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RÉPUBLIQUE ITALIENNE / REPUBLIC OF ITALY / ITALIENISCHE REPUBLIK / ИТАЛЬЯНСКАЯ РЕСПУБЛИКА

The Constitutional Court of the Republic of Italy
La Corte costituzionale della Repubblica italiana

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XVIIth Congress of the Conference of European Constitutional Courts

The role of constitutional courts in upholding and applying constitutional principles
Questionnaire

For national reports

I. The role of the Constitutional Court in defining and applying explicit/implicit constitutional principles

1. (a) Within constitutional review proceedings, does the Constitutional Court or any other equivalent body vested with the power to conduct constitutional review (hereafter referred to as the Constitutional Court) have recourse to any constitutional principles (including for example the separation of powers, checks and balances, the rule of law, equality and non-discrimination, etc.)? To what extent does the Constitutional Court base its action on those principles?

These principles have been constituent elements of the common European legal culture for more than two centuries.
Also Italian law, in line with other democratic European legal orders, is based on a number of necessary foundations, which constitute the essential features of the rule of law. These include first and foremost the political-constitutional role of the state as the supreme guardian of the rights and freedoms of individuals, as an instrument through which peaceful cohabitation between citizens is achieved. With that principal aim in mind, the constitutional organisation is structured around the principle of the separation of powers, with political power being divided between different institutional bodies, the powers of which are defined and protected on constitutional level. The guarantor role is also achieved through the principle of legality, namely the rule that public authorities may only act on the basis of prior legislative authority, thereby excluding forms of arbitrary actionand any limitation to the scope of the freedoms guaranteed to each individual must occur according to law. The law legitimises and delineates the action of public authorities; the law is a guarantee of the freedom of all. The principle of legality within Italian law, which follows the legal tradition of continental Europe (*civil law*), is encapsulated in the idea that the law, as formulated by the representatives of the Nation and having general and abstract characteristics, constitutes the source of all power. The principle of legality embraces the idea of the superiority of the law as enacted by the representatives chosen by the public at large. This representative principle is also a constituent element of the rule of law. A further distinctive feature, which completes and closes the system, is the guarantee of access to justice, which in turn is the manifestation of a complex body of principles, including primarily the independence and impartiality of the judiciary and the right to a fair trial.
These concepts have naturally taken on different meanings throughout the different periods of history. The fact that led to a change in the orientation of these concepts was the introduction of democratic constitutions in the aftermath of the Second World War. If one considers Italian law it is in fact evident that the notion of the rule of law within the liberal system of the Nineteenth Century or in the first few years of the Twentieth Century was quite different from the constitutional notion of the rule of law from the republican era. Similarly, and in parallel, all of its constituent principles have undergone profound change. One instance of such change relates to the primacy of the legislature as conceived *prior to* the republican Constitution, which nowadays has a different meaning due precisely to the presence of the superior source of the Constitution and the constitutional guarantee operating through the Constitutional Court. Another instance concerns the principle of equality, which has been profoundly changed, specifically as a result of the 2

Constitution, from a merely formal criterion into a substantive criterion. This – the principle of substantive equality – is the distinctive and characteristic feature of the Italian republican Constitution, the principle which operates as the necessary premise for a pluralist democracy and which is achieved through the construction of the welfare state. *On this point, reference is made to the presentation concerning the principle of equality and the prohibition on discrimination.*

The rule of law

The Constitutional Court has frequently referred to the concept since the outset of its activities, in order to stress the common substrate which includes the principles that guarantee the essential freedoms of citizens and which must be considered to be fundamental and essential for current democratic systems.

The Court has held that, within a state governed by the rule of law, a legal interest can only be afforded protection in accordance with the objective rules laid down within constitutional law (see Judgment no. 155 of 1990). There is a vast case law on this issue. This concept is perfectly exemplified by the assertion that any rule that has the effect of endorsing situations brought about by the violation of the principle of *neminem laedere* will be inconsistent with the framework of values upon which the rule of law is founded (see Judgment no. 16 of 1992). As far as the right to security is concerned, the Court takes the view that it consists in "orderly civil cohabitation", which is undoubtedly one half of a liberal and democratic state governed by the rule of law (see Judgment no. 2 of 1956). As regards the constitutional principles that legitimise the power of the government to adopt secondary legislation (decrees), the Court has held that these are fundamental and traditional constitutional principles of any state governed by the rule of law, which are now expressly provided for under Articles 70 and 77(1) of the Constitution (see Judgment no. 37 of 1957). In order to appreciate the meaning and scope of the right to a defence, the Court has held that it is fundamental within any legal system based on the indefatigable requirements of justice and on the linchpins of the rule of law (see Judgment no. 46 of 1957), and that within a free and democratic state governed by the rule of law, citizens may be afforded sufficient means to defend themselves against arbitrary action (see Judgment no. 121 of 1957). The rule of law ensures a suitable guarantee against abuses and excesses by the public administration (see Judgment no. 100 of 1987). As justification for the possibility of interpretative legislation, it has been asserted that such an instrument is widely accepted by other legal systems that feature characteristics of the rule of law and the democratic state, and that the enactment of interpretative legislation does not necessarily impinge upon the principle of the division of powers (see Judgment no. 118 of 1957). The principle of the pre-constituted court of law is considered to be rooted in the traditional concept of the natural judge, which has been forcefully and continuously asserted as one of the guarantees of the rule of law (see Judgment no. 88 of 1962). The guarantee of judicial relief ensured to "all persons" is an expression of a principle that is coessential with every type of state governed by the rule of law (see Judgment no. 44 of 1968). The proper conduct of the judicial function is recognised as being one of the fundamental aspects in the life of a state governed by the rule of law and the principle of legality is classified as a fundamental requirement of the rule of law (see Judgment no. 100 of 1981). Similarly, citizens' legitimate expectation of legal certainty is a fundamental and indispensable element of the rule of law (see Judgment no. 349 of 1985). The proper management of public funds obtained from taxpayers as a whole and destined for the satisfaction of public needs is a general principle of our legal order, which may be traced back to a fundamental principle of the rule of law (see Judgment no. 1007 of 1988). Military service has been classified as a personal service *par excellence* and the most burdensome that may be admitted within a civil and democratic society and a state governed by the rule of law (see Judgment no. 41 of 1990).

The separation of powers

The power exercised by the Constitutional Court to review jurisdictional disputes between branches of state or between bodies from the same branch of state is necessarily rooted in the principle of the 3

separation of powers. Similarly, the principle of the separation of powers is engaged when the Constitutional Court, acknowledging the limits placed upon its authority, recognises that the question brought before it for examination falls under the political discretion reserved to the legislature (see Judgment no. 23 of 2016), or when it reminds itself of its duty "of strict compliance with the limits placed on the powers of the Constitutional Court" (see Judgment no. 233 of 2015). It may thus be asserted that this general principle, which has not been expressly provided for within constitutional law, is a constituent element of the Italian legal order. Having once been understood as an expression of the fundamental powers of the state in accordance with the canons of the formal-substantive doctrine, it now operates as an instrument of guarantee, which may also coexist with a different conceptual arrangement of functions, in the sense that each branch of state may be vested with some of the functions that were traditionally separated (see Judgment no. 309 of 1988).

The broad case law in which the principle of the separation of powers is invoked features, first and foremost, the case law of the Constitutional Court, which has asserted, with regard to the structure of normative sources – which is recognised as one of the principal elements characterising the form of government within the constitutional system, and is correlated to the protection of fundamental values and rights – that "within the states that draw inspiration from the principle of the separation of powers and the subjection of the judiciary and the executive to the law, the adoption of primary rules is a matter for the body or bodies the power of which is derived directly from the people" (see Judgment no. 171 of 2007).

The same concept was reiterated by the Court in ruling that a position adopted within the case law could not result in an *abolitio criminis*, even if it was supported by a ruling of the Joint Divisions of the Court of Cassation, since "It is opposed also, and primarily – along with the principle of amendment exclusively by primary legislation in relation to criminal matters, cited at various points above, as laid down by Article 25(2) of the Constitution – by the principle of the separation of powers, and specifically as a ramification of the principle (Article 101(1) of the Constitution) that the courts must be subject (only) to the law… As is the case for the enactment of law, and of the criminal law in the present case, according to the constitutional architecture, so too their repeal – whether full or partial – cannot result from rules of case law, but only from an act of legislation (*eius est abrogare cuius est condere*)" (see Judgment no. 230 of 2012).

In other cases, the principle of the separation of powers expresses the principle of the independence of the judiciary or of the reservation of decision-making power in certain areas to the judiciary [*riserva di giurisdizione*] (see Judgment no. 85 of 2013), in that it limits the scope for action of the executive vis-à-vis the judiciary, as was the case in Judgment no. 457 of 2005 or in Judgment no. 200 of 2006 which, summarising the case law of the Constitutional Court, stated "the now consolidated view that, with implicit reference to the principle of the separation of powers, precludes any involvement of members of the government in the enforcement of criminal convictions in view of the judicialisation of such matters and in accordance with the principle that only the judiciary may address issues relating to criminal enforcement". Alternatively, and conversely, the principle is invoked in order to regulate the potential impact on the exercise of judicial powers against representatives of the Government (see Judgments no. 23 of 2011 and no. 168 of 2013).

On other occasions, the principle of the separation of powers has defined the position of the Houses of Parliament in relation to the judiciary according to constitutional principles: "These principles result in a rational and measured balance between the requirements of the rule of law, which tend to stress the values related to the exercise of judicial powers (universality of the law, legality, removal of all privileges, mandatory requirement for criminal prosecution, right to a defence in proceedings, etc.) and the need to safeguard areas of parliamentary autonomy that are not subject to ordinary law, the aim of which is to guarantee an indefatigable area of freedom to political representatives. In fact, not all conduct by members of Parliament is covered by immunity, but only that which is strictly conducive to the independent exercise of the powers of the legislature, whilst conduct that is 4

not related to the justificatory rationale for the constitutional autonomy of the Houses of Parliament falls within the scope of the ordinary legal rules" (Judgment no. 379 of 1996).

The principle of equality and the prohibition on discrimination

The principle of equality and non-discrimination is laid down by Article 3(1) of the Constitution, which provides that: "All citizens have equal social dignity and are equal before the law, without distinction as to sex, race, language, religion, political opinion or personal and social circumstances".

The Court has brought a range of principles and criteria under this provision, which have been decisive within the history of the case law of the Constitutional Court: equality in all of its various manifestations as the uniform treatment of identical or equivalent situations and the suitably different treatment of different situations, the fact that absolute presumptions will violate the principle of equality, the rationality or logical principle of non-contradiction, reasonableness or practical reason, the legitimacy of the end pursued by the legislature, the suitability and necessity of the means with regard to the end, the consistency of the legal order, the topical relevance of the *ratio legis*, the assessment of the legislative context and the factual conditions characterising the area of law within which the legislation is adopted, proportionality, adequacy, suitability, etc.

The principle of formal equality has since the very outset of the activity of the Constitutional Court taken on a pre-eminent role within constitutionality proceedings as it "is a general principle which conditions the entire legal order in terms of its objective structure" (see Judgment no. 25 of 1966), and is a "canon of consistency within the field of legal norms" (see Judgment no. 204 of 1982).

Starting from the principle of equality, the case law of the Court has also developed a general principle of "reasonableness", according to which the law must regulate identical situations in the same manner and different situations in a rationally different manner, with the result that a difference in treatment may be justified by a difference between the situations to which the law applies. The principle of equality "must ensure to all persons equal treatment when the subjective or objective conditions to which the legal rules apply for the purpose of their application are the same" (see Judgment no. 3 of 1957); the principle of equality is violated whenever the law, without reasonable justification, treats individuals differently even though their circumstances are the same (see Judgment no. 15 of 1960); the principle is also violated "when, confronted with objectively similar situations, different legal rules are adopted, resulting in arbitrary and unjustified discrimination" (see Judgment no. 111 of 1981). Conversely, whilst it may be the case that a finding that the principle of equality applies is premised on the similarity of the situations under comparison, the principle of equality "cannot be invoked where the circumstances are intrinsically different" (see Judgment no. 171 of 1982), or "when the circumstances, notwithstanding their derivation from common bases, differ on account of particular distinctive aspects" (see Judgment no. 100 of 1976).

Thus, equality proceedings under Article 3 of the Constitution involve two stages, the first consisting in a verification as to whether the situations under comparison are similar - that minimum degree of homogeneity necessary in order to initiate reasonableness proceedings - and the second, which is conditional upon a positive result to the first, a consideration as to whether or not the difference in treatment provided for by the law is rational.

