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Report of the President of the Constitutional Court

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1. Foreword

Between 2022 and 2023 the anguish of the pandemic gave way to the clangour of weapons, first on the borders of Europe, as a result of Russian aggression against the Ukrainian people, and now in the Middle East, due to the horror of terrorist attacks and the harsh Israeli reaction.

The year 2023 was also the year that saw atrocious cases of feminicide in Italy and, in any case, witnessed numerous repugnant acts of violence against women. And it was the year in which more than a thousand (an average of as many as three a day!) frightening work-related deaths occurred. Tragedies with which, directly or indirectly, the Constitutional Court has dealt and will have to deal, with regard to both the condition of women and important aspects of the organisation of work in business enterprises.

It was also a year marked by serious natural disasters, on which climate change and, in any case, the neglect exhibited by many public authorities had some bearing.

The approval by a very large parliamentary majority of a rewording of Articles 9 and 41 of the Constitution incorporating stances most of which already adopted by this Court is at least a sign of greater awareness of the issues to be addressed.

2. *The statistics and their meaning*

Unfortunately, I cannot give due prominence here to such dramatic events, and, as is customary, I will begin my report on the Constitutional Court's work in 2023 with a sober reference to some of the statistics that I consider most significant.

In the past year, **229 decisions** were adopted, **compared to 270 in 2022**. It would take too long to cite them individually. Rather, I will try to highlight the procedural avenues that have gradually unfolded and still display problematic aspects. **I will avoid detailed citations of** constitutional case law, for which one should refer to the relevant publication, valuable as always, by the Studies Department and the Yearbook, also available on the Court's website.

I will make a few exceptions. Today is the day dedicated in Italy to the memory of the victims of Covid (18 March 2020 witnessed the sad procession through Bergamo of lorries loaded with coffins!). My heartfelt thoughts go out to their memory and in this regard I would like to mention, among last year's decisions, Judgments Nos 14 and 16, relating to

mandatory vaccination for healthcare workers, and Judgment No 15, relating to workers employed in residential health and social care facilities.

In those decisions, **on the basis of available scientific data** and taking into account what had been achieved in other legal systems similar to the Italian one, the Court held that quite a number of questions as to constitutionality were unfounded, ruling that the legislature had struck a **not unreasonable balance** between individual freedoms and the fundamental right to health, defined by Article 32 of the Constitution also as a "**collective interest**".

In Judgment No 25, on the other hand, the Court held that a mandatory vaccination requirement – not concerning the Sars-Cov-2/Covid infection – imposed on military personnel selected to carry out missions abroad was unconstitutional in that the legislation was not sufficiently detailed on the point.

The drop in the number of decisions highlighted above is linked, in particular, to the **reduction in the number of direct applications**. Indeed, only 35 were filed in 2023, a decrease of about 60% compared to the previous year.

That **significant decrease in the number of disputes between the State and the Regions** is most likely due to **liaison mechanisms at political level** between the bodies concerned that enables them to find common ground and reach a compromise. The Court has no role to play in the latter, without prejudice of course to having to rule on any questions as to the constitutionality of the ensuing regional legislation that may subsequently come before it in incidental proceedings.

The recent directive of the President of the Council of Ministers of 23 October 2023 (Examination of the laws of the Regions and Autonomous Provinces of Trento and Bolzano and of questions as to constitutionality pursuant to Article 127 of the Constitution. Streamlining of the Government's inquiries) can be viewed as a step in that direction.

Also deserving of special mention is the well-established trend towards **a reduction in the number of questions as to constitutionality raised in incidental proceedings**, the referral of which is the duty of any court that, in the course of proceedings before it, has to apply a provision having the force of law, the constitutionality of which it has reason to doubt.

There was – it is true – a slight increase in the number of referral orders in 2023, from 160 to 170, but they **remain far below** the **average** recorded between 2009 and 2013. An average that steadily decreased in the following years.

One may ask: does **such a drop coincide with an actual fall in the number of constitutional issues** brought to the attention of the judiciary?

That is not the case. On the contrary, those issues appear more keenly felt than ever as a result of multiple political and social pressures, on which this is not the place to dwell.

