Dipartimento di Scienze Politiche
Cattedra di Public Law

The Italian Constitutional Court and the Lawmaker: the 'Cappato case' (Order no. 207/2018)

RELATORE
Prof. Nicola LUPO

CANDIDATA
Margherita CAROTTI
Matr. 082972

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Ai miei nonni

Chapter I

'The Italian system of Constitutional Adjudication'

1.1 The Italian system of Constitutional Adjudication: the debated establishment of the Italian Constitutional Court

Nowadays, the Italian Constitutional Court and the relative system of judicial review, in which the *Consulta* plays a pivotal role, prove to be extremely solid, efficient and politically accepted. Despite its current fame, the historical evolution of the Italian system of Constitutional adjudication has been rough and time-consuming.

In this respect, as Enzo Cheli[1] puts in, the present Constitutional framework originated from a *process of historic layering* that began with the activity of the Constituent Assembly and was further clarified through subsequent – *activating* – legislation. According to the jurist, it was then secured and stabilized through the Court's *jurisprudential practice,* coherently disciplined through the establishment of procedural mechanisms[2].

In light of the above, the adoption of the *Statuto Albertino* on March 4, 1848 proves to be fundamental in order to clarify the process that led to the creation of the current system of Constitutional adjudication in Italy.

Despite determining the rights and duties of the citizen and outlining the powers of the governing bodies, the Statute did not allow for any mechanism of judicial review of legislation. In addition, a widely shared tendency to classify the Statute as flexible in nature implied the impossibility to use the latter as an adequate parameter for judicial review. Accordingly, the lack of an amendment clause and the improbability to maintain the Statute forever unchanged led to the conviction that the power to modify it could only belong to the legislator, thus depriving the king – who had *irrevocably*[3] transferred his legislative competence to the Parliament – of this prerogative.

Consequently, the Albertine Statute could not impose any limitation on the legislative activity of the Chambers, to which the Statute was itself subordinated. As opposed to other contemporary

[1] Enzo Cheli has been Justice of the Italian Constitutional Court from 1987 to 1995 and Vice President of the latter from 1995 to 1996.

[2] 'The current structure of our system of constitutional adjudication was not born as the product of a model fully defined in all of its aspects from the beginning. Rather, it was the result of a complex process of historic layering that started from the work of the constituent phase, became more precise in the activating laws of 1948 and 1953, and then reached the point of consolidation – especially in the first decade of the Court's life – through its jurisprudential practice, through the fine-tuning of its procedural instruments, and through the definition of the relationship of the Court with the political instruments of the State as well as with the organs of the judicial power'. Cheli, E. (1981). Prefazione a '*La genesi della Corte Costituzionale*' di G. D'Orazio. Milano. Giuffrè, p. 10.

[3] 'Legge fondamentale, perpetua ed irrevocabile della Monarchia'. (1848). *Statuto Albertino.*

constitutional models, the Italian system did not provide any differentiation between ordinary and constitutional legislation. In fact, the latter did not require an extraordinary procedural path to be passed nor a supermajority was demanded in order to amend the Albertine Statute. Therefore, 'parliamentary omnipotence' and the consequent impossibility to resort to a rigid Constitution impeded the establishment of a mechanism of judicial review at that time.

An additional factor undermined the realization of the above-mentioned achievement. Accordingly, the lack of an independent Judiciary constituted a further obstacle[4]. In this respect, the content of Article 68 of the Albertine Statute[5] greatly resumed the subordination of the Judiciary to the executive.

Moreover, Article 73 attributed the interpretation of laws exclusively to the legislator, thus preventing the Judiciary from exercising this power[6]. Hence, this resulted in the incapacity of the Judiciary to provide stable foundations for judicial review of legislation under the Albertine Statute.

However, two exceptions need to be mentioned: on the one hand, judges had to check the procedural validity of laws, which could be challenged for failing to meet formal requirements.

Consequently, before applying them, judges had to verify their compliance with the *formal requisites of law*. On the other hand, the executive's diffused practice to issue decrees having the force of law generated great discontent within the academic community. Hence, in concrete cases, judges could refuse to apply the norms that had been issued by the government.

As Vittorio Emanuele Orlando[7] declared, 'decree-laws are in form irremediably unconstitutional' and judges were thus empowered to not apply them, although they could not exercise any form of judicial control over Parliamentary laws converting decrees into ordinary legislation[8].

However, a further step towards judicial review of decree-laws was encouraged by Ludovico Mortara. The President of the Court of Cassation, through renowned judicial decisions, declared the illegitimacy of decree-laws not containing the 'conversion clause' and suggested that judges could refuse to apply those executive-issued norms that did not meet the *necessity* requirement[9].

Later, the Attorney General of the Court of Cassation explicitly demanded that the power of judicial review was recognized in Italy, on the model of the United States of America. The fascist regime strongly opposed the request and a further law on the matter was emanated by the Parliament. This

[4] Barsotti, V. et al. (2017). *Italian Constitutional Justice in global context*. New York. Oxford University Press, p. 8.
[5] 'Justice emanates from the King, and is administered in his Name by the Judges that He appoints'.
[6] 'The interpretation of the laws, in an obligatory way for all, is the exclusive task of the legislative power'.
[7] Vittorio Emanuele Orlando (May 19, 1860 – December 1, 1952) was an Italian statesman, jurist and politician.
[8] Decree-laws 'are in form irremediably unconstitutional – all of them! And even if the Judiciary cannot attribute to itself a parliamentary competence of *annulling* the norms issued by the executive branch, nevertheless it can rightfully refuse to apply them in a concrete case'. Orlando, V. E. (1925). *Ancora dei decreti-legge per fatto personale.* Roma, p. 211.
[9] Barsotti, V. et al. (2017). *Italian Constitutional Justice in global context*. New York. Oxford University Press, p. 10.

provided that nobody but the legislator had the power to verify the necessity and urgency of decree-laws, which could be unlimitedly issued by the executive.

With the end of the Second World War, Italians were called to take part in the referendum that counterposed monarchy to republic and to elect the Constituent Assembly, which would have laid the foundation for the future constitutional panorama in Italy.

In the meanwhile, the lack of an elected Parliament made the legislative power shift to the executive branch. Lately, once the Constituent Assembly had been instituted, the matter was further clarified and the executive maintained its legislative competence. However, the latter could not have exercised any authority for what concerned *constitutional matters.* This specification, contained in a Legislative Decree approved by the *Luogotenente* of the Kingdom[10], recognized the rigidity of the Constitutional text and its hierarchical superiority with respect to ordinary legislation.

Consequently, magistrates were conferred the power to exercise judicial review of the latter, which should have been in compliance with the Constitution. Ordinary judges continued to carry out this activity until the Constitutional Court became effective in 1956. Accordingly, the diffuse review system laid the foundation for the future work of the *Consulta*, which will instead represent the unique and centralized 'watchdog' of the Constitution in the following decades.

Moreover, the decisions on the constitutionality of legislation issued by ordinary judges in this transitional phase did not have general effect but, contrarily, they were only applicable *inter partes*.

Later, the activity of the Constituent Assembly strongly contributed to the development of the Italian system of constitutional adjudication.

In fact, after the conclusion of the fascist experience and the establishment of the Italian Republic by referendum, the 'founding fathers' had the task to draft a new Constitution that would represent the normative skeleton of the renewed State. In this respect, many unsolved questions tormented the work of the Assembly that, along with other fundamental decisions, had to deliberate on the eventual creation of an effective system of constitutional adjudication.

However, the orientations of the 556 members seemed to be extremely divergent. On the one hand, the Christian Democrats strongly supported the establishment of a mechanism of judicial review[11], which would have been fed through the creation of a special court.

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[10] *Durante il periodo della Costituente e fino alla convocazione del Parlamento a norma della nuova Costituzione il potere legislativo resta delegato, salva la materia costituzionale, al Governo, ad eccezione delle leggi elettorali e delle leggi di approvazione dei trattati internazionali, le quali saranno deliberate dall'Assemblea.* D.Lgs.Lgt. March 16, 1946, n. 98, art. 3.
GU Serie Generale n.69 del 23-03-1946.

[11] De Gasperi, A. (1959). *Le idee ricostruttive della Democrazia Cristiana* in *Atti e documenti della Democrazia Cristiana.* Roma, Edizione Cinque Lune, p. 12-15.

On the other hand, the left – especially the Communist Party – firmly objected to it since only the Parliament, a popularly elected organ, could have authority in this sense. After a long and heated debate, the former opinion prevailed over the latter and the Constituent Assembly could finally begin to define the characteristics of the Italian system of constitutional adjudication.

However, defining its cornerstones proved to be extremely complex since no previous experience could offer valid and concrete guidelines in relation to judicial review of legislation. In this respect, the 'founding fathers' decided to refer to the most renowned foreign models – i.e. the American and the Austrian systems of constitutional adjudication.

On the one hand, the Constituent Assembly decided to follow the first one and consequently opted for a centralized body that would have exclusively reviewed the compliance of legislation with the Constitution. On the other, the access to the (specialized) Court would have been disciplined by a mixture of the two models. Accordingly, the American one contributed to the Italian system for what concerned the diffuse and incidental procedure.

Thus, ordinary judges could deliberate on the constitutionality of a given law during the proceedings of a given case; nevertheless, their judgments would have been valid only *inter partes* – not having general effect like those delivered by the Constitutional Court. In the footsteps of the Austrian model, the direct mode of access was introduced in Italy. Therefore, some specific parties would have been empowered to raise questions of constitutionality before the specialized court.

Despite the above, the concrete activation of the *Consulta* took additional time and required further Parliamentary law-making efforts (Ordinary Law No. 87/1953; Constitutional Law No. 1/1953), in addition to the Constitutional bases laid down by the Constituent Assembly (arts. 134-137 of the 1948 Constitution; Constitutional Law No. 1/1948)[12].

Moreover, Parliamentary uncertainty in naming five of the Justices delayed the Court's effective settlement until 1955, when the Chambers agreed on the appointment of two Christian Democrats, one Liberal, one Communist and one Socialist. Finally, on advice of the President of the Republic, the Court officially started its first judicial term in January 1956.

Even after its official activation, many doubts continued to undermine the authority and the effective functioning of the *Consulta*. First of all, the conservative judiciary was not prone to recognize the hierarchical superiority of the 1948 Constitution over ordinary legislation. Contrarily, in case of conflict between the two, it declared to apply the former rather than the latter due to the principle of *lex posterior derogat priori.* Thus, instead of referring to a hierarchical criterion, magistrates invoked the temporal principle when asked to justify the application of the Constitution in lieu of ordinary

[12]See section 2, Chapter 1.

legislation. Consequently, the jurisdiction of the Court became narrower and its powers were reduced.

Moreover, the 1948 Constitution did not provide detailed norms but general principles that could not be concretely applied by the judges. This caused great precariousness within the Italian panorama: no exhaustive norms disciplined the internal organization of the Constitutional Court that, despite being formally active, was actually lacking concrete instructions to properly work. Consequently, as provided for by law No. 87/1953[13], the Court had to develop and establish its own rules of procedure; in the interim, it had to refer to the Council of State's, which proved to be the highest tribunal for what concerned administrative law adjudication.

In this respect, the Court managed to reach the above-mentioned objective three months after the beginning of its first judicial term: in March 1956, the *Consulta* put its *Integrative Norms Regarding Proceedings Before the Constitutional Court* into effect. This achievement eclipsed the influence of the Council of State's rules of procedure over the Court, which gradually started to affirm its authority in the Italian Constitutional framework.

A further and significant step in this direction consisted in judgment 1/65, delivered by the *Consulta* on June 5, 1956. This case was later defined as the 'Italian *Marbury v. Madison'* and enabled the Court to clarify its powers and the hierarchical superiority of the Constitution over ordinary legislation.

Thus, the Court was – incidentally – called to deliberate on the constitutionality of Article 113, forming part of the 1931 Law on Public Security[14] with respect to Article 21 of the 1948 Italian Constitution. On the one hand, the former provided that a preventive authorization by the *autorità locale di Pubblica Sicurezza* was required for those who wanted to express their opinion through flyers or posters. On the other hand, Article 21 recognized people's freedom of expression, without identifying any restriction or limitation to this right – e.g. the necessity to possess a clearance, formally released by the competent bodies.

Through judgment 1/56, the Court firstly reaffirmed the undeniable superiority of the Constitution, which was recognized as the highest source of law and it secondly eliminated any distinction between *pre* and *post*-Constitution laws since none of them could be exempted from being constitutionally reviewed by the same Court.

The *Consulta,* in declaring the constitutional illegitimacy of Article 113 (except for clause V) with

[13] Law No. 87/1953. Title II, art 22: 'Nel procedimento davanti alla Corte costituzionale, salvo che per i giudizi sulle accuse di cui agli articoli 43 e osservano, in quanto applicabili, anche le norme del regolamento per la procedura innanzi al Consiglio di Stato in sede giurisdizionale. Norme integrative possono essere stabilite dalla Corte nel suo regolamento.'
[14] Royal Decree No. 773 (June 18, 1931).

respect to Article 21 of the 1948 Italian Constitution, asserted its exclusive competence to evaluate the constitutionality of legislation. Thus, judgment 1/56 represented a milestone for what concerns the development path of the Constitutional Court that, despite copious obstacles, currently holds an extremely relevant position and proves to be fundamental within the Italian system of constitutional adjudication.

1.2 The Constitutional Court: Title VI, Articles 134-137 of the 1948 Italian Constitution

As mentioned earlier, the efforts made by the Constituent Assembly allowed for the adoption of the Italian Constitution in 1948. Accordingly, title VI is entirely dedicated to *Constitutional Guarantees* – i.e. those instruments specifically aimed at the conservation of the Constitution, which symbolizes the fundamental pact between the State and the People after the Second World War and thus the Fascist atrocities.