The technique of the equality judgment is thus illustrated by Judgment no. 163 of 1993: "the principle of equality entails that a category of individuals, defined according to identical or reasonably similar characteristics in relation to the objective end at which the legislation under consideration is directed, must be subject to identical and homogeneous legal treatment, which is reasonably commensurate with the essential characteristics with reference to which that category of persons was defined. Conversely, where the individuals falling under a certain provision, which is intended to regulate a certain situation, give rise to a class of persons vested with characteristics that are not homogeneous having regard to the objective end pursued by the legal rules applied to them, these rules will only be compliant with the principle of equality in the event that they are reasonably

nuanced having regard to the different characteristics of the sub-categories of persons comprising that class".
According to the settled case law of the Court, the "passage of time" has been recognised as a significant element for the purposes of equality proceedings. In fact, "the events upon which the passage of time impinges are characterised by peculiar features, which render them different from similar situations under comparison" (see Judgment no. 6 of 1988), which means that the principle of equality will not be breached by a difference in treatment applied to the same category of individuals at different points in time as "the occurrence at different points in time of events and acts can in itself legitimise the application of one particular rule compared to the other" and "the temporal element may be a legitimate criterion for discrimination" (see Judgment no. 276 of 2005).
As regards the subjective scope of the principle of equality, the Court has repeatedly held that the principle is of general application, irrespective of the nature and classification of the subjects to which it is imputed. It thus applies not only in relation to natural persons but also to legal persons, associations and the state.
But above all it is beyond doubt that Article 3 of the Constitution also applies to foreign nationals. The Court has repeatedly asserted since Judgment no. 120 of 1967 that "although it appears in Article 3 of the Constitution in relation to citizens, the principle of equality must be considered to extend to foreign nationals where it impinges upon the protection of inviolable human rights, which are guaranteed to foreign nationals also under international law".
In more recent times after the free movement of persons and the phenomenon of migration to Italy became structural features, the assertion that the enjoyment of inviolable human rights cannot tolerate discrimination between Italian nationals and foreigners has become even weightier within the case law of the Court. According, Judgment no. 252 of 2001 acknowledged that the right to healthcare treatment that is necessary in order to protect an individual's health is "conditioned under constitutional law" by the requirement that it be balanced against other interests protected under constitutional law, subject in any case to the guarantee of "an irreducible core of the right to health" protected by the Constitution as an inviolable aspect of human dignity, which requires that no situation may be brought about in which protection is lacking. This irreducible core must be recognised also to foreign nationals, irrespective of their status under the legislation regulating the entry into and stay within the state, although the legislature may provide for different arrangements for its exercise as "a foreign national who is present, even unlawfully, within the country has the right to benefit from all services that are non-deferrable and urgent […] as this is a fundamental human right". More generally, it has been declared that where the right of residence is not in question, there can be no discrimination against foreign nationals by subjecting them to particular restrictions with regard to the enjoyment of fundamental human rights, which are by contrast recognised to citizens (see Judgment no. 306 of 2008), and that the restriction of benefits intended to ensure "sustenance", namely the survival of the individual, based on prerequisites other than individual circumstances is discriminatory against non-Community foreign nationals (see Judgment no. 187 of 2010). The case law of the Constitutional Court has also upheld as lawful actions taken by the regions in order to ensure that foreign nationals who do not have a valid residence permit have access to fundamental rights, such as schooling and professional training, social assistance, work, housing and health, without thereby encroaching upon the competences of the national government over immigration (see Judgments no. 61 of 2011 and no. 299 of 2010).
As regards the prohibition on discrimination, Article 3(1) of the Constitution expressly lays down a prohibition on discrimination on the grounds of sex, race, language, religion, political opinion or personal and social circumstances.
Please refer to section 6 of this first part of the questionnaire for an illustration of certain significant decisions in which this constitutional principle has been specifically applied.
The principle of substantive or material equality is laid down by Article 3(2) of the Constitution, which provides that: "It is the duty of the Republic to remove those obstacles of an economic or 6

social nature that constrain the freedom and equality of citizens, thereby impeding the full development of the human person and the effective participation of all workers in the political, economic and social organisation of the country".
This is a directive or policy provision, which seeks to direct the action of the public authorities with a view to achieving the material transformation of the reality underlying the legal order.
However, precisely due to its inclusion amongst the "fundamental principles" of the Constitution, this amounts to a substantive provision as it endows the entire system with meaning.
In the first place, it plays a decisive role in the interpretation of the entire legal order, including the Constitution. Formulae featuring in the Constitution such as "social utility" (Article 41(2)), "social ends" (Article 41(3)), the "social function" (Article 42(3)), "utility" or the "general interest" (Article 43) or "fair social relations" (Article 44(1)) would be clauses devoid of specific content were it not possible to view them in the light of the policy provision laid down by Article 3(2) of the Constitution.
Furthermore, it precludes any further legislation or activity that is at odds with the aim of achieving "*de facto*" equality, and at the same time legitimises acts that are indispensable in order to achieve that aim, even where these depart from the principle of formal equality.
Judgment no. 109 of 1993 clarifies well these concepts in asserting that "'positive' actions constitute the principal instrument available to the legislature in order to implement the duty - which Article 3(2) of the Constitution vests in the Republic - of ensuring an effective state of equal opportunity of social, economic and political inclusion for socially disadvantaged classes of person, fundamentally those that may be classified under the prohibition on discrimination laid down in paragraph one of Article 3 (sex, race, language, religion, political opinion or personal and social circumstances); since these 'positive actions' are intended to balance out situations of substantive inequality of circumstances, they entail the adoption of different legal provisions to benefit the disadvantaged social categories, notwithstanding the general principle of formal equality of treatment laid down by Article 3(1) of the Constitution, although must be implemented uniformly throughout the entire country as they may otherwise morph into additional factors of unequal treatment".
Therefore, for these reasons, the principle of substantive equality laid down in Article 3(2) of the Constitution may be defined as the essential key for understanding the Constitution, and in fact proves to be a decisive element in construing the very principle of constitutional equality.
The principle of substantive equality is reciprocally related and closely linked to social rights (protection of health, education, work, social security, assistance in the event of need, etc.) recognised in Part One of the Constitution. It may be stated that the principle of formal equality is an expression of the rule of law, whilst the principle of substantive equality is an expression of the welfare state. In fact, the purpose inherent within pluralist democracies in maintaining social cohesion requires the legal order to respond to the demands of the economically weaker social classes. The recognition and guarantee of the market economy, of ownership and of freedom of enterprise must be corrected through public action aimed at reducing material inequalities.
The case law of the Constitutional Court has expressly referred on various occasions to the constitutional parameter in question. For example, it was held in Judgment no. 38 of 1960, when reviewing the law on the mandatory employment of persons maimed or disabled as a result of occupational accidents within private undertakings that: "The rationale of the contested decree is not therefore to ensure that persons injured at work are provided with charity but to put in place the conditions that enable a contract of employment to be concluded where fitness for work is a requirement for the continuation of that relationship. When examining and assessing the provisions contained in the contested decree, it must not be forgotten that it applies to persons who have been maimed or disabled as a result of occupational accidents, and not to persons who are unfit for work. In keeping with the spirit and provision of Article 3(2) of the Constitution, by making this provision the decree removes the barriers that prevent the effective participation of all workers in the economic and social organisation of the country; in keeping with the spirit underlying Article

the Constitution, it promotes and implements the conditions that enable persons who have been maimed, having been recognised as such following appropriate investigation, who are still fit to work - and who, to repeat, are not referred to generically but in relation to professional categories - to be re-incorporated into the workplace from which they would otherwise be excluded under employment contracts that presuppose the performance of work; it offers these citizens who have been the victim of accidents a way of continuing to perform a role in line with their own possibilities; it also calls for the fulfilment of that inderogable duty of solidarity, which is solemnly listed amongst the fundamental principles of the Constitution (Article 2)".

1.(b) Does the Constitution or any other legal act direct constitutional review by referring to specific sources that are identifiable in the basic law, which the Constitutional Court may use as a basis for its argumentation?

All of the Court's decisions are based on the provisions of the Constitution as a parameter for judgment. However, not infrequently the provisions of the Constitution lay down rules concerning the production of law and the system of sources or refer to the provisions of non-state law. In cases of this type, any contrast between the law under review and the source referred to by a specific parameter of constitutional law, whereby the Constitution is supplemented by that source, will result in an indirect violation of that parameter of constitutional law. According to the terminology used in the case law of the Constitutional Court, sources referred to by constitutional provisions are defined as "interposed parameters".

Some of these are produced within the legal order. The most important include: the parent statute for a legislative decree; the fundamental principles of state legislation in relation to the legislative competence of the regions over areas falling under shared competence; the principles applicable to state legislation adopted pursuant to an exclusive power in relation to the legislative competence of the regions over residual areas; the regional statutes; the laws to which Article 137 of the Constitution refers in relation to the exercise of judicial powers, as well as the function and establishment of the Constitutional Court; the fundamental state principles governing the system of local self-government as identified by the Constitution and within the case law of the Constitutional Court.

Other sources originate from different legal systems or have the status of treaties, including in particular the Lateran Treaty (Article 7 of the Constitution); concordats with religious denominations (Article 8 of the Constitution); generally recognised rules of international law (Article 10 of the Constitution), European Union law (Articles 11 and 117(1) of the Constitution); international treaties and more particularly the ECHR (Article 117(1) of the Constitution).

As regards the ECHR, Judgments no. 348 and no. 349 of 2007 regulating the status of the Convention provisions within the system of Italian sources are of particular significance. They clarified that adherence to the ECHR did not entail any limitations on sovereignty, and that the position developed within the case law of the Constitutional Court concerning the prevalence of directly applicable EU law cannot accordingly apply to the provisions of the Convention. On the other hand, in the event that a contrast between national law and the Convention that cannot be rectified through interpretation, the ordinary courts have a duty to initiate the process of constitutional review in relation to a potential violation of Article 117(1) of the Constitution. The Court thus held that the provisions of the ECHR, as interpreted by the Strasbourg Court, acquire the force of constitutional provisions and are immune from constitutional review, ruling that "It is precisely because the provisions in question supplement a constitutional principle, whilst always retaining a lower status, that it is necessary that they respect the Constitution". It went on to specify that "The special nature of these provisions, which are different from both EC and treaty law, means 8

that constitutional review cannot be limited to the possible violation of fundamental principles and rights (see *inter alia*, Judgments no. 183 of 1973, no. 170 of 1984, no. 168 of 1991, no. 73 of 2001, no. 454 of 2006) or of supreme principles (see *inter alia*, Judgments no. 30 and no. 31 of 1971, no. 12 and no. 195 of 1972, no. 175 of 1973, no. 1 of 1977, no. 16 of 1978, no. 16 and no. 18 of 1982, no. 203 of 1989), but must extend to any contrast between 'interposed provisions' and 'constitutional provisions'".

2.(a) Which constitutional principles are considered to be systematic within your jurisdiction? Are there any explicit provisions within the Constitution that lay down fundamental principles?

With the advent of the rigid constitution within Italian law, the principles coincide with the constitutional provisions to which they relate. These values are fleshed out by the Court through its interpretative activity, and are inferred from the constitutional parameters affected by the questions brought before it for review (see Judgment no. 18 of 1982).

The text of the Italian Constitution starts with what it refers to as "Fundamental Principles". These are comprised of 12 Articles which lay down the founding values of the republican order: the principle of democracy and popular sovereignty (Article 1); the "personalist" principle, which is manifested in the recognition of inviolable human rights (Article 2), equal social dignity (Article 3(1)), the full development of the individual (Article 3(2)), the foundation of the democratic Republic on work (Articles 1(1) and 4(1)); the value of the common good to which all persons are obliged to contribute (Article 4(2)); the principle of solidarity uniting the general public (Article 2); the unitary principle and the principle of political institutional pluralism (Article 5); the protection of linguistic minorities (Article 6); the reciprocal independence of the State and the Catholic Church (Article 7); freedom of religion (Article 8); the promotion of culture and research (Article 9(1)); the protection of the landscape and of social and artistic heritage, as values impinging upon the identity of the Italian Nation (Article 9); the principle of openness towards the international community (Articles 10 and 11); the principle of the protection of foreign nationals who are persecuted in their own country (Article 10(3) and (4)); and the principle of non-aggression (Article 11).

Part I of the Constitution lays down further values, principles and rights (Articles 13-54) which constitute the democratic "rules of the game": political rights, civil rights, social rights and economic rights. These amount to the substantive prerequisites for enabling all persons to participate in democracy.

It may be stated that the principle of the welfare state emerges out of the complex body of principles and rights contained in Part I which, whilst not being expressly codified as such, is a distinctive and indispensable feature of the Republic. Consider health, which the Republic protects as a fundamental rights and interest of the public at large (Article 32(1)). This means that its protection performs an evidently crucial role within the process of constructing a collective national identity.

The social rights laid down in Part One of the Constitution are legitimised by Article 3(2) of the Constitution, which charges the Republic with a duty "to remove those obstacles of an economic or social nature which constrain the freedom and equality of citizens, thereby impeding the full development of the human person and the effective participation of all workers in the political, economic and social organisation of the country".

