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CONSTITUTIONAL JUSTICE: FUNCTIONS AND RELATIONSHIP WITH THE OTHER PUBLIC AUTHORITIES

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The Constitutional Court of the Italian Republic

I. THE CONSTITUTIONAL COURT'S RELATIONSHIP TO PARLIAMENT AND GOVERNMENT

1. **The role of Parliament (as the case may be, of the Government) in the procedure for appointing judges to the Constitutional Court. Once appointed, can judges of the Constitutional Court be revoked by that same authority? What could be the grounds/ reasons for such revocation?**

The aftermath of the totalitarian experiences that marked European history of the first half of the 1900s fostered the development of an awareness of the need for a sound means of controlling and reviewing the deeds and acts of representative bodies – including parliamentary assemblies and the laws by them enacted – if the rights enshrined in constitutional charters were to be upheld. In Italy, the Constituent assembly chose for these tasks, and for that of ensuring general observance of the Constitution, to be entrusted to a wholly new organ, created expressly for the purpose, and separate from the judicial branch: the Constitutional Court of the Italian Republic.

Article 135 of the Constitution establishes, *inter alia*, the structure and composition of the Constitutional Court. According to this Article, fifteen judges sit in the Court, five of which are elected by the Parliament, five by the highest courts and five nominated by the President of the Republic. This composition ensures the presence, within the Court, of a range of different institutional sensitivities, corresponding to each of the various entities entrusted with the selection of judges. Constitutional Court judges can be appointed from among superior court judges (including those who have retired), university professors of legal subjects and lawyers with at least twenty years of practical legal experience.

The judiciary's appointees are nominated by the Court of Cassation (responsible for selecting three of the total five "judicial" nominees), the State Council and the Court of Accounts (each of which can put forth one judge), and tend to be appointed from among members of the judiciary itself. On the other hand, a salient feature of Presidential appointments consists in their tendency to seek to balance the Court's composition, in terms of both ideology and professional qualification. The role of the Government is circumscribed to countersigning the Presidential decrees through which Presidential nominees are appointed; traditionally, such countersignature plays a purely formal part, as the choice of nominees is entirely up to the President.

As aforementioned, Parliamentary nominees are appointed by Parliament in joint session, usually from among professors and lawyers whom have also engaged in political activity in the past (including within the Parliament itself). However, it is important to note that these appointees are not representatives or agents of their nominating forces or of Parliament, but are, rather, completely independent of any political party and of the Parliament itself. Several balloting rounds are envisaged for

the appointment procedure, as a two-thirds majority of the Members of Parliament is required to pass the first three rounds and, for subsequent rounds, a majority of three-fifths of the same; such high thresholds ensure that the appointee is not selected by governing forces alone. As could be expected, such a complex appointment procedure can protract in time; during the wait to fill the vacant seat, the Court is able to continue performing its functions, provided that the minimum number of eleven component judges is always present.

Constitutional Court judges are elected to complete a mandate of nine years, upon conclusion of which judges are conferred the title of "Judge Emeritus", which in turn entails the enjoyment of certain benefits for life. The mandate is not renewable or extendable in any way. The Court alone has the power to remove or suspend its components from office; nominating bodies, including the Parliament, do not have any such power, even over their own appointees. Article 3 of Constitutional Law No. 1 of 1948 establishes that "Constitutional Court judges cannot be removed or suspended from their office, if not by decision of the Court itself, because of physical or civil incapacitation that may have arisen, or for serious shortcomings in the performance of their functions." "Constitutional Court judges can be [thus] removed or suspended only pursuant to a decision by the Court, taken with the support of two-thirds of the components that participate in the meeting convened for the purpose" (Article 7, Constitutional Law No. 1 of 1953). To date, no cases requiring removal or suspension of Constitutional Court judges have ever arisen.

2. **To what extent is the Constitutional Court financially autonomous – in the setting up and administration of its own expenditure budget?**

The Constitutional Court ranks as a constitutional organ. This definition derives from the fact that the Court is not only mentioned, but also - albeit broadly - object of regulation by the Constitution. This is a feature common to all organs at the highest levels of the legal system, which distinguishes them from all other organs of the State, which are regulated by sources of an exclusively, or almost exclusively, primary-law nature.

Qualification as a constitutional organ has repercussions of not only formal nature: on the substantive level, indeed, constitutional organs are distinguished by the enhanced protection accorded to their autonomy; in other words, by the impossibility, for any external entity, to affect their organization and functioning, except to the extent established by the Constitution itself. With specific regard to the Court, the Constitution does provide for intervention, on part of the legislature (whether through constitutional or ordinary laws), aimed at providing a framework regulation of the structure, organisation and functioning of the organ: such provision, however, is limited to regulation of a general and abstract type, and cannot extend to the definition, on part of the legislature, of the *concrete*, practical, operation of the Court. It is by virtue of examining the limits imposed - in conceptual, more significantly than constitutional, terms - upon the law that the shape of the financial autonomy enjoyed by the Court can emerge.

In concrete terms, the Court is endowed with its own seat and with an autonomous budget, funded out of the State budget (in 2009, the Court's budget amounted to EUR 52.7 million) and publicised on the Court's website (http://www.cortecostituzionale.it). Within this allocation, expenses are determined in full autonomy by the Court and its internal organs, without any external interference whatsoever, including for audit or control purposes.

In connection to the latter point, it is possible to state that the Constitutional Court does not fall within the scope of application of Article 103, Paragraph 2 of the Constitution, which affirms that "The Court of Accounts has jurisdiction in matters of public accounts and in other matters laid out by law." The Court itself - in Case No. 129 of 1981 - decided a dispute stemming from the claim, of the Court of Accounts, to audit the Treasurers of the Presidency of the Republic and of the two Houses of Parliament. Although the Constitutional Court was not directly involved in the dispute, the *ratio decidendi* of the decision, which rejected the claim advanced by the Court of Accounts, can also be extended to include the Constitutional Court. From that *ratio* it is possible to discern, indeed, that the legal foundation of the Court of Account's jurisdiction to review is not of immediate operation in every case, as it must necessarily face the limits posed by the objective amenability of subjects to review and by the respect for constitutional norms and principles. In particular, the autonomy and independence enjoyed by the highest constitutional organs must be acknowledged not only as consisting in powers of self-organisation, but also in the application of constitutional measures, which does not envisage any possibility for invoking administrative or jurisdictional remedies. With regard to the apparatuses at the service of constitutional powers, the exemption from accounts-related judgments (*giudizi di conto*) is the direct reflection of the autonomy enjoyed by the highest constitutional organs, *a fortiori* in light of the absence of detailed and specific constitutional regulation, integrated by unwritten principles consolidated through the constant repetition of uniform courses of conduct. Holding the power to submit the Treasurers of the Presidency of the Republic, and of the lower and upper Houses of Parliament, to auditing review is not, therefore, within the jurisdiction of the Court of Accounts.

3. **Is it customary or possible that Parliament amends the Law on the Organization and Functioning of the Constitutional Court, yet without any consultation with the Court itself?**

Parliament, as mentioned above, has the power to regulate the organisation and functioning of the Court: Article 137, Paragraph 1 of the Constitution establishes that "[a] constitutional law shall establish the conditions, forms, terms for proposing judgments on constitutional legitimacy, and guarantees on the independence of constitutional judges", while Paragraph 2 of the same Article adds that "[o]rdinary laws shall establish the other provisions necessary for the constitution and the functioning of the Court".