As stated before, the Albertine Statute was a flexible constitution and its modification did not require an extraordinary procedure. In addition, ordinary legislation did not need to be in compliance with the former since no formal control was exercised over it: each subsequent ordinary law could amend the Statute. These features let the Fascist regime cancel many of the rights and fundamental freedoms contained – but not adequately safeguarded – in the Statute.

Mindful of this experience, the Constituent Assembly approved a rigid Constitution, thus preventing ordinary legislation from modifying it. In fact, its amendment demands an aggravated procedure, which implies a wider Parliamentary majority or allows citizens to express their view by referendum. For the protection of the Constitution, the *Consulta* has been instituted and given the task to check the compliance of laws with the Italian fundamental charter. Consequently, the first section of Title VI is dedicated to the Constitutional Court, a *super partes* organ that proves to be essential for the maintenance of the Republican form of government in Italy.

In this respect, I will proceed to illustrate the content of above-mentioned articles in order to delineate the constitutionally-established rules that determine the main features of the *Consulta* and consequently clarify the mechanisms that characterize the Italian system of constitutional adjudication. First of all, Article 134[15] describes the scope of the Court's jurisdiction and identifies

[15] '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; conflicts arising from allocation of powers of the State

four main circumstances on which it is called to pass judgment. Primarily, it should adjudicate the conformity (with the Constitution) of a given law or enactment having force of law[16] issued by the State and Regions. Secondly, it should rule on conflicts of attribution among the powers of the State, between the State and Regions or among Regions.

The Constitution, according to the principle of institutional pluralism, distributes competences among various State organs and different power centers. Since none of them can override the others, it is necessary that the Court, a *super partes* body, resolve the disputes arising from competences allocation. Finally, the *Consulta* should pass judgment on the *charges brought against the President of the Republic.* The choice to prevent ordinary judges from performing this task can be justified by two main reasons.

First of all, the 'founding fathers' wanted to avoid that the judiciary could use this tool to exercise undue influence on the institutional life of the country, thus compromising the equilibrium and the correct relationship with the other Constitutional powers of the State.

Secondly, the *super partes* Justices were considered to better balance institutional and political considerations with technical and juridical evaluations, as required in such complex proceedings. In addition to the attributions expressly mentioned in Article 134, the Constitutional Court is bestowed a further power. Accordingly, it should adjudicate the admissibility of abrogative referenda.

This attribution proves to depart from the others, which share a jurisdictional nature (dispute). Contrarily, it is exercised *ex officio* by the Court, which is conferred this task due to its *super partes* character.

Furthermore, Article 135[17] relates to the composition of the *Consulta* and identifies both the nomination procedures and the requirements needed to become Justice, by identifying the length and the nature of his/her judicial term. In this respect, the Court shall be composed of fifteen judges.

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and those powers allocated to State and Regions, and between Regions; charges brought against the President of the Republic, according to the provisions of the Constitution'. *Senate's official translation of the Italian Constitution.*

[16] Law-decrees, delegated decrees and legislative decrees.

[17] 'The Constitutional Court shall be composed of fifteen judges, a third nominated by the President of the Republic, a third by Parliament in joint sitting and a third by the ordinary and administrative supreme Courts. The judges of the Constitutional Courts shall be chosen from among judges, including those retired, of the ordinary and administrative higher Courts, university professors of law and lawyers with at least twenty years practice. Judges of the Constitutional Court shall be appointed for nine years, beginning in each case from the day of their swearing in, and they may not be re-appointed. At the expiry of their term, the constitutional judges shall leave office and the exercise of the functions thereof. The Court shall elect from among its members, in accordance with the rules established by law, a President, who shall remain in office for three years and may be re-elected, respecting in all cases the expiry term for constitutional judges. The office of constitutional judge shall be incompatible with membership of Parliament, of a Regional Council, the practice of the legal profession, and with every appointment and office indicated by law. In impeachment procedures against the President of the Republic, in addition to the ordinary judges of the Court, there shall also be sixteen members chosen by lot from among a list of citizens having the qualification necessary for election to the Senate, which the Parliament prepares every nine years through election using the same procedures as those followed in appointing ordinary judges'. *Senate's official translation of the Italian Constitution.*

However, they should be appointed following three different procedures: a third of them should be nominated by the President of the Republic, a third by Parliament in joint sitting and a third by the ordinary and administrative supreme Courts – more specifically, three of the five by the Court of Cassation, one by the Council of State and one by the Court of Auditors.

In its ordinary composition, the Constitutional Court operates with al least eleven judges out of fifteen. This reflects the unwillingness to block the work of the Court, which proves to be quite frequent due to delays in the substitution of Justices, especially by the Parliament.

In its 'enlarged' composition, the intervention of at least twenty-one members is required – with the majority of them being non-togated judges, in order to guarantee the presence of the People in the administration of justice. Article 135 proceeds by clarifying the qualifications demanded in order to become a Justice.

In this respect, twenty years of experience – as judge of the ordinary and administrative higher Courts, as university professor of law or as lawyer – are needed.

The second clause of the article specifies the length of the Justices' term: they are appointed for nine years and they cannot be re-appointed. Despite the above, it is worth mentioning that the duration of the office has been reduced from twelve to nine years, as provided for by Constitutional law No. 2/1967.

The latter also excluded the possibility to obtain the extension of the judges' mandate. Thus, the second clause indicates the willingness to weaken the relationship with the organs that have elected the Justices and to prevent the latter from exercising their functions in light of future consensus for their reelection. In order to guarantee the impartiality and the independence of the Justices, Article 135 also establishes that their office shall be incompatible with private and public roles, professional and commercial activities and undertakings linked to political parties.

The last clause is specifically focused on impeachment procedures. Accordingly, it determines that, in such delicate situations, the composition of the Court should be integrated with (sixteen) additional members, which are randomly chosen from a list composed of forty-five citizens possessing the requirements for becoming Senator.

Furthermore, Article 136[18] illustrates the characteristics of the decisions taken by the Court. However, a literal interpretation of its wording would seem to reduce the alternatives of the *Consulta* to two options only: on the one hand, rejecting the constitutional challenge (*sentenza di rigetto*), on

[18] 'When the Court declares the constitutional illegitimacy of a law or enactment having force of law, the law ceases to have effect the day following the publication of the decision. The decision of the Court shall be published and communicated to Parliament and the Regional Councils concerned, so that, wherever they deem it necessary, they shall act in conformity with constitutional procedures'. *Senate's official translation of the Italian Constitution.*

the other, sustaining it (*sentenza di accoglimento*).

Despite the above, over the years the Court was capable of distancing itself from such a strict path and managed to take less defined routes[19]. Concerning the effects of the Court's decisions, Article 136 specifies that a law (or enactment having force of law[20]), when declared constitutionally illegitimate, *ceases to have effect the day following the publication of the decision.*

This formulation would suggest that the declaration of unconstitutionality produces effects in the future, only. In fact, from the day following the publication of the decision, the illegitimate law cannot be applied anymore by the authorities nor invoked by private parties (*erga omnes* effect). Nevertheless, Article 136 should be interpreted in light of Constitutional law No. 1/48 that, by introducing the incidental mode of access, implies that the effects of the judgment delivered by the Court are binding in that specific case (that gave rise to the question of constitutionality), thus having retroactive effects.

Finally, Article 137[21] confers constitutional laws the power to establish the *conditions, forms, terms for proposing judgments on constitutional legitimacy* – i.e. the rules that discipline the procedures before the constitutional judge and the functions of other organs that are strictly linked to the latter. Moreover, Article 137 enables constitutional laws to set the *guarantees on the independence of constitutional judges.* Contrarily, ordinary laws regulate the constitution and the functioning of the Court. Ultimately, the last clause specifies that the judgments delivered by the constitutional judge cannot be impugned.

However, Article 111[22] provides an exception to this provision. Accordingly, it is possible to appeal against those judgments (delivered by the Constitutional Court) that relate to personal liberty before the Court of Cassation.

In conclusion, it is necessary to affirm that the Constitution, despite providing fundamental standards for the Constitutional Court, leaves room for further legislative developments in this field. As will be seen in the next section, additional legislation will discipline the subject and will fill the legislative void that characterized the first wording of the 1948 Constitution. Accordingly, Constitutional Law No. 1/1948, Ordinary Law No. 87/1953 and Constitutional Law No. 1/1953 will provide for further clarifications in this sense.

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[19] See section 4, Chapter 1.
[20] See note no. 16.
[21] 'A constitutional law shall establish the conditions, forms, terms for proposing judgments on constitutional legitimacy, and guarantees on the independence of constitutional judges. Ordinary laws shall establish the other provisions necessary for the constitution and the functioning of the Court. No appeals are allowed against the decision of the Constitutional Court'. *Senate's official translation of the Italian Constitution.*
[22] 'Appeals to the Court of Cassation in cases of violations of the law are always allowed against sentences and against measures affecting personal freedom pronounced by ordinary and special courts'. *Senate's official translation of the Italian Constitution.*

Thus, next paragraph will be implied to specify the innovations introduced by the post-Constitution law-making efforts, taken both by the Constituent Assembly and the Parliament.

1.3 The Court's Jurisdiction and Effective Functioning: further clarifications provided by Constitutional Law No. 1/1948, Ordinary Law No. 87/1953 and Constitutional Law No. 1/1953

Conventionally, the Constituent Assembly was operative from June 25, 1946, until the approval of the Constitution, on December 22, 1947. However, its protracted activity lasted until January 31, 1948, due to the necessity of approving some integrative 'constitutional statutes'.

Nowadays, this task belongs to the Parliament that, through a special procedure – as provided for by article 138, could approve laws boasting the same legal value as the Constitution. Nevertheless, being the latter extremely undetailed in its wording, the Constituent Assembly was called to provide further clarifications in the period immediately after its approval[23].

This relates to Constitutional law No. 1/1948[24], which proves to be the 'founding fathers'' ultimate effort for what concerns the Constitutional Court. The law, entitled 'Norms regarding judgments of constitutional legitimacy and on the guarantee of the independence of the Constitutional Court', is composed of three articles.

The first one describes and disciplines the incidental mode of access to the Court. As its text states, 'a question of the constitutional legitimacy of a law of the Republic or of an act having the force of law, raised *ex officio* or raised by one of the parties in the course of a proceeding and not considered manifestly unfounded, shall be submitted to the Constitutional Court for its decision'.

Accordingly, Constitutional law no. 1/48 establishes that a law (or act having the force of law) – which was going to be applied in a given proceeding, when considered to possibly violate the Constitution, shall be subject to a question of Constitutional legitimacy. The latter should be raised during the proceeding by the (*a quo)* judge, on his own motion or on the behalf of one of the parties.

[23] The first Parliament of the Italian Republic will take office just some months later, on May 8, 1948.

[24] 1. – 'La questione di legittimità costituzionale di una legge o di un atto avente forza di legge della Repubblica rilevata d'ufficio o sollevata da una delle parti nel corso di un giudizio e non ritenuta dal giudice manifestamente infondata, è rimessa alla Corte costituzionale per la sua decisione.' 2. – 'Quando una Regione ritenga che una legge od atto avente forza di legge della Repubblica invada la sfera della competenza ad essa assegnata dalla Costituzione, può, con deliberazione della Giunta regionale, promuovere l'azione di legittimità costituzionale davanti alla Corte nel termine di 30 giorni dalla pubblicazione della legge o dell'atto avente forza di legge.' 3. – 'Una legge d'una Regione può essere impugnata per illegittimità costituzionale, oltre che nei casi e con le forme del precedente articolo e dell'art. 127 della Costituzione, anche da un'altra Regione, che ritenga lesa da tale legge la propria competenza. L'azione è proposta su deliberazione della Giunta regionale, entro 60 giorni dalla pubblicazione della legge.'

In this respect, as Piero Calamandrei put in, the ordinary judge can be defined as the 'gatekeeper'[25] of the Constitutional Court.

Moreover, it is important to underline that the challenged law should be relevant to the case in question: the ordinary judge will thus need to obtain a binding decision from the Court in order to adjudicate the concrete case. In fact, no hypothetical or abstract question would be taken into consideration by the Court in these circumstances, as provided for by article 1 of Constitutional law no. 1/48.

In addition, the claim should not be manifestly unfounded: being the Court unable to choose the cases to decide at will, the ordinary judge should perform a sort of preliminary selection. Nonetheless, this preventive skim is not always effective.

Accordingly, judges are tasked to refer questions of legitimacy in relation to all the laws that are *prima facie* possibly unconstitutional. This has caused, over the years, an increase in the workload of the Court, which has encouraged ordinary judges to perform, as far as possible, the so-called '*interpretazione conforme a Costituzione'*.

Finally, the incidental method of access to the Constitutional Court – introduced by Constitutional law no. 1/48 and further disciplined by law no. 87/53 – guarantees that those laws that are considered possibly unconstitutional are evaluated in concrete cases – not abstractly (*per se)*.

Moreover, Article 2[26] of Constitutional law no. 1/48 relates to the direct mode of access to the Court. Accordingly, it establishes that a Region can challenge the constitutionality of a law – or enactment having the force of law – of the Republic when considered to violate the constitutionally-established competences-allocation scheme.

Thus, if the State is believed to invade a Region's authority through the adoption of a given law, the same Region is entitled to refer a question of constitutional legitimacy to the Court. The same applies to the case in which a Region considers a law enacted by another Region possibly unconstitutional. Following the analysis of arts. 1 and 2 of the above-mentioned constitutional law, it is possible to exclude the possibility of a single citizen directly presenting a constitutional challenge before the Court. Finally, the third article[27] of Constitutional law no. 1/48 provides some guarantees that the

[25] Calamandrei, P. (1965). *Il procedimento per la dichiarazione di illegittimità costituzionale. Opere giuridiche.* Vol. III, Napoli, Morano, p. 372.