Rather, and this seems to me to be the most plausible explanation, one can detect an approach adopted by the courts, at times episodic it must be said, **rooted in an activity of interpretation shaped directly by constitutional values** (or ones held to be such), the outcome of which is a rather serious **disapplication of legislative provisions**, even by higher courts.

One can understand (but not condone) the fact that a court feels the need to provide a response, as swiftly and effectively as possible, to regulatory frameworks deemed to conflict with the Constitution, and, more specifically, the need to offer protection to the inviolable rights enshrined therein. However, that response is **incompatible** with the Constitution itself. In that regard, it is worth briefly recalling that the **Constituent Assembly,** after rejecting the North American model of decentralised

jurisdiction, wished to follow a path of **centralised review**, with the resulting decisions to have *erga omnes* effects, so as to also ensure the "predictability and certainty of constitutional law".

The above-mentioned approach exhibited by the ordinary courts has no practical rationale in light of the fact that this Court is now able to decide incidental constitutional proceedings within a few months and in the meantime the referring court can grant interim relief so that there is no vacuum of constitutional protection. In this respect, it should be noted that **the average time required to issue a ruling in 2023 was 227 days**, a timeframe that can be significantly reduced for particularly important issues.

On this last point, I would point out that Judgment No 137/2023 clarified that administrative courts are empowered to adopt any proactive or substitute measures necessary to ensure interim protection. That includes staying any measures applying a legislative provision that is referred to this Court for a review of its constitutionality. A position that is justified "with a view to the effectiveness of judicial protection".

Of course, I do not intend to deny the fundamental role that the ordinary courts can and must exercise, but rather to **bring that role back within the limits of their** sphere of **competence**, steering clear of that "indulging in values" that quite a few judges sometimes feel they must partake in.

Raising a question of constitutionality is certainly not a minor function. On the contrary, and this is something that I would like to recall, the impetus coming – right since the earliest years – from the **referral orders** of the then "lower courts" (the famous *praetors*), which led to many advances in the law in our country, is actually responsible for some of the most beautiful pages of constitutional case law.

And it is in that area that this Court's case law (not without some fluctuations over the years) has encouraged and intends to continue to encourage "interpretations conforming to the Constitution" made by the ordinary courts. However, where such interpretations are not possible or give rise to conflicting solutions, the system requires constitutional review proceedings designed to operate not only in the individual case but *erga omnes*, precisely to assure – I repeat – "legal certainty".

3. "Non-application" and European Union law

A totally different case occurs when an ordinary court may – indeed must – **not apply** provisions of a domestic law on the grounds of a **sharp contrast** with directly applicable rules of European Union law.

I emphasise "sharp contrast" since it is not in keeping with the constitutional system to seek to disapply a domestic rule held to be at odds with the principles enshrined in the Charter of Fundamental Rights of the European Union. An operation that is not permitted even in the face of the national Constitution, since a court in case of doubt must refer a question as to constitutionality to this Court.

In such cases – aimed at ensuring **the "supremacy" of EU law** – the ordinary courts are not however precluded from making a reference for a preliminary ruling to the Court of Justice or referring a question of constitutionality to this Court on the conditions set out in the well-known Judgment No 269/2017, now in accordance with the most recent EU case law.

Through incidental constitutional proceedings before this Court, in particular, which may have been initiated at a stage prior to a reference for a preliminary ruling to the Court of Justice in

Luxembourg, the referring court ensures that the question is properly assessed in the light of the Italian Constitution so as to unveil, if the question is held to be unfounded constitutionally, any further aspect worthy of consideration from the perspective of European Union law.

That in no way downplays the vital importance of EU law and the role of the Court of Justice. On the contrary – I stress the point! – there can be no doubt that constitutional proceedings are now a key forum for the application of Union law, with a view to integrating the safeguards and giving them greater meaning.

Both the era when this Court did not believe it could dialogue with the Court of Justice (from Order No 103/2008 onwards) and the era when the latter sought to exclude what it feared could be potentially competing national reviews as to constitutionality are behind us. And the resistance of those courts not well disposed towards an interposition between them and the Court of Justice is fading.

It is not far-fetched to say that we can increasingly undertake – and this is our commitment – an "**integrated uniform interpretation and application of the law**" through the osmosis between national and European parameters.