These two reservations in favour of the legislature were not supplemented by a measure providing for the involvement of the Constitutional Court in the identification of the provisions to be reviewed and texts to be elaborated: on a formal level, therefore, the Court is precluded from exercising any influence on any action that the Parliament may decide to take.

The two reservations for the legislature were invoked, naturally, prior to the Court's entry into operation, with Constitutional Law No. 1 of 9 February 1948, and No. 1 of 11 March 1953, as well as with Law No. 87 of 11 March 1953 (the Court passed its first judgment in 1956; this law is of ordinary rank). After these interventions, the Parliament very rarely intervened to modify laws that had already been issued. Most of the time, these were revisions of a purely technical nature. However, at least one case of broad-reaching legislative intervention has occurred, with Constitutional Law No. 2 of 22 November 1967, which, *inter alia*, reduced the mandate of Constitutional Court judges from twelve to nine years, introduced the prohibition on reelection or reiteration of appointment, and expressly excluded the possibility for the so-called *prorogatio* of judges at the end of their mandate (judges cease to perform their functions, therefore, even if their substitutes have not yet been appointed; this has at times created some functional difficulties for the Court, obliging it to operate with fewer judges).

Another intervention of considerable significance was operated by Constitutional Law No. 1 of 16 January 1989, pursuant to which the Court's power to judge upon crimes committed by Ministers was eliminated (the Court remains the criminal judge for the President of the Republic alone, should he - or she - be charged with high treason or attack on the Constitution). Prior to then, constitutional criminal proceedings took place only once, giving rise to great operational difficulties for the Court, which, blocked for several months between 1977 and 1979 by the so-called "Lockheed case", experienced an accumulation of a great volume of "ordinary" cases, which were finally conclusively dealt with only at the end of the 1980s.

Other than a few additional interventions aimed at amending and/or integrating Law No. 87 of 1953 (of ordinary status), a recently-adopted provision is worthy of mention, despite not being amenable to contextualisation within the category of amendments to organisational and functioning rules. This is Article 69 of Law No. 69 of 18 June 2009, through which it was expressly acknowledged that the State Council, seised in (formally) consultative terms in the course of proceedings for deciding an extraordinary claim lodged with the Head of State, can qualify as a judge capable of raising referral orders. The anomaly of such a legal rule - unique in the national context - is sharpened by its manifest divergence from very recent case-law of the Constitutional Court (in this light, reference to Case No. 254 of 2004, subsequently confirmed, may be useful). The rule amounts to an unspecified impact upon the functioning of the Court operated by the legislature, an impact that materialised in an unconventional way, but that is a further indication of the separation between the respective activities of the Court and of the Parliament, two organs that operate within distinct spheres, which do not intersect even if the laws to be approved concern the Court directly.

4. Is the Constitutional Court vested with review powers as to the constitutionality of Regulations/ Standing Orders of Parliament and, respectively, Government?

The very nature of constitutional organs (discussed in the response to Question No. 2 above), which pertains as much to the Parliament as to the Government, provides a solution to the query upon the amenability to review, by the Court, of regulations governing their operation and functioning.

In this connection, it is useful to distinguish the case of Parliamentary regulations from that of regulations concerning the functioning of Government.

With regard to the former category, the Constitutional Court has clearly excluded any possibility of review. In the context of well-established jurisprudence, the leading case is No. 154 of 1985, in which the declaration of inadmissibility of the issue (and, therefore, the impossibility for the Court to engage in an examination of the merits) was justified on the basis of two sets of reasons; the first of these regarded the extraneousness of Parliamentary regulations to the measures envisaged by Article 134, Subsection 1 of the Constitution (according to which "The Constitutional Court shall pass judgment on [...] controversies on the constitutional legitimacy of laws and enactments having force of law issued by the State and Regions"), and the second related instead to the institutional position of the Houses of Parliament ("immediate expression of the sovereignty of the People"). Considering the first reason, the Court, having found that Article 134 of the Constitution has "rigorously [delimited] the precise and insurmountable boundaries of the powers of the judge with regard to laws of our legal system", deduced that "since the formulation [of the Article] ignores Parliamentary regulations, only by way of interpretation could it be considered that the latter are therein equally included". The impossibility of an extensive reading of Article 134 was therefore justified in light of its asserted incompatibility with the system, which beholds the Parliament as the central organ, of which independence must be guaranteed with regard to every other power. Transposing this argument from the organ (Parliament) to the source (regulations), the impossibility to review Parliamentary regulations was made to derive from its especial role of "direct executor of the Constitution", which itself gives rise to a "peculiarity", expression of the fact that "the constitutional reservation of regulatory power falls within the safeguards provided by the Constitution to ensure independence of the sovereign organ from every other power".

The impossibility for the Court to operate a scrutiny for constitutionality is confirmed in regard to Government regulations too; in relation to these, however, uncertainty arises as to the reasoning adduced in support of an evident conclusion. On one hand, it could be considered possible to simply extend part of the considerations in support of the unreviewability of Parliamentary regulations, and especially in light of the constitutional nature of the organ from which the regulation originates. On the other hand, however, Article 95, Paragraph 3 of the Constitution establishes a reservation

regarding the regulation of the Presidency of the Council (and therefore of the head of the Government). Such a reservation ("[t]he law establishes the organisation of the Presidency of the Council, as well as the number, competence and organisation of the ministries") is of a relative, rather than absolute, kind, which implies the possibility that subordinate sources (that is, regulations issued by the Government) may intervene to discipline those areas which are not regulated by the legislature: this constitutional provision lends support to the view that regulations on the organisation and functioning of Government are of a secondary-source nature. Such a placement within the system of legal sources means that the Court cannot, in any case, scrutinise them (unless in exceptional cases), since its jurisdiction is limited to laws and enactments having force of law.

5. Constitutionality review: specify types / categories of legal acts in regard of which such review is conducted.

Adjudication of "controversies on the constitutional legitimacy of laws and enactments having force of law issued by the State and Regions" (Article 134 of the Constitution) is the principal, and historically most significant, task of the Constitutional Court. All laws and measures having force of law, regardless of date of enactment (whether prior to, or following, the entry into force of the Constitution on 1 January 1948) can be subjected to the Court's review for constitutional legitimacy – and thus possibly be annulled, i.e. removed completely from the legal system, along with all meanings potentially ascribable. The Court may be called upon to ascertain whether legislative measures were enacted in accordance with the procedures established by the Constitution (i.e. formal constitutionality) and whether the content of the acts conform to the principles enshrined in the Constitution (i.e. substantive constitutionality).

The enactments susceptible to submission to the Court for constitutional scrutiny are numerous: these comprise laws enacted by the State, delegated legislative decrees (legal measures issued by the executive upon delegation from the Parliament) and decree-laws, legal measures issued by the executive in necessary and urgent response to emergency situations and that, after sixty days, must be converted by the Parliament into laws. The Court can also adjudicate upon the constitutionality of laws enacted by Regions and by the two Autonomous Provinces to which the Constitution has granted legislative powers (i.e. the Provinces of Bolzano and Trento, which constitute the Region of Trentino-Alto Adige). The Court's capacity for review for constitutionality also extends to Presidential decrees that declare the abrogation of a law or of legal measures operated through a referendum as established by Article 75 of the Constitution.

