# Constitutional Courts as Negative Legislators?

*Some Thoughts on the Italian Experience*
*from a Criminal Law Scholar's Perspective*

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## *1. Introduction.*

In a famous essay dating back to 1929, Hans Kelsen defined the Constitutional Court as a "negative legislator". In his view, the decision by the Court to annul the provision because of its incompatibility with the Constitution is adopted following a judicial proceeding, but has in fact legislative character, since it modifies the law in force within the legal order, by excluding from it the provision declared unconstitutional.

In Kelsen's theoretical construction, however, such a power should be limited to the mere negative effect of what he calls the '*Aufhebung*' of the unconstitutional provision, whilst the task of closing the lacuna created by the Court's decision by the enactment of a new provision should be reserved to the only democratically legitimized decision-maker, the Parliament.

The point was essential to Kelsen, who has always been aware of the danger for the Constitutional court to step improperly, through its decisions, into the realm of the *political* decisions, thereby superposing its own evaluation about the competing interests involved in any legislative decision to that of the democratically elected Parliament. When, two years later, he defended the role of a Constitutional court in a democratic system against Carl Schmitt's objections, he insisted on the purely *negative* character of the Court's 'legislation': the task for the Court should have only been that of applying the Constitutional rules to the legal provisions brought to its attention, in order to verify that the latter be in line with the former, without any exercise of political discretion in this assessment.

The Italian Constitutional Court, as many other Constitutional Courts throughout the

world, has remarkably departed from Kelsen's model since its birth in 1956. Indeed, the Court has developed a wide-ranging set of constitutional remedies that go far beyond the patterns of a mere 'negative' legislation, and allow the Court, to a significant extent, to set rules that *directly close the lacunae* created by its decisions to annul legislative provisions.

In this brief contribution, I would like to examine these techniques in the particularly sensitive field of the legal system that is represented by criminal law.

## *2. The starting point: criminal law as the ideal field for the application of Kelsen's model.*

Criminal law is the sector of the legal order where the reasons for a mere negative role to be played by the Court seem to be more compelling. An additional argument to that of the general deference to the democratically elected political bodies can be easily invoked here: according to a common understanding at least among the continental legal systems, the principle of legality in criminal matters – *nullum crimen, nulla poena sine lege* – requires that the choices on whether a behavior should be criminalized, and how it should be punished, are only determined by the 'law', i.e. by an act of Parliament. And this because the Parliament is the body vested with the task of forming and expressing the 'common will' of the nation, to which – according to a long-standing tradition dating back at least to the French Declaration of 1789 – the power to limit the citizens' liberties should be reserved.

Therefore, the only role in this field for a non-political (and, of course, non-representative) body such as the Constitutional court seems to be that of *annulling* the criminal provisions adopted by Parliament in breach of a Constitutional provision, with the sole effect of removing a limitation of the citizen's liberties. The criminal law in force the legal order will be, of course, modified by the Court's decision; but this effect remains in line with the *nullum crimen* principle – which is itself a constitutional principle –, since no new criminal provision is created as an effect of the Court decision. On the contrary, the area of criminally relevant behaviors is reduced, and the citizens' freedoms are – correspondingly – expanded.

In the first years of its history, the Italian Constitutional Court has in fact confined its scrutiny in criminal matters to such a negative role. In 1960, for example, the Court

declared unconstitutional a provision stemming from the fascist era and criminalizing the strikes called by workers and unions: the offence was found to be in breach of the constitutional provision recognizing the right to strike within the limits set by the law. Similarly, in 1968 the old offence of female adultery was annulled because of its incompatibility with the constitutional principle of equality between the spouses. More recently, a decision in the year 2000 declared unconstitutional the criminal offence of contempt of the Catholic religion, which was found to violate the principle of equality of all religions before the law; and a provision setting forth a general aggravating circumstance for every offence committed by an alien illegally residing in Italy was annulled in 2010, because of its incompatibility with the still more general principle of the equality of everyone (citizens and aliens) before the law.

In all these cases, the Constitutional Court was clearly not preoccupied with the consequences of its decision. All those offences declared unconstitutional had been rarely applied in recent times, and appeared as mere historic relics, so that their elimination from the criminal law system did not create any dangerous vacuum. Also the annulment of the aggravating circumstance concerning illegal immigrants, which had been immediately criticized by scholars for its discriminatory character, was not seen as a problem either, since the crimes committed by those offenders continued to be subjected to the ordinary penalties applicable to every perpetrator.

