlighting its own unsuccessful attempt(s) to establish institutional cooperation with the Parliament, the Court invokes the urgency of unconditionally guaranteeing fundamental rights[71]. In this way, its subsidiary action proves not only to be necessary but also fully aligned with its guarantee function. Inertia ceases to be a stumbling block to evolve into a milestone, reshaped by the Court in order to legitimise its own role in the system and in the eyes of the public opinion.

Therefore, the parliamentary indifference has become a crucial procedural element within the Court's reasoning. Besides, these decisional options also demonstrate that the Court's activism is firmly underpinned by a jurisdictional *modus operandi*. It may be suggested that even this more audacious style of reasoning unfolds through solid procedural rules or, at least, tries to keep appearance of objectiveness and proportionality. By describing the essence of the Constitutional Court's nature, one of its former Presidents, justice La Pergola, pointed out that

[69] A. VON BOGDANDY-D. PARIS, *Building Judicial Authority: A Comparison Between the Italian Constitutional Court and the German Federal Constitutional Court*, Max Planck Institute for Comparative Public Law & International Law (MPIL) Research Paper, no. 1., 2019, Available at SSRN: https://ssrn.com/abstract=3313641 or http://dx.doi.org/10.2139/ssrn.3313641 (accessed 3 August 2020).

[70] *Ivi*, 15.

[71] See G. SILVESTRI, *Del rendere giustizia costituzionale*, in *Questione giustizia*, 4-2020.

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«the judicial procedure fits the substance of its powers like a glove»[72]. This statement seems to perfectly summarize the Court's intentions. Such an innovative approach, even if aiming at justifying interventions less constrained by procedural limitations, paradoxically found in the procedural rulings its pivotal element and the main source of its success and legitimisation.

ABSTRACT

The Italian Constitutional Court is currently manifesting centralizing tendencies which result in the achievement of a role of unprecedented relevance. Starting from the analysis of this new scenario, the paper aims to highlight how the Italian constitutional Court has meanwhile developed an innovative approach to Parliament's unresponsiveness. Unlike previous stages, whereby the Parliament's lack of reaction to judicial stimuli proved detrimental to the effectiveness of the judicial review, some recent landmark judgements suggest that legislative omissions may have turned into a crucial procedural element in the Court's reasoning and into a solid mainstay to legitimize the Court's activism.

L'attuale fase della giustizia costituzionale italiana si caratterizza per l'acquisizione di un ruolo di rinnovata centralità da parte dell'organo di garanzia. Partendo dall'analisi di questo scenario in evoluzione, il contributo si propone di evidenziare come oggi la Corte abbia sviluppato anche un approccio differente in presenza dell'inerzia parlamentare. L'annoso problema della scarsa reattività dell'organo politico di fronte ai moniti del giudice delle leggi, tradizionale elemento cardine della dialettica Corte-Parlamento e fattore in grado di incidere negativamente sull'operazione di giustizia costituzionale *lato sensu*, appare infatti emergere sotto una nuova luce nella giurisprudenza più recente. L'analisi di alcune rilevanti decisioni dimostra come le omissioni legislative sembrano esser diventate un fondamento procedurale cruciale all'interno della motivazione della Corte e un solido caposaldo per legittimare il suo attivismo.

KEYWORDS: Constitutional Court, Parliament, legislative unresponsiveness, constitutional justice, judicial activism.

PAROLE CHIAVE: Corte costituzionale, Parlamento, inerzia legislativa, giustizia costituzionale, attivismo giudiziale.

[72] A. LA PERGOLA, *Introductory statement*, in *The role of the constitutional court in the consolidation of the rule of law*, in *Science and technique of democracy*, no. 10, 1994, 12.

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