The Court must also review, within certain limits, the constitutionality of laws which amend the Constitution, and of other constitutional laws. Judgments in these cases concern the compatibility of the acts or provisions with (not all provisions of the Constitution, but only) the supreme principles of the legal system that can be derived from the Constitution. This task will shortly be explored in more detail, in the response to Question 6.b).

The Court's power of review does not extend, instead, to secondary legislation, such as regulations issued by the Government. These acts are, indeed, subjected to a review for legality, or conformity to primary law - a review which falls to be performed by ordinary and administrative judges. Therefore, in light of the fact that regulations must conform to laws, and laws must conform to the Constitution, regulations conform to the Constitution by necessary implication, without any need for a separate review against the Constitution specifically.

Regulations enacted by the European Union are not classified as laws or enactments having the force of laws for the purposes of constitutional review, although the Constitutional Court has affirmed that European law cannot contrast with the "fundamental principles of the constitutional system or with inalienable human rights" (Case No. 98 of 1965, subsequently upheld repeatedly); should such an incompatibility be ascertained, in deference to the dualistic conception that informs the relationships between national and European law, the Court's review will nevertheless be limited to the Italian implementing legislation, to the extent that it transposes the European measure.

With regard to the non-reviewability, by the Constitutional Court, of regulations governing constitutional organs, that can nevertheless be defined as sources of primary law (akin to laws), reference shall be made to the response to Question No. 4, above.

6. **a) Parliament and Government, as the case may be, will proceed without delay to amending the law (or another act declared unconstitutional) in order to bring such into accord with the Constitution, following the constitutional court's decision. If so, what is the term established in that sense? Is there also any special procedure? If not, specify alternatives. Give examples.**

In describing the consequences of Constitutional Court decisions, it may be useful to operate a preliminary distinction based upon the type of decision discussed.

Even circumscribing the field of inquiry to decisions upon the constitutionality of laws or enactments having force of law, the effects of decisions can differ significantly, depending upon whether the Court declares the unconstitutionality of a provision or measure, or denies foundation to the matter submitted to its evaluation.

Decisions rejecting the claim, whether based on the merits of the case or on procedural reasons, leave the challenged measure intact, thus making any further intervention by the legislature - at least in principle - unnecessary. It is not rare, however, for the Constitutional Court to establish the non-unconstitutionality of one or more provisions while also highlighting the desirability, or even the necessity, for the legislature to intervene so as to better align the measure in question with the constitutional framework or the evolution of society. Such affirmations by the Court

amount to "admonishments", which can be enhanced by the "threat" that should those same provisions return to the Court's scrutiny once again, the Court will instead prescribe their unconstitutionality. It is clear, therefore, that such rejection decisions beg intervention by the Parliament, which hopefully will not delay.

Parliamentary intervention may also be invoked in case of decisions of unconstitutionality. When the Court declares that a given provision or enactment is unconstitutional, it is thereby eliminated from the legal system. A "gap" thus arises, and is usually filled through interpretative activity on part of the judiciary; judges will have to find, in other laws or general principles of the legal system, the correct law to govern those situations previously regulated by the newly unconstitutional provisions. It can happen, however, that such interpretation cannot effectively address the legislative gap; in these cases, the legislature is called upon to provide a remedy.

In some cases, the Constitutional Court employs techniques of decision-making which, in declaring unconstitutionality, also expressly call for an action on part of the legislature: this occurs when one or more provisions are declared unconstitutional and necessarily require substitution, if a particular set of circumstances is to be regulated by law; through a declaration of unconstitutionality, the Court therefore establishes a principle, calling upon the legislature (as well as upon judges) to ensure its materialisation in concrete terms (these are the so-called "principle-additive" judgments).

From the above observations, it emerges that although the Court's decisions may not formally require a reaction of Parliament, in concrete terms, a response to the Court's solicitations is provided quite often.
However, in practice, such a correspondence can be all but taken for granted: several examples exist of "warnings" unheeded by the legislature, as there are numerous examples of situations in which the judiciary alone was made to bear the burden of adapting legislation to constitutional law, through interpretation.

The oft-displayed Parliamentary inertia is not subject to sanctions of any sort, as the Court does not - in general terms - have the power to react to legislative omissions.

With regard to the consequences of decisions, the difficulties encountered by the Court and political organs in the course of their interaction surface regularly. And the problems which arise do not seem to be amenable to resolution - or at least have not been thus amenable to date – by means of the Regulations of both lower and upper Houses of Parliament (respectively, Articles 108 and 13) which govern the "follow-up of Constitutional Court decisions", consisting in the duty of the relevant Parliamentary Committees to issue within 30 days their conclusions as to the advisability of initiating legislation. Once the necessity in this sense has been ascertained, the legislative initiative does not enjoy any privilege over others, with the result that its eventual success depends upon political considerations alone.

6. b) Parliament can invalidate the constitutional court's decision: specify conditions.

According to Article 137, Paragraph 3 of the Constitution, "[n]o appeals are allowed against the decision of the Constitutional Court."

This provision confers a "final" quality to the Court's decisions; indeed, no form of express appeal against the decision has been provided.

However, this cannot be taken to mean that the Court's decisions are "untouchable". Firstly, the Parliament could very well approve measures that are identical to those declared unconstitutional. The "constitutional adjudication" would not be damaged by this new legislation, if the latter has prospective effects alone; if, however, the new law's effects were also retrospective, the Court's decision would be legally affected, in a manner precluded by the Constitution itself.

In any case, it is clear that new enactments identical to those declared unconstitutional are most likely to be annulled by the Constitutional Court; prior to its annulment effected by the new decision, however, the enactment would still be capable of producing legal effects, and adversely affect, therefore, the effectiveness of the first declaration of unconstitutionality.

In terms of the hierarchy of legal sources, decisions declaring the unconstitutionality of a measure are placed on the same level of the enactment or provisions they address: this means that the annulment of ordinary laws is operated by judgments that take on the rank of primary law. As a consequence, the Parliament could very well overcome - i.e. operate a *de facto* invalidation of - the Court's decision by passing a constitutional law, which is of higher ranking. In some cases, the Court itself suggested this course of action to the Parliament: having established the unconstitutionality of a law due to its violation of certain constitutional provisions, the Court then clarified that the contents of that law should have been enshrined in a constitutional law, which would not suffer from invalidating flaws (a logical framework of this type can be traced, for example, in case No. 262 of 2009, which declared the unconstitutionality of an ordinary law that conferred temporary criminal immunity upon the highest State offices).

The power to approve a constitutional law cannot, however, ensure that the "final word" lies with the Parliament: in fact, it may seem very difficult for the Court to oppose Parliament again; however, in a strictly legal sense, such a possibility does exist.

According to the Court's jurisprudence (especially Case No. 1146 of 1988), it is indeed possible to subject constitutional laws too to constitutional review, and to annul them for violating the supreme principles of the legal order. As is well-established, no organ has the legal power to challenge the Constitutional Court should

it decide for such a declaration of unconstitutionality (which, to date, has never been issued): due to the rank they assume within the legal system, decisions which affirm the unconstitutionality of constitutional laws can be overcome only if the supreme principles of the legal order are amended. However, there is no organ within the system that can perform such an operation - not even the People, which does not exercise its sovereignty in an absolute sense, but in the "forms and within the limits of the Constitution" (Article 1, Paragraph 2, of the Constitution). As a consequence, a judgment affirming the unconstitutionality of a constitutional law could only be invalidated upon intervention by the Constituent power; this would cause a fracture in the legal system, which would thereby become radically different from the system established upon the entry into force of the republican Constitution.