Moreover, Union law has been the protagonist of constitutional proceedings, as in the cases decided by Judgment No 111 on the extension of the right to silence and Judgment No 192 on criminal trials *in absentia* (*Regeni* case). Also prominent in this respect are Judgments Nos 177 and 178 concerning European Arrest Warrants against third-country nationals, precisely because the Italian decisions are the effect of rulings of the Court of Justice, from which preliminary rulings were sought on foot of Orders Nos 216 and 217 of 2021.

4. The European Convention on Human Rights and comparative law

A constant of this Court's case law is reference to the **European Convention on Human Rights**, with a view to supranational integration.

The **nonchalant** attempts by some ordinary courts to disapply national rules that they consider to be contrary to the said Convention are **by now marginal**. On the other hand, there are **numerous and often important rulings of this Court** that have referred to the decisions of the **European Court of Human Rights**, including in 2023.

These include Judgments No 8 on the subject of undue payments, No 40 on the subject of pecuniary sanctions, No 105 on the subject of inmates' contacts with family members, Nos 107 and 205 on the subject of the reasonable duration of trials, No 111 on the subject of the right to silence and No 183 on the subject of the protection of minors.

The challenges of the contemporary world for liberal democracies are largely the same. It would be short-sighted to want to face them alone, without dwelling on what has been decided elsewhere, in the certainty, as borne out by practice, that in turn the reasoning of this Court will be taken into account.

That goal is furthered by the international exchanges and meetings that this Court has had with other European courts, including in 2023.

In that regard, **extensive references to comparative law** appear in Judgment No 14 on mandatory vaccination, Judgment No 110 on obscure regulatory provisions and No 161 on assisted reproductive technology, holding that the father's consent could not be withdrawn after fertilisation of the oocyte. Judgment No 159 on the subject of compensation for war damage resulting from crimes linked to World War II did not, as regards the constitutional provisions invoked by the referring court, consider unconstitutional the legislature's choice to reconcile the right to compensation for damage with the observance of certain immunities granted by international law on the basis of a not unreasonable balancing act made necessary by Judgment No 238/2014. In the case just cited, the legislature's actions were precious in avoiding an otherwise inevitable conflict with the case law of the International Court of Justice, given the need to ensure compliance with a supreme principle of the domestic constitutional order.

5. The constitutional order and the role of Parliament

The 1948 Constitution is, on the whole, especially in terms of **principles**, still robust because it is a text that the Constituent Assembly wanted to be "**eclectic**" and "**inclusive**" with "**multiple potential**".

It accompanied both the early constitutional case law on rights, linked to the values of a predominantly rural society, and the case law following the changes of the 1970s. Moreover, our Constitution has not ceased to express its vitality even at times following the **decline of the political parties** that had given birth to it and supported it for decades.

That potential leads one to view the Constitution **not as a "separate" text but as a radiating part of a broader "constitutional order"**, an order nourished by the "material base" on which the text rests and which is **constantly evolving**. That base is represented by a rich social, political and cultural fabric, as interpreted by judges, but also – I stress – by the network of elective assemblies.

In a constitutional system based on the **separation of powers**, strict respect for the decisions of the judiciary must be matched by equally strict **respect for the decisions of legislatures**, expressions of popular sovereignty**.**

I am not referring to individual legislative acts. It is true that the Constitutional Court must eschew "any assessment of the use of Parliament's discretionary power", as per Article 28 of Law No 87/1953, but it is equally true that the Court is also required to establish that the legislature has not exceeded the limits set by the Constitution.

On the contrary, I am referring to the broader role of Parliament **in grasping the evolutionary impulses of pluralist society**, with which **the Constitution breathes**; impulses that are necessary to adapt to continuous developments in society.

It is also from that standpoint that one must view the **involvement of the legislature,** which this Court urges in making choices that necessarily require an interpretation of constitutional provisions that is not strictly textual, "non-originalist".

I will put it succinctly: this Court is **called upon to be the "guardian of the Constitution", but it is obliged to be equally careful not to construct**, with the tools of interpretation alone, **a fragile "Constitution of the guardians"**.