[26] 'When a Region claims that a law of the Republic, or an act having the force of law, intrudes upon the sphere of competence assigned to it by the Constitution, it may (…) bring forward a claim of constitutional legitimacy to the Court.'

[27] 'The judges of the Constitutional Court cannot be removed nor suspended from their office, except by decision of the Court or due to physical or civil incapacitation or severe lacks in the exercise of their functions.
While they remain in office, the Justices of the Constitutional Court enjoy the immunity granted by the second clause of art. 68 of the Constitution to the members of the two Chambers. The authorization provided for therein is given by the Constitutional Court'. (Non-official translation).

Justices enjoy.

In addition to the above, ordinary law no. 87/1953 and the subsequent Constitutional law no. 1/1953 ('Norms integrating the Constitution concerning the Constitutional Court') further clarify the constitution and the functioning of the Court. Accordingly, as Livio Paladin put in, their approval represented the most relevant achievement during the first two decades of the Italian Republic[28]. Thus, after the adoption of the 1948 Constitution and the entry into force of Constitutional law no. 1/48, Parliament had the task to fill the normative void left by the previously mentioned statutes. With great difficulty, the Chambers finally managed to approve the 1953 activating legislation, thus clarifying the procedural and technical conditions for the effective functioning of the Court.

Specifically, article 1 of the 1953 Constitutional law establishes that 'the Constitutional Court exercises its functions within the forms, limits and conditions of the Constitution, the Constitutional Law of February 9, 1948, and the ordinary law issued with regard to the first activation of the preceding constitutional norms'.

Thus, the previous 1948 constitutional statute was given legitimacy, despite the concerns raised within the academic community. In fact, being a product of the Constituent Assembly's legislative activity[29], its constitutionality was believed to be extremely questionable.

Moreover, constitutional law no. 1/53 conferred ordinary law no. 87/53 a higher hierarchical position within the legal sources panorama. Accordingly, by confirming the 1953 Court-activating (ordinary) law, Constitutional law no. 1/53 'crystallized' its content in a constitutional statute, thus acquiring the same legal value as the Constitution.

The final step towards the effective functioning of the *Consulta* was taken by the Court itself. In March 1956, the latter managed to adopt its 'Integrative Norms Regarding Proceedings Before the Constitutional Court'.

In this way, it distanced itself from the Council of State's rules of procedure, to which it had to previously refer as provided for by article 22 of law no. 87/53. Consequently, the Court affirmed its own identity and independence, through the clarification of its internal mechanisms and the establishment of its own rules of procedure, to which those belonging to the Council of State became subsidiary.

In conclusion, the Constitutional Court proves to be disciplined by arts. 134-137 of the 1948 Italian Constitution. However, further legislative efforts by both the Constituent Assembly (Constitutional

[28] Paladin, L. (2004). *Per una storia costituzionale dell'Italia Repubblicana.* Bologna. Il Mulino, p. 130.
[29] As mentioned earlier, Constitutional Law no. 1/1948 had been adopted by the Constituent Assembly, not by Parliament, the popularly elected organ that, through a special procedure, would be empowered to approve statutes having the same legal value as the Constitution.

Law no. 1/48) and the Parliament (Ordinary law no. 87/53; Constitutional Law no. 1/53) were required for the concrete activation and the effective functioning of the *Consulta.*

1.4 The Decisions of the Constitutional Court and Their Effects

After describing the development path of the Italian system of constitutional adjudication and analyzing the legal sources disciplining the Constitutional Court, this chapter will illustrate the decisions of the Court and their effects. In this respect, the *Consulta* can issue two different typologies of decisions.

On the one hand, orders (*ordinanze*) are non-definitive and *briefly-reasoned*[30]. When the question of constitutionality is raised through the incidental procedure, the Court is empowered to send it back to the *a quo* judge in two main circumstances.

The first refers to the event in which the constitutional challenge is not considered to be pertinent to the case[31] at hand or when other procedural and formal flaws are detected. Consequently, the Court will issue an order of inadmissibility – *ordinanza di inammissibilità.* In fact, since the question was raised through the incidental procedure, it would be pointless for the Court to rule on the constitutionality of a law (or enactment having the force of law) that proves to be unnecessary for the judgment of the case from which the constitutional challenge originated. The second concerns the event in which the question is considered to be manifestly unfounded. In this case, the Court will issue an *ordinanza di manifesta infondatezza.*

In addition to the above, the Court can issue judgments (*sentenze)* – i.e. *fully-reasoned* decisions requiring that the Court's analysis is extended to the merits of the question. Thus, judgments imply a deeper analysis that could compare the object (laws that are considered possibly unconstitutional) to the parameter (provisions of the Constitution that could have been violated). Moreover, the decision taken by the Court should perfectly regard the question of constitutionality raised before it, as provided for by article 27 of Law no. 87/53 (*principio della corrispondenza tra chiesto e pronunciato*).

Judgments can be divided in two categories. On the one hand, a *sentenza di accoglimento* sustains the constitutional challenge raised before the Constitutional Court. Consequently, the contested law

[30]Barsotti, V. et al. (2017). *Italian Constitutional Justice in global context*. New York. Oxford University Press, p. 82.
[31] The case from which the question of constitutionality originated (incidental procedure).

is declared unconstitutional and 'ceases to have effect on the day following the publication of the decision', as provided for by article 136 of the Italian Constitution.

On the other hand, a *sentenza di rigetto* rejects the constitutional challenge that, however, can be presented again before the Court. Accordingly, a *sentenza di rigetto* proves to be binding only *inter partes,* while a *sentenza di accoglimento* has universal effects: the unconstitutional law cannot be applied anymore by judges nor can be invoked before them (*erga omnes*). Despite the wording of article 136[32]*,* a judgment sustaining a constitutional challenge proves to have retroactive effects. Accordingly, a party would not be interested in raising a question of constitutionality if he could not benefit from the effects of a favorable judgment issued by the Court.

In addition to the above, the *Consulta* can take further (and more particular) types of decisions. In this respect, interpretative judgments emphasize the difference between provision and norm – being the former the mere text of a law and the latter the interpretation given to it by the judiciary.

The Court can issue an interpretative *sentenza di accoglimento* or an interpretative *sentenza di rigetto.*

In the first case, the Court sustains the constitutional challenge by declaring that one of the norms originating from a given provision is not in compliance with the Constitution. However, this does not exclude the fact that the same provision, if given another interpretation, could not be unconstitutional.

In the second case, the Court rejects the constitutional challenge by affirming that the contested provision, if properly interpreted, can give rise to a norm that respects the Constitution. Thus, the Court decides to not declare the provision unconstitutional, in order to avoid the creation of legislative voids, since a Constitution-compliant interpretation can be found.

Moreover, the *Consulta* can issue manipulative judgments, which can only be *di accoglimento* – of acceptance. In fact, the Court, after declaring the unconstitutionality of the challenged provision, modifies or integrates it. However, this type of decision has raised many critiques within the academic community.

On the one hand, it is accused to threaten the relationship between the Judiciary and the Court for what concerns the interpretation of provisions. On the other hand, it is considered to undermine the legislative competence of Parliament.

It is possible to distinguish among three typologies of manipulative judgments.

First of all, judgments of partial acceptance declare the unconstitutionality of a part of the provision,

[32] 'When the Court declares the constitutional illegitimacy of a law or enactment having force of law, the law ceases to have effect the day following the publication of the decision.'

while leaving the rest untouched. This highlights the unwillingness of the Court to unreasonably repeal legislation – *utile per inutile non vitatur.*

Secondly, substitutive judgments allow the Court to manipulate the legislative text, in order to substitute the part(s) of the provision that give rise to unconstitutional norms. Thirdly, additive judgments give the Court the possibility to actually legislate. Accordingly, the *Consulta* is empowered to add the norm (rule) that proves to be necessary to avoid the repeal of the whole statute which, otherwise, would be unconstitutional.

Finally, besides interpretative and manipulative decisions, the Court can issue exhortative judgments – *sentenze monito.* Through the latter, the Constitutional judge does not declare the unconstitutionality of a given provision but, differently, exhorts Parliament to modify it. If the legislator does not satisfy the request, the Court can decide to finally take a stand and sustain the constitutional challenge.

In conclusion, after illustrating the main characteristics of the Italian system of constitutional adjudication and outlining the distinctive features of the 'Constitutional watchdog', the next chapter will be focused on the analysis of the 'Cappato case'. Accordingly, it will proceed by examining the question of constitutionality raised by the Court of Assizes of Milan (Order no. 1/2018) in relation to Article 580 of the Italian Criminal Code.

Chapter II

'The 'Cappato Case''

2.1 Marco Cappato: a brief introduction to the subject

Marco Cappato – an Italian politician and activist, was born in Milan, on May 25, 1971. After attending the *Collegio Cattolico Villoresi San Giuseppe* in Monza, he graduated in Economics at *Bocconi University* (Milan), in 1994. In 1999, he became a member of the European Parliament – representing the *Bonino List,* forming part of the *Alliance of Liberals and Democrats for Europe*. From April 21, 2006 to May 8, 2006 he was a deputy of the Italian Republic (*Rosa nel Pugno* coalition). In 2001, he became a member of the *Italian Radicals* while, since 2019, he is an exponent of the *Più Europa* party.

Marco Cappato is currently treasurer of the association *Luca Coscioni*, promoter of the *World Congress for Freedom of Scientific Research* and supporter of the campaign *Eutanasia Legale* ('legal euthanasia')[33].

Marco Cappato, in his personal website, declares 'to fight for the legalization of euthanasia' and to be available for 'helping those who want to obtain an assisted suicide in Switzerland, by self-incriminating' after it[34].

This denotes his willingness to 'provide information and, in some cases, even logistic and financial assistance to those who want to obtain euthanasia' – if and only if the conditions provided for by the (popularly-promoted)[35] legislative proposal of the committee for legal euthanasia persist. In this respect, Marco Cappato affirms: 'My action – that I conduct with Mina Welby and Gustavo Fraticelli, is an act of civil disobedience against the existing legislation, for the sake of the right to self-determination, of the fundamental freedom to choose for oneself, one's own body and illness, even in the final phase of one's life'[36]. 'The action of civil disobedience, with self-incrimination, will continue until the Italian Parliament assumes responsibility for deciding in relation to the *end of life*'[37].

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[33] *Marco Cappato. Libertà, Legalità, Laicità*. Available at: http://www.marcocappato.it/biografia/ [Accessed on May 15, 2019]
[34] *Marco Cappato. Libertà, Legalità, Laicità*. Eutanasia Legale. Available at: http://www.marcocappato.it/biografia/ [Accessed on May 15, 2019]
[35] *Di iniziativa popolare*.
[36] *Marco Cappato. Libertà, Legalità, Laicità*. Eutanasia Legale. Available at: http://www.marcocappato.it/biografia/ [Accessed on May 15, 2019]
[37] *Marco Cappato. Libertà, Legalità, Laicità*. Eutanasia Legale. Available at: http://www.marcocappato.it/biografia/ [Accessed on May 15, 2019]

In light of the above, the connection between Marco Cappato and Fabiano Antoniani becomes clear[38]. Accordingly, the former – in defending its radical beliefs and safeguarding Dj Fabo's rights, would have helped the former in committing an assisted suicide, by informing him and his family of this possibility and by physically transporting the ill to Switzerland.

Marco Cappato, by self-incriminating after adopting the above-mentioned conduct, sought to mobilize public opinion and, consequently, to give rise to a question of constitutionality[39]. The latter, in return, would have triggered the work of the Constitutional Court that, through order no. 207/2018, has spurred Parliament to further legislate on the *end of life.*

2.2 Introduction to the facts

On February 28, 2017, Marco Cappato appeared before the *Carabinieri* of Milan and declared that, in the previous days, he had accompanied Fabiano Antoniani to 'Dignitas', a Swiss medical institute where his friend, Dj Fabo, would have committed an assisted suicide.

Antoniani's physical conditions had heavily deteriorated after a brutal car accident that made the man blind and tetraplegic, despite leaving his mental faculties intact.

Marco Cappato was thus included in the list of suspects by the Public Prosecutor of Milan. In detail, Cappato was charged with strengthening Dj Fabo's suicidal purpose (*proposito suicidiario*), by offering him the opportunity to receive assistance for his suicide and by informing his relatives of this possibility. Moreover, the charges included the concrete facilitation of Dj Fabo's suicide – on February 25, 2017, Cappato had physically accompanied Antoniani to Switzerland where, on February 27, the (assisted) suicide took place.

Despite the above, on May 2, 2017, the Tribunal of Milan presented a motion for dismissal[40] in favor of the defendant. Accordingly, it proposed a constitutionally-oriented interpretation of art. 580 p.c. – in this way, Cappato's conduct could have been considered as criminally irrelevant.

Mr. Luigi Gargiulo – the justice for preliminary investigation, scheduled a hearing in closed session on July 6, 2017. During the audience, the Prosecutors presented a memory[41] demanding the judge to raise a question of constitutionality of article 580 p.c. – for what concerned the part that condemns

[38] On his Facebook page, Marco Cappato had declared: 'Fabo asked me to accompany him to Switzerland, I said 'yes'. (…) When I come back to Italy, I will self-incriminate, by assuming all the responsibilities arising from my conduct'. Sky tg24. Available at: https://tg24.sky.it/cronaca/approfondimenti/dj-fabo-storia.html [Accessed on May 16, 2019]
[39] Of article 580 of the Italian Criminal Code.
[40] Richiesta di archiviazione.
[41] *Memoria.*

the conduct of '*material* or *physical participation*' to one's suicide (without excluding the penal relevance of the conduct of those who help the terminally-ill to end his life, when the same ill person considers his life-conditions to harm his/her dignity). Cappato's lawyer lodged a defense[42] as well. Through the latter, he required to evaluate the compliance of art. 580 p.c. with the Italian Constitutional Charter.