Within the constitutional system, social rights do not differ from traditional freedom rights, understood as individual rights. Having from the outset resolved the issue of the merely policy status of the reference constitutional provisions (see Judgment no. 1 of 1956), the case law of the Constitutional Court – in parallel with that of the ordinary courts – has chosen to render constitutional provisions directly applicable, even though they are asserted as principles. However, as rights to benefits, the protection they receive may vary in scale, because they must be balanced against other protected constitutional interests, including the availability of resources in the context of a necessary equilibrium within public finances, without prejudice to those interests that, 9

following the constitutional reform of 2001, represent essential levels of benefit, or a kind of hard core.
Moving beyond the albeit rich catalogue of social rights offered by the Constitution, the Court has significantly enriched it. In this regard the case law of the Constitutional Court has often referred to Article 2 of the Constitution which, through the principle of "equal social dignity" has been construed as a "pressure valve" for the system.
Part II of the Constitution sets out the principles regulating the operation of public authorities. These include *inter alia* the principles regulating the exercise of the judicial function, such as the principle of the independence of the judiciary (Articles 101-110), the principle of a fair trial and the right to make representations in the hearing of criminal evidence (Article 111), or the principle of the mandatory nature of criminal prosecution (Article 112). They also include the principles of the proper operation and impartiality of the public administration, the principle of budgetary equilibrium and the sustainability of the public debt and the principle of access to public sector employment through public competition (Article 97), which govern the operation of the public administration, along with the principles of subsidiarity, differentiation and adequacy (Article 118(1)) which regulate the administrative functions of the bodies comprising the Republic.
The case law of the Constitutional Court has introduced the concept of "supreme principles". This arises in situations in which the possibility of subjecting to constitutional review also constitutional laws that are considered to conflict with the "supreme principles" of the constitutional order is recognised (see Judgment no. 1146 of 1988). In order to clarify better these principles, the Judgment added that fundamental principles and inviolable human rights constitute "the characteristic and indispensable features of the constitutional order", and for this reason are also immune to constitutional review.
More recently (see Judgment no. 1 of 2013), the Court has held that the supreme constitutional principles include the "protection of life and individual freedom" and "safeguarding the constitutional integrity of the institutions of the Republic", with reference to the absolutely confidential status of the telephone conversations of the President of the Republic.
Furthermore, the case law of the Constitutional Court has used what it has defined as the "supreme principles of the Constitution", namely "fundamental principles of the constitutional system" in order to limit the incorporation into national law of provisions of European Union law and the terms of concordats as referred to in Article 7 of the Constitution.
These are values which the republican order cannot disregard even in relation to contact with other legal orders. Judgment no. 73 of 2001, amongst others, summarised the concept as follows: "The stance of openness of the Italian legal order both towards generally recognised rules of international law as well as towards international treaty law is subject to those limits that are necessary in order to guarantee its identity, and thus first and foremost the limits resulting from the Constitution. This applies even in the situations in which it is the Constitution itself that offers a specific basis for the adaptation of national law in line with international law, such as to vest the provisions introduced into Italian law with a particular legal status. The "fundamental principles of the constitutional order" and the "inalienable rights of the individual" in fact operate as a limit on the incorporation both of generally recognised rules of international law, with which the Italian legal order "complies" in accordance with Article 10(1) of the Constitution (see Judgment no. 48 of 1979), as well as the provisions contained in the treaties establishing international organisations with the purposes indicated in Article 11 of the Constitution or those adopted by such organisations (see Judgments nos. 183 of 1973; 176 of 1981; 170 of 1984; 232 of 1989 and 168 of 1991). In addition, the bilateral provisions by which the State and the Catholic Church regulate their relations according to Article 7(2) of the Constitution are subject, as a bar on their incorporation into Italian law, to the "supreme principles of the constitutional order of the state" (see Judgments nos. 30 and 31 of 1971; 12 and 195 of 1972; 175 of 1973; 16 of 1978; 16 and 18 of 1982)."
By Judgment no. 238 of 2014 the Court for the first time actioned the so-called "counterlimits" against a provision of international law. On that occasion, the Court ruled unconstitutional, with

reference to Articles 2 and 24 of the Constitution, a provision of international law on the immunity of states from the civil jurisdiction of other states. The questions were accepted insofar as the Italian courts were obliged to comply with the ruling of the International Court of Justice which required them to decline jurisdiction in relation to the acts (carried out *iure imperii*) of a foreign state which amounted to war crimes and crimes against humanity in breach of fundamental rights. The Court asserted that the total sacrifice of the right to judicial relief in respect of the fundamental rights violated by conduct recognised as constituting war crimes was entirely disproportionate: in fact, there cannot be considered to be any overriding public interest in the objective of not interfering with the exercise of the governmental powers of the state where these consist in "conduct that can be and is classified as constituting war crimes against individuals, as these are entirely extraneous to the legitimate exercise of governmental power".

2.(b) Is there any case law on the application of fundamental principles? With what frequency does the Court refer to such principles?

One of the most prominent techniques elaborated within the case law of the Constitutional Court in order to rationalise the application of the fundamental principles is the theory of the balancing between the values with constitutional status that protect all of the rights and principles at issue in the decision. This fundamental theory results from the constitutional law meta-principle (which is not expressly stated but is implicit) of pluralism, which embraces all other principles: tolerance between principles, a kind of *Grundnorm* of the pluralist constitutional state. It manifests itself through two propositions: no constitutional principle can stake a claim to apply to the extent that it negates others; a formula for reconciliation between principles must be found, or if this is not possible at least of coexistence. In order to achieve this result it is necessary to relativise against one another the constitutional principles specifically involved in order to create a space of recognition for all. This relativisation is referred to as balancing.

Balancing may be considered as the decision making technique *par excellence* within constitutional proceedings.

Out of the many assertions of principle by which the Court has illustrated the rationale we may cite: The role assigned to this Court as the guardian of the Constitution as a whole requires it to avoid any declaration that a statutory provision is unconstitutional from resulting, paradoxically, in effects which are even more incompatible with the Constitution than those that led it to challenge the legislation" (see Judgment no. 13 of 2004); "The institutional task vested in this Court requires the Constitution to be guaranteed as a unitary whole in such a manner as to ensure "systematic and unfragmented protection" for all rights and principles affected by the decision" (see Judgment no. 264 of 2012); "If this were not the case, one of the rights would end up expanding and would thereby become 'dominant' over the other legal interests recognised and protected under the Constitution" and "[t]he Italian Constitution, as is the case for other contemporary democratic and pluralist constitutions, requires an ongoing mutual balancing between fundamental principles and rights, none of which may claim to have absolute status" (see Judgment no. 85 of 2013). The Court has held that the criterion of balancing also applies to situations in which the interests in play involved the safeguarding of the powers of self-government enshrined in constitutional law and the need to ensure uniform protection for fundamental human rights. To cite an example, according to Judgment no. 121 of 2010 – on the provision of credit for the purchase of first homes by "weak" parties – "a balanced solution to the possible contradictions between the two legislative powers must take account of the fact that it is impossible for the principle of protection or the principle of competence to prevail absolutely. It would also be unacceptable were the state to relinquish any tangible policy aimed at protecting social rights, rather limiting itself to proclaiming theoretical levels of protection whilst taking no interest in the actual reality, or for the full legislative power of the regions to be sacrificed, as it could easily be deprived of substance by state legislation inspired by the aim of centralising social protection". 11

The more recent decisions in which the balancing technique has played a decisive role in resolving the complex cases brought before the Court for examination include Judgment no. 10 of 2015, which permitted the retroactive effects of a declaration of unconstitutionality to be limited, where it would have seriously affected the public finances, and Judgment no. 85 of 2013, which addressed the issue of the point of equilibrium between the right to health and the right to work.
A further development within the case law formulated in order to ensure the application of fundamental principles is the interpretative canon of "interpretation in a manner consistent with constitutional law" [*interpretazione conforme*], which is rooted in the principle of constitutional supremacy, and is expressed as follows by the Constitutional Court: "no statutory provision may be ruled unconstitutional solely on the grounds that it is open to interpretation in a manner that contrasts with the principles of constitutional law; rather, it must only be ruled unconstitutional when it is not possible to attribute it a meaning that would render it compatible with the Constitution" (see *inter alia*: Judgments no. 276 of 2009, no. 165 of 2008 and no. 379 of 2007; Orders nos. 341, 268 and 165 of 2008; no. 115 of 2005).
Another principle is that of the progressive implementation of constitutional values, which imposes significant burdens on the state budget, according to which budgetary choices: "being the result of non-justiciable political discretion, demand particular and substantive respect also by the Constitutional Court, which respect (…) has already translated – through a long-standing and consolidated position within the case law – into precise grounds for judgment, such as the safeguarding of the essential unitary and global nature of the budget (see Judgments no. 12 of 1987, no. 22 of 1968 and no. 1 of 1966) and above all the recognition of the principles of progressive action and proportionality in relation to the implementation of constitutional values that entail significant burdens for the state budget (see *inter alia*, Judgments no. 33 of 1987, no. 173 and no. 12 of 1986, no. 349 of 1985 and no. 26 of 1980)" (see Judgment no. 188 of 2015).
The principle that so-called free zones immune from constitutional review cannot be tolerated dictates that there cannot be any constitutional value the implementation of which may be considered to be exempt from the inviolable guarantee of constitutional review proceedings. According to that principle, the Court has on several occasions within interlocutory proceedings resolved procedural aspects which, according to its ordinary applicatory practice, could have led to the adoption of a procedural ruling, and decided on the merits of the question brought before it for examination. These ultimately involve adaptations of the rules of constitutional procedure which are justified by the overriding interest of enduring that the principle of legitimacy prevails over the principle of legality (see *inter alia* Judgments no. 1 of 2014, no. 46 and 5 of 2014, no. 273 and no. 28 of 2010, no. 57 of 2009, no. 325 of 2008 and no. 394 of 2006).
The principle of loyal cooperation between institutional bodies was recently used as a basis for Judgments no. 87 and no. 88 of 2012 in order to resolve two jurisdictional disputes between branches of state that had arisen between Parliament and the judiciary in relation to ministerial offences. In that case, the Court clarified that the prerequisite for the imposition by the principle of loyal cooperation of rules of action is the convergence of the branches of state - each acting within its own sphere of competence - on the resolution of a situation of significance under constitutional law where such branches do not operate separately but are rather coordinated by the Constitution, in order to enable the situation to be resolved through joint contributions from the various bodies between which the exercise of sovereign power is divided; on the other hand, it is evident that the principle of loyal cooperation need not operate unless there is a confluence of powers and their separation lies at the root of the choices made in the Constitution with the aim of dividing and organising the spheres of constitutional competence: this issue arises above all in relation to the judiciary, on which the current constitutional system imposes strict limits with regards to the prospects for interaction with other branches of state. A further example of the application of the principle of loyal cooperation between branches of state is provided by Judgment no. 168 of 2013, which confirmed that, whilst the legitimate impediment on the accused President of the Council of Ministers to participate in criminal hearings due to their concomitance with the exercise of 12

parliamentary and/or governmental functions is an institution subject to ordinary law and not to exceptional rules, it must nonetheless comply with the requirements imposed by the principle of loyal cooperation between branches of state (see Judgments no. 23 of 2011, no. 262 of 2009, no. 451 of 2005, no. 284 of 2004, no. 263 of 2003 and no. 225 of 2001).

The principle of supplementary protection applies in relation to the international and Community legal order and the ECHR. There are many explanations of this within the case law of the Constitutional Court. These include: the minimum levels of protection for fundamental rights laid down in the ECHR, as interpreted by the Strasbourg Court, constitute an inderogable limit for the Italian legislature only "downwards" and not "upwards" (see Order no. 223 of 2014); in the area of fundamental rights, respect for international obligations can never constitute a reason for reduced protection compared to that already put in place under national law, but may and must constitute an effective instrument for the expansion of such protection: in other words, the principle of the maximum expansion of protection and the resulting prevalence of the source that grants the strongest protection applies (see Judgment no. 317 of 2009); it is not possible for the provisions that provide the strongest guarantees under national law to be ruled unconstitutional in the name of the requirement to abide by the provisions of the ECHR or an interpretation thereof by the Strasbourg Court (Order no. 223 of 2014); the principles of constitutional standing and the principles laid down by the ECHR interact within a system of protection which, through the clause on compelling reasons of general interest, enables a point of equilibrium to be identified within the dialectic between the values in play and to release them from an atomistic consideration in isolation from one another. This clause contributes to striking a reasonable balance between the rights of individuals, which also have a super-individual relevance, and the spirit of solidarity inherent within the Constitution, which identifies the goals of equalisation and rebalancing within a broader system of constitutionally protected interests (see Judgment no. 127 of 2015).

3. Are there any implicit principles which are considered to be an integral part of the Constitution? If so, how can their existence be rationally explained? How have they formed over time? Do they originate from legal sources (e.g. national constitutional law or constitutional principles, principles derived from international or European law; new principles adopted recently or principles derived from previous constitutions)? Have university researchers or other social groups contributed to the development of the principles enshrined in the Constitution?

The task of the Constitutional Court boils down to its capacity to enforce the provisions of the Constitution as factors of cohesion, standing above any specific vested interests, in order that the Constitution may perform the "constitutive" role it is charged with. To that end, constitutional justice, in the search for fair rules that are historically suited to keeping together the whole, uses the yardstick of reasonableness and principles that are necessarily "open". The Constitutional Court thus draws heavily on constitutional principles that are not directly rooted in any constitutional provision: these are implicit principles. The systematic nature of the Constitution, which translates into the requirement that it must never be interpreted in a piecemeal fashion, rule by rule, but at all times interpreted as a "whole", enables implicit principles to be inferred from the system.