7. **Are there any institutionalized cooperation mechanisms between the Constitutional Court and other bodies? If so, what is the nature of these contacts / what functions and powers shall be exerted on both sides?**

The Italian constitutional system does not provide for institutionalised mechanisms of cooperation between the Constitutional Court and other organs. The Constitutional Court effectively acts as a self-standing organ, and does not fall within the category of political organs, nor within the judicial order.

Such affirmations are valid on a formal level; from a substantive point of view, it is instead possible to consider those procedures through which cases are submitted to the Constitutional Court as, to a certain extent, mechanisms of cooperation.

The rationale that governs submission of cases to the Court varies, according to the type of power it applies. In conflicts of attribution between the powers of the State or between the State and the Regions, the subject-matter of the case is linked solely to the claim to a certain power, or to a challenge to the modes (supposedly noxious to the powers pertaining to the claimant) through which the claimant has exercised a power properly within its sphere of competences.

In judgments involving the constitutionality of laws and equivalent enactments, claims submitted by Regions are guided by the same rationale governing the abovementioned conflicts, whereas in cases involving the central Government, the latter entity takes on the role of guardian (other than of its own prerogatives) of the constitutionality of the legal order in its entirety (as can be seen in Case No. 274 of 2003); in this case, it appears, therefore, that a certain form of cooperation - between the entity bringing the claim and the entity which defines it - can take shape, aimed ultimately at eliminating legislative norms which contrast with the Constitution. This type of cooperation is, moreover, much more pronounced in judgments for constitutional review brought on an interlocutory basis, in which an ordinary judge, in the course of legal proceedings before him or her, submits to the Court a doubt upon the constitutionality of a norm that he or she must apply.

In proceedings submitted on an interlocutory basis, concerning the constitutionality of laws, a "claimant" figure need not necessarily exist; therefore, the subject submitting the claim does not have any personal interest in obtaining the Court's acceptance of the petition. Thus, the ordinary judge assumes the role of "gatekeeper" of the Court (to recall the apt expression of the eminent Constitutional founding father, Piero Calamandrei): the judge's role is that of filtering the claims eventually submitted by the parties to the cases heard; in this role, the judge must "open the door" to the Court only if he or she considers that the doubt of constitutionality is not manifestly unfounded.

The cooperation established between the Court and ordinary judges upon submission of the issue of constitutionality on an interlocutory basis arises once again, usually, in the decisional stage too. Throughout the years, several decisional techniques have been developed, the effectiveness of which depends upon the fruitful "dialogue" between the Court and the ordinary judiciary. Very often, the Court will not issue a judgment of unconstitutionality, but will, instead, call upon judges to apply a certain interpretation to the legal provisions in question, that can render these compatible with the Constitution: not coincidentally, a principle that began to develop in constitutional jurisprudence as from the mid-1990s affirms that a norm is not unconstitutional simply because it is amenable to an unconstitutional interpretation, but will be so only if it is not amenable to any interpretation which can render it compatible with the Constitution.

II. RESOLUTION OF ORGANIC LITIGATIONS BY THE CONSTITUTIONAL COURT

1. What are the characteristic traits of the contents of organic litigations (legal disputes of a constitutional nature between public authorities)?

Tradition suggests that conflicts between organs representative of public powers are to be framed in the context of normal political dialectics and, as such, elude any form of constitutional review.

Although such a position was strongly supported within the Constituent Assembly, the majority position eventually favoured an opposite stance, founded upon the view that a written, rigid, and rather analytical Constitution allows, under many perspectives, for contextualisation, within legal frameworks, of several strongly politicised conflicts (in this regard, it may be apt to recall the formulation - as brief as it is effective - coined by Louis Favoreu in France in the 1980s, in his evocation of "politics captured by the law").

Beyond these preliminary remarks, however, it emerges that providing a system for classification of these conflicts is rather difficult, given the extremely wide range of situations that should be mentioned. Briefly - and by means of a significant simplification - conflicts can be distinguished in terms of the contrasting parties, of the subject-matter of the conflict, and of the underlying reasons for the dispute.

With regard to the subject-based distinction, the two main categories of conflicts are, on one hand, those between organs or subjects of the State apparatus, and, on the other, those between the State and autonomous territorial bodies (principally, the Regions; in theory, Provinces and Municipalities could also be included). The latter type of dispute has "standardised" subjects, meaning that once the organs that represent the State and the Regions are identified, conflicts will always arise between these bodies alone. The former type of conflicts, instead, involves subjects which cannot be identified *a priori*, in that the dispute can arise between several different organs. It is, nevertheless, possible to distinguish between disputes within a branch of power, and disputes involving several branches of power: with regard to the former, the internal organisation of the power will determine which body has the power to arbitrate the dispute; with regard to the latter, instead, a problem as to an appropriate entity, equidistant from the two conflicting powers, may arise.

With regard to the Constitutional Court's activity, it is clear that the more interesting types of conflict - other than those between the State and autonomous territorial entities - are those within the State of the second type described above. In these cases, the issue of identifying the concept of "power" arises, especially in light of the fact that the classical Montesquieuian tripartition is no longer all-comprehensive. In any case, in

terms of trends, conflicts can present opposition between legislative and executive organs, executive and judicial organs, and legislative and judicial organs; furthermore, those powers which do not fall within the tripartition, such as those represented by the Head of State or by the Constitutional Court itself, should also be recalled.

With regard to the subject-matter of the dispute, this can consist of any type of measure or even a course of conduct. For certain types of disputes, special modes of resolution are established (for example, those related to legislation are, save for exceptional cases, solved in the context of dedicated judgments), while those of lesser importance - which do not, that is, present a "constitutional tone" - are solved by the ordinary judiciary. It may be deemed necessary to hear all other types of conflict before a specifically-individuated entity, according to particular procedures.

In regard to the distinction based upon the underlying reasons for the dispute, there are two main categories. Conflicts can be due to so-called "usurpation", which arises when a body lays its claim as to a particular power, exercised in practice by another body: the ultimate aim of the conflict is to regain full possession of the power, excluding every future (but also past - through annulment of the act) action of the respondent. Conflicts of interference (or impairment), instead, do not entail a challenge regarding the proper possession of the power; the matter of contention consists, rather, in the ways in which the power was exercised, which were allegedly detrimental to the sphere of powers granted to the claimant (for example, a body adopts a decision which is fully within its powers to adopt, but does so without consulting another entity which had the right to express its point of view).

2. Specify whether the Constitutional Court is competent to resolve such litigation.

The Constitutional Court's power to resolve disputes between subjects or organs of the State is enshrined in Article 134 of the Constitution. Indeed, it is thereby affirmed that "The Constitutional Court shall pass judgment on […] conflicts arising from allocation of powers of the State and those powers allocated to State and Regions, and between Regions […]". Therefore, the Court can hear and adjudicate upon conflicts arising within the central State itself (between, for example, legislative and executive organs), between the central State and a particular Region or between Regions.