On July 10, 2017, Mr. Gargiulo opposed the requests forwarded by both the Public Prosecutors and Cappato's defense. Moreover, he required the Attorney General's office to formulate the charge[43] against Marco Cappato.

On September 5, 2017, Cappato's defense presented a motion for summary judgment[44].

On September 18, the Tribunal of Milan issued the decree approving the request and scheduling a hearing on November 8, before the First Section of the Court of Assizes.

Consequently, on November 8, the Court of Assizes admitted the evidence requested by the parties – including the video containing the last interview released by Dj Fabo[45] for *Le Iene*, an Italian television broadcast.

Two further hearings were dedicated to the examination of witnesses[46]. In the first one, held on December 4, the Court heard evidence from Riccardo Di Teodoro (*Luogotenente dei Carabinieri*), Valeria Imbrogno (Dj Fabo's fiancée), Carmen Carollo (Dj Fabo's mother), Anna Maria Francavilla (Valeria Imbrogno's mother), Johnny Enriques (Dj Fabo's medical assistant) and Antonio Rossetti (Dj Fabo's friend).

On December 13, instead, the Court heard evidence from Giulio Golia (*Le Iene* reporter), Carlo Lorenzo Veneroni (Antoniani family's doctor), Maria Cristina Marenghi (Prosecutor's counselor) and Mario Riccio (anesthetist at Cremona hospital). Finally, Marco Cappato was examined and the Court postponed until January 17 for the discussions.

At that hearing, the public prosecutor asked for the acquittal of the defendant or, alternatively, to raise a question of constitutionality concerning art. 580 p.c.. The same request had been forwarded by Marco Cappato's defense as well. At the hearing of February 14, 2018, the Court of Assizes of Milan issued an order containing a constitutional challenge to art. 580 p.c..

Accordingly, the next chapter will be dedicated to the analysis of the above-mentioned order and to the outline of its main characteristics. In detail, it will provide further clarifications on the limits to

[42] *Memoria difensiva*.
[43] *Imputazione.*
[44] *Giudizio immediato.*
[45] Available at: https://www.radioradicale.it/scheda/524706/processo-a-marco-cappato-per-aiuto-al-suicidio-per-aver-accompagnato-fabiano-antoniani [Accessed on May 2, 2019]
[46] Escussione dei testimoni.

the applicability of art. 580 p.c., by describing the reasons that brought the Court of Assizes to issue such a decision.

2.3 The question of constitutionality raised by the Court of Assize of Milan (Order No. 1/2018) and the evaluations provided by the judge *a quo*: limits to the applicability of Art. 580 of the Italian Penal Code

Through order no. 1/2018[47], issued on February 14, 2018, the Court of Assizes of Milan raised the question of constitutionality of art. 580 of the Italian Penal Code[48], for what concerned the part in which it:

(a) prosecutes the conducts of *aiuto al suicidio* (help to suicide), alternatively to those of *istigazione al suicidio* (incitement to suicide) – thus regardless of their contribution to the determination or strengthening of one's suicidal purpose (*proposito di suicidio)*, for estimated contrast with arts. 3[49], 13 (subparagraph 1) and 117[50] of the Italian Constitution, in light of arts. 2[51] and 8[52] of the ECHR;

(b) establishes that the conducts of *agevolazione dell'esecuzione del suicidio* (facilitation to the implementation of suicide) – that do not influence the deliberative process of the aspiring suicide, are punishable by imprisonment from 5 to 10 years, with no distinction from the conducts of incitement,

[47] The full text is available at: https://www.associazionelucacoscioni.it/wp-content/uploads/2017/11/Ordinanza-Corte-di-Assise-Milano-Processo-Cappato.pdf [Accessed on May 4, 2019]

[48] 'Chiunque determina altri al suicidio o rafforza l'altrui proposito di suicidio, ovvero ne agevola in qualsiasi modo l'esecuzione, è punito, se il suicidio avviene, con la reclusione da cinque a dodici anni. Se il suicidio non avviene, è punito con la reclusione da uno a cinque anni, sempre che dal tentativo di suicidio derivi una lesione personale grave o gravissima [583]. Le pene sono aumentate [64] se la persona istigata o eccitata o aiutata si trova in una delle condizioni indicate nei numeri 1 e 2 dell'articolo precedente. Nondimeno, se la persona suddetta è minore degli anni quattordici o comunque è priva della capacità d'intendere o di volere [85], si applicano le disposizioni relative all'omicidio [575-577]. *Italian Penal Code.*

[49] 'All citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinion, personal and social conditions. It is the duty of the Republic to remove those obstacles of an economic or social nature which constrain the freedom and equality of citizens, thereby impeding the full development of the human person and the effective participation of all workers in the political, economic and social organization of the country'. *Senate's official translation of the Italian Constitution.*

[50] The full text is available at: https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf [Accessed on May 5, 2019]

[51] 'Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary: (a) in defence of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; (c) in action lawfully taken for the purpose of quelling a riot or insurrection'. *European Convention of Human Rights.*

[52] 'Everyone has the right to respect for his private and family. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others'. *European Convention of Human Rights*.

for estimated contrast with arts. 3, 13[53], 25 (subparagraph 2)[54] and 27 (subparagraph 3)[55] of the Italian Constitution.

Accordingly, the Court of Assizes believed that, pursuant to arts. 3, 13 (subparagraph 1) and 117 (with respect to arts. 2 and 8 ECHR), suicide could be regarded as an exercise of one's individual freedom. Therefore, only those actions that would undermine one's self-determination would be criminally punishable. In light of the above, Cappato's help – as occurred in the case in point, does not prove to harm any legal asset, since Antoniani's suicidal purpose was already strong and firm and Cappato's contribution merely consisted in physically transporting the suicide to 'Dignitas' (Switzerland).

In view of these premises, the norms the judges consider to have been violated refer to Constitutional arts. 3, 13 (subparagraph 2), 25 (subparagraph 2) and 27 (subparagraph 3) which, jointly, establish the principles of reasonableness and proportionality in relation to the offensiveness of the conduct.

First of all, it is worth mentioning the content of the norm at hand, in order to understand its relevance to the case at hand, by focusing on the difference between the conducts therein outlined. Accordingly, art. 580 p.c. refers to a crime *a fattispecie alternative* that aims at incriminating three distinct conducts – which differ among them in their influence on the suicidal purpose.

The first two, both referable to the notion of *instigation,* can be distinguished into (a) determination (*determinazione*) and (b) strengthening (*rafforzamento*) of one's suicidal purpose. On the one hand, the former refers to a conduct that gives rise to a previously-inexistent intention. On the other, the latter concerns any behavior aimed at strengthening someone's (suicidal) purpose that, albeit mild, was already present in the individual.

These conducts influence and invade the individual's deliberative sphere, by conditioning his/her autonomy and spontaneity and thus giving causal contribution to the implementation of his/her suicide.

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[53] 'Personal liberty is inviolable. No one may be detained, inspected, or searched nor otherwise subjected to any restriction of personal liberty except by order of the Judiciary stating a reason and only in such cases and in such manner as provided by the law. In exceptional circumstances and under such conditions of necessity and urgency as shall conclusively be defined by the law, the police may take provisional measures that shall be referred within 48 hours to the Judiciary for validation and which, in default of such validation in the following 48 hours, shall be revoked and considered null and void. Any act of physical and moral violence against a person subjected to restriction of personal liberty shall be punished. The law shall establish the maximum duration of preventive detention'. *Senate's official translation of the Italian Constitution.*

[54] 'No punishment may be inflicted except by virtue of a law in force at the time tehe offence was committed'. *Senate's official translation of the Italian Constitution.*

[55] 'Punishments may not be inhuman and shall aim at re-educating the convicted'. *Senate's official translation of the Italian Constitution.*

The third conduct, recognized as *aiuto al suicidio* (help to suicide), incriminates whoever facilitates, in any manner, the implementation of one's suicide.

The interpretation of art. 580 p.c. with respect to 'living law' is linked to a unique and isolated judgment delivered by the Court of Cassation in 1998[56]. Here, the latter has considered the three conducts as alternatively suitable for constituting a criminal offence.

In light of this 'alternativity', any action facilitating suicide – and thus causally linked to it, should be deemed suitable for being criminalized[57]. In fact, despite being alien to the deliberative process of the passive subject, any behavior facilitating suicide still falls within the conduct of *aiuto al suicidio* – punishable under Sect. 580 of the Penal Code.

The case at hand seems to perfectly reflect this circumstance. Accordingly, Cappato's conduct, despite not strengthening Antoniani's purpose, can be considered suitable for constituting a criminal offence (*aiuto al suicidio)* and it is thus incriminated by art. 580 p.c..

As stated by the Court of Milan, such an interpretation of art. 580 p.c. could lead to legitimate doubts on its constitutionality. In this respect, judges have observed that the norms concerning the incitement (istigazione) and the help to suicide (*aiuto al suicidio*), introduced by the legislator in 1930, were based on a negative conception of the act of suicide. In fact, the punishment provided for by art. 580 p.c. was meant to safeguard people's right to life – regardless of its 'owner's' decisions.

However, if the same norm is read nowadays[58], the need to overcome those pre-constitutional principles becomes evident. Particularly, through an overall reading of the text, it is possible to evict a new and different conception of the right to life that, despite not being expressly defined in the Constitution, represent a prerequisite for further rights recognized to the individual.

Moreover, by introducing the innovative *principio personalistico* – personalistic principle (enunciated in art. 2) and the inviolability of personal freedom (art. 13), the Constitutional Charter has enshrined a significant turnaround: it is the man, no longer the State, to be at the heart of social life. In light of this reversed centrality, human life cannot be considered to depend on a heteronomous aim anymore.

Furthermore, the Constitution guarantees freedom from 'arbitrary interference of the State' (art. 13); from this primary right, both the 'power to dispose of one's own body' and the impossibility to be obliged 'to be subject to a non-desired sanitary treatment'[59] derive. This second principle,

[56] Cass. pen., sect. I, n. 3147 del 6.2.1998.
[57] Idonea a integrare il reato.
[58] In light of the principles of the 1948 Constitution.
[59] In the absence of a norm explicitly imposing it.

expressly mentioned in art. 32[60] of the Italian Constitution, asserts the individual freedom of self-determination. In fact, it allows the individual to refuse medical treatment and consequently obliges the State to respect such a decision, even if the latter could lead to death.

Definitely, the lack of any obligation to undergo (compulsory) medical treatment shows that the right to freedom cannot by constrained by any heteronomous conception of life. Accordingly, individuals cannot be forced to therapeutics, unless to safeguard others. In other terms, this is the only case in which the right to freedom can be legitimately limited.

The argumentative process of the Court's order proceeds by analyzing the evolution of the ECHR case-law. The latter, by enhancing the content of arts. 2 and 8 ECHR, maintained that 'an individual's right to decide by what means and at what point his or her life will end, provided he or she is capable of freely reaching a decision on this question and acting in consequence, is one of the aspects of the right to respect for private life within the meaning of Article 8 of the Convention[61]'.

Moreover, according to the ECHR, the intervention by the States in this field is solely aimed at preventing 'risks of abuse' – i.e. undue influence over people that are particularly weak and conditionable, such as those who have lost interest in life.

The Milan Court of Assizes has thus proceeded by analyzing the most significant decisions of European case law. First of all, the case Pretty v. United Kingdom[62] is really noteworthy. Here, the ECHR has affirmed what follows:

(a) art. 2 ECHR cannot be interpreted – negatively – as conferring the right to death nor can give rise to the right to self-determination, for what concerns the choice to live or die;

(b) national norms that incriminate the *help to suicide* do no violate art. 3 ECHR;

(c) forcing someone to undergo medical treatment without his/her consent could constitute a breach of art. 8 ECHR.

Despite the above, more recent judgments delivered by the European Court of Human Rights – by overcoming the principles outlined in Pretty v. UK, have recognized the 'individual's right to decide by what means and at what point his or her life will end'[63] (provided that the subject is able to rationally and consciously deliberate).

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[60] 'The Republic safeguards health as a fundamental right of the individual and as a collective interest, and guarantees free medical care to the indigent. No one may be obliged to undergo any health treatment except under the provisions of the law. The law may not under any circumstances violate the limits imposed by respect for the human person'. *Senate's official translation of the Italian Constitution.*

[61] Case of *Haas v. Switzerland*. (2011). ECHR.

[62] ECHR, sect. IV, jdg. April 29, 2002. application no. 2346/02, Pretty v. United Kingdom.

[63] See note no. 61.

Afterwards, the Milan Court's order focused on the recent *Living Will* Law (Law no. 219/2017)[64] and assumed that the founding principles of this norm could be useful to the interpretation of art. 580 p.c.. More specifically, the above-mentioned legislation recognizes the individual's possibility to state his/her wish concerning the 'end of life'[65] in advance.

Therefore – the Court stated, in the event of illness, the legislator has expressly acknowledged the right to let oneself die, being the subject in full possession of his/her faculties. However, since the current normative framework does not allow for assisted suicide in Italy, doctors cannot administer medications that would provoke the patient's death.

On the other hand, the ill is entitled to reject any treatment and allow himself/herself to die, either way.

Finally, the Court of Assizes focused on the sanctioning profile[66] of the case. It recognized that, even if the *Consulta* had not sustained the constitutional challenge, many doubts on the constitutionality of art. 580 p.c. would have remained, at least in another respect. In fact, art. 580 p.c. attributes the same statutory penalty[67] to two distinct conducts, which strongly differ among them for their impact over the act of suicide.