Amongst the unwritten principles, significance must be attributed to the prohibition on arbitrary legislation, which may be considered to be fundamental and foundational from the "constitutive" point of view. The case law of the Constitutional Court has developed the criteria for defining arbitrary legislation (see Judgment no. 107 of 1981). Non-arbitrariness includes the category of rationality and reasonableness. The principle of rationality, construed as logical consistency, is a structural characteristic of the law as conceived within the culture of our times (see Judgments no. 204 of 1982, and no. 156 of 1988). The case law expresses this concept according to the formula "identical laws for identical situations; different laws for different situations". The principle of reasonableness points to the consistency of the law with overriding values. Thus, the review of 13

reasonableness must be based on a scale of values, which naturally depends upon the existing legal culture and the reference framework comprised of the overall body of constitutional assertions of value.
Similarly, the following unwritten principles must be regarded as fundamental: the democratic principle which manifests itself in the status of equal citizenship for all and in the majoritarian principle associated with the protection of minorities; the secular principle, which the Court has classified as the "supreme principle of the constitutional order", with "a value higher than other rules and laws of constitutional status" (see Judgments no. 203 of 1989, and no. 13 of 1991); the principle of the continuity of the state, classified as "fundamental", which – according to the Court - is not an abstraction and is thus realised in tangible situations through the continuity in particular of its constitutional bodies, which are constitutionally necessary and essential bodies and cannot at any time cease to exist or lose their capacity to deliberate (see Judgment no. 1 of 2014); the principle of loyal cooperation between the state and the local government bodies which, already under the system in place *prior to* the reform of Title V of the Constitution (Constitutional Law no. 3 of 2001), was principally rooted in Article 5 of the Constitution (see Judgment no. 19 of 1997) and was explicitly classified as a constitutional principle (see Judgment no. 550 of 1990).
The principles of legal certainty and legitimate expectations occupy a primary position amongst the implicit principles. Within this context, the case law on the admissibility of laws laying down authentic interpretations is significant; such laws – as has been clarified – may be regarded as constitutional where they serve "the purpose of clarifying 'situations of objective uncertainty within the wording of the law' owing to 'unresolved debate within the case law'", or of "re-establishing an interpretation that more closely reflects the original intention of the legislature […] in order to uphold legal certainty and equality between private individuals, thus principles of pre-eminent constitutional significance" (see Judgment no. 78 of 2012). It must however also comply with a series of limits "with a view to safeguarding not only principles of constitutional law but also other fundamental values of legal culture, which have been laid down in order to protect the addressees of the provision and the legal order itself, including: the requirement to respect the general principle of reasonableness […]; the protection of the legitimate expectations of individuals as a principle inherent within the rule of law; the consistency and certainty of the legal order; and respect for the functions reserved under constitutional law to the judiciary (see Judgment no. 209 of 2010)" (see Judgment no. 78 of 2012)" (see Judgment no. 308 of 2013).
Certain implicit principles are an expression of the more developed European culture. These include the humanitarian principle. Many of the decisions of the Constitutional Court in the area of immigration provide an example of how constitutional principles may transform legislation grounded on cultural premises that contrast with the Constitution, without dismantling it but rather remoulding it after the fashion of legal culture (see *inter alia*, Judgment no. 5 of 2004).
Further implicit principles have been identified by the Court through interpretation, starting from express principles. For example, referring to Article 36 of the Constitution – which recognises the right to remuneration in proportion with the work performed that is capable of ensuring a free and dignified existence for the worker and his or her family – the case law of the Constitutional Court has declared the right to choose one's own form of gainful activity, the right to carry it out in any part of the national territory, the right to psychological and bodily integrity and the right of the worker to medical assistance, the right not to be arbitrarily dismissed, etc.
There are innumerable instances of implicit principles that have been formulated through the case law: the right to confidentiality, the right to a healthy environment, the right to information, the right to access the internet, the right to culture, the right to essential goods, the right to a home as an expression of human dignity and the minimum conditions of civil cohabitation, the right and protection of the dignity of the embryo, the right to gender identity, status as a parent as an expression of the fundamental and general freedom of self-determination, the right to live freely as a homosexual couple, etc. 14

Recently the concept of "new rights" has been used with specific reference to social rights; however, "novelty" has always been construed in the sense of not being expressly stated by the Constitution yet inferable from it through interpretation by reading the Constitution in a manner that is adapted to social developments. The elevation to the status of constitutional rights of interests deserving protection that result from the development of society has not applied to all interests, but only to those with a clear and close link with other constitutionally protected interests. In this regard the case law of the Constitutional Court has often referred to Article 2 of the Constitution which, through the principle of "equal social dignity" has been construed as a "pressure valve" for the system.

New rights may also emerge by virtue of the multi-level framework which the protection of rights has taken on. This means that there are new social rights, in the sense of rights not codified within the text of the Constitution, which have entered into national law by virtue of Article 117(1) of the Constitution (and Article 11 of the Constitution in relation to EU law only), thereby enabling further new dimensions to the full development of the individual and of equal dignity to be inferred through these supranational provisions.

As regards the contribution by the literature to the case law of the Court, the examples may be innumerable; to cite a view, it is sufficient to recall concepts that have entered into the case law of the Constitutional Court such as the "mandatory solution" ["*rime obbligate*"], "interposed parameters" and the "requirement of interpretation compatible with the Constitution", which have been developed precisely by pre-eminent scholars. Above all however, it is evident that the judges on the Constitutional Court, and in particular those originating from academia, bring to the body their own experience, training and studies. As far as the performance of its activities is concerned, the contribution provided to constitutional justices by "study assistants" is significant. These are particularly qualified lawyers chosen by the judge at the start of his or her mandate from either academia or the judiciary. With a view to the discussion of and decision concerning each case allocated to their own constitutional justice, study assistants attend to preparatory research, which also includes a selection of the literature. The purpose of this material is to enable the judge rapporteur and the Court to obtain a general overview of the matter at issue in the case, to provide more critical and complex detail in relation to specific points, and to account for the logical structure and problematic aspects of the legislation which have developed over time. An important aspect in more recent times has also been the contribution by foreign literature and the precedents to which such publications refer. In addition, the literature that analyses and comments the decisions of the Court also makes a contribution. Nowadays, thanks to the dissemination of online legal sites, a form of dialogue has been established between lawyers commenting on a decision *ex post* 'whilst the issue is still live', or even publishing short commentaries on questions that are still pending before the Court.

4. What role does the Constitutional Court play in the definition of constitutional principles? How has the Constitutional Court been able to identify fundamental principles over time? What type of interpretation (grammatical, literal, logical, historical, systematic, teleological, etc.) or which combination is used by the Constitutional Court when defining and applying these principles? What role is performed by the preparatory works to the Constitution or the preamble to the basic law when identifying and defining constitutional principles? Do universally recognised legal principles have any significance in this process?

In contrast to rules that are expressed through descriptions of acts or facts from real life, principles are expressed through "open concepts", i.e. concepts that can only be substantiated through "conceptions of those concepts". Centuries of political history, visions, religious and moral sentiment and social and philosophical ideas are condensed into these conceptions. Principles demonstrate that it is impossible to separate the law from the cultural environment within which the 15

principles are immersed and from which they draw life. This is why principles must be accounted for with reference to their historical dynamic. In spite of the fact that they are formulated within constitutional law, the content of principles arises, subsists and develops in line with the evolution of the culture to which they belong.

The Constitutional Court is called upon to interpret and apply the Constitution. As is the case for all judicial bodies, the Court too performs its regulatory function by determining the normative scope of the provisions it is required to apply. Principles may also be contained in ordinary legislation, although those contained in the Constitution give meaning and direction to the legal order. This is why constitutional interpretation calls for recourse to further canons of interpretation in addition to those required in order to interpret the law, since constitutional principles prevail over the entire legal order, including Article 12 of the Provisions on the Law in General [*preleggi*, enacted at the same time as the Civil Code], since constitutional rules are predominantly principles. A basic rule of interpretation provides assistance in this regard, according to which "any residual uncertainties within interpretation are destined to be resolved once the principle of constitutional supremacy has been adopted as pre-eminent canon of interpretation, which requires the interpreting body to choose, out of the various possible solutions, that which renders the provision compatible with the Constitution" (see Judgments no. 206 of 2015, no. 198 of 2003, no. 316 of 2001, no. 113 of 2000).

In addition, the hierarchical superiority of constitutional principles gives priority status to the systematic approach to interpretation, which dictates that coherence for the legal order on constitutional level must be sought. The Court asserts that all fundamental rights protected by the Constitution mutually supplement one another and that it is not therefore possible to identify whether any of them predominates absolutely over the others (see Judgment no. 85 of 2013); protection must always be systematic and must not be dissipated over a series of uncoordinated provisions that are in potential conflict with one another (see Judgment no. 264 of 2012).

A further special feature of constitutional interpretation consists in the fact that it involves interpretation of the various texts over time that contain the principles comprising the constitutional framework (canon of evolutive interpretation), endorsing one specific conception. An example of the transformation over time of the way in which constitutional principles are conceptualised is provided by Judgment no. 138 of 2010 on marriage between persons of the same sex. In this judgment – after acknowledging that the Constitution considers marriage exclusively as between a man and a woman – the Court added that the concepts of marriage and family "cannot be considered to have 'crystallised' with reference to the time when the Constitution entered into force as they feature the flexibility typical of constitutional principles, and must therefore be interpreted taking account not only of the transformations within the legal order but also of the development of society and customs". Another example of the evolution of principles is offered by the judgments concerning the issue of adultery, which refer to different conceptions of "family unity": Judgment no. 64 of 1961 ruled unfounded a question concerning the difference in the treatment of the spouses under criminal law, whereas – having ascertained that at that moment in social history the objective difference in circumstances that the Court had found to exist in the previous Judgment, thereby justifying different treatment by the criminal law for the wife compared to the husband, no longer obtained – Judgment no. 126 of 1968 ruled that provision unconstitutional.

The fact that constitutional rules are predominantly principles also demands a particular manner of interpretation, the principal expression of which is the technique of balancing which involves weighing up and settling the conflicting principles comprising the constitutional framework of a pluralist state. The Italian Constitution, as is the case for other contemporary democratic and pluralist constitutions, requires continuous reciprocal balancing between principles and fundamental rights, without claiming absolute status for any of them (see Judgment no. 85 of 2013).

The Court's interpretative activity has also been defined as creative or even normative when it has the result of changing the law through decisions which are referred to as "modificatory", provided that this occurs within the limits of the "mandatory solution". At a later stage, the "creative" attitude 16

manifested itself in the identification of fundamental rights not expressly recognised in the text of the Constitution.
As regards its interpretative activity, the Court has since Judgment no. 59 of 1958, "asserted that its power 'to rule legislation unconstitutional cannot be impeded by any gap in the law which may be caused with regard to the relations at issue; as it is a matter for the legislator […] to remove it with the utmost dispatch and in the most appropriate manner' and has recently reasserted that 'when confronted with a violation of the Constitution which cannot be resolved through interpretation – especially where it relates to fundamental rights – the Court is in any case required to provide a remedy' (see Judgment no. 113 of 2011)". (see Judgment no. 162 of 2014).
All of this explains the predominant role of the case law of the Court within constitutional interpretation, since its case law represents applicable and effective constitutional law.
The interpretative freedom enjoyed by the Court is however tempered by the richness and breadth of the reasons by which the Court has, over the course of its history, always paid heed to its precedents and the reasons that may have led it to depart from consolidated lines of case law.
Within the case law of the Constitutional Court, recourse for interpretative purposes to the preparatory works of the Constitution has turned out to be quite limited and tends to be limited to the initial years of the Court's existence when the problem of identifying and defining constitutional principles was a new one (see Judgments nos. 2 of 1956; 29 of 1958; 22 of 1959; 15 of 1962; 126 of 1962; 94 of 1965; 12 of 1966; 271 of 1986; 77 of 1987; 274 of 1993; 280 of 1995). Nowadays the Italian Constitutional Court, which has a history dating back sixty years, draws amply on its own precedents.
As regards universally recognised principles of law, these have significance as one of the characteristic elements of the legal order rooted in the Constitution is the strong openness towards international law and more generally towards external sources. This status has been further clarified by the new wording of Article 117(1) of the Constitution introduced by Constitutional Law no. 3 of 2001 which, in line with the constitutions in other European countries, expressly applies a specific restriction to the framework of principles which already provided a primary guarantee of compliance with the international obligations taken on by the state. However, within internal law the Constitutional remains the *master* of fundamental principles, and fundamental rights may not be regarded as an area in relation to which a transfer of sovereignty is conceivable; this is explained in Judgment no. 49 of 2015 as follows: "on most occasions, the convergence sought-after by legal practitioners and constitutional and international courts around shared approaches to the protection of inviolable human rights will offer a solution to the specific case which is capable of reconciling the principles flowing from both of these sources of law. However, in the highly unlikely event that such a route is blocked, it is beyond doubt that the courts will be required to abide first and foremost by the Constitution". Judgment no. 238 of 2014 reiterated also with reference to the rules of customary international law that the Court is the sole body competent to review compatibility with fundamental principles and with inviolable human rights, which constitute "the characteristic and indispensable features of the constitutional order, which for this reason are also immune to constitutional review".
5. What is the legal status of constitutional principles? Are they to be considered as foundational for the existing constitutional framework? What importance does the Constitutional Court ascribe to fundamental principles within the framework of substantive constitutional law? Are fundamental principles interpreted differently from the rights listed in the Constitution or does the Constitutional Court interpret fundamental principles in relation to the specific constitutional right as a supplementary means for its interpretation? Within your legal system, can fundamental principles constitute a self-standing basis for unconstitutionality, even if there is no link to the specific constitutional rule? Is there any legal action that specifically relates to judicial acts in order to ensure the application of constitutional principles?

With the historic Judgment no. 1 of 1956, the Court held that the renowned distinction between substantive norms and policy norms "is not decisive within constitutionality proceedings" because even a so-called "policy" of the legislature may have its own coercive force. With this Judgment it can be said that the Constitution became an "actionable norm" and was thus potentially applicable to all relations - not only political but also civil, social and economic - and was transformed in any case into a source of new fundamental principles for the legal order, in the light of which the Constitutional Court and the ordinary courts are called upon, each acting within its own ambit, to interpret the law.