Moreover, **important developments** in the history of the Republic – there springs to mind the regulation of **termination of pregnancy** or of **civil partnerships** – stemmed from important Constitutional Court rulings (Judgments No 27/1975 and No 170/2014 respectively), which were followed up by no less significant legislative action, which saw the legislature widely involved (Law No 194/978 and Law No 76/2016 respectively). That convergence was welcome precisely because in those areas the wording of the Constitution did not disclose an unambiguous solution.

That said, in the absence of such convergence and **in the face of any persistent legislative inertia**, the Court – in cooperation with the ordinary courts in the sense specified – cannot forsake its role of guardian, which also includes the task of ascertaining and declaring the fundamental rights claimed by a constantly evolving constantly evolving "societal consensus".

Accordingly, Judgment No 135 upheld the right to personal identity of adopted persons as to their surname. While the aforementioned Judgment No 161, in declaring unfounded a question as to constitutionality with regard to prohibiting a father from withdrawing his consent to medically assisted procreation, reviewed the extensive constitutional case law on this sensitive matter, often shaped by this Court's rulings striking down offending legislation.

6. The types of decisions

An issue that the Court has been called upon to reflect on several times concerns the types of its decisions.

The axis is the one identified by Law No 87/1953. It hinges on the assumptions that legislative provisions declared to be unconstitutional are void and devoid of legal effect *ex tunc* and that it is impossible to limit the effects of the decisions solely to the future.

That is certainly correct when the challenged legislation is clearly inconsistent with precise provisions of the Constitution. However, it is more problematic when it is alleged that the legislation infringes principles and values.

The evolution that has taken place in constitutional case law since the early years has shown how this radical remedy is, in very many cases, *excessive* in relation to the purpose pursued. Likewise, in order to avoid gaps in the legislation, a declaration of unconstitutionality *in parte qua*, also defined as ablative or partial (i.e. the unconstitutionality of a given provision "to the extent that it provides"), has been considered a *sufficient* remedy. At other times, following further developments, the defect has been identified in the legislature's failure to provide that the provision also applies to a case not encompassed by the actual wording: hence declarations of unconstitutionality *in parte qua*, but of the opposite sign to the previous one ("to the extent that it does not provide"), so-called additive rulings, or, again, so-called substitutive rulings.

This was the approach that prevailed in the early days of the Court's operation, which referred to parameters linked to precise provisions of the Constitution (Judgment No 98/1979) and which led to the dismantling of

legislation of the old regime that was for the most part clearly inconsistent with constitutional norms. However, since the second half of the 1980s (Judgment No 561/1987), there has been an increasingly frequent reference to "constitutional values", relying in particular on Article 2 of the Constitution, viewed as a provision **not merely summarising** the rights expressly enshrined in Article 13 *et seq.* but considered "open-ended" and capable, in any case, of influencing the interpretation of other constitutional provisions.

Since it is a provision that is open, in particular, to evolving "societal consensus" stemming from the pluralism of society and from political-parliamentary developments, it follows that there is a need for a rigorous **delimitation of the boundaries**. A field in which both legislative activity and constitutional review must converge.

Constitutional review has, moreover, gained in scope through an ever-increasing recourse to the canons of **reasonableness and proportionality**, which in turn are grafted onto an approach inspired by the axiological breadth of "principles" rather than the narrower concept of "rules".

But they are naturally very elastic criteria, which cannot always be defined with *ex ante* certainty and whose application is alien to the "syllogistic" canons of interpretation typical of a declining positivist culture. Hence the question as to whether a declaration of retroactive unconstitutionality, *ex tunc*, can still be the axis around which to continue building our system of constitutional justice. An approach rooted – as I said before – in finding a clear and precise contrast between the challenged legislative provision and constitutional provisions.

The dilemma is well-known: when faced with an unconstitutional provision of law whose repeal would open loopholes undermining constitutional principles equally worthy of protection, the question arises as to whether the Court should strike down the provision whatever the cost. Or instead should it resign itself to hesitant rulings of inadmissibility, even if this allows the infringement to remain in the system?

The shift in recent years from the apparent strictness of an approach premised on a "sole constitutionally mandated solution" to one centred on a "suitable constitutionally compatible solution" has fuelled extensive debate in the legal literature. I do not intend to wade into that discussion, but in my opinion it is the result of an overemphasis on the distinction in question. Recourse to those approaches tends to contain a para-legislative function of the Constitutional Court. I wonder whether it would not be better to focus on highlighting the importance, to this end, of the duty of cooperation between the Constitutional Court and the legislature, each with regard for and within the limits, including procedural ones, of its own remit (as expressly recalled in Judgment No 152/2020).