Disputes between the central State and Regions or between Regions can arise in relation to any type of measure or enactment, except for those of primary ranking, for which a specific procedure is established: proceedings concerning the constitutionality of laws in which the Court is seised directly, established by Article 127 of the Constitution, which states that "The Government may question the constitutional legitimacy of a regional law before the Constitutional Court within sixty days from its publication, when it deems that the regional law exceeds the competence of the Region" (Paragraph 1) and, analogously, "[a] Region may question the constitutional legitimacy of a State or regional law or measure having the force of law before the Constitutional

Court within sixty days from its publication, when it deems that said law or measure infringes upon its competence" (Paragraph 2). Mainly through its jurisprudence, the Constitutional Court successively clarified that the State can challenge a regional law on the basis of an alleged violation of any provision of the Constitution, in the interests of preserving the constitutionality of the legal system as a whole; Regions may only challenge laws and enactments with force of law issued by the State that infringe upon their own Regional competences, either directly or indirectly.

However, as mentioned above, State/Regional disputes can centre upon measures other than those having legal force; these cases specifically are called "conflicts of attribution". In these cases, the issue crucial to the proceedings is whether the allegedly offending measure is at least potentially harmful, whether at present or in the future, to the sphere of powers pertaining to the claiming organ. Unlike proceedings concerning the constitutionality of laws in which the Court is seised directly, conflicts between the State and Regions are marked by the fact that the parties tend to be in a position of absolute equality, and the flaws that can constitute subject-matter of the proceedings are the same for both the State and Regions, consisting solely of the alleged violation of competences properly pertaining to the claimant party (and not of a violation of other constitutional provisions).

Disputes between powers of the State (i.e. between the executive, legislative and judicial branches, but also between itself and other bodies) can centre upon measures taken, but also, as aforementioned, legally relevant courses of conduct, which allegedly violate the integrity of the position of autonomy and independence granted by the Constitution to a particular body. Courses of conduct can consist of actions, whether leading to formalised or non-formalised deeds, or positively or negatively affirming a particular result. However, omissions too can amount to courses of conduct for these purposes. Claimant bodies must have a concrete and current interest in bringing the claim.

In all cases, the subject-matter of conflicts involving State organs must be concrete; the Constitutional Court cannot consider hypothetical or theoretical situations.

3. Which public authorities may be involved in such disputes?

Conflicts of attribution can arise between a wide range of public actors. In disputes between the central State and a Region, or between Regions, the State is represented by the President of the Council of Ministers. Regions, on the other hand, are represented by their respective Presidents of the Regional Executives. Currently, the Italian Republic comprises twenty Regions, enumerated at Article 131 of the Constitution. Among the subjects that can be party to conflicts between the State and Regions, it is necessary to include the Autonomous Provinces of Trento and Bolzano too, so that the total number of entities capable of entering such conflicts grows to twenty-three (the State, twenty Regions, and two Provinces).

Identification of the specific potential parties to disputes involving State powers is not as straightforward, also due to the evolution of the State apparatus beyond the hypotheses envisaged by the Constitution's founding fathers, in response to arising needs of interconnection and coordination. There can be, therefore, no finite list of bodies amounting to State powers for these purposes, the Constitutional Court having, substantially, identified them through interpretative operations based on the circumstances of individual cases.

Nevertheless, some generalizations in this sense can be made. In the first place, conflicts between "State powers" can take place between any entity to which the Constitution has granted and guaranteed a certain amount of competences. Scholarship and the Court's jurisprudence alike have confirmed that these bodies must pertain - albeit with a limited number of exceptions - to the "State" as the centralised, organised, authority with legal personality, and not simply to the broader notion of "State" as a community. In addition, the entity in question should be capable of issuing acts or engaging in conduct that is binding for the entire "branch" of power, inasmuch as these acts or courses of conduct cannot be altered or eliminated through action of another organ within that same branch.

Judicial power is of a diffuse nature, in that every member of the power is fully independent, performs powers guaranteed by the Constitution, and is capable of binding the entire branch of power through his or her decisions (for example, decisions of first instance can be binding too, as their modification is a mere possibility; such decisions are, indeed, final, unless they are challenged). Legislative power is of an "egalitarian" nature, as each component of the power is endowed with a range of competences guaranteed by the Constitution – although the legislative function may pertain to the two Houses of Parliament, other tasks are performed by different organs, to the point that articulations within the Parliament too, as long as they enjoy a certain degree of power, can amount to "State powers" for the purposes of Constitutional conflicts. In practice, the Houses of Parliament themselves have fulfilled such a definition, both individually and jointly, as have Parliamentary Inquiry Commissions; the admissibility of individual Members of Parliament as parties to disputes before the Constitutional Court, although perhaps theoretically viable, has, to date, never been granted in practice. Hierarchy-type power can be perceived in the executive realm, as an "apex" organ is clearly identifiable in the form of the Council of Ministers. This body has been defined as a State power, but so have individual Ministers with regard to certain specific portfolios.

A State power for the purposes of Constitutional Court disputes can also be one of the many self-contained public entities that do not fall within the traditional trichotomy of roles, yet perform their functions, endowed by the Constitution, in full autonomy and independence. Examples of such bodies have been the Court itself, the President of the Republic and the Court of Accounts in its auditing role.

4. **Legal acts, facts or actions which may give rise to such litigations: do they relate only to disputes on competence, or do they also involve cases when a public authority challenges the constitutionality of an act issued by another public authority? Whether your constitutional court has adjudicated upon such disputes; please give examples.**

Conflicts of attribution between the State and Regions, by their very structure and "concurrence" with proceedings in which the Court is seised directly (which is a necessary occurence in disputes between the State and Regions, should a legal measure be involved), arise with regard to clearly defined subject-matter: secondary legal measures, administrative enactments or jurisdictional enactments (as the State alone has jurisdictional functions, only Regions can submit claims of the latter type). The rationale in support of such conflicts is necessarily linked to the claim to a power (usurpation conflict) or to the exposure of an alleged impairment of a power (interference conflict). Therefore, in broad terms, the legitimacy or constitutionality of the measure constituting the subject-matter of the conflict, can never be disputed (although, naturally, the decision on the possession or non-possession of a power or on its proper exercise entails, should the claim be accepted, the annulment of the measure which gave rise to the conflict).

This issue becomes more complex when conflicts between the powers of the State are involved. Firstly, the subject-matter of the conflict need not be an "act", or even an omission. This inlet makes it impossible to classify the subject-matter of the conflicts, which includes laws too (pursuant to a jurisprudential evolution culminating with Case No. 457 of 1999, subsequently repeatedly confirmed). Conflicts of attribution between State powers was gradually shaped as an instrument with definite borders, perhaps not so much in terms of subject-matter, as, perhaps, in terms of the potential subjects to disputes resolved by the Constitutional Court.

Conflicts between powers of the State tend to not differ from those between the State and Regions with regard to the underlying reasons for the dispute. In these cases too, conflicts can originate from claims of alleged usurpation, or detriment to the body's own powers. Challenges to legislative measures too do not escape this rationale: the Court has indeed specified that it is possible to challenge legislative measures through such avenues only if the measure giving rise to the detriment in question could not be the object of a referral order for proceedings made on an interlocutory basis (the latter, which represent the "normal" way to challenge a law or enactment, are affected by some "bottlenecks" - as defined by the ex-President of the Constitutional Court, Gustavo Zagrebelsky - stemming from the fact that if the Court is to be seised, the relevant law must be applied in a case, a fact that can be all but taken for granted for certain categories of laws, such as electoral laws, those which allocate funds, etc.).