As a result of this strong statement of position against attempts to render inoperative the extraordinary novelty of the entry into force of the democratic and republican Constitution, the Constitution actually became the basis not only for legal change within the country, but prior to that also cultural and social change. It is sufficient to consider the role performed by the case law of the Constitutional Court in rendering possible the democratisation of a legal order and of institutions that had originated in legislation enacted during the Fascist period. This is in addition to the role performed in order to eliminate from the legal order all anti-historical vestiges that denied equal dignity to women and in order to render their participation in society real and effective.

Principles have been decisive in achieving the revolution which the country required, prior to and even more so than rules and rights. This is the great historical merit which all people recognise in the Constitutional Court.

The importance of principles and the irreplaceable role which they have performed within the system later enabled it to be asserted that the Constitution is a norm that lives within the legal order and that it is implemented through the actions of all persons responsible for public functions. In particular, the ordinary courts have asserted this responsibility directly through interpretation in a manner compatible with the Constitution, which the Constitutional Court itself imposed as an obligation on referring courts, and the failure to comply with which is sanctioned by a ruling that the question of constitutionality is inadmissible. Order no. 174 of 1999 clearly illustrates the task set for the ordinary courts: "…the referring court has failed to comply with its duty to search for and to privilege possible interpretations that enable the statutory provision to be adapted in line with the parameters invoked by it in support of its doubt concerning the constitutionality of the contested provision; […] as this Court has asserted on numerous occasions, that search is vice versa necessary since, as a matter of principle, "laws are not declared unconstitutional because it is possible to interpret them so as to render them unconstitutional (and because some court is minded to do so), but because it is impossible to interpret them so as to render them constitutional" (see Judgment no. 356 of 1996); […] on the other hand, the referring court's interpretation appears to have been chosen, out of the various available, precisely in order to promote the question of constitutionality; […] therefore, the referring court has improperly requested this Court to issue a ruling to resolve the doubts it harbours concerning the possible contradiction between the provision thus interpreted and the Constitution, as the task - which is all the more unavoidable in the absence of any contrary position within the case law (see most recently Order no. 167 of 1998) - of providing an account of the normative system and of selecting, insofar as possible and using the interpretative instruments available, an interpretation that can avoid the aforementioned contradiction, falls primarily to the referring court".

However, leaving aside the sanction of inadmissibility for a referring court that has not attempted to identify an interpretation that is compatible with the Constitution, all ordinary courts, acting within their ordinary adjudicatory function, are required to apply the law in the light of the Constitution, for which the Court of Cassation acts as guarantor, both in its capacity as the supreme court but above all in its capacity as the court guaranteeing the uniform interpretation of the law. Recently the Court expressly acknowledged the contribution provided by the Court of Cassation, in guaranteeing the uniform interpretation of the law, to constitutional legality. By Judgment no. 119 of 2015, in upholding as admissible a question of constitutionality raised by the Joint Civil Divisions in relation

to the assertion of a legal principle in the interest of the law pursuant to Article 363(3) of the Code of Civil Procedure, it acknowledged that "it is in this way that the general interest of the legal order in constitutional legality is realised through the meeting and dialogue between two courts, which in all instances – and all the more so in this case – contribute to the definition of objective law. And it is a dialogue that proves to be particularly profitable, in particular in situations involving the extension of protection for a fundamental right".

6. Which fundamental principles are most often applied by the Constitutional Court? Please describe one or more constitutional principles which has/have been broadly influenced within your jurisdiction by constitutional review. What contribution has the Constitutional Court made to the formation and development of these principles? Please cite some examples from the case law of the Constitutional Court.

The principle of equality and the prohibition on discrimination are certainly the principles that have been most broadly applied over the course of sixty years of constitutional history.

The case law dealing with the issue of discrimination on the grounds of sex has been undoubtedly important. There has been a gradual yet significant development in this area in the rulings of the Court, which have moved from initial caution in the full application of the principle of equality to an increasingly marked recognition of equality between men and women. In Judgment no. 33 of 1960 the Court ruled partially unconstitutional Article 7 of Law no. 1176 of 1919 insofar as it excluded women from all public appointments involving the exercise of rights and political powers, thereby paving the way for the adoption of Law no. 66 of 1963, which provided for the eligibility of women for all appointments, professions and public sector employment, including the judiciary.

Again in the area of equality of access to work, and in particular to public sector employment, in Judgment no. 163 of 1993, which ruled unconstitutional a provision laying down identical physical requirements (height not lower than cm. 165) for both men and women for the purposes of access to the technical position of fire prevention officer, the Court noted that "to render participation [in a] public competition […] conditional upon compliance with the physical prerequisite of a particular minimum height, which is the same for men and women, […] without any distinction between women and men within that category [...] gives rise to 'indirect discrimination' against women as they are disproportionately disadvantaged compared to men in consideration of a statistically significant physical difference that is objectively dependent upon sex".

Judgment no. 109 of 1993 ruled unfounded the objections raised by certain regions against the financial initiatives provided for under Law no. 215 of 1992 in favour of undertakings under majority female ownership or management with the aim of offsetting (or mitigating) the historical imbalance against women entrepreneurs. The Court held that these measures fell under the forms of "positive actions" aimed at achieving effective equality between men and women; thus, as a positively differentiated discipline in view of the uniform implementation throughout the country of a primary constitutional value, its indirect impact on incentivisation policies promoted by the regions within the specific areas falling under their jurisdiction cannot constitute grounds for unconstitutionality, but rather requires the provision of adequate instruments for cooperation between the state and the regions.

However, it is above all with regard to the relationship between men and women within the family that the principle of equality has been increasingly broadly applied: thus, whilst in Judgment no. 64 of 1961 the Court justified the different treatment of men and women under the criminal law for the offence of adultery by reference to the different objective circumstances of men and women, making repeated references to concepts such as "social life", "public opinion" and "common experience", when it returned to the issue in Judgment no. 126 of 1968 it by contrast held that "the principle that the husband may violate the obligation of marital faithfulness with impunity, whilst the wife must be punished […] dates back to distant times in which the woman, who was even 19

considered to be legally incapable and deprived of many rights, was in a position of subjection to the power of her husband. Much has changed within social life since then, also in consideration of Article 29 of the Constitution, which allows for limitations on the moral and legal equality of man and wife solely in order to guarantee the unity of the family, which could in fact even be harmed by the criminal law provision in question".

This ruling is also related to several later Judgments, such as no. 127 of 1968 concerning the provision in the Civil Code that considered only adultery as grounds for separation, no. 147 of 1969 on the differences between an adulterous relationship of the wife and a husband's relationship with a mistress, and no. 99 of 1974 on the reciprocal obligation of faithfulness in the event of separation by mutual consent.

Another issue that has been repeatedly addressed by the Court is that of equality between man and women in the area of citizenship; there have in fact been numerous judgments in this area, which have resulted in the removal of several restrictions such as the rule within the reform of family law providing for the loss of Italian citizenship by any woman who acquired the citizenship of her foreign husband as a result of marriage (see Judgment no. 87 of 1975) and Law no. 555 of 1912 insofar as it did not provide that the child of an Italian mother who had retained her citizenship even after marriage to a foreign national should be an Italian citizen. On that occasion, in finding that the situation gave rise to discrimination between man and wife in relation to the determination of the *status civitatis* of their legitimate children, the Court stressed that "the current legislation […] violates in various ways the legal position of the mother in her relations with the state and her family. In particular, it cannot be disputed that both parents have a legally relevant interest in ensuring that their children are citizens and hence members of the same state community as themselves and that they may benefit from the protection associated with such membership. Similarly, the legislation violates the mother's position within the family, having regard to the requirement of equal duties and responsibility towards the children, which has now been established within the legal systems of our times" (see Judgment no. 30 of 1983).

However, the principle of equality without distinction as to sex has not been used solely to combat discrimination against women, as the Court has intervened on numerous occasions in order to strike down provisions that discriminate against men.

For instance, with regard to the provisions regulating the arrangements put in place in order to protect maternity and children, with particular reference to the failure to apply them or their limited application to a working father, Judgment no. 1 of 1987 stressed "the increasingly widespread position according to which the tasks of the woman and of the man are not to be divided according to distinct and separate roles, but must by contrast complement one another both within the family and within extra-familiar activities", given "the need for both parents to participate in the care and education of the children" and taking account of the fact that "also the father is capable of providing material assistance and emotional support to the child".

Judgment no. 341 of 1991 argued along similar lines in granting to a working father with a right of custody over a child the right to paternity leave for the first three months after the child joins the family, on an alternative basis to the mother; similarly, Judgment no. 179 of 1993 provided for the right to daily periods of rest for working fathers, as a general matter and under all circumstances, instead of the mother, subject however to the requirement of her consent, in order to care for the child during the first year of its life; finally, Judgment no. 385 of 2005 recognised a self-employed foster father undergoing procedures to adopt a child the right to receive, as an alternative to the mother, the maternity allowance for the first three months after the child joins the family.

Another area with particular social significance in which the Court has been called upon to rule is that concerning equality between races. The prohibition on distinctions based on race was referred to in Judgment no. 239 of 1984 in which the Court held that a provision requiring membership of the Jewish Community for all Israelis resident within the country clearly violated "the fundamental principle enshrined in Article 3 of the Constitution, which establishes the equality of all citizens 20

before the law "without distinction", *inter alia*, on the grounds of "race" or "religion". By contrast, the contested Article 4 gives essential significance specifically to religious and ethnic characteristics that flow into the classification of "Jewish"; this specifically results in a difference in treatment between citizens with that ethnic and religious characteristic, and who by virtue of that fact are automatically registered with the Jewish Community, thereby mandatorily becoming subject to the effects that result from such membership also under ordinary state law, and all other citizens to whom the provision does not apply".

As regards the issue of discrimination on the grounds of language, in Judgment no. 312 of 1983 the Court held that the imposition of a requirement of bilingualism for certain classes of public sector employee within a bilingual province "not only represents a form of protection for a linguistic minority - which is moreover only a minority on national level - but expresses the recognition (also in accordance with the international law obligations of the state) of a *de facto* situation and of the duty of every citizen, irrespective of his or her native language, to be able to communicate with other citizens when charged with public functions or required to provide a service in the public interest. Thus, the principle applies not only to citizens […] who are native Italian speakers, but also those who are native German speakers, and far from violating in fact fulfils the principle of equality in relation to which, as this Court has previously held (see Judgment no. 86 of 1975), it 'represents something different and additional', in strict accord with Article 6 of the Constitution".

As far as differences on the grounds of religion are concerned, the case law of the Court has registered a progressive evolution, as is demonstrated by the various positions adopted over time, in relation to the offence of blasphemy. In a 1958 judgment which classified the Catholic denomination not as a religion of the state as a political organisation but of the state as a society, the Court justified the special protection afforded to it by reference to the significance which that religion has had "in view of the long-standing and uninterrupted tradition of the Italian people, almost all of whom have always belonged to it" (see Judgment no. 79 of 1958) and subsequently confirmed that view, holding that "the limitation of the legislative provision to offences against the Catholic denomination results from an assessment made by the legislature of the scope of the social reactions caused by offences against the religious sentiment of the majority of the Italian population" (see Judgment no. 14 of 1973). Finally, Judgment no. 440 of 1995 provided that "the setting aside of the juxtaposition between the Catholic denomination, as the sole state religion, and the other 'recognised' faiths […] would now render unacceptable any type of discrimination based solely on the greater or lesser number of members of the various religious faiths"; thus, "the abandonment of the quantitative criterion […] means that, in the area of religion, since the number is not relevant, equal protection is required for the conscience of any person who professes a faith, irrespective of the religious denomination of origin". More recently, with regard to the offence of contempt against any person who professes a faith or a minister of a faith, by Judgment no. 168 of 2005 the Court ruled unconstitutional a provision stipulating an increased penalty if the offence was committed against the Catholic denomination, asserting that: "the constitutional requirements of equal protection for religious sentiment underlying the provision for equal penalties for the offences committed both against the Catholic faith and against other religious faiths […] result on the one hand from the principle of equality before the law without distinction as to religion laid down by Article 3 of the Constitution and on the other hand from the principle of the secular or non-confessional nature of the state […] which implies *inter alia* equidistance from and impartiality with regard to all religions, as required under Article 8 of the Constitution".

Finally, it is important to note several decisions concerning the distinction between political opinions and personal and social circumstances. Judgment no. 311 of 1996 is of particular interest: here the Court ruled unconstitutional a provision permitting the assessment, for the purposes of 21

compliance with the prerequisites for approval of appointment as a qualified private security guard, of the 'political' conduct of a candidate for appointment and conduct falling under the generically defined category of 'moral', which related exclusively to the area of private life and individual freedom, which are thus by their nature, infrequency and separation over time, not capable of reasonably impinging upon the reliability of the individual with regard to the correct performance of the specific function or activity under consideration.

Judgment no. 131 of 1979 is significant with regard to the consequences of the particular personal and social circumstances of each individual, which held that the automatic and non-deferrable conversion - on account of the established insolvency of the convicted person - of a fine into a custodial sentence violated the principle of equality before the criminal law. The Court held that: "The conversion in fact entails without any doubt an aggravation of the penalty imposed by the judge and thus alters the relationship of proportionality between the seriousness of the offence and the guilty party's capacity to offend on the one hand and the type and severity of the penalty imposed on the other hand, as determined at the discretion of the judge and subject to the limits and parameters laid down by law. This had the result that, on account of the financial circumstances of the convicted person, different sanctions would result from levels of responsibility that are deemed to be equivalent in relation to the violation of the criminal law provision, so much so as to require an insolvent individual to serve a sentence that is different in type and more severe than that stipulated within the general and abstract provision enacted by the legislature where the offence is punished solely by a fine".