Among other things, that cooperation could also be made easier, as I will explain shortly, by varying the effects of Constitutional Court decisions so that they apply just in the future.

In order to pursue this objective, it is well known that this Court has over the years developed with increasing intensity a series of procedural tools, some more successful than others, with which to urge the legislature to intervene when deemed necessary.

Just to summarise: from **warnings** there has been a shift to **additive rulings of principle**; from rulings of **inadmissibility owing to legislative**

discretion there has been a shift to **prospective but undeclared unconstitutionality**, or, even more incisively, to rulings of **deferred unconstitutionality**.

Having ascertained the constitutional infringement and frozen the judicial application of the provision affected by it, rulings of deferred unconstitutionality adjourn the proceedings to a given date, precisely in order to enable the legislature to take remedial action in the meantime (Order No 207/2018 in the *Cappato case*, and more recently Orders Nos 97/2021 and 132/2020).

By limiting itself to exercising its power to set the date on which a question is to be dealt with, the Court operates in terms not dissimilar to what has been achieved in other European jurisdictions with "**incompatibility**" rulings. In so doing, the Court avoids making choices that are a matter, at least in the first instance, for the legislature. It is worth noting in this regard that, in most of these cases, the Court could have immediately declared the challenged provision to be unconstitutional, so much so that this is precisely what then subsequently happened on several occasions due to the legislature's continued inertia. However, this does not detract from the fact that, in the first instance, in order to ensure a systemic and not isolated assessment of the values involved, it was **constitutionally correct** to pause in order to allow the legislature to exercise its function of remedying the possible gap in the system. This by means of a more harmonious framework than any rulings of this Court could offer and falling within the realm of the political discretion that still remains after the declaration of unconstitutionality.

In the light of the above, one cannot but express a certain **regret** that in the most significant cases the legislature did not intervene, forgoing a prerogative vested in it and obliging this Court to proceed with its own independent solution, inevitable by virtue of the imperative to observe the Constitution.

It is in this spirit that I hope that the legislature will act in order to follow through on Judgment No 242/2019 in the *Cappato* case on **end-of-life decisions** and to adopt measures that take account of the warnings in

Judgments Nos 32 and 33 of 2021 regarding the **civil status of children of same-sex couples**.

The **legislature's silence** is leading, in the first case, to numerous stopgap regional laws and, in the second case, to haphazard and contradictory measures adopted by mayors within whose remit civil registry offices fall.

7. The varying of the temporal effects of decisions

Those techniques also include one aimed at varying the **temporal effects** of decisions ascertaining a constitutional infringement.

Numerous attempts have been made in our constitutional case law to dissociate *pro praeterito* the invalidity and effectiveness of legislative acts. Could the same be attempted diachronically *pro futuro*?

That has already been done, albeit in a few cases. In incidental constitutional proceedings, one may recall Judgments No 1/2014 on the electoral law, No 10/2015 on the so-called Robin Tax, as well as the previously mentioned Judgment No 152/2020 on disability allowances for civilians completely unable to work.

The absence of similar rulings in 2023 testifies that it is an approach that this Court adopts with (perhaps excessive) caution, but I wish to discuss it since I believe it to be an avenue that could be explored and examined in greater depth, subject to **necessarily conferring** with the panel of judges over which I have the honour of presiding.

The terms of the problem are not dissimilar to those already raised regarding the relationship between constitutional justice and legislative discretion. Here too the Court finds itself in the middle of a **dilemma**

between the imperative to remove an unconstitutional provision from the system and the need to prevent serious imbalances from arising by doing exactly that.

Judgments Nos 48, 57, 64, 70 and 165 reiterated in this regard that effects disrupting **balanced financial management** must be avoided on foot of the expansive force of the new wording of Article 81 of the Constitution. It is not an aspect that this Court can disregard, albeit as part of the duty to ensure, first and foremost, the protection of fundamental rights.

But neither can it disregard decisive aspects of the **organisation of the Republic**. One may recall, in this respect, Judgment No 41/2021 on questions relating to the honorary judiciary: had this Court not tailored its finding of unconstitutionality, the appellate courts would have been paralysed.