In substantive terms, conflicts between powers of the State may, in theory, concern any type of act or course of conduct, but are nevertheless not an omnipotent remedy, through which any gap encountered in the system of constitutional guarantees can be

addressed: since the interaction between powers is, in these cases, a conflict, they remain inevitably linked to the rationale governing disputes between parties, and to the debate concerning the balance of respective powers.

5. **Who is entitled to submit proceedings before the Constitutional Court for the adjudication of such disputes?**

As mentioned previously, the powers of the State, the central State, and Regions benefit from the possibility of direct resort to the Court.

With regard to the specific entities that can directly apply to the Court, remand shall be made to Question 3 of this Part of the Questionnaire.

6. **What procedure is applicable for the adjudication of such dispute?**

As has been mentioned above, the procedure for resolution of conflicts between powers within the State or between the State and Regions can be initiated through a direct application to the Constitutional Court.

Conflicts between the State and Regions and which concern laws or enactments having force of law (i.e. proceedings in which the Court was seised directly) present several analogies with conflicts between the same entities but that regard other acts (i.e. conflicts of attribution in a strict sense). It is necessary to note, however, that in cases of the former type, the Court must establish, within ninety days of the date of registration of the appeal, the hearing of the case.

The Court can conduct an investigative stage, entrusted to a Judge-Rapporteur by the President of the Court. The investigation can, at times, also have the function of ensuring that the claimant receive some form of precautionary protection, in the form of a suspensory order commanding the suspension of the challenged act (in conflicts of attribution, this power was already recognised in Law No. 87 of 1953; in direct applications, instead, suspension of laws was enabled only with Law No. 131 of 2003).

After conclusion of the investigation, a hearing takes place, in which the parties to the conflict can express their own point of view, specifying and integrating, if necessary, the content of the application or of the initial pleading of the case, or of subsequent pleadings registered near the date of the hearing itself.

Following this adversarial part of the proceedings, the Court reunites to decide the issue in a closed, private, hearing in chambers. The decision is usually drafted by the judge who led the investigative phase, and binds the entire college of judges, as no provision is made for the drafting of dissenting opinions.

Conflicts between powers of the State present some significant particularities. An organ that challenges the violation of powers (allegedly) properly pertaining to it lodges,

indeed, an application with the Court in which it restricts itself to describe the detriment suffered and perhaps the act that caused such damage. The Court decides whether the claim is admissible; if so, the Court will identify the respondent organ (or organs). The claimant will have the responsibility of notifying the respondents of the case, and of registering the claim once again, inclusive of the notifications served, with the Court's Records Office. From then on, the conflict between powers of the State is solved on the basis of a procedure that is entirely analogous to that prescribed for proceedings concerning constitutional legitimacy and conflicts of attribution between the State and Regions. The most significant divergence consists in the fact that, in conflicts between State powers, it is not possible to issue a suspensory order with regard to the allegedly offending measure.

7. What choices are there open for the Constitutional Court in making its decision (judgment). Examples.

The range of decisions available to the Court can be divided into two categories: those related to procedural aspects of the claim, and those related to its merits. Within the former category, the Court can issue a decision based on procedural factors such as the impossibility to proceed, inadmissibility, extinction of the claim or cessation of the subject-matter of contention. Decisions related to the merits of the claim are the acceptance of the claim (and consequent annulment of the legal measure originating it) and its rejection (affirming, therefore, the non-foundedness of the requests advanced by the claimant party). This response shall deal only with final decisions, i.e. those which conclusively define the case, and not so-called "interlocutory decisions", which do not entail conclusion, even of a temporary nature, of the case (examples would be decisions which communicate the admissibility of parties to the case).

The range of possible decisions partially changes in proceedings for constitutional legitimacy in which the Court is seised directly. Although it may be true that this type of decision takes on (or, more precisely, can take on) the shape of a dispute between State and Regions, it is also true that such controversies are not truly conflicts, but rather involve a judgment of constitutional legitimacy. The judgment does not, therefore, refer directly to the power claimed, but to the legal measure challenged. The Court consequently decides upon the constitutional legitimacy of the act or provisions challenged. Judgments upon the merits of the case can therefore be judgments of unconstitutionality (akin to the upholding of the claim) or judgments of non-foundedness (with reference to the failure to perceive a flaw, in constitutional terms, of the law challenged and, therefore, to the rejection of the claim).

8. Ways and means for implementing the Constitutional Court's decision: actions taken by the public authorities concerned afterwards. Examples.

The rules governing decisions upon conflicts between the State and Regions, or between powers of the State, do not significantly differ, at least on a theoretical level,

from those regulating other decisions issued by the Constitutional Court.

For these decisions too, the provision of non-challengeability established by Article 137, Paragraph 3 of the Constitution, remains valid. Given this insurmountable restriction, the implementation of judgments upon the proper possession of the power in question is basically remanded to the parties to the conflict.

If the conflict concerns an act, the Court provides a significant measure of direction in executing its decision, as it can determine the fate of the act in question (therefore, should the Court affirm foundation to a claim of usurpation advanced by the claimant, the Court has the power to annul the act implemented by the respondent).

In other cases, however, the effectiveness of the decision depends upon its spontaneous acceptance on part of the defeated organ or subject.

Should no such acceptance occur, the only possible remedy is to resort once again to the Constitutional Court, which will adjudicate upon the failure to act on the decision contained in the previous judgment.

Actions which can constitute the "acceptance" in question vary, naturally, according to the type of conflict decided, and, especially, according to its subject-matter and the underlying reason for the conflict. Especially significant is, for example, the fact that an act may be annulled: if the annulment is due to a finding of usurpation of a power that rightly belongs to another body, the Court legitimates the claimant to perform the act wrongfully carried out by that other body. If, instead, the annulment is a consequence of an impairment conflict, the act in question will have to be adopted once again, but in the forms, and with limits, that can ensure the integrity of other bodies' powers.

A few words should probably be spent on that which is, statistically speaking, the most frequent cause of resort to the Court in cases of conflicts between State powers. This is the challenge to decisions of non-reviewability of opinions expressed by Members of Parliament. The House to which the Member belongs, through these decisions, renders sterile any claim - whether of civil or criminal nature - brought by an individual who believes to have suffered detriment from statements made by the Member of Parliament in question. The judge before whom the claim was brought has two options: he, or she, can either interrupt the case, or resort to the Constitutional Court, adducing the mistakenness of the parliamentary decision, which was such as to cause detriment to the prerogatives of the judiciary. If the Court accepts the application, it annuls the decision and the case proceeds as any other; should the Court reject the application, the decision excludes any illicitness of the statements made by the Member of Parliament, so that the very foundation of the claim fails.

III. ENFORCEMENT OF CONSTITUTIONAL COURT'S DECISIONS

1. **The Constitutional Court's decisions are:**
   a) **final;**
   b) **subject to appeal; if so, please specify which legal entities/subjects are entitled to lodge appeal, the deadlines and procedure;**
   c) **binding** ***erga omnes;***
   d) **binding** ***inter partes litigantes.***

As established by Article 137, paragraph 3 of the Constitution, "[n]o appeals are allowed against the decision of the Constitutional Court." Decisions of the Constitutional Court cannot be challenged, regardless of their classification, by any entity, of whatever nature, even before the Court itself, and including the Court itself. An exception to this rule is the correction of material errors, which can occur only in rare circumstances, if necessary to ensuring appropriate intervention upon the effectiveness of the legal measure in question.