II. Constitutional principles as higher norms? Is it possible to determine a hierarchy within the Constitution? Unamendable (eternal) provisions in Constitutions and judicial review of constitutional amendments.

1. Do constitutional principles have any kind of superiority over other provisions of the basic law? What type of relationship is there between principles and other constitutional provisions on the one hand and international and/or European Union law on the other? Are any provisions of international law or European Union law regarded as superior to national constitutional principles? If so, how are these superior international provisions applied in relation to national constitutional principles? What is the prevailing legal opinion amongst university researchers and practitioners in your legal system in relation to the superiority of certain constitutional principles over other provisions of the basic law?

In general, except as will be specified below in relation to the supreme principles of the constitutional order and those that may be classified under the concept of the "republican form" of the state, which are not amenable to constitutional review pursuant to Article 139, constitutional principles do not as such benefit from any specific superiority over and above provisions of the basic law. In fact, both the constitutional provisions laying down principles and those asserting rules are situated at the summit of the hierarchy of the sources of Italian law, are capable of operating for parameters of constitutionality and canons for the interpretation of laws and acts with 22

the force of law and, since they are contained in a rigid Constitution, may only be amended in accordance with the special procedure for constitutional amendment (Article 138).
The Constitution, which was written in the aftermath of the Second World War, is characterised by a marked openness to supranational and international legal orders, within a spirit of peace and cooperation with other countries and with inter-state organisations. This is apparent: in Article 10, which provides for a permanent and automatic mechanism for adapting Italian law in line with the provisions of customary international law, which are placed in a hierarchically superior position compared to primary sources; in Article 11 which permits limitations on sovereignty, under conditions of equality with other states, that are necessary in order to establish a system to ensure peace and justice between nations (second sentence) and requires the promotion and facilitation of international organisations pursuing that purpose (third sentence); and in Article 117(1) which requires the state and the regions, when exercising their respective legislative powers, to comply with the restrictions resulting from Community law and international obligations. Although Article 11 was conceived of with a view to Italy's membership of the UN, it subsequently enabled the Court to ensure constitutional coverage for the process of European integration, which was launched with the creation of the European Communities and eventually resulted in the creation of the European Union. Article 117 expressly constitutionalised the peculiar phenomenon of Community law and elevated international treaty law to the status of interposed parameters for establishing the constitutionality of internal legislation.
The internationalist vocation of the Constitution does not however imply that any provision whatsoever of European or international law can enter into the national legal system by virtue of the transfers of sovereignty permitted under European treaties or legislation implementing international treaties. In fact, the Constitution has a strong sense of its identity and, in order to ensure that the democratic, pluralist framework laid down by it for our Republic is not overturned, requires that the constituent elements of the Italian legal order, which no international commitment may prejudice, must be safeguarded unconditionally.
Within its copious and significant case law concerning the relations between national and Community law – which, where contained in acts that are directly applicable or vested with direct effect, can be introduced into the Italian legal order as a result of the transfer of legislative competence permitted by adherence to the treaties establishing the European Communities and the European Union – the Constitutional Court has discerned the characteristic features of the constitutional architecture to be the supreme principles of the constitutional order and the inalienable rights of the individual. In particular, Judgment no. 183 of 1973 specified that the restrictions on sovereignty permitted under Article 11 cannot under any circumstances vest the European institutions with an "inadmissible power to violate the fundamental principles of our constitutional order or inalienable human rights" and that, "should such an aberrant interpretation ever emerge (…) in such an eventuality the guarantee of constitutional review by this Court of the continuing compatibility of the Treaty with the said fundamental principles would always be guaranteed". The incorporation of any European provision at odds with indispensable constitutional values would thus result in a declaration that the provision implementing the treaty was unconstitutional insofar as it permitted the operation of the former provision within the legal system, obviously according to the time-scales and ordinary procedures applicable to the conduct of constitutional proceedings. This is the heart of the "doctrine of counterlimits", by which the Court has sought to impose limits (to date only theoretically) on the increasing dissemination of Community legislation in order to protect the identity of the republican legal order. On the other hand, constitutional provisions that laid down detailed rules, such as those on the division of legislative powers between the state and the regions, may be set aside by European law. In this regard, Judgment no. 126 of 1996 recognised two specific areas of state competence, after having found that the implementation of Community law within the Member States "must take account of the structure (centralised, decentralised, federal) of each of them, so as to enable Italy to respect its 23

fundamental regional structure, in addition to the applicability of its own constitutional law. The first area relates to the fact that it is the state that bears full and unitary responsibility towards the European Community for the implementation of Community law within the national legal system and, notwithstanding the competence "in the first instance" of the regions and autonomous provinces, it must be vested with competence "in the second instance" so as to enable it, through the exercise of powers to repeal, replace or supplement legislation, to avoid remaining powerless in the face of breaches of Community law caused by certain acts or omissions by bodies vested with constitutional autonomy. The second area corresponds to a genuine derogation from the international constitutional attribution of powers as "owing to the organisational requirements of the European Union, Community law may legitimately stipulate arrangements for its own implementation, and thus state legislation that departs from that framework of the ordinary constitutional distribution of internal powers, subject to compliance with fundamental and indispensable principles of constitutional law".

Counterlimits operate with the same intensity also in relation to other international rules backed up by specific constitutional cover. Judgment no. 48 of 1979 clarified in relation to the customary rules of international law referred to by Article 10 of the Constitution that the mechanism for automatic adaptation provided for thereunder "cannot in any way permit the violation of the fundamental principles of our constitutional order, operating within a constitutional system that is rooted in popular sovereignty and the rigidity of the Constitution". Also the provisions derived from the Concordat (Article 7) governing relations between the state and the Catholic Church cannot "act in opposition to the supreme principles of the constitutional order" (see Judgment no. 18 of 1982 which upheld the fundamental right to a defence guaranteed by Article 24 of the Constitution). More recently, Judgment no. 238 of 2014 - a historic case involving the actioning of the doctrine of counterlimits in relation to state immunity from civil jurisdiction for war crimes - reiterated that " the fundamental principles of our constitutional order or inalienable human rights" operate as a "limit on the incorporation both of generally recognised rules of international law, to which the Italian legal order 'complies' in accordance with Article 10(1) of the Constitution (…) and operate as counterlimits to the incorporation of provisions of European Union law (…), as well as limits on the incorporation of provisions implementing the Lateran Treaty and the Concordat (…). In other words, they constitute the characteristic and indispensable elements of the constitutional order, and for that reason are not amenable to constitutional review".

The position is different on the other hand as regards the relationship between the Constitution and other international law provisions, such as those derived from treaty law, which, prior to the constitutional reform of 2001, were incorporated into internal law largely on the level of and with the force of the source of primary law implementing the treaty, with the result that they could be disregarded or revoked by subsequent legislation, subject to the responsibility of the state, if applicable, under international law. It has only been the recent amendment of Article 117 that has raised the provisions of international treaty law to the status of interposed parameters for establishing the constitutionality of ordinary legislation, and hence any discrepancies that cannot be resolved through interpretation may give rise to the referral of questions of constitutionality. The question has been considered in greater depth within the detailed case law concerning the issue of relations between the internal legal order and the *sui generis* international body, the Council of Europe, resulting in the creation of a singular judicial system for the protection of human rights and fundamental freedoms, which is enshrined in the European Convention on Human Rights, and has been placed under the charge of the Strasbourg Court. The twin judgments no. 348 and no. 349 of 2007 clearly delineated the differences between the ECHR and European Union law: Article 11 of the Constitution may apply in relation to the former, "because it is not possible to identify any limitation on national sovereignty in the specific treaty provisions under examination". Since adherence to the ECHR did not entail any transfer of sovereignty, contrary to the position for participation in the process of European integration, constitutional principles apply with more cogent force, and are fully supreme over the provisions of the Convention, their applicability not

being restricted to the more limited field of supreme principles. Moreover, "because the provisions in question supplement a constitutional principle, whilst always retaining a lower status", and may be differentiated "from both EC and treaty law", it is necessary that the provisions of the ECHR as interpreted by the European Court "respect the Constitution" and that "constitutional review cannot be limited to the possible violation of fundamental principles and rights (…) or of supreme principles (…), but must extend to any contrast between interposed rules and the Constitution. The requirement that the provisions which supplement the constitutional principle must themselves respect the Constitution is absolute and inderogable in order to avoid the paradoxical situation whereby a legislative provision is declared unconstitutional on the basis of another sub-constitutional provision, which in turn breaches the Constitution. In all questions flowing from allegations of incompatibility between interposed rules and internal ordinary legislation, it is necessary to establish at the same time that both respect the Constitution, and more specifically that the interposed rule is compatible with the Constitution, as well as the constitutionality of the contested provision in the light of the interposed rules. Where an interposed rule is found to be in breach of a provision of the Constitution", the Court "has a duty to declare that the interposed rule is incapable of supplementing that parameter, providing, according to established procedures, for its removal from the Italian legal order. (…) the complete effectiveness of interposed rules is conditional on their compatibility with the Italian constitutional order, which cannot be modified by external sources, especially if these are not created by international organisations in relation to which limitations on sovereignty have been accepted such as those provided for in Article 11 of the Constitution".

Ultimately, according to the current constitutional framework and the case law of the Constitutional Court, the only provisions of international and European law that may be considered to be superior to national constitutional principles are the provisions of customary international law (Article 10), the provisions of concordats (Article 7) and the provisions of European Union law (Articles 11 and 117) which however cannot under any circumstances violate the supreme principles of the constitutional order and inalienable human rights, failing which they will be barred from incorporation into the internal legal order by a declaration of unconstitutionality in relation to this aspect of the law implementing the treaty that contains them or a ruling that the mechanism of dynamic reference ["*rinvio mobile*"] pursuant to Article 10 does not apply. All other non-state norms, which may at most operate as interposed parameters, must to that effect comply with the principles and rules laid down in the Constitution.

The (small number of) international provisions with superior status to the principles of national constitutional law (or, to be more precise, superior status to constitutional provisions laying down specific rules) are applied within national law largely following an assessment by the Constitutional Court, which alone has ultimate power of review of the constitutionality of non-state legislation. At levels below that of constitutional review, the bodies charged with applying the law, both within the judiciary and within the administration, decide on specific cases in accordance with the indications provided by the Constitutional Court. In the absence of a ruling by the Court, such international provisions will be applied in accordance with the relevant principles of interpretation and in accordance with any statements of position by the competent institutions, including the courts (for example the Strasbourg or Luxembourg courts or the International Court of Justice).

The prevalent opinion regarding the asserted superiority of certain constitutional principles over fundamental legislative provisions largely supports this view because the elaboration of the doctrine of counterlimits - with the attendant specification of the supreme principles of the constitutional order and the inalienable rights of the individual as characteristic and indispensable features of the republican order - has provided the Court with an instrument that is potentially able to stem in particular phenomena (which are however unlikely) involving the regression of the European

architecture and the weakening of fundamental constitutional guarantees, where these are considered to be stronger than those resulting from membership of a body, such as the Council of Europe, which is characterised by significant legal diversity between the participant countries. In this way, the international openness of the legal order is offset by a non-negotiable defence of the fundamental values of the Constitution. Moreover, the prudent use by the Court of the doctrine of counterlimits, which are asserted in general terms and only actioned in exceptional cases, has been favourably accepted as an expression of a stance of cooperation and not of conflict.

2. What type of relationship is there between constitutional principles within national law? Is there any hierarchy between these principles? What is the approach of the Constitutional Court towards the structuring of a hierarchy within the Constitution? Can it be concluded that the case law of the Constitutional Court grants a higher status to some constitutional principles compared to other provisions of the basic law?

Constitutional principles sit at the apex of the hierarchy of the sources of Italian law on an equal footing with all provisions with constitutional status, laying down parameters of constitutionality and canons of interpretation for internal legislation. Any constitutional provision, irrespective of whether or not it asserts a principle, may only be amended according to the arrangements and subject to the limits laid down for the constitutional amendment procedure.

The Constitution does not expressly provide for any hierarchy between constitutional principles. Besides, as provisions that are highly generic and not substantiated, constitutional principles are asserted in absolute terms. The lack of a pre-determined hierarchy is confirmed by the requirement that, in the event of conflict between principles, the Court systematically engages in delicate balancing operations with the aim of identifying a constitutionally acceptable balance between opposing rights or values. Judgment no. 85 of 2013 clearly asserted in this regard that "all fundamental rights protected by the Constitution mutually supplement one another and that it is not therefore possible to identify whether any of them predominates absolutely over the others. Protection must always be systematic and must not be dissipated over a series of uncoordinated provisions that are in potential conflict with one another (…). If this were not the case, one of the rights would end up expanding without limitation and would thereby become dominant over the other legal interests recognised and protected under the Constitution, which as a body constitute an expression of the dignity of the individual". In particular, the "fundamental" or primary status of a right or a value asserted by a constitutional provision laying down a principle can never give rise to a rigid hierarchy between fundamental rights because the Italian Constitution, as is the case for other contemporary democratic and pluralist constitutions, "requires continuous reciprocal balancing between principles and fundamental rights, without claiming absolute status for any of them". The classification of certain values as "primary" means that they may not be sacrificed entirely to other interests, even if these are protected under constitutional law, but not that they are placed at the summit of an absolute constitutional hierarchy. "Precisely because it is dynamic and not set in advance, the point of equilibrium must be assessed – by Parliament when enacting legislation and by the Constitutional Court upon review – according to the criteria of proportionality and reasonableness in such a manner as to ensure that their essential core is not sacrificed".