On the one hand, *incitement to suicide* reflects a psychological manipulation of the aspiring suicide. On the other, *help to suicide* is the mere implementation of the ill's own will.

Consequently, the same sanction (from 5 to 10 years imprisonment) cannot be applied to both the conducts, which are significantly different from each other.

In fact, the principles of reasonableness and proportionality of punishment would be violated. In addition, such a sanction – clearly disproportionate to the offence made, would not contribute to the culprit's reeducation, as provided for by art. 27 (subparagraph 3)[68] of the Italian Constitution.

In conclusion, the Court of Assizes reiterated that Cappato's proceeding could not be defined independently from a judgment on the constitutionality of art. 580 p.c.[69]. The norm, as interpreted by 'living law', considers suicide as reprehensible and regards the right to life as independent from the willingness of its 'owner'.

This conception proves to be in contrast with arts. 3, 13 (subparagraph 1) and 117 of the Italian Constitution – in light of arts. 2 and 8 ECHR, according to which the right to end one's own life

[64] The full text is available at: https://www.gazzettaufficiale.it/eli/id/2018/1/16/18G00006/sg [Accessed on May 6, 2019]
[65] '*Fine-vita'*.
[66] Profilo sanzionatorio.
[67] Pena edittale.
[68] 'Punishments may not be inhuman and shall aim at re-educating the convicted'. *Senate's official translation of the Italian Constitution.*
[69] For what concerns the part in which it incriminates the conducts of *help* and *facilitation to suicide*, in alternative to those of *incitement* – thus independently from their effective contribution to the passive subject's deliberative process.

constitutes a freedom of the individual. Therefore, a conduct that does not violate this liberty in deliberative terms proves to be criminally irrelevant and the consequent sanction is thus unreasonable and disproportionate, in breach of arts. 3, 13 (subparagraph 2), 25 (subparagraph 2) and 27 (subparagraph 3) of the Constitutional Charter.

Chapter III

'The Constitutional Court and the creation of a hybrid: Order No. 207/2018[70]'

3.1 Order No. 207/2018: The rational behind its content and nature

Through the filing of the grounds[71] for order no. 207/2018 - which postponed the handling of the question of constitutionality[72] [73] to the public hearing of September 24, 2019 (in order to allow Parliament to further discipline the *end of life* matter *medio tempore*), the Constitutional Court inaugurated a new and courageous path.

Accordingly, the latter enlarges the margins of individual self-determination[74], by moving its boundaries beyond the actual perimeter guaranteed by art. 32 (subparagraph 2) Const. Moreover, it increases the number of the Court's decisional techniques, by recognizing (without declaring – at least for now) the partial constitutional illegitimacy of art. 580 p.c. Finally, it actualizes the dialogue with Parliament and, despite recognizing its discretionary powers, it suggests *tempi, modi e luoghi* (time, modality and setting) of the legislative intervention, aimed at filling the perceived Constitutional void.

There fore, order no. 207/2018 transcends the purely criminal aspect of the question, by focusing on bioethical, philosophical, religious and constitutional considerations. In addition, it enlarges the procedural field of the Court's decisional techniques.

Thus, a preliminary framing of the case is required.

The intervention by the *Consulta* draws origin from the doubts of constitutional legitimacy of art. 580 p.c. The latter had been raised by the Milan Court of Assizes (order no. 1/2018 of December 14, 2018) with regard to the Cappato case. The defendant had been charged with having strengthened Fabiano Antoniani's suicidal purpose (*proposito suicidario*) and having materially facilitated his suicide.

In detail, article 580 p.c. had been challenged for what concerned the part in which:

(a) prosecutes the conducts of *aiuto al suicidio* (help to suicide), alternatively to those of *istigazione al suicidio* (incitement to suicide) – thus regardless of their contribution to the determination or

[70] The full text of the order is available at: https://www.cortecostituzionale.it/actionSchedaPronuncia.do?anno=2018&numero=207 [Accessed on May, 16, 2018]
[71] Deposito delle motivazioni.
[72] Of article 580 of the Italian Criminal Code.
[73] Raised by the Court of Assizes of Milan, through order no. 1/2018.
[74] By respecting the need to safeguard the good of life – *il bene della vita*.

strengthening of one's suicidal purpose (*proposito di suicidio)*, for estimated contrast with arts. 3, 13 (subparagraph 1) and 117 of the Italian Constitution, in light of arts. 2 and 8 of the ECHR.

(b) establishes that the conducts of *agevolazione dell'esecuzione del suicidio* (facilitation to the implementation of suicide) – that do not influence the deliberative process of the aspiring suicide, are punishable by imprisonment from 5 to 10 years, with no distinction from the conducts of incitement, for estimated contrast with arts. 3, 13, 25 (subparagraph 2) and 27 (subparagraph 3) of the Italian Constitution.

Moreover, it is necessary to state the conditions in which the suicidal choice has been taken. Accordingly, a serious car accident[75] had rendered Fabiano Antoniani tetraplegic and permanently blind. Thus, the ill was not autonomous in breathing and feeding. Additionally, his constant and severe suffering could be only be alleviated through deep sedation.

Despite the above, Dj Fabo had maintained his mental faculties intact and was thus aware of his irreversible conditions. Consequently, he had firmly expressed the willingness to end his life, despite the copious attempts to change his mind – carried out by his loved ones. Antoniani, in order to emphasize his determination, had even gone on a speech and hunger strike. Furthermore, he had released public communications stating his willingness to commit an (assisted) suicide and explaining the reasons of his decision.

In these circumstances, he got in touch with Marco Cappato who suggested him to interrupt any medical treatment[76], in Italy. Facing Dj Fabo's firm purpose to obtain a 'voluntary death' in Switzerland, Cappato decided to indulge his requests and to accompany him to Switzerland. There, the personnel of 'Dignitas' further verified Antoniani's health conditions, his persisting consensus and his capacity to autonomously take the medication that would have provoked his death. Afterwards, on February 27, 2017, the suicide took place.

Through order no. 207/2018, the Constitutional Court[77], after reconstructing the *procedural iter*, clarified that the constitutional challenge could not be sustained in its entirety – *nella sua assolutezza.* Accordingly, the indictment of *aiuto al suicidio*[78] is not, per se, incompatible with the Constitution since it aims at safeguarding weak and easily conditionable people from damaging decisions[79], by creating a sort of 'protective belt' around them.

In detail, as the Court states, the above-mentioned indictment is not considered to be in contrast with:

[75] The car accident took place on June 13, 2014 in Milan, while returning home from a bar where Antoniani had held a dj set.
[76] See Law no. 219/2017. The full text is available at: https://www.gazzettaufficiale.it/eli/id/2018/1/16/18G00006/sg [Accessed on May 16, 2019]
[77] By analyzing the merits of the question.
[78] Incriminazione dell'aiuto al suicidio.
[79] i.e. taken against their interest, by taking advantage of their weakness and pliancy.

(a) the right to life – corresponding to art. 2 Const. and art. 2 ECHR (as referred by the *a quo* judge), since, from those articles, only the 'duty of the State to protect each individual's life' can be derived. In fact, from that legislation, 'no duty to recognize each individual the possibility of obtaining, from the State or from a third party, a help to die' can be deduced, being it diametrically opposed to the right to life;

(b) a generic right to self-determination – linked to arts. 2 and 13 (subparagraph 1) Const., as referred by the *a quo* judge. In fact, article 580 p.c. aims at safeguarding vulnerable people from arbitrary influence over the act of suicide – exercised by third parties, maybe in light of their own interests;

(c) the right for private life recognized to each individual, with regard to art. 8 ECHR. Indeed, according to the Court, the indictment contained in art. 580 p.c. would be justifiable 'to protect weak and vulnerable people' – as can be observed in similar legislation adopted by other Member States.

Despite the above – the Court continued, it is impossible to neglect situations 'unimaginable at the time when the incriminating law was introduced but extremely frequent nowadays, due to medical and technological developments that, despite being capable to snatch terminally ill patients from the jaws of death, cannot fully restore their vital functions'[80].

In these circumstances, the indictment of *help to suicide*[81] proves to be in contrast with the Constitution since it challenges the 'need for protection that in other cases justifies the criminal repression of the *help to suicide*'[82].

Reference is made to the eventuality in which – as in the case at hand, the man who was facilitated to commit suicide was actually suffering from an irreversible illness (that provoked him severe pain, both psychological and physical) and was kept alive by continuous medical treatments, despite maintaining his mental faculties intact.

It is in these circumstances that the 'assistance by third parties in committing suicide represents the only way for the ill to escape life, by rejecting undesired medical treatments[83], in accordance with his own concept of dignity'.

Actually – continued the Court, the ill could let him/herself die by demanding the interruption of life-sustaining treatments, being consequently subject to deep and continuous sedation. The possibility to forward such a request, binding on third parties, has its foundation in Constitutional case law – with respect to the value of 'informed consensus', in common judges (both in criminal and civil matters – Englaro and Welby cases) and in Law no. 219/2017 (*Norme in materia di consenso*

[80] See note no. 70.
[81] Incriminazione dell'*aiuto al suicidio.*
[82] See note no. 70.
[83] As provided for by art. 32 (subparagraph 2) Const.

informato e di disposizioni anticipate di trattamento).

By reconstructing the normative plot of the latter, the Court has recalled: 'the request to suspend medical treatment can be associated to palliative therapies, aimed at mitigating the patient's suffering (art. 2, subparagraph 1). This would lead, according to the Court, to a 'weakening of the patient's organic functions, whose result – not necessarily rapid, would be his/her death'.

Contrarily, doctors (acting on the behalf on the State) are prevented from actively and directly determining the patient's death. Consequently, those who suffer from the above-mentioned conditions are obliged to 'be subject to a slower process, which hardly reflects their concept of dignity and causes more suffering to their beloved ones'.

These circumstances recall Fabiano Anoniani's vicissitudes. Accordingly, the man had discarded that process of slow agony, by considering this modality of ending his life 'undignified' and by denouncing the fact that his relatives would have had to emotionally handle it.

For these reasons, Dj Fabo strongly insisted on receiving assistance for committing suicide, in order to rapidly die.

Consequently, according to the Court, the doubts on the constitutional legitimacy of art. 580 p.c. should be strictly linked to this *fattispecie*[84], perfectly outlined by the constitutional judges.

In this respect, the Court provided two main logical argumentations:

(a) the preeminent value of life, not excluding the duty to respect the patient's willingness end his life (through the interruption of life-sustaining treatments) – even when this requires the intervention of third parties, cannot represent an 'absolute (and criminally-punishable) obstacle to actively help the ill to rapidly end his/her life, by safeguarding him/her from a slow and undignified course'.

(b) although terminal patients can be regarded as vulnerable subjects (thus needful of protection), once they have been judged to be in full possession of their faculties[85], there is no reason to consider them to be in need of indiscriminate protection against their own willingness[86].

In light of the above, the incompatibility between the absolute prohibition of the help to suicide (*aiuto al suicidio*) and the patient's freedom to self-determination[87] (derived from arts. 2, 13 and 32, subparagraph 2) becomes evident.

Accordingly, the imposition of a 'unique manner to end one's life – not being this limitation aimed at safeguarding another Constitutionally-valuable interest, violates the principle of *human dignity,* in

[84] Circumstance.
[85] That is, able to consciously decide to end their life.
[86] I.e. the willingness to end their life through the intervention of third parties.
[87] In relation to the choice of therapies, including those aimed at freeing him/her from his/her suffering.

addition to those of *reasonableness* and *equality'*.

After defining the 'area of unconstitutionality', the Court discarded the most immediate solution – the declaration of unconstitutionality of art. 580 p.c. *in parte qua* (when the help to suicide is lent to subjects being in the above-mentioned conditions).

In fact, the *Consulta* wanted to avoid the creation of the legislative void that this action would cause. In detail, the Court aimed at preventing the abuses that could originate from such a decision, at the expense of weak and vulnerable people.

There fore, the Constitutional judges proceeded by highlighting some main areas in which further legislative efforts would be necessary:

(a) the procedures for medical verification of the requirements needed to request the *help to suicide;*

(b) the rules for the relative 'medicalized process'[88];

(c) the eventual exclusivity of the State (SSN – *Servizio Sanitario* Nazionale) in administering such treatments;

(d) the possibility of conscientious objections by the medical personnel involved in the procedure.

Moreover, order no. 207/2018 suggests some guidelines for Parliamentary intervention:

(*i*) the area in which these norms should be inserted. Accordingly, the Court proposes to incorporate them in the normative frame of Law no. 219/2017, rather than art. 580 p.c.. In this way, such legislation would be included in the area concerning the 'relation of treatment and trust between the patient and the doctor', properly disciplined by art. 1 of the same law.

(*ii*) the introduction of an *ad hoc* legislation for past vicissitudes[89], such as those related to the case *a quo* (Cappato's);

(*iii*) the adoption of proper precautions in order to avoid that, in the concrete application of this future regulation, health facilities will not allow the patient to undergo palliative treatments[90] when administering him/her the immediately fatal medication.

[88] Processo medicalizzato.
[89] Vicende pregresse.
[90] More in detail, 'palliative treatments' do not refer to deep and continuous sedation.

3.2 An innovative approach to Constitutional Adjudication: the role of the legislator and ordinary judges

Through order no. 207/2018, the Constitutional Court has embarked on an innovative path, by setting a precedent within the Italian panorama of constitutional adjudication. As Antonio Ruggeri put in[91], it adopted a 'decision that, once again, denotes the vivid imagination by which the constitutional judge continuously delivers new types of decisions, that is, it makes original use of well-established and well-known decisional techniques'[92].