Decisions of the Court are restricted to the issue as raised by the referring judge (in proceedings raised on an interlocutory basis). In practice, however, the powers enjoyed by the Court in interpreting the referral order have enabled a certain degree of flexibility in defining the scope of the matter to be decided; nevertheless, the Court cannot intervene to modify the subject-matter of the referral order (the legal measure challenged and submitted to its scrutiny) and the Constitutional provisions reported as allegedly infringed. An exception to this principle consists of the possibility, for the Court, to declare the unconstitutionality of laws that were not challenged, but which become unconstitutional as a consequence of the invalidation of those norms which effectively were the subject-matter of the judgment of constitutionality: i.e. the so-called consequential constitutional illegitimacy.

The nature of the effects of decisions of the Constitutional Court depend upon the content and nature of the decision itself.

In this respect, it may be useful to single out those decisions that uphold the unconstitutionality of the legal measure in question. In these cases, the measure is annulled and automatically loses legal effectiveness; according to Article 136 of the Constitution and Article 30 of Law No. 87 of 1953, it can no longer be applied as from the day following the publication of the decision of annulment on the Official Gazette (judgments are subject to a double publication: the first through registration in the Records Office of the Court, and the second on the Official Gazette; the majority of scholars consider the effects of the judgment to arise with reference to the latter publishing). In this case, the Court's decision does, therefore, have a general and final effect, which extends beyond the individual judgment that raised the issue. The law (or legal measure) vanishes from the legal system.

However, declarations of unconstitutionality tend to affect only a part of the legal measure in question. In this case, naturally, only the unconstitutional part of the measure would fall, and the rest would remain in force. To minimize the risk of disrupting the legal system, the Court tends to painstakingly specify which parts of the law are to be annulled, at times even stating the norm that is to replace it, as derived from the Constitution itself or from the legal system.

It can be further noted that a declaration of unconstitutionality is not simply of prospective scope, but also prevents any application of the unconstitutional norm in relation to past events, unless these have been conclusively settled and cannot therefore be reopened to judicial action. If, however, the unconstitutional measure imposes a criminal penalty on a course of conduct, the measure loses all effect even if the penalty handed down is final, as the relationship is therefore conclusively determined.

Should the Court declare that the doubt upon the constitutionality of the legal measure is unfounded, the law remains in force. The decision, in this case, does not have *erga omnes* effects, but rather is binding only upon the judge who referred the issue to the Court. Indeed, the very same legal provision could be submitted for the Court's scrutiny once again, by another judge, perhaps with new lines of argument, and the Court may very well issue a declaration of unconstitutionality this time, in light of the new arguments adduced or simply breaking with its previous stance.

The same occurs with regard to decisions related to procedural matters. In these cases, the Court has not been able to evaluate the merits of the claim, due to the existence of a procedural "obstacle". The legal issue therefore remained in place, and can be referred to the Court again.

The Court can issue an "interpretative" judgment. These decisions uphold a "constitutional" interpretation of the law, and formally do not bind judges other than the remitting judge; the rest of the judiciary is in theory free to interpret laws in complete autonomy. Usually, however, they will adopt the interpretations offered by the Court, if these are necessary to avoid that the law take on an unconstitutional value. Judges cannot apply the interpretation rejected by the Court; if they seek to rely on this interpretation, it is hoped, and presumable, that they will remit the question to the Court anew. This enables the Court to "duplicate" the first rejection decision with a judgment that declares the unconstitutionality of the law (so-called system of "double judgment").

2. **As from publication of the decision in the Official Gazette/Journal, the legal text declared unconstitutional shall be:**
   a) **repealed;**
   b) **suspended until when the act/text declared unconstitutional has been accorded with the provisions of the Constitution;**
   c) **suspended until when the legislature has invalidated the decision rendered by the Constitutional Court;**
   d) **other instances.**

If the Court issues a decision of unconstitutionality with regard to particular measures, these can no longer be applied as from the date following publication of the Court's decision; the loss of effectiveness of the measures affects all pending cases, which means that the Court's decision does have retroactive effect, since it does apply to events which materialised previously too, with the exception of those circumstances which are part of legal relationships that have already been conclusively settled. When the Court declares the unconstitutionality of an act, this act is annulled in its entirety; it is annulled partially, instead, only when the incompatibility with the Constitution affects only some of its provisions.

The Court can also limit the retrospective effects of unconstitutionality, through decisions pronouncing "intervening unconstitutionality". In narrow terms, the Court thus declares that a particular legal provision, which was compatible with the Constitution upon its entry into force, became unconstitutional only later, when certain events arose; the effects of the declaration of unconstitutionality will begin, therefore, only upon the materialisation of such events (as long as these have not been conclusively defined in legal terms).

3. **Once the Constitutional Court has passed a judgment of unconstitutionality, in what way is it binding for the referring court of law and for other courts?**

Decisions of unconstitutionality introduce an innovation into the legal system, eliminating one or more measures from it; it therefore applies to all subjects within the legal system once it has become effective.

Consequently, the case before the referring judge, and all other pending cases, must be decided without application of the law affected by the Court's declaration. Judges will, therefore, have to glean the norms applicable to the case from other sources. Such an activity naturally varies in accordance with the measure that was declared unconstitutional by the Court. Thus, for example, if a measure establishing an exception in a particular case was annulled, judges will have to apply the general rule; if, instead, a law abrogating another law were found to be unconstitutional, it is possible to affirm that the abrogated law "revives".

The mechanism through which the declaration of unconstitutionality operates does not change, in substantive terms, if the Court issues a manipulative judgment - if it has, that is, modified the content of a provision, by eliminating or adding a normative fragment (in the first case, the judgment can be defined as "ablative", in that it declares the unconstitutionality of a legal provision "to the extent that" it establishes a certain state of affairs; in the second, the decision can be defined as "additive", as it declares the unconstitutionality of a legal measure "inasmuch as it does not" establish a certain outcome). Furthermore, the Court can substitute a particular fragment for another, of its own creation (a "substitutive" judgment, which declares the unconstitutionality of a

provision "to the extent that" it provides for one result "rather than" another). In all the abovementioned cases, the judge is given a provision to apply that substitutes the original provision (by reducing its scope, adding content, substituting a part of it): the innovation introduced into the legal system is linked, therefore, to the fact that the Court itself designs the new legal framework that the judge will have to apply.

The case of so-called principle-additive judgments is slightly different; through these judgments, the Court declares the unconstitutionality of a measure inasmuch as it does not include content that can concretely give rise to a particular principle. Unlike in "simple" additive judgments, the Court does not specify the new content that the legal measure should include, but limits itself to suggesting what the judge should bring about in applying the principle: its concrete realisation is therefore entrusted to the judge (at least until the legislature intervenes to specify the matter traced only broadly by the Court).

A further special case consists of a declaration of unconstitutionality, issued by the Court, which does not regard a legal measure, but rather an interpretation of the measure in question (interpretative upholding judgments). In these cases, judges continue to apply the measure, but will no longer be able to apply the interpretation rejected by the Court.