*3. Manipulation techniques.*

However, things appear to be more complicated in other sets of cases.

For example, in 1970 the Court was asked whether a provision criminalizing the public glorification of an offence was compatible with the freedom of speech clause contained in the Italian constitution. The Court upheld the provision, but clarified in its reasoning that its application is compatible with the Constitution only in so far as the act of glorification creates a 'present risk for the public order'.

Four years later, the Court changed its strategy. Faced with the similar question whether the criminalization of public incitement to breach the law was, on its turn, compatible with the freedom of speech, the Court *annulled* the provision "in so far as it does not exclude from its scope behaviors that do not create any present risk for the public order". The result was, in its substance, the same as in the previous decision; however, this time

the Court took a tougher stance, not confining its intervention to a mere recommendation to criminal courts as to how to construe the provision. Instead, the Court directly modified the boundaries of the offence through a decision of annulment, which is immediately binding on ordinary courts.

In both cases, the Court opined that the problem with the provisions at issue was not their 'facial' incompatibility with the Constitution – the problem was, instead, their possible unconstitutional *applications* to sets of cases where no present danger for public order was involved. The two provisions were, in other words, *overbroad* in respect of the need to protect freedom of speech, since they did not strike a proper balance between freedom of speech and the necessity to protect public order. In such circumstances, a remedy consisting in the annulment of the whole provision would have been clearly excessive, and would have created an intolerable vacuum in the protection of public order. What needed to be avoided from a constitutional perspective was, therefore, only the application of the *sub-rule*, implied in the challenged provision, encompassing public glorifications or incitements that do not cause any present danger for public order. And in the latter decision, the Court concluded that the most straightforward way to achieve this aim was, precisely, the *partial* annulment of this provision, in so far as its wording also encompasses the said sub-rule.

The same technique was adopted in a number of other instances, including a remarkable case on abortion in 1975, where the Court declared unconstitutional the criminal provision in force at that time in so far as it did not exclude from its scope the situation where termination of pregnancy is necessary to save the mother from a (mere) danger for her life or health, even in the absence of a present and imminent danger covered, as such, by the ordinary defense of necessity. Here, again, the provision was simply annulled *in parte qua*: the Italian Court was, at that time, not prepared to follow the path of *Roe v Wade*, and merely concluded that the application of the abortion provision in the name of the fetus' interests would have violated the right to life and physical integrity of the mother, should it be applied also in a situation of risk for these, overriding, rights.

Another interesting example is represented by a celebrated decision dating back to 1988, concerning a provision of the general part of the criminal law, which precluded the defendant from invoking his or her mistake of law as an excuse. The Court did not declare the provision fully unconstitutional, but – again – annulled it in so far as its wording also covers 'unavoidable' mistakes of law. A new defense of mistake of law, was, this way, created by the Court.

Is such a technique consistent with Kelsen's idea of the Constitutional court as a mere 'negative' legislator?

From a formal perspective, it is still arguable that in these cases the Court simply *removes* from the legal order the sub-rule implied in the challenged provision. However, the boundaries of this sub-rule are not expressed in the legal provision, and are instead *entirely shaped by the Court itself*. It is actually the Court that, for instance, recognizes – within the general provision criminalizing public glorification – a sub-rule criminalizing the instances of glorification that are performed in such a way as to not create any danger for public order. Correspondingly, the Court in fact transforms the challenged criminal provisions, *reducing their scope* through the *addition* of a requirement – the present danger for public order; the absence of a danger for life and health of the mother; the possibility to avoid the mistake of law, etc. – which was not originally contained in them, and is simply *created* by the Court.

It can hardly be argued, therefore, that the Court refrains from any political appreciation in making decisions of this kind, as it should do according to Kelsen's original understanding. Instead, the Court does make here a choice between competing interests, modifying the solution adopted by the legislator in order to bring the law in line with its the Constitution, without waiting for the Parliament to make its own choice.

Actually, the Court becomes here a *positive* legislator.

*4. The constitutional review of punishments.*

Other delicate problems arise when a criminal provision is challenged before the Court as to the type and quantity of the punishment it provides for. In these cases, it is clear that a remedy consisting in the full annulment of the provision would not be appropriate, since such a solution would determine the disappearance from the legal order of a provision that criminalizes a behavior that does deserve to be punished. On the other hand, the simple annulment of the *part* of the provision setting forth the punishment provided for the offence would determine the impossibility for any criminal court to sentence the perpetrator of the offence in view of the *nulla poena* principle, which requires that the punishment be determined by law.