In this respect, the Court has abandoned the traditional path that is normally adopted in similar situations, that is, the declaration of inadmissibility of the question raised, accompanied by a warning to the legislator – so that the latter could remove the identified *vulnus* through the adoption of the necessary legislation.

The rational behind this choice is linked to the unwillingness to 'maintain the unconstitutional norm in force for an unpredictable period of time', until a new constitutional challenge is raised.

The solution that the Court devices for balancing the needs of the concrete case with systematic considerations consists in conferring Parliament the possibility to further legislate on the matter, in light of its discretional powers. However, this decision – aimed at safeguarding the patient, sets well-defined boundaries on the above-mentioned legislative capacity of the Chambers[93].

Moreover, it draws inspiration from precedents of the Canadian (*Carter v. Canada*, February 6, 2015) and the UK (*Nicklinson v. Ministry of Justice*, June 14, 2015 et al.) Supreme Courts and consists in postponing the judgment[94] of the pending case to the hearing of September 24, 2019. Following it, the eventual survival of a law disciplining the subject, in conformity with the signaled needs for protection, will be evaluated.

On the procedural side, the judgment *a quo* was suspended. Equally, for what concerns other cases, judges were invited to assess (in light of the content of order no. 207/2018) the *relevance* and the *non-manifest groundlessness*[95] of analogous questions of constitutional legitimacy of art. 580 p.c., in order to avoid its application *in parte qua.*

On the institutional side, the adopted decision allows Parliament to take any desirable action - 'in a spirit of loyal and dialectic institutional collaboration', in order to prevent 'a disposition from

[91] Ruggeri, A. (2018). *Pilato alla Consulta: decide di non decidere, perlomeno per ora... (a margine di un comunicato sul caso Cappato)*. Consulta Online. Studi 2018/III, 568.
[92] 'Una decisione che, ancora una volta, rende testimonianza della fervida fantasia con cui il giudice costituzionale sforna a getto continuo nuovi tipi di decisione ovvero fa originali utilizzi di tipi noti e collaudati'.
[93] See subparagraph 3.1.
[94] Disporre il rinvio del giudizio.
[95] La rilevanza e la non manifesta infondatezza.

continuing to produce constitutionally-illegitimate effects'.

As specified in its annual report[96], the Court was previously used to state the inadmissibility of a question when, after an eventual declaration of constitutional illegitimacy, a further 'closing' legislative effort would have been necessary.

However, the *Consulta* is now more reluctant to adopt such a decision. Accordingly, it happened that a question[97] – already declared inadmissible due to the difficulties in restoring legislative harmony in case of acceptance[98] (Judgment no. 30/2014), was then considered *grounded* (Judgment no. 88/2018), since the Court had to acknowledge that the legislator, despite previous and intense solicitations, had not provided to amend the already-stated constitutional flaw.

This is the case in which a norm, despite its proven constitutional illegitimacy, continued to be applied for a long period of time, since the Court – through the decision of inadmissibility, had determined the incidental judgment and was thus able to further examine the question just when the latter was later re-proposed by another judge.

In such cases, there is a compression of constitutional guarantees to which the 'warning technique'[99]

does not respond – if the legislator stays dormant.

Consequently, it becomes difficult to choose between solutions of inadmissibility that safeguard legislative discretion – by unsatisfying those constitutional interests deserving protection, and *pronounce di accoglimento* that, by sacrificing this discretion, safeguard the above-mentioned interests (thus disrupting the system, by leaving it with no complete legislative guidelines – which the Court cannot provide).

In order to solve this dilemma, the Court adopted a new decisional technique (order no. 207/2018) that Giorgio Lattanzi defined as '*a incostituzionalità prospettata*'[100]. Through this order, the Court has acknowledged the constitutional criticality of art 580 p.c., in the part in which it incriminates whoever facilitates the suicide of irreversible and suffering ills that, freely and consciously, reject life-sustaining medical treatments, contrary to their concept of dignity.

At the same time, the Court has stressed the necessity to regulate the conditions of the right to definitely escape life with the help of third parties. Moreover, it attributed this competence to the legislator, by considering itself unable to perform such a task.

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[96] Corte Costituzionale. *Giurisprudenza Costituzionale dell'anno 2018.* Riunione straordinaria della Corte Costituzionale del 21 Marzo 2019. Roma, Palazzo della Consulta, pp. 12-13.
[97] With regard to the so called *Legge Pinto.*
[98] Accoglimento.
[99] Tecnica monitoria.
[100] Corte Costituzionale. *Giurisprudenza Costituzionale dell'anno 2018.* Riunione straordinaria della Corte Costituzionale del 21 Marzo 2019. Roma, Palazzo della Consulta, p. 13.

Thus, in order to remove the above-mentioned unconstitutional dispositions (by preserving legislative discretion), the Court postponed the case to September 2019, by offering, in the meanwhile, broad justification of the reasons that led to consider the challenged norm unconstitutional.

However, the new decisional technique – which Ruggeri defined as a 'constitutional *ircocervo*'[101], has raised concerns within the academic community.

First of all, Jorg Luther[102] denounces that the new procedural rule does not seem to take into account the consequences that it could provoke. Secondly, as Bruno Brancati put in[103], the management of the process has not been particularly linear.

On the one hand, the technique contains a contradiction *in nuce*, since the Court affirms of being unable to take a definitive decision. However, it risks contradicting itself by sustaining the constitutional challenge in the future, in the absence of Parliamentary intervention.

On the other, the technique gives rise to a 'delay' in constitutional justice, through the procrastination of the definitive decision.

The invention of this new technique reflects the emergence of increasing the number of procedural instruments available to the Court. Nevertheless, as Brancati[104] put in, such a delicate action should be conducted through an intervention on the sources that discipline constitutional justice and by the clarification of the criteria that constrain the Court's discretion, in a clear, preventive and abstract way.

As Lorenzo Madau put in[105], the order at hand has been heavily criticized, in light of two main considerations. On the one hand, the action taken by the Court can be regarded as a '*pilatesca non-decisione*[106]'. On the other, it seems to invade Parliament's sphere of competence, since it substantially dictates the legislator the content of the expected law, by also setting a temporal deadline (September 24, 2019).

For what concerns the first critique, the Court affirmed that, until then, in such cases it was used to

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[101] Ruggeri, A. (2018). *Venuto alla luce alla Consulta l'ircocervo costituzionale (a margine della ordinanza n. 207 del 2018 sul caso Cappato)*. Consulta Online, Studi 2018/III, 571.
[102] Luther, J. (2019). Intervention at the meeting *'Dopo l'ordinanza n. 207/2018 della Corte Costituzionale: una nuova tecnica di giudizio? Un seguito (e quale)?'*. Bologna. Radio Radicale. Available at: https://www.radioradicale.it/scheda/574998/dopo-lordinanza-n-2072018-della-corte-costituzionale-una-nuova-tecnica-di-giudizio-un [Accessed on June 3, 2019]
[103] Brancati, B. (2019). *Il Forum. Sull'ordinanza Cappato (Corte Costituzionale, Ord. No. 207/2018) in attesa della pronuncia che verrà.* Rivista del Gruppo di Pisa, p. 64.
[104] Brancati, B. (2019). *Il Forum. Sull'ordinanza Cappato (Corte Costituzionale, Ord. No. 207/2018) in attesa della pronuncia che verrà.* Rivista del Gruppo di Pisa, p. 64.
[105] Madau, L. (2019). *Il Forum. Sull'ordinanza Cappato (Corte Costituzionale, Ord. No. 207/2018) in attesa della pronuncia che verrà.* Rivista del Gruppo di Pisa, p. 67.
[106] Lit: Pilate's non-decisions.

declare the inadmissibility of the question, accompanied by a warning to the legislator. Thus, the Court explained that such decisions – constituting an example of 'denial of constitutional justice' (Zagrebelsky and Marcenò) and characterizing its previous jurisprudence, proved to be ineffective. In fact, the legislator has never indulged the Court's warnings, thus keeping non-constitutional norms in force for long periods of time.

Mindful of this (unfortunate) jurisprudence, the Court decided to take a further step and, by postponing the decision to an established date, it went beyond its usual (and real) non-decisions.

Accordingly, as Roberto Romboli put in[107], the innovative character of the Court's decision consists in including the warning in an interim ruling, rather than in a definitive one.

In relation to the second critique, it is worth mentioning that, pursuant to the current trends of constitutional jurisprudence, the alternative to the decision adopted in order no. 207/2018 would be the *accoglimento* (even interpretative or manipulative) of the question – being this action more effective than the above-mentioned warnings to the legislator.

Consequently, as Madau put in[108], the new decisional technique proves to be valuable since it reflects a more general (and bold) orientation of the Court, aimed at progressively abandoning Crisafulli's 'obliged rhymes'.

Moreover, as stated by Giacomo Salvadori[109], the strength of this innovative technique consists in the large attempt to better safeguard the fundamental rights and freedoms at hand.

However, Enrico Grosso[110] expressed further concerns in relation to order no. 207/2018. By taking a cue from Alessandro Pizzorusso's reflection on the distortion of procedural rules, he questioned the generalizability of the decisional technique outlined in Cappato's order. Thus, his interpretation seems to strongly diverge from Giorgio Lattanzi's belief.

The latter, by coining the expression '*incostituzionalità prospettata*', claims that this technique could constitute a generalizable procedural instrument for the future – since the decisions of ascertained (but not declared) unconstitutionality are not effective and the legislator is reluctant to act according to the principle of *loyal collaboration*.

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[107] Romboli, R. (2019). *Il Forum. Sull'ordinanza Cappato (Corte Costituzionale, Ord. No. 207/2018) in attesa della pronuncia che verrà.* Rivista del Gruppo di Pisa, p. 71.
[108] Madau, L. (2019). *Il Forum. Sull'ordinanza Cappato (Corte Costituzionale, Ord. No. 207/2018) in attesa della pronuncia che verrà.* Rivista del Gruppo di Pisa, p. 68.
[109] Salvadori, G. (2019). *Il Forum. Sull'ordinanza Cappato (Corte Costituzionale, Ord. No. 207/2018) in attesa della pronuncia che verrà.* Rivista del Gruppo di Pisa, p. 74.
[110] Grosso, E. (2019). Intervention at the meeting *'Dopo l'ordinanza n. 207/2018 della Corte Costituzionale: una nuova tecnica di giudizio? Un seguito (e quale)?'*. Bologna. Radio Radicale. Available at: https://www.radioradicale.it/scheda/574998/dopo-lordinanza-n-2072018-della-corte-costituzionale-una-nuova-tecnica-di-giudizio-un [Accessed on June 3, 2019]

On the other hand, Grosso affirms that the Court considers the declaration of inadmissibility to be inefficacious since it does not allow the Constitutional judge to strictly control the period of time within which it could intervene to sanction the defaulting legislator.

Thus, Grosso wonders if the Court believes to control, through the management of the times of the proceeding[111], the legislator's reaction time – by keeping the incidental judgment[112] alive. However, his (self)-response seems clear.

Accordingly, the decision contained in order no. 207/2018 derives from the contingency that generated it. In fact, this specific situation originated from Cappato's political action of civil disobedience. The activist, indeed, had violated the criminal norm and had consequently denounced himself – thus giving rise to the question of constitutionality of art. 580 p.c.

Thus, Grosso denies that the so-delicate subject of *fine-vita* 'can represent the gym where the Court could test a new (and generalizable) decisional technique that would remedy the shortcomings of the traditional warnings'[113]. According to the scholar, this solution seems illogic.

Consequently, can a procedural rule – if this is a (generalizable) procedural rule, be elaborated on the basis of a well-circumscribed *fattispecie* or specificity?

Francesco Dal Canto[114] shares the concerns highlighted by Grosso. In this respect, he considers the Court's decision as an *unicum* since it cannot be generalized (being thus not destined to a bright future). Two main reasons justify his statement: first of all, the decision 'raises more problems than those that it solves'[115] and threatens the credibility of the Court. Secondly, it is extremely linked to the peculiarities of the Cappato case, thus referring to a well-defined *fattispecie.*

In this respect, Antonio Ruggeri[116] wonders whether there are limits to the invention of ever-new instruments (or mere variations of traditional instruments) of constitutional justice by the Court. Thus, if not, what are the risks of resorting to such unusual tools? Moreover, can the Court introduce

[111] Gestione dei tempi del processo.
[112] The incidental judgment within which the warning (to the legislator) was formulated.
[113] Grosso, E. (2019). Intervention at the meeting *'Dopo l'ordinanza n. 207/2018 della Corte Costituzionale: una nuova tecnica di giudizio? Un seguito (e quale)?'*. Bologna. Radio Radicale. Available at: https://www.radioradicale.it/scheda/574998/dopo-lordinanza-n-2072018-della-corte-costituzionale-una-nuova-tecnica-di-giudizio-un [Accessed on June 3, 2019]
[114] Dal Canto, F. (2019). Intervention at the meeting *'Dopo l'ordinanza n. 207/2018 della Corte Costituzionale: una nuova tecnica di giudizio? Un seguito (e quale)?'*. Bologna. Radio Radicale. Available at: https://www.radioradicale.it/scheda/574998/dopo-lordinanza-n-2072018-della-corte-costituzionale-una-nuova-tecnica-di-giudizio-un [Accessed on June 3, 2019]
[115] Carnevale, P. (2019). Intervention at the meeting *'Dopo l'ordinanza n. 207/2018 della Corte Costituzionale: una nuova tecnica di giudizio? Un seguito (e quale)?'*. Bologna. Radio Radicale. Available at: https://www.radioradicale.it/scheda/574998/dopo-lordinanza-n-2072018-della-corte-costituzionale-una-nuova-tecnica-di-giudizio-un [Accessed on June 3, 2019]
[116] Ruggeri, A. (2019). Intervention at the meeting *'Dopo l'ordinanza n. 207/2018 della Corte Costituzionale: una nuova tecnica di giudizio? Un seguito (e quale)?'*. Bologna. Radio Radicale. Available at: https://www.radioradicale.it/scheda/574998/dopo-lordinanza-n-2072018-della-corte-costituzionale-una-nuova-tecnica-di-giudizio-un [Accessed on June 3, 2019]

a new decisional technique through mere casuistic and jurisprudential instruments?