4. **Is it customary that the legislature fulfills, within specified deadlines, the constitutional obligation to eliminate any unconstitutional aspects as may have been found– as a result of *a posteriori* and/or *a priori* review?**

When the Court issues a declaration of unconstitutionality with regard to a legislative measure or one or more provisions, the legal system is already modified by this very fact alone. In principle, therefore, providing for the implementation of the Court's decision is not a concern for the legislature.

A burden does arise for the legislature when the Court issues a principle-additive judgment, as it is hoped that the realisation of the principles postulated in the judgments will occur through a legislative measure and thus guarantee certainty of law. This amounts, however, simply to a *burden* incumbent upon the legislature, which could very well remain inactive, leaving the judiciary therefore with the task of implementing these principles in applying the relevant legal principle.

The burden of intervention placed upon the legislature can also (or rather, especially) be found in certain types of rejection decisions, i.e. those in which the Court does not proceed to annul the measures that constitute the subject-matter of the judgment, but rather highlights doubts as to the legitimacy of a legal measure's validity. In other words, the Court holds that a particular provision should not be annulled, but draws attention, in the reasons for the judgment, to the advisability or necessity of modifying it. The force of this affirmation - and, consequently, the weight of the burden falling upon the legislature, can be gauged through an examination of the terminology employed by the Court. Thus,

the legislature can be simply "invited" to act (through which the advisability of altering the legislation in question is signalled), or "warned" (such a decision alerts the legislature against maintaining the current state of positive law, which could be subject to further challenges and which would encounter a declaration of unconstitutionality should it return to the Court's scrutiny), or subjected to the more forceful forms of advice, according to the doctrine perceivable in certain judgments according to which the "unconstitutionality is established, but not declared": the Court clearly affirms the existence of constitutional flaws in the measure, but nevertheless abstains from formally declaring them (eliminating, therefore, all consequences of unconstitutionality). The apparent paradox can be addressed by recalling the circumstance that, at times, eliminating an unconstitutional measure can give rise to problems greater than its preservation within the system (for example, if a measure recognises a right in an incomplete way, annulment of the measure would have the effect of excluding the right from all forms of legal recognition). The legislature is therefore firmly asked to intervene, so as to retrieve a situation of coherence of the legislation in relation to the Constitution. Should the legislator remain inactive, the Court reserves the right to proceed to declare the law unconstitutional on the next occasion; such a declaration would amount to a double penalty on the legislature: first, for having adopted a law which contrasts with the Constitution, and secondly, for not having promptly provided for the removal of the reasons giving rise to the unconstitutionality.

In case of judgments affirming "established, but not declared unconstitutionality", no deadline for Parliamentary intervention is fixed. The assumption is, however, that such intervention shall take place as soon as possible. Certain cases do arise in which the Court sets a deadline; this happens when it is possible to identify a specific moment in which the situation of incoherence with the Constitution will become so serious as to be intolerable (for example, the deadline set for implementation of an European directive may be relevant in this sense).

5. **What happens if the legislature has failed to eliminate unconstitutional flaws within the deadline set by the Constitution and/or legislation? Give examples.**

The answer provided to Question 4 above can apply in response to the present Question, once it is mentioned that the Italian legal system does not establish a time period within which the legislature must act to address unconstitutionalities identified by the Court.

6. **Is legislature allowed to pass again, through another normative act, the same legislative solution which has been declared unconstitutional? Also state the arguments.**

As mentioned above (in Part I, Question 6.b), decisions that declare the unconstitutionality of legal measures assume the same rank of the provisions addressed.

It derives, therefore, that decisions which completely or partially annul a law can be placed, within the system of legal sources, on an equal footing with ordinary laws. The Parliament may very well prevail over the Court's declaration by enacting the same provision once again, but in the higher form of a constitutional law. However, not even this course of conduct precludes intervention on part of the Court, which also has the power to review constitutional laws. It should nevertheless be mentioned that review of these legal measures is significantly less extensive, as invalidation of a constitutional law cannot be based only upon its incompatibility with (other) provisions of the Constitution; rather, the constitutional flaw must consist of a violation of a supreme principle of the legal order.

Upon close examination, moreover, the declaration of unconstitutionality of a law does not prevent Parliament from enacting it again, with the very same form and contents. Indeed, the requirement of respect of the "constitutional adjudication" does not cover future situations, but only past: the legislature cannot, therefore, enact an unconstitutional provision and endow it with retrospective effect; with regard to the future, instead, no such limitation exists. As may be clear, re-approval will carry an extremely high risk of reiteration of the judgment of unconstitutionality. As high as this risk may be, however, the Court's conduct can never be predicted with certainty. Indeed, several factors of varying nature can arise to prevent a second declaration of unconstitutionality.

First, the issue may not reach the Court: the Court does not have any official or officious power to initiate proceedings; its review is conditional upon receiving a reference of the issue, either on a direct application (by the State against Regional laws or by a Region against a State legal measure), or on an interlocutory basis (by judges in the course of ordinary judicial proceedings). If these parties do not act, the Court necessarily remains inactive: even faced with the re-approval of a legal provision already declared unconstitutional, it is nevertheless for others to enable the Court to express itself.

A second judgment of unconstitutionality may not be issued even if the Court is effectively seised of the issue. In the time between the first declaration of unconstitutionality and the new case, new laws may have been enacted, and this evolution may have had an impact on the constitutionality of the provision (for example, if the unconstitutionality consisted in discrimination, operated by the law, against a class of subjects excluded from enjoying a particular benefit, and that benefit universally ceased to exist, there would be no need for another judgment of unconstitutionality). Also, the factual circumstances may have changed, so that a provision that was once declared unconstitutional may no longer be incompatible with the Constitution, given the new state of affairs (if, for example, a provision was declared unconstitutional in that it posed excessive restrictions upon individual liberty, the development of a public security emergency may render that provision acceptable). Several examples in this sense could be made, proving the mistakenness of a blanket affirmation that the earlier judgment necessarily prejudices the later one.

7. Does the Constitutional Court have a possibility to commission other state agencies with the enforcement of its decisions and/or to stipulate the manner in which they are enforced in a specific case?

The Constitutional Court does not possess a coercive apparatus, nor policing forces that empower it to impose the implementation of its decisions upon other subjects of the legal system.

However, it is necessary to clearly distinguish between judgments that declare unconstitutionality (or, in broad terms, provide for the annulment of an act) from all others. The judgments with which the Constitutional Court annuls a legal measure are effective in themselves, as they directly introduce an innovation to the legal order (in this connection and for a brief mention of some special cases, reference may be made to Question 3 of Part III above). Other cases, instead, may require adaptation, which is to be executed by other subjects within the legal system: for example, a so-called interpretative rejection decision – through which the court declares that a given measure is compatible with the Constitution, upon condition that a particular, Court-given interpretation be followed – requires that judges (and other judicial actors) effectively interpret the decision in the sense prescribed by the Court. As interpretative rejection decisions do not amount to sources of law, it cannot be excluded that the Court's appeal will go unheeded. If this occurs, however, the Court does not lack means of placing pressure. In particular, the Court can be seised again, with reference to the provision that constituted the subject-matter of the interpretative judgment; in this case, in light of the failure to implement the interpretation provided in the first decision, the Court can opt for a declaration of unconstitutionality, to ensure respect for the judgment, and therefore, for constitutional norms.

As can be deduced from the above example, implementation of the judgments of the Court largely depends upon cooperation on part of other subjects within the legal system – a cooperation that, however, does not take place according to formalized avenues, as was mentioned above (Part I, Question 7).