Hence a need may arise in exceptional cases to **vary the temporal effects of a ruling of unconstitutionality** with a view to **cooperating with the legislature**. In fact, containing the impact of the decision within a precise timeframe facilitates legislative action that will introduce provisions to resolve the issue thereby **avoiding regulatory vacuums** as well as assuring **greater certainty of legal relations**.

In this regard, a clarification is in order: the choice as to how to vary the temporal effects should obviously be identified by this Court on the basis of objective criteria inferable from the legislative framework concerned, the context of reference and, as the case may be, the phases of the economic cycle within the meaning of Article 81 of the Constitution.

Alongside the tools (already tried out on several occasions) to limit the retroactive scope of rulings of unconstitutionality, it is possible – I believe – albeit in special cases, to **determine** that they take effect only **from a**

future date. This is, moreover, what Hans Kelsen, the founding father of constitutional justice, has suggested in various writings.

Indeed, it is well known that the **constitutional courts of countries closer to us** in terms of tradition and experience (Germany, Spain, Austria, Portugal and France) have not failed to manipulate the temporal effect of decisions, at times on the basis that it is an **inherent power** that they may exercise.

I recall, in this regard, that the **Court of Justice** itself, pursuant to Article 264 of the Treaty on the Functioning of the European Union, in declaring an act to be "void" may rule out the effectiveness *ex tunc* of the decision (including vis-à-vis the parties to the main proceedings). But it may also **suspend the effects** of the annulment until an act is adopted to replace the annulled one.

Such a context, marked by the common willingness of the said constitutional courts to actively regulate the temporal effects of their decisions, cannot just be a coincidence but rather suggests that there are homogeneous and strong reasons of constitutional law militating in favour of such an approach.

8. The composition of the Court

I move on to my last point. The Constituent Assembly's choice of criteria for **the composition of the Court** has proved particularly successful, ensuring an input of expertise and experience that are all equally fruitful.

The constitutional provisions in question effectively ensure, **alongside pluralism, the independence of the Court**. The latter does not run the risk

of being undermined by contingent political events, because of the variety of channels through which judges are appointed to the Court, the large majority required for the election of the judges that Parliament appoints, and the ban on re-appointment. This is in contrast with the composition of other European courts, which are sometimes – I must stress – improperly compared to the Italian Constitutional Court.

In this context, allow me to address an **invitation to Parliament**, now that the first two rounds of voting have been completed, to proceed to complete the process as soon as possible. Needless to say, the contribution of each and every judge is essential for the successful outcome of constitutional proceedings, based on full collegiality.

When I became a Constitutional Court judge, I was struck by the intensity with which collegiality permeates the life of the Court, to the point that there is no aspect of a decision (including the most minute grammatical issues and choice of wording!) that has not been subject to thorough discussion among us.

The drafting of a constitutional decision, and its subsequent reading and approval, eschew any predetermined logic: majorities are formed and dissolved from time to time, beyond backgrounds and beyond political leanings.

It is also for this reason, I believe, that, apart from isolated opinions, there has been no need to introduce forms of dissenting opinions right from the Court's early years. Moreover, the international literature agrees that where such an option has been introduced, alongside some positive effects, it has had serious negative effects, chief among which the weakening of the authority of the decision.

Any discussion on the subject – let me be clear! – is wholly legitimate. However, **as the law currently stands**, the secrecy of the deliberations in chambers must nevertheless be **observed**, a point I wish to strongly emphasise. Secrecy that is not intended to bolster the outdated notion of *arcana imperii*, but that is **necessary to ensure** the **freedom** and **independence of the Constitutional Court**.

I do not intend to rely on textual data, but deliberation in secret in chambers is a practice that has always been followed in the history of the Court, consistent moreover with the general rules of procedure.

I conclude by emphasising that the goal that unites the members of the Court is the protection and development of our Constitution, to be understood – I repeat – not as a **document brandished for divisive interpretation** but as the **fabric that, through the sharing of its principles, sustains and unifies the Republic**.

With such a legacy, built over almost 70 years of the Constitutional Court's life, we will certainly be able to face this year's commitments with confidence.

Thank you very much for your attendance and kind attention.