As Antonio Ruggeri put in, this action denotes evident discomfort and intolerance by the Court to stay inside the set of procedural tools defined by the Constitutional Charter, Law no. 87/53 and the rules established by the same Court in the process of self-regulation.

Is there any risk to let the Court proceed to an incessant (and circumstance-based[117]) modification of the Italian model of Constitutional justice?

Antonio Ruggeri answers in a positive way, by stating two main reasons: on the one hand, there would be an increase in the politicization rate of judgments[118]. On the other, such an unlimited autonomy of the Court could provoke adverse consequences. In fact, since the constitutional judge was reluctant to apply any previously-established[119] instrument (thus inventing the tool that it considers more suitable to each case), it risks contradicting itself.

Moreover, Paolo Carnevale[120] identifies a further doubt concerning the Court's decision. In fact, the latter has been submerged by so many (academic) comments that jurists seem to participate *ex ante* – rather than analyzing *ex post,* to the building of the 'final result' of the question (by playing, *medio tempore,* not only the role of *amicus curiae* but also that of 'prompter of the legislator'). Carnevale declared to feel as a 'commentator of the comments'[121].

For what concerns the role of ordinary judges, criminal law finds it difficult to guide consociates' conduct – while waiting for a legislative intervention and for the consequent conclusion of the judgment of constitutionality, as Giulia Battaglia put in[122].

This criticality is widely referred by Marco Bignami[123], in his comment to order no. 207/2019. On the one hand, he claimed that consociates should follow the current formulation of art. 580 p.c. – being it still in force, even if destined to die (*'morituro'*). On the other hand, Bignami explained that applying a norm 'whose unconstitutionality has already been ascertained' would constitute a serious

[117] 'Riconformazione secondo occasione'.
[118] 'Innalzamento del tasso di politicizzazione dei giudizi'.
[119] 'Strumento preformato in via normativa'.
[120] Carnevale, P. (2019). Intervention at the meeting *'Dopo l'ordinanza n. 207/2018 della Corte Costituzionale: una nuova tecnica di giudizio? Un seguito (e quale)?'*. Bologna. Radio Radicale. Available at: https://www.radioradicale.it/scheda/574998/dopo-lordinanza-n-2072018-della-corte-costituzionale-una-nuova-tecnica-di-giudizio-un [Accessed on June 3, 2019]
[121] Carnevale, P. (2019). Intervention at the meeting *'Dopo l'ordinanza n. 207/2018 della Corte Costituzionale: una nuova tecnica di giudizio? Un seguito (e quale)?'*. Bologna. Radio Radicale. Available at: https://www.radioradicale.it/scheda/574998/dopo-lordinanza-n-2072018-della-corte-costituzionale-una-nuova-tecnica-di-giudizio-un [Accessed on June 3, 2019]
[122] Battaglia, G. (2019). *Il Forum. Sull'ordinanza Cappato (Corte Costituzionale, Ord. No. 207/2018) in attesa della pronuncia che verrà.* Rivista del Gruppo di Pisa, p.62.
[123] Bignami, M. (2018). *Il caso Cappato alla Corte Costituzionale: un'ordinanza ad incostituzionalità differita*. Questione Giustizia. Available at: http://www.giurcost.org/decisioni/index.html [Accessed on February 14, 2019]

procedural irregularity[124]. Moreover, it would effectively represent a source of civil and disciplinary responsibility for the (ordinary) judge – due to a manifest violation of law.

In addition, Elena Malfatti[125] proposes a dual interpretation of the Court's decision, with respect to the relationship between the Court and ordinary judges. On the one hand, order no. 207/2018 shows a special focus on other (eventual and analogous) pending cases. In fact, the Court reminds the judges (involved in such proceedings) of something that could seem obvious – that is, to evaluate the *relevance* and the *non-manifest groundlessness*, in order to avoid the application of the same (challenged) provision of the Criminal Code *in parte qua.*

On the other hand, the above-mentioned solicitation could represent a novelty, since the duty to raise analogous questions is not expressly mentioned. Thus, some room for the suspension of those judgments (that will not be referred to the Court) is probably left.

Conclusively, through order no. 207/2018, the Court has inaugurated a strongly innovative path. By introducing a new decisional technique, it went beyond the traditional (procedural) rigidity characterizing the Italian system of constitutional adjudication.

Accordingly, the quest for a 'loyal and dialectic institutional collaboration' shows the willingness to overcome the inefficiency of the customary declaration of inadmissibility, usually accompanied by a warning to the legislator. The desire to safeguard fundamental freedoms and rights proves to be of the utmost importance. In fact, through order no. 207/2018, the Court expressly aimed at receiving a proper and effective response from the legislator.

Through the postponement of Cappato's judgment, the Court invited Parliament to further discipline the matter, by providing concrete guidelines in this sense. Therefore, instead of fully sustaining the constitutional challenge to art. 580 p.c. (*sentenza di accoglimento*) – thus creating a legislative void, the Court decided to take a safer path.

By issuing an interim decision, it demanded immediate parliamentary collaboration. In fact, the traditionally-used warning to the legislator[126] has often fallen on deaf ears. This once, instead, the Court will be able to remedy (the eventual) parliamentary inactivity, by delivering its final and definitive decision.

[124] Vizio del procedimento.
[125] Malfatti, E. (2019). *Il Forum. Sull'ordinanza Cappato (Corte Costituzionale, Ord. No. 207/2018) in attesa della pronuncia che verrà.* Rivista del Gruppo di Pisa, pp. 68-69.
[126] Following a Court's declaration of inadmissibility.

Conclusions

In conclusion, the Cappato case has proven to be extremely significant within the Italian panorama of Constitutional adjudication. In this respect, order no. 207/2018 introduced an innovative decisional technique, by enlarging the set of procedural instruments available to the Court.

The decision to avoid the traditional declaration of inadmissibility (accompanied by a warning to the legislator) denotes the willingness to obtain a concrete and effective Parliamentary response. On the other hand, the choice to discard the possibility of issuing a *sentenza di accoglimento* reflects the unwillingness to create a severe legislative void.

Thus, the technique of *incostituzionalità prospettata* seemed the best alternative for triggering a parliamentary action. At the same time, in case of (legislative) inaction, the Court will be able to dispel this constitutional uncertainty – by delivering its final decision (being order no. 207/2018 just an interim measure).

Despite the above, the future evolution of the case is still uncertain. In fact, having the Court postponed the handling of the question of constitutionality to the public hearing of September 24 2019, Parliament could take any (eventual) legislative action until that date.

However, as Nicola Lupo[127] put it, the Italian panorama of constitutional adjudication is currently witnessing a 'double Parliamentary inaction'[128]. One concerns the merits of the question while the other is related to the constitutional process – i.e. the legislator is not taking the actions that are necessary to the maintenance of Italian Constitutional justice (concerning both the ways of access and the decisional techniques).

In fact, as Simone Baldetti[129] claims, the probability that the demand (forwarded by the Court to the legislator) is met proves to be low. Accordingly, for what concerns the legislator's initiative, future does not seem bright. Beyond the composition of parliamentary majority, the legislator is generally reluctant to intervene in situations similar to those characterizing the case at hand. This does not reflect an ideological or political block but rather a widely-spread parliamentary tendency – i.e. neglecting ethical questions and subjects related to the 'spiritual' dimension of the citizen.

[127] Lupo, N. (2019). Intervention at the meeting *'Dopo l'ordinanza n. 207/2018 della Corte Costituzionale: una nuova tecnica di giudizio? Un seguito (e quale)?'*. Bologna. Radio Radicale. Available at: https://www.radioradicale.it/scheda/574998/dopo-lordinanza-n-2072018-della-corte-costituzionale-una-nuova-tecnica-di-giudizio-un [Accessed on June 3, 2019]

[128] 'Doppia latitanza del legislatore'.

[129] Baldetti, S. (2019). *Il Forum. Sull'ordinanza Cappato (Corte Costituzionale, Ord. No. 207/2018) in attesa della pronuncia che verrà.* Rivista del Gruppo di Pisa, p. 90.

Accordingly, cases similar to Antoniani's – e.g. Welby's and Englaro's, have not represented an occasion for deep reflection or organic intervention by the legislator. Contrarily, they have witnessed extemporaneous legislative initiatives, completely divergent from judges' decisions.

In fact, these are issues in which law is obliged to face those ethical values that are always difficult to handle.

In the modern (pluralist) society, where no unique perspective is imposed on citizens, many traditions (both cultural and religious) coexist. In this respect, some religious orientations define the questions related to the *end of life* as non-negotiable values.

Thus, it is perceivable why, for some, the recourse to euthanasia or assisted suicide is not compatible with their values. On the other hand, some consider acceptable to voluntarily end one's life.

However, it is necessary that the legal system take a position on these problems, by overcoming those predictable difficulties.

For what concerns the Court's behavior after an eventual legislative initiative, great uncertainty can be detected. In fact, foreseeing the content of a Court's decision is often arduous. However, it is possible to attempt to outline some scenarios. As Bruno Brancati put in[130], if the legislator's intervention takes place, the Court would probably issue an order *di restituzione degli atti* to the judge *a quo*, due to the presence of *ius superveniens.*

Nevertheless, a legislative non-intervention is highly probable: in this way, the regulatory framework would remain unchanged. Thus, in such a case, it is difficult to think that the Court will further postpone the decision, since it would explicitly escape the duty to decide. Instead, the constitutional judge will probably conclude the proceeding.

However, whatever the definitive decision is, it will be extremely hard for the Court to avoid contradicting itself. On the one hand, if it respects the legislator's sphere of competence – by maintaining the existing rules unchanged, it will disprove the considerations that justified the postponement of the hearing to September 24 2019 and the protracted suspension of the judgment *a quo.*

On the other, the Court could not merely exclude from the scope of art. 580 p.c. the hypotheses of *help* given to subjects being in the same conditions as Antoniani, since this would provoke the creation of a legislative void. Thus, a judgment determining the above-mentioned effects is unlikely. At the same time, an interpretative *sentenza di rigetto* probably represents an unfeasible path. If it

[130] Brancati, B. (2019). *Il Forum*. *Sull'ordinanza Cappato (Corte Costituzionale, Ord. No. 207/2018) in attesa della pronuncia che verrà.* Rivista del Gruppo di Pisa, p. 92.

were intentioned to issue such a decision, the Court would have already done it – by avoiding the recourse to order no. 207/2018.

Thus, as Brancati put in, the most probable solution would be a *pronuncia di accogliemento.* As stated by Giuseppe Campanelli[131], the Court could risk delegitimizing itself, in the case that it does not declare the unconstitutionality of the challenged legislation. In fact, the Court has expressly denounced the violation of fundamental constitutional principles by the current normative framework.

Thus, it will hardly reverse course. Moreover, the same expression '*incostituzionalità prospettata'* – used by the President of the Court Giorgio Lattanzi, could be interpreted as foreseeing a declaration of unconstitutionality, in case of legislative inaction.

However, as Brancati put in[132], the *accoglimento* of the constitutional challenge 'is constrained between Scylla and Charybdis'. On the one hand, the Court cannot give rise to a lack of protection (*vuoto di tutela*).

On the other, it cannot invade the legislator's sphere of competence, as stated in order no. 207/2018. Thus, according to Brancati[133], the Court should provide an adequate solution, capable of escaping both the 'monsters'.

In conclusion, this thesis aimed at describing the Italian system on Constitutional adjudication, by previously illustrating the debated establishment of the Constitutional Court. Later, it provided to outline the legislation that disciplines the latter, by specifying its content and nature. Consequently, the traditional types of decisions that the Court can issue were analyzed.

Thus, after describing the general characteristic of the Italian system on Constitutional adjudication, this thesis specifically focused on the Cappato case. Accordingly, following a brief introduction to the subject, order no. 1/2018 was mentioned and explained. Through the latter, the Court of Assizes of Milan has raised a question of constitutionality of art. 580 p.c..

In turn, the Constitutional judge has responded in an innovative way. In fact, through order no. 207/2018, the Court has introduced a new decisional technique – i.e. *incostituzionalità prospettata.* By demanding a (Parliamentary) legislative action through an interim measure, the *Consulta* has set a precedent within the Italian system of Constitutional adjudication.

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[131] Campanelli, G. (2019). *Il Forum*. *Sull'ordinanza Cappato (Corte Costituzionale, Ord. No. 207/2018) in attesa della pronuncia che verrà.* Rivista del Gruppo di Pisa, p. 93.
[132] Brancati, B. (2019). *Il Forum*. *Sull'ordinanza Cappato (Corte Costituzionale, Ord. No. 207/2018) in attesa della pronuncia che verrà.* Rivista del Gruppo di Pisa, p. 93.
[133] Brancati, B. (2019). *Il Forum*. *Sull'ordinanza Cappato (Corte Costituzionale, Ord. No. 207/2018) in attesa della pronuncia che verrà.* Rivista del Gruppo di Pisa, p. 93.

Conclusively, how will the legislator respond to this request? Will it take a legislative action within September 24 2019? Moreover, how will the Constitutional judge react to an (eventual) Parliamentary inaction?