Whilst it is based on the need to arrive at solutions to the questions raised over time, case law of the Constitutional Court has complemented the requirement of coexistence with principles of equal standing, which is regulated in accordance with the principles of reasonableness, balancing and proportionality, with a different approach which aims to elevate certain principles, which are specifically supreme, to the status of constituent and characteristic features of the constitutional order. As indicated above, the 'theoreticisation' of the supreme principles of the constitutional order 26

and the inalienable rights of the individual has found its chosen field in the definition of relations between national law and extra-state law. However, those very same principles - which have been identified as being capable of resisting any, albeit rare, encroachments originating from international or supranational law - have been recognised consistently as having a passive force that is stronger than constitutional principles that cannot be said to be supreme, with the result that they are immune to constitutional review. In this way, the Court has ended up tracing out a substantive hierarchy within constitutional rules that have the same formal characteristics, with at its pinnacle the supreme principles of the constitutional order and the inalienable rights of the individual, which cannot be amended or revoked either by external rules or by constitutional amendment. Judgment no. 1146 of 1988 held in this regard that "The Italian Constitution contains certain supreme principles that cannot be subverted or amended in terms of their essential content even by legislation amending the Constitution or by other constitutional laws. These include both the principles expressly asserted by the Constitution itself to constitute absolute limits on the power of constitutional amendment, such as the republican form of government (Article 139 of the Constitution), as well as the principles which, whilst not being expressly mentioned under those that are not amenable to constitutional amendment, belong to the essence of the supreme values on which the Italian Constitution is based".

The case law of the Constitutional Court has fleshed out this general assertion with several detailed findings regarding the specific identification of overarching constitutional principles. For example, in recalling that the right to judicial relief is an "inviolable human right, which the Constitution guarantees in Article 2", Judgment no. 18 of 1982 did not hesitate to classify that right as one of "the supreme principles of our constitutional order, within which the guarantee to all persons and at all times of a judge and the right to judicial proceedings in relation to any dispute is intimately related to the very principle of democracy". Judgment no. 366 of 1991 observed that "the right to free and secret communication is inviolable in the general sense that its essential content cannot be subject to constitutional review as it incorporates a value of the personality that has foundational status with regard to the democratic system intended by the Constituent Assembly". By Judgment no. 35 of 1997, "the right to life, conceived of in its broadest extension, [must be] included under the inviolable rights, that is the rights that occupy a position within the legal order that is, so to speak, privileged since – to use the expression contained in Judgment no. 1146 of 1988 – they encapsulate the essence of the supreme values on which the Italian Constitution is based". Judgment no. 508 of 2000 classified the principle of secularism "inferred from the system of constitutional rules" as a "supreme principle" which characterises "the form of our state in a pluralist sense, within which different faiths, cultures and traditions must cohabit with equal freedoms".

The catalogue of overarching supreme principles, which are immune from constitutional review at least as regards their essential core, has been variously enriched by the literature which normally includes amongst them not only the republican form of the state (the only limit on amendment that is expressly stated in the Constitution in Article 139) but also all of the principles that appear to be indispensable in order to able to consider a given particular system as democratic: popular sovereignty, the elective and representative nature of the institutions, free and equal voting, freedom of information and the whole body of inviolable human rights guaranteed in general by Article 2 and by specific constitutional provisions, which give concrete overall form to the very concept of human dignity. For some, even the unitary and indivisible nature of the Republic amounts to a supreme principle immune to amendment.

In conclusion, whilst the case law of the Constitutional Court has constantly applied the technique of balancing between constitutional principles considered to be of equal standing, it has ended up attributing a superior status to certain constitutional principles that are "supreme" with regard to other fundamental legal provisions with the aim in particular of recognising their greater resilience against provisions originating from outside the legal system and their tendency to be immune to the process of constitutional amendment.27

3. How is the Constitution amended within your legal system? What procedure is provided for under the fundamental law for constitutional amendments? How was the Constitution approved? Does it explicitly provide for any clauses that cannot be amended (eternal)? Is there any difference between the way in which the Constitution was initially adopted and the current procedure for amending the basic law? Have there been any occasions on which constitutional principles have been subject to change within your legal system? If so, for what reason?

Under the constitutional order, amendments are subject to the procedure laid down by Article 138. In order to amend the Constitution two separate resolutions must be obtained from each House of Parliament at a distance of at least three months, and the second vote in each House must be approved by an absolute majority of the members of that House. Laws to amend the Constitution are then subject to a confirmatory referendum if so requested within three months of their publication by one fifth of the members of a House or 500,000 voters or five regional councils; they are not promulgated unless they are approved by a majority of the votes validly cast. However, no such referendum - the validity of which is not subject to any quorum - will be held if the law is approved during the second vote by each House by a majority of two thirds of the members.
Article 138 thus lays down a reinforced procedure compared to that governing the enactment of ordinary legislation, which involves two votes by the two Houses, the requirement of qualified majorities during the second vote and the possibility for the electorate to confirm or reject the proposed constitutional amendment.
The legislation described above pursues the twofold aim of favouring the due consideration of initiatives to amend the Constitution and of ensuring the greatest possible convergence of the political forces present within Parliament around any changes, such that the constitutional amendment is not dependent upon the governing majority of the day. In that sense, the failure to achieve a broad consensus of two thirds of the members of each House of Parliament enables in particular the opposition and minority parties to use the referendum in order to establish whether the choices made by a smaller parliamentary majority are endorsed.
Article 138 lays down the ordinary provisions governing constitutional review. However, it may be set aside by a Constitutional Law, as occurred with Constitutional Law no. 1 of 1993 and no. 1 of 1997 concerning the establishment of bi-cameral committees on institutional reforms, which were charged with drawing up complex and systematic proposals to amend large parts of the Constitution. However, these attempts were unsuccessful, in the first case due to the early end to the legislature, and in the second case due to the collapse of the necessary agreement between the political parties. To date, all constitutional amendments that have been successfully approved have followed the procedure laid down by Article 138.
The approval of the Constitution in the immediate aftermath of the Second World War represented the conclusion of a complex journey starting with the plebiscite held on 2 June 1946, the first to be held in Italy after the extension of universal suffrage also to women. On that occasion an institutional referendum was held in which the electorate stated its preference for a republic rather than a monarchy, and also elected the Constituent Assembly on a proportional basis, which was charged with the task of redrafting the Constitution and, pending the implementation of the new framework, performing typical parliamentary functions, such as the approval of legislation, the election of the provisional head of state and the control of the executive. The Assembly approved the final text of the Constitution on 22 December 1947 by a wide majority of its members (almost 90%), and the new republican Constitution entered into force on 1 January 1948.
The Constitution explicitly provides that only one (so-called eternal) clause may not be amended, with Article 139 stipulating that the republican form of the state may not be subject to constitutional 28

amendment. As already noted above, the case law of the Constitutional Court and the literature have dedicated a great deal of commentary to that clause, concluding that the supreme principles of the constitutional order and the inalienable rights of the individual are elements of the constituent and characteristic features of the Italian framework, and are as such immune to the power of constitutional amendment.

The procedure followed for the original approval of the Constitution and that laid down by Article 138 for constitutional amendment differ profoundly in two fundamental respects. First and foremost in terms of the decision making body: an *ad hoc* Constituent Assembly elected for that specific purpose in the former instance and the ordinary Parliament in the latter; secondly in terms of the procedure followed: one single vote of approval without a subsequent plebiscite in 1948 and a dual parliamentary vote, subject to special functional quora and followed if appropriate by a referendum for constitutional amendments. Within the literature, the procedure laid down by Article 138 has on some occasions been considered to be conducive to the adoption of specific and circumscribed initiatives to amend the Constitution, both on account of the quorum required by it, which is not particularly high (simple majority on the first vote, absolute majority on the second vote and a referendum, which is valid irrespective of the number of votes cast) and due to the opportunity to enable the electorate to make a clear and unequivocal choice. This is proven by the fact that, out of all the constitutional amendments adopted to date, only the 2001 reform related to a significant body of constitutional provisions (contained in Title V of Part II dedicated to local self-government). For this reason, the debate concerning the need to update the Constitution, which has been ongoing for several decades, has often called for the election of a new Constituent Assembly as this is considered to be the most appropriate instrument for pursuing the - widely shared - aim of making far-reaching changes to the Constitution, including in particular Part II regulating public powers.

To date, no changes have occurred that have had a significant impact on the fundamental principles laid down in Articles 1-12 of the Constitution or on Part I on the rights and duties of citizens (Articles 13-54).

The limited constitutional amendments to which the first 54 Articles of the Constitution have been subject are set out below.

The sole Article of Constitutional Law no. 1 of 1967 excluded the applicability to the offence of genocide of Articles 10, last paragraph, and 26, last paragraph, which prohibit the extradition of respectively foreign nationals and Italian nationals for political offences. By that amendment, Italy honoured the commitments made by it in adhering to the Convention on the Prevention and Punishment of the Crime of Genocide adopted by the General Assembly of the United Nations on 9 December 1948, balancing the countervailing requirements of the respect for and application of the Convention, which introduced the principle of extradition for genocide offences, with the constitutional provision prohibiting extradition for political offences.

Article 1 of Constitutional Law no. 1 of 2007 imposed an absolute prohibition on the death penalty, removing from the last paragraph of Article 27 the phrase ", except in the situations provided for under wartime military laws". The constitutional amendment – which was preceded by the repeal, by Law no. 589 of 1994, of the provisions of the Wartime Military Criminal Code that still contemplated the death penalty on a residual basis – came as the final step in a long journey of legal culture which, with the exception of the Fascist period, Italy embarked upon in 1889 with the adoption of the Criminal Code on the initiative of the Zanardelli Government, which was one of the first in Europe to have removed the death penalty from the range of sanctions that could be imposed for criminal offences. In addition, the amendment to Article 27 was adopted against the backdrop of a broader international strategy, which was pursued by Italy also within the European institutions, seeking to achieve a universal moratorium on UN level followed by the abolition of the death penalty; it also enabled Italy to complete the ratification procedure for Protocol no. 13 to the 29

European Convention on Human Rights, Article 6 of which provides for the absolute abolition of the death penalty under all circumstances, including for acts committed Protocol no. 13 to the European Convention on Human Rights.
Article 1 of Constitutional Law no. 1 of 2000 introduced a new paragraph three into Article 48, which stipulates that ordinary legislation shall define the prerequisites for and procedure for exercising the right to vote of citizens resident abroad in order to ensure its effective exercise, and establishing a foreign constituency for elections to the Houses of Parliament. The amendment sought to put an end to the exclusion from the exercise of political rights of millions of Italian citizens whom, in a unitary spirit, the political forces finally considered to be a major resource and a great source of cultural and economic wealth as well as in terms of international relations and in relation to major moral and political issues.
Finally, Article 1 of Constitutional Law no. 1 of 2003 supplemented the first paragraph of Article 51 by committing the Republic to take appropriate steps to promote equal opportunities between men and women in access to public and elected office. The reform provided an effective response to the general crisis of representation and the democratic deficit by confronting the increasingly pressing problem of the low level of female representation in public and institutional life. The formulation adopted was fully incorporated into the existing constitutional architecture, operating as further clarification for the principle of substantive equality (Article 3(2)). Mindful of the gap that had opened up between female participation in professional, social and cultural life and female participation in the political and institutional life of the country, the political forces concluded that Article 51 should achieve substantive equality for all citizens, and no longer only formal equality, also in the area of political rights.
More significant amendments concerned the provisions of Part II of the Constitution (Articles 55-139) governing the governmental structure of the Republic and hence the organisation and structure of public powers.
Constitutional Laws no. 2 of 1963 and no. 1 of 2001 amended Articles 56 and 57 on the composition and distribution of seats respectively in the Chamber of Deputies and in the Senate of the Republic. Constitutional Law no. 2 of 1963 also amended Article 60, providing for legislatures of equal duration for both Houses of Parliament. Constitutional Law no. 3 of 1993 reformulated Article 68 on the guarantees vested in Members of Parliament. Constitutional Law no. 1 of 1992 replaced Article 79, reformulating the procedure applicable to the grant of amnesties and sentence-reduction measures. Constitutional Law no. 1 of 1991 amended Article 88 on the dissolution of the Houses by the President of the Republic. Constitutional Law no. 1 of 1989 amended the procedural legislation governing ministerial offences laid down by Article 96. Constitutional Laws no. 1 of 1999 and no. 3 of 2001 radically amended the entire Title V dedicated to autonomous local government, reinforcing the regional structure of the republican system.
In terms of principles however, specific mention should be made of Constitutional Laws no. 1 of 2012 and no. 2 of 1999, which placed on constitutional footing respectively the principle of a balanced budget and the principle of a fair trial.
In particular, the constitutional law adopted in 2012 amended Articles 81, 97 and 119 (and, in a less evident manner, Article 117), providing *inter alia* that: "The state shall ensure a balance between income and expenditure within its own budget, taking account of both adverse and favourable stages of the economic cycle" (Article 81(1)); "The public administrations, acting in accordance with EU law, shall ensure that a balanced budget is achieved and that the public debt is sustainable" (Article 97(1)); "The municipalities, the provinces, the metropolitan cities and the regions shall have financial autonomy over income and expenditure, subject to the requirement that their respective budgets must be balanced, and shall contribute to ensuring compliance with the economic and financial constraints resulting from European Union law" (Article 119(1)). The incorporation into the Constitution of the principle of a balanced budget complied not only with financial requirements but also sought to pursue the objective of incorporating Italy into the process of fuller European integration, adhering to the principles of balanced budgets and sustainable public 30

debt. In particular, Parliament honoured the commitments made on Community level and, when confronted with changes on a global geopolitical level, considered it appropriate to contribute to designing a new form of European governance, which was more stable and efficient in terms of growth. The amendment represented the first step within a broader process of reform of public institutions, which required a coherent development on the level of implementing provisions as the positive effects expected imply a clear vision of political priorities, the reduction of spending in absolute terms, efficient public sector intervention and the elimination of pockets of low productivity.