The Court was faced to this problem, for example, in a case where the criminal offence of insulting a public officer was challenged because of the disproportionality of the

punishment provided for the offence (imprisonment for a minimum of 6 months). The Court held, in 1994, that that minimum was unreasonably higher than the minimum provided for the general offence of insulting anyone, and annulled *in parte qua* the impugned provision, *replacing* the original minimal punishment with that of 15 days imprisonment, already provided for that other offence.

A similar solution was adopted by the Court when it held, in 2012, that the minimum penalty of 24 years imprisonment for the offence of kidnapping someone with intent to obtain a ransom could turn out to be disproportionately harsh under some circumstances, and therefore to be contrary to the proportionality principle enshrined in the Constitution. In that case, the Court declared, again, the unconstitutionality *in parte qua* of the relevant provision, in so far as it does not provide for the *same possibility of reducing by one third the minimum penalty* that is allowed for the comparable offence of kidnapping someone with a terrorist intent. The practical effect of the decision was to replace the original statutory minimum (24 years imprisonment) with a new one (16 years).

In both cases, and in a number of similar cases, the substitution of the original punishment was possible because the Court was able to identify a so-called *tertium comparationis*, i.e. a provision criminalizing a similar (or, possibly, still more serious) unlawful behavior, providing for a more lenient penalty that could 'borrowed' in replacement of the punishment declared unconstitutional.

In such instances, the Court does work as a *positive* legislator (the decision certainly modifies the law previously in force), but intends to avoid any discretionary evaluation as to the penalty to be imposed for the offence: the nature and measure of the punishment arising from the Court's decision already exists in the legal system, and is merely *transferred* from a provision to another.

An obvious flaw in this technique is that such a transfer presupposes the existence of a provision similar to the impugned within the legal system. When a suitable *tertium comparationis* is not to be found, there seems to be no remedy, at the current stage of the Italian constitutional case law, for the violation of the principles regarding the type and amount of penalties provided for offences that are *per se* compatible with the Constitution. An odd situation indeed, which will probably lead the Court in the future to further develop its jurisprudence in this field and assume a still more proactive role in the amendment of unconstitutional penalties.

*5. Constitutional remedies for failures to criminalize?*

A further problematic field concerning the constitutional review of legislation in criminal matters refers to situation where the breach of the constitutional principles is based on a legislative *omission*: may it be a radical failure to criminalize a behavior that should be criminalized, or rather a provision that unduly limits the scope of an existing criminal provision, thereby leading to the impunity for behaviors that should instead be criminalized.

These problems were, of course, unknown at Kelsen's times. The very idea of *constitutional* obligations to criminalize is relatively recent, essentially dating back – in the international discussion – to the mid-seventies, at the time of the decision on abortion by the German *Bundesverfassungsgericht*. Yet, the Italian Constitution of 1948 does contain at least the obligation to criminalize acts of torture committed against persons deprived of their personal liberty; and several other parallel obligations – with regards to the rights to life, to personal integrity and liberty, etc. – can now be derived from the international human rights law, whose obligations are now considered to be binding in principle on the Italian legal order even from a constitutional perspective.

Of course, the *nullum crimen, nulla poena* principle is widely regarded as an obstacle to allow a constitutional remedy in case of radical non-compliance by the legislator with these obligations. The Constitutional court is certainly not in a position to close such a lacuna, by directly setting forth criminal provisions that Parliament has omitted to enact, in spite of the international obligations incumbent on the State.

However, the Italian Constitutional court has since 1983 repeatedly affirmed its power to examine the compatibility with the Constitution of any *exceptional* provision establishing an area of impunity – or of unjustifiable more favorable treatment – in a field already covered by a criminal provision of *general* application. The Court has also clarified that, in such cases, its decision to annul the exceptional and more favorable provision should only have effects *pro futuro*, in order to avoid any retroactive application of the general criminal provision, at the detriment of all those who had relied on its validity.

The concrete applications of these principles have not been particularly remarkable so far; nevertheless, it is clear that the Italian Court now disposes of all the necessary tools to exercise a constitutional review, e.g., of *defenses* that may possibly be drafted by legislation in such a way as to determine impunity of serious violations of human rights, or – if the case might be – of *amnesty laws* producing the same effect, like the shameful

'self-amnesty' laws that have been declared unlawful by the Inter-American Court and later disapplied, for this reason, in many national jurisdiction in that continent. The immediate effects of the decision would be, then, to *expand* the applicability of the criminal provisions with respect to the situation prior to the intervention of the Court.