These questions are currently mobilizing the academic community. In fact, the Court's final judgment will inevitably determine the fate of the Italian system of Constitutional adjudication, by marking a milestone in this sense.

Riassunto in Italiano

Attualmente la Corte Costituzionale italiana e il relativo sistema di revisione giurisdizionale, nell'ambito del quale la Consulta ricopre un ruolo di primo rilievo, si rivelano essere estremamente solidi, efficienti e politicamente accettati. Nonostante la sua attuale fama, l'evoluzione storica del sistema italiano di giudizio costituzionale è stata tortuosa e dispendiosa di tempo. Si è trattato infatti di un processo di *stratificazione storica* che si è originato con l'attività dell'Assemblea Costituente e si è ulteriormente delineato attraverso legislazione successiva e 'attivante', stabilizzandosi mediante la pratica giurisprudenziale della stessa Corte, coerentemente disciplinata dalla specifica introduzione di meccanismi procedurali.

A questo proposito, molti fattori hanno impedito allo Statuto Albertino di assumere un ruolo di riferimento in materia di revisione giurisdizionale della legislazione. Tra i principali, si annoverano l'onnipotenza parlamentare, la tendenza a classificare lo Statuto quale strumento flessibile in natura – senza possibilità di differenziare per rango la legislazione ordinaria da quella costituzionale – e la scarsa indipendenza del potere giudiziario.

All'assetto appena delineato si ponevano tuttavia due eccezioni legate, da un lato, alla ridondante produzione normativa per decreto da parte dell'esecutivo – circostanza che legittimava il giudice alla disapplicazione; d'altro canto, la previa necessaria verifica della regolarità formale delle leggi consentiva un possibile sindacato sulla stessa. A ciò si aggiungano autorevoli pronunce della Corte di Cassazione (Pres. Ludovico Mortara) con le quali, anche recependo la posizione espressa da Vittorio Emanuele Orlando, veniva dichiarata l'illegittimità dei decreti emanati dall'esecutivo che non contenessero la clausola di conversione e che non soddisfacessero il requisito della *necessità.*

In epoca fascista la questione è stata ulteriormente dibattuta in senso restrittivo, limitando al solo Parlamento la facoltà di esprimersi sull'urgenza e la necessità della legislazione per decreto (che poteva essere illimitatamente emanata dall'esecutivo). Dunque, la proposta di introdurre un meccanismo di revisione giurisdizionale in Italia è stata fermamente respinta dal regime.

Inoltre, in seguito al referendum del 1946 e all'istituzione dell'Assemblea Costituente, la mancanza di un Parlamento democraticamente eletto ha determinato il trasferimento in capo al potere esecutivo della competenza legislativa, con l'unica eccezione data dalla materia costituzionale.

Di conseguenza, la riconosciuta rigidità del testo costituzionale ha conferito ai giudici il potere di esercitare un controllo giurisdizionale sulla legislazione ordinaria, fino all'insediamento della Corte Costituzionale nel 1956.

Nel 1948, gli sforzi perpetrati dall'Assemblea Costituente hanno portato all'adozione della Costituzione italiana; a questo proposito, il titolo VI è interamente dedicato alle garanzie costituzionali.

Nello specifico, l' articolo 134 definisce l'estensione della giurisdizione della Corte e identifica le circostanze in cui la stessa è chiamata a pronunciarsi. In primis, la Corte dovrà quindi intervenire nel valutare la conformità di una legge (o atto avente forza di legge) alla Costituzione. In secondo luogo, dovrà pronunciarsi sui conflitti di attribuzione tra i poteri dello Stato, tra Stato e Regioni e tra Regioni. Ricorrerà inoltre la giurisdizione della Corte nelle fattispecie di accuse promosse contro il Presidente della Repubblica. Infine, la Corte è chiamata a pronunciarsi in tema di ammissibilità del referendum abrogativo.

Di seguito, l'articolo 135 fa riferimento alle composizione della Corte e stabilisce le procedure di nomina e i requisiti necessari per divenire giudice costituzionale, identificando la lunghezza e la natura del mandato.

Inoltre, l'articolo 136 illustra le caratteristiche delle decisioni della Corte. È pero doveroso ricordare che un'interpretazione letterale della sua formulazione sembrerebbe ridurre l'ambito decisionale della Consulta a due sole alternative: sentenza di rigetto o di accoglimento. Nonostante ciò, la Corte è stata in grado, nel corso degli anni, di distanziarsi da un percorso così circoscritto, riuscendo a intraprendere strade meno definite. Infine, l'articolo 136 stabilisce che, quando una legge (o atto avente forza di legge) viene dichiarata incostituzionale, questa cessa di avere effetto nel giorno successivo alla pubblicazione della decisione.

In conclusione, l'articolo 137 conferisce alla leggi costituzionali il potere di stabilire la condizioni, le forme, i termini di proponibilità dei giudizi di legittimità costituzionale e le garanzie d'indipendenza dei giudici della Corte. D'altra parte, le leggi ordinarie si prestano a regolare la costituzione e il funzionamento della Corte.

In definitiva, nonostante il testo costituzionale fornisca parametri fondamentali per quanto concerne la Consulta, resta comunque spazio per ulteriori sviluppi legislativi in questo campo. Infatti, la materia è anche regolamentata da altre fonti, in termini di complementarietà e integrazione al dettato Costituzionale. A questo proposito, la Legge Costituzionale n. 1/1948, la Legge n. 87/1953 e la Legge Costituzionale n. 1/1953 forniscono ulteriori specificazioni al riguardo.

Dopo aver descritto il percorso di sviluppo del sistema italiano di giudizio Costituzionale e aver analizzato le fonti normative che disciplinano la Corte, si specificano le tipologie delle decisioni rimesse alla giurisdizione di quest'ultima. In primo luogo, si evidenzia la differenza tra ordinanza e sentenza.

In relazione alla prima, quando la questione di legittimità è sollevata in via incidentale, la Corte può emettere un'*ordinanza di inammissibilità* se la sfida costituzionale non è pertinente al caso che l'ha originata o nell' eventualità in cui vengano identificati altri vizi formali e procedurali. Inoltre, la Consulta ha la facoltà di emettere un'*ordinanza di manifesta infondatezza* qualora la questione di legittimità costituzionale sia chiaramente priva di fondatezza.

D'altro canto, il ricorso alla sentenza richiede che l'analisi della Corte si estenda ai meriti della questione, implicando quindi un confronto tra l'*oggetto* e il *parametro.* È possibile suddividere le sentenze in due principali tipologie: da un lato quelle *di accoglimento* e dall'altro quelle *di rigetto*. Un'ulteriore classificazione implicherebbe l'analisi delle *sentenze interpretative*, attraverso le quali viene enfatizzata la sostanziale differenza tra norma e disposizione. Infine, è doveroso menzionare la nota tipologia della *sentenza manipolativa* (di accoglimento) mediante cui la Corte, dopo aver dichiarato l'incostituzionalità di una norma, provvede a integrarla o modificarla.

In seguito a una rapida descrizione delle principali caratteristiche del sistema italiano di giudizio Costituzionale, si procede a riflettere, nel dettaglio, sul caso Cappato. A questo proposito, una breve introduzione sull'imputato risulta necessaria. Marco Cappato è un politico e attivista italiano, di orientamento radicale, da sempre impegnato nella difesa dei diritti civili e promotore dell'eutanasia. Di rimando, nel suo sito personale, dichiara la sua disponibilità a fornire informazioni e, in alcuni casi, persino assistenza logistica e finanziaria, a coloro che desiderano far ricorso alla pratica dell'eutanasia.

Alla luce di ciò, la connessione tra Fabiano Antoniani e Marco Cappato risulta chiara. Infatti, il 28 Febbraio 2017, quest'ultimo si presenta presso una caserma dei Carabinieri di Milano e, autodenunciandosi, dichiara di aver accompagnato Dj Fabo, nei giorni precedenti, in Svizzera per sottoporsi, presso la clinica 'Dignitas', a una pratica di suicidio assistito.

In seguito a tale iniziativa, il caso viene sottoposto alla competenza della Corte D'Assise di Milano che, mediante l'Ordinanza n. 1/2018, solleva la questione di legittimità costituzionale dell'art. 580 del Codice Penale nella parte in cui:

(a) assimila le fattispecie di *istigazione* e di *aiuto al suicidio*, riunendole in un'unica previsione di reato che non tiene in debito conto del differente contributo alla determinazione o al rafforzamento del proposito suicidario dell'individuo – per ritenuto contrasto con gli artt. 3, 13 (comma 1) e 117 Cost., alla luce degli artt. 2 e 8 CEDU;

(b) stabilisce che le condotte di *agevolazione all'esecuzione del suicidio* (che non influenzano il processo deliberativo dell'aspirante suicida) siano, per quanto riguarda la pena prevista, assimilabili

a quelle di *istigazione* e quindi punibili con la reclusione da 5 a 10 anni – per ritenuto contrasto con gli artt. 3, 13, 25 (comma 2) e 27 della Costituzione italiana.

Investita della questione, la Corte Costituzionale ha emanato la nota Ordinanza n. 207/2018 con la quale ha ampliato lo spettro degli strumenti procurali a sua disposizione, configurando la tecnica decisoria della c.d. *incostituzionalità prospettata.* Nello specifico, si è trattato di ipotizzare la fondatezza della questione sollevata, soprassedendo tuttavia da una pronuncia di accoglimento, al fine di evitare il determinarsi di un vuoto legislativo. La Corte ha quindi ritagliato un profilo di illegittimità più circoscritto rispetto a quello individuato dal giudice *a quo*, concentrandosi sulla specificità della condizione di Fabiano Antoniani, reso permanentemente cieco e tetraplegico da un violento incidente automobilistico – e quindi condannato a continue e profonde sofferenze, sia psicologiche che fisiche, pur restando in pieno possesso delle sue facoltà mentali.

La Consulta ha dunque rinviato, attraverso l'Ordinanza n. 207/2018, la trattazione della questione di legittimità costituzionale all'udienza pubblica del 24 Settembre 2019, invitando *medio tempore* il Parlamento a legiferare in materia. Suggerendo alle Camere la cornice normativa all'interno della quale il legislatore dovrà inserire l'auspicata regolamentazione, la Corte ha dettato al Parlamento specifiche linee guida, imponendo anche una scadenza temporale allo stesso.

La comunità accademica si è variamente espressa sui possibili ed eventuali esiti di tali vicende. A questo proposito, il Parlamento si assumerà la responsabilità di legiferare in materia di *fine-vita* entro la data stabilita o rimarrà inattivo? Inoltre, qualora si verifichi quest'ultima eventualità, quali provvedimenti assumerà la Corte?

Le opinioni dei giuristi si rivelano essere molteplici ed estremamente divergenti. Infatti, la rilevanza della questione è legata alla diffusa consapevolezza che il giudizio definitivo della Corte determinerà inevitabilmente il destino del sistema italiano di giudizio costituzionale, sia in ambito procedurale che sostanziale, venendo dunque a rappresentare una pietra miliare in questo senso.

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Il termine italiano "simpatia" deriva dal greco antico "συνπαθειν" (sympathein) che significa "soffrire insieme". È curioso come, nel corso del tempo, sia andata perduta gran parte dell'enfasi che il lemma possedeva in precedenza: nella lingua odierna, infatti, il concetto di simpatia è di gran lunga riduttivo rispetto a quello di amicizia che, al contrario, risponde a pieno ai criteri di pertinenza dettati dall' etimologia greca. Alla luce di questa consapevolezza, desidero rivolgere i miei più sentiti ringraziamenti a coloro che mi hanno accompagnato in questo percorso, con inesauribile entusiasmo e profonda "simpatia". In primis, mi rivolgo ai miei genitori che, nell'inesorabile succedersi degli anni, hanno nutrito la mia curiosità e arginato la mia impulsività, sostenendomi nelle piccole sfide quotidiane. In secondo luogo, ringrazio i miei nonni che, seppur in parte lontani, mi hanno sempre protetto e viziato, con quella dolcezza in più che spesso, per vari motivi, è preclusa ai genitori. Inoltre, un sentito ringraziamento va a mia zia Lucia e mio zio Paolo che hanno saputo sostenermi in questo percorso, nonostante le sporadiche occasioni di incontro che la distanza e il tempo ci hanno concesso negli ultimi anni. In aggiunta, mi rivolgo alle amiche di una vita che, seppur spesso lontane, non hanno mai smesso di supportarmi, appoggiandomi pubblicamente e rimproverando le mie intemperanze nell'intimità delle nostre conversazioni. Un grazie speciale va quindi ad Alice, Sara, Valeria, Giorgia ed Elisa che, giorno dopo giorno, hanno alleggerito, rallegrato e movimentato la mia quotidianità. Inoltre, desidero ringraziare i miei compagni di corso (e amici) che, semestre dopo semestre, mi hanno strappato un sorriso tra una lezione e l'altra, colmando il mio pessimismo e calmando le mie ansie. Condividendo il mio stesso percorso di studi, hanno saputo offrirmi validi consigli e concrete linee guida, spronandomi, esame dopo esame, a non fermarmi alle prime difficoltà. Ringrazio anche le mie coinquiline Liliana e Maria Teresa che, vedendomi scoraggiata, non smettevano di rassicurarmi e motivarmi. Desidero inoltre menzionare Francesco Guccini che ha indubbiamente allietato le mie giornate di studio, concedendo una sfumatura poetica anche a materie irrimediabilmente sterili sul piano emotivo. Infine, il mio più sentito ringraziamento va al mio Professore di Public Law, Nicola Lupo, che mi ha dato la possibilità di approfondire una tematica a me molto cara, offrendomi supporto didattico nell'ambito del progetto conclusivo del mio percorso di laurea triennale.

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