Finally, Constitutional Law no. 2 of 1999 introduced five new paragraphs at the start of Article 111. The first two lay down provisions on trials in general: "Judicial powers shall be exercised through due process regulated by law. All court trials shall be conducted according to adversarial proceedings and the parties shall be conducted under conditions of equality before an independent and impartial judge. The law shall provide for the reasonable duration of trials". On the other hand, the following three provisions lay down specific rules governing the exercise of criminal judicial powers: "In criminal law trials, the law shall ensure that the alleged offender is promptly informed in confidentiality of the nature and reasons for the charges that are brought and has adequate time and conditions to prepare a defence. The defendant shall have the right to cross-examine or to instruct the cross-examination before a judge of the persons making accusations and to summon and examine persons for the defence under the same conditions as the prosecution, as well as the right to produce all other evidence in favour of the defence. The defendant shall be entitled to the assistance of an interpreter in the event that he or she does not speak or understand the language in which the court proceedings are conducted. In criminal law proceedings, the taking of evidence shall be based on the principle of adversarial hearings. The guilt of the defendant cannot be established on the basis of statements by persons who, out of their own free choice, have at all times voluntarily avoided undergoing cross-examination by the defendant or the defence counsel. The law shall regulate the situations in which the taking of evidence does not occur within adversarial proceedings with the consent of the defendant or owing to reasons of ascertained objective impossibility or proven unlawful conduct". The reform, which was sought in part in order to render explicit guarantees that were already inherent within the constitutional system and fell under Article 24, introduced the concept of a fair trial as a basic prerequisite for the constitutionalisation of the principles underlying the new adversarial model of criminal procedure: impartiality of the judge, reasonable duration of trials, equality between the parties and the principle of adversarial proceedings. Moreover, the political forces decided to make express provision governing the *corpus* of the trial within constitutional law.

4. Must the procedure for amending the Constitution be subject to judicial review by the Court or is this an exclusive prerogative of political actors? Regarding this issue, what is the dominant legal opinion amongst university researchers and other social groups in your legal system?

The procedure currently governing constitutional review does not contemplate preventive judicial review by the Court prior to definitive approval by the Houses of Parliament; it therefore remains an exclusive prerogative of political operators, subject to the verdict of the electorate in the event that a confirmatory referendum is triggered and subject to subsequent constitutional review by the Court pursuant to Article 134 and the relevant implementing provisions contained in constitutional law and ordinary legislation.

To date there does not appear to have been any debate concerning the lack of any provision for judicial review by the Court as part of the process of constitutional amendment.31

However, the attendant benefits and risks may be intuited even only by reference to the opinions mentioned below that have accompanied the recent proposal for constitutional reform, which makes provision for the preventive judicial review of the constitutionality of electoral legislation.
Accordingly, the Court's involvement in the process of amendment could be welcomed insofar as it reinforced its role as the guardian of the Constitution precisely in the specific area - constitutional amendment - that more than any other, due to the delicate nature of amendment, would require a close verification of compliance with the procedural and substantive limits applicable to the exercise of the power of amendment. In this way, the review of compliance with the characteristic and essential features of the legal order would become effective and could consequently force politicians to draw up commonly endorsed constitutional reforms. On the other hand, the choice not to involve the Constitutional Court within such a strictly political process would preserve its autonomy and independence of judgment, which would be necessary in order to carry out any subsequent review in a credible and persuasive manner.

5. In your legal system, does the Constitution provide for the possibility of the constitutional review of constitutional amendments? If so, which legal body may apply to the Constitutional Court to dispute the constitutionality of an amendment of the basic law? In this case, what review procedure is provided for?

Constitutional review of constitutional amendments is only permitted under Italian law on an *ex post* basis. In fact, the terminology adopted in Article 134(1) ("The Constitutional Court shall pass judgement on disputes concerning the constitutional legitimacy of laws and enactments having force of law issued by the state and regions") has been consistently interpreted as being applicable to laws amending the Constitution. In fact, if this were not the case, absent any possibility to seek review by the Court, the issue of compliance with Article 139 and the other implicit limits on the power of amendment would be inadmissibly detached from the judicial control which is coessential to the rigid nature of the Constitution, and would be left to the free discretion of the parliamentary majority, or at most to the electorate.
The constitutionality of a law amending the Constitution may be questioned by the same parties and according to the same procedures laid down in general terms for the constitutional review of legislation. The Court may thus be seized on an interlocutory basis (Articles 1 of the Constitutional Law no. 1 of 1948 and 23 of Law no. 87 of 1953) by a "judge" who considers, during the course of "proceedings" of which he or she is apprised, that a question raised in relation to a parameter of constitutional law that has been subject to amendment is relevant and not manifestly groundless; or directly (Articles 127 of the Constitution, 31, 32 and 33 of Law no. 87 of 1953) by application by bodies vested with legislative power (state, regions and autonomous provinces) within a mandatory time limit of 60 days of publication of the Law if they consider their powers to have been encroached upon or that the Constitution has been violated as a consequence of the amendment.
No provision is made, not even within the internal rules of the Court, for specific rules in the event that constitutional proceedings relate to laws concerning the amendment of the Constitution.

6. Is the Court entitled to review the constitutionality of an amendment of the basic law with regard to substantive aspects or can it only express itself in relation to procedural aspects? If such competence has not been explicitly recognised, has the Court ever ruled on or has it ever interpreted a constitutional amendment? What did the Constitutional Court base its position on? Is there any precedent in which the Constitutional Court defined its power to review constitutional amendments from a substantive or procedural viewpoint? What is the legal effect 32

of decisions of the Constitutional Court establishing the incompatibility of a constitutional amendment with the Constitution? Please cite some examples from the case law of the Constitutional Court.

According to the settled position within the literature, the Court is empowered to review the constitutionality of any amendment to the Constitution both in terms of formal defects resulting from the violation of the procedural rules laid down by Article 138 and in relation to substantive defects resulting from the violation of explicit limits (Article 139) to the power of amendment, and implicit limits that may be inferred through interpretation.

In this regard, Judgment no. 1146 of 1988 expressly acknowledged that the Court has competence "to rule on the compatibility of laws amending the Constitution and other constitutional laws also with the supreme principles of the constitutional system" because, if this were not the case, "it would lead to the absurd result of considering the system of judicial guarantees for the Constitution to be defective or not effective precisely in relation to its supreme value".

Leaving aside the above statement of the theoretical position, the Court has never had the opportunity to rule on the constitutionality of a law amending the Constitution. Only one constitutional law has been ruled unconstitutional: this occurred in Judgment no. 6 of 1970 which struck down the provisions of the Statute of Sicily Region concerning the High Court of Sicily Region on the grounds that "within a unitary state, even one that is comprised of a plurality of self-governing territories (Article 5 of the Constitution), the principle of the unitary of constitutional jurisdiction cannot be subject to any exceptions".

Conversely, the Court may and must interpret the constitutional amendment, which must be used as a parameter for assessing the constitutionality of primary legislation. In such an eventuality in fact, the Constitutional Court does nothing other than carry out the preliminary operation of defining the content of one of the two terms of the judgment falling to it, which is necessary in order to verify the constitutionality of the contested legislation. One example, which is extremely significant due to its recurrence, was offered by the 2001 reform which, amending Title V of Part II of the Constitution with the aim of enhancing the regional structure of the Republic, engaged the Court for a number of years in a delicate task of interpretation in order to delineate the respective competences of the state and the regions and to define the relative areas of law and the necessary mechanisms for engagement in order to ensure the proper conduct of relations between local autonomous bodies. The interpretation of the constitutional amendment has given rise to the principle that regional powers should be exercised according to the principle of subsidiarity (see Judgment no. 303 of 2003) whilst giving a new lease of life to the principle of loyal cooperation which permeates the entire sector of relations between the state and self-governing bodies, regulating the frequent and inevitable cases in which competences overlap (see Judgments no. 50 of 2005 and no. 31 of 2006).

The positions expressed by the Constitutional Court were based, with regard to the amenability to constitutional review of laws amending the Constitution, on the need to guarantee the efficacy of the system of constitutional justice and, in the final analysis, the rigidity of the Constitution with regard to "rules of higher status" (see Judgment no. 1146 of 1988). As regards the business of interpreting constitutional amendments which are taken as a parameter (and not as the object) of proceedings, this is the inherent feature of judicial activity, in accordance with the principle *iura novit curia*.

The judicial effect of a decision of the Court ruling that a constitutional amendment is unconstitutional can only, under current arrangements, be that laid down by Article 136(1) of the Constitution and Article 30(3) of Law no. 87 of 1953, which provide respectively for the termination of the effects and the prohibition on the application of any provision declared 33

unconstitutional from the day after publication of the decision. With regard to laws amending the Constitution, any finding concerning a breach of the procedural rules laid down in Article 138, the supreme principles of the constitutional order or the inalienable rights of the individual must lead to a ruling that the constitutional provisions previously in force were never validly repealed. Although the revival of the norms repealed by provisions that have been declared unconstitutional is a phenomenon that is not entirely uncontroversial and is in any case exceptional, any other solution would appear to be precluded by the need to guarantee the primacy of the Constitution and in particular its intangible core.

7. Is there any tendency within your legal system to reinforce the authority of the Constitution by extending the Constitutional Court's power in relation to the review of laws amending the basic law? Do university researchers or other social groups support this view? How is constitutional review carried out in this case? Would the extension or recognition of the authority of the Constitutional Court encourage the fulfilment of constitutional objectives or would it by contrast constitute a threat to their fulfilment? What is the debate among legal practitioners and jurists in your legal system?

Within the current legal order, it is not at present possible to discern any sure and certain tendency to reinforce the authority of the Constitution by extending the Court's power in relation to the review of laws amending the basic law. However, an indication to that effect may be discerned within Article 13 of the draft bill to amend the Constitution, which is currently pending confirmation by referendum having been approved by Parliament during the current legislature. In fact, Article 134 would be supplemented by a second paragraph which would vest the Court with the task of judging also the "constitutionality of laws governing the election of members of the Chamber of Deputies and of the Senate of the Republic" in accordance with Article 73(2). This latter provision provides for the subjection of electoral legislation, prior to promulgation, to "preventive constitutional review" in the event that an application supported by reasons is presented within ten days of approval of the law by one quarter of the members of the Chamber of Deputies or by one third of the Senators. Whilst proceedings are pending, which must be concluded within the following thirty days, the time limit for promulgation will remain suspended and in the event of a declaration of unconstitutionality the law must not be promulgated. Whilst electoral law may form part of ordinary legislation, there is no doubt that the proposed configuration of new preventive constitutional review (which would operate alongside that currently provided in relation to the statutes of the ordinary regions) would accentuate the role of the Court within an area which is in any case closely related to the form of government and the organisation of the central state.

Whilst the debate concerning this issue cannot be compared with that surrounding the new constitutional settlement for the Senate, it has resulted in contrasting opinions.

The literature has in particular noted the benefits and risks associated with the introduction of preventive constitutional review proceedings for electoral legislation. On the positive side, the effect of encouraging a shared position in relation to electoral legislation is stressed, which would be furthered, almost as a deterrent, by a ruling of the Court in the event that it were petitioned by a dissenting minority; positive responses have also been received to the attempt to limit *ex post* constitutional review in future which, as has been demonstrated by the experience culminating in the recent ruling that certain aspects of the applicable electoral legislation were unconstitutional (see Judgment no. 1 of 2014), represents a reaction by the legal system which is not only uncertain in terms of what is challenged and when, but may also give rise to controversy as to the legitimacy of a legislature elected on the basis of rules that are unconstitutional. In a nutshell, the proposed reform seeks appropriately to avoid an electoral law that is already in force and has already been applied from being challenged and ruled unconstitutional, whilst reinforcing the role of the Court as

the guardian of the Constitution and of fundamental values such as governability and the right to vote, enabling these to contribute to the creation of a calm and stable political atmosphere. On the negative side, other responses have stressed the inappropriateness of any substantive involvement of the Constitutional Court with laws that fall to the political arena, which would distort its standing as a judicial body, albeit *sui generis*, which can moreover only intervene in response to breaches of the Constitution asserted within proceedings before a court of law. Thus, the critical issues pointed out relate to the Court's possible exposure to external pressure and conditioning, which is liable to give rise to a dangerous dynamic of legitimisation, along with the intrinsic heterogeneity of the new function vis-a-vis the powers currently vested in the Constitutional Court.
In general, commentators have stressed the need for the concise provisions made in the reform to be supplemented both through legislation - whether constitutional or ordinary - and through regulations of the Court, with the adoption of rules aimed at resolving some of the not insignificant problems associated with implementation (the preclusion or admissibility of subsequent interlocutory proceedings, the definition of the *thema decidendum* of preventive review and the result of rulings of partial unconstitutionality).

Given the uncertainty within opinions it is thus not possible to discern whether the extension or recognition of the Court's authority would encourage or by contrast hinder the realisation of constitutional objectives.