Similarly, there seems to be no conceptual obstacle for the Court to annul a law *repealing* a criminal provision that was compliant with the constitutional obligations to criminalize a particular behavior, either without replacing it, or by replacing it with a criminalization that falls short of the standards of protection required by the Constitution (as it was the case in the already mentioned abortion decision by the German Constitutional court in 1975). Such an annulment – while formally retaining the nature of an *actus contrarius* to the new legislation – would likely have the effect of directly *restoring* the pre-existing provision, without any intervention by Parliament.

*6. Closing remarks.*

All the techniques described in paragraphs 3-5 above constitute significant departures from Kelsen's model of the Constitutional court as a mere negative legislator, which should have been deprived of any discretionary power as how the strike a balance between the competing interests underlying any legal rule. Even in the field of criminal law – which is governed by the principle *nullum crimen, nulla poena sine lege* – the Italian Court has often *replaced* the original legislative rule with a new one, thereby acting in fact as a *positive* legislator.

The most obvious explanation of such developments is that the Italian Court has been never recognized the power to *delay* the effects of its decisions, already envisaged by Kelsen in his 1929 essay as a strategy to avoid intolerable legislative vacuums created by the Court's decisions; nor has it been ever vested with the power of simply declaring a provision *incompatible with Constitution* but not (yet) void, as other Constitutional courts usually do.

The problem is, though, how to justify a *creative* role of the Court in directly re-shaping the existing (criminal) provisions after its annulment decisions, and – crucially – how to set reasonable limits to this power.

The argumentative strategy pursued by the Court so far has, in essence, been the following: on the one hand, our decisions in criminal matters merely *reduce* the area of

application of criminal law with respect to the previous situation and, therefore, do not violate the *nullum crimen, nulla poena sine lege* principle; on the other hand, our decisions do not *create* any new rule either – instead, they just *find* within the system some pre-existing rule compatible with the Constitution.

Neither argument is really convincing: after all, the Court may sometimes *expand* the field of application of criminal law through its decision, as we have just seen (paragraph 5); and the very idea of a mere *finding* of a pre-existing rule within the legal system is hardly sustainable, if we think for example of the 'present danger for public order' rule as a limitation of the glorification and public incitement offences – such a rule was in fact 'imported' from the US constitutional law, rather than 'found' in the Italian legal system.

The preoccupation underlying this double argumentative strategy, though, is clear: while actually exercising a kind of 'positive' legislative role, the Court is keen to avoid the possible accusation of making discretionary – i.e., political – choices in the setting of new legal rules, and therefore denies any creative character of its own choices.

A fairer approach could be perhaps to frankly recognize that many of the solutions put in place so far by the Court with a view to mend constitutional flaws in the criminal legislation should simply be meant as *temporary* remedies after the (total or partial) annulment of a legal provision, aimed at avoiding the creation of legal lacunae within the legal system. After all, the rules set forth by the Court are themselves compatible with the Constitution, but can most rarely be regarded as the *only* possible solutions. The legislator retains in these cases the possibility to exercise *later* its full discretion and, if the case may be, to strike a different balance between the competing interests – of course, *within* the boundaries set by the Court's decision –: for example, by deciding that abortion should be allowed also in other cases than those indicated by the Court; that public incitement should be de-criminalized at all; or that the least serious cases of kidnapping with a view to obtain a ransom may be punished with 8 or 10 years imprisonment, instead of 16.

The recognition that the techniques examined so far have, in fact, a mere temporary character – and should, therefore, be considered as a kind of *interim measures* pending a subsequent, and more comprehensive, solution by the competent legislative body – could possibly help to de-dramatize the whole discourse, and to open the path to reasonable strategies to address also the issues that the Italian Court has not been able to solve so far, such as the annulment of provision setting forth disproportionate penalties, in the absence of a suitable *tertium comparationis* from which the penalty could be 'borrowed'.

The creativity of the solutions the Court might then adopt – and their connected 'political' character – could be perhaps more easily justified in view of their mere *transitional* status. In fact, no attempt to the prerogatives of the legislator would be perpetrated though these solutions: the Court would indeed act as an *interim* 'positive' legislator, but only until the 'true' legislator decides to intervene, and to freely exercise its constitutional responsibilities.