THE ITALIAN WAY TO THE "POLITICAL QUESTION"

Paolo Zicchittu*

Abstract:

Is there a political question doctrine in Italy? Following an historical-empirical perspective, the essay analyses how and when the Italian Constitutional Court deals with controversies featuring issues of a political nature. The article investigates the crucial relationship between constitutional review and democratic processes, underlining the political nature of constitutional justice. The decisions of the Italian Constitutional Court concerning "political questions" are here studied in order to reflect on the constant connection between law and politics and to show what role is truly played by the Constitutional Court in the Italian legal system. The final objective is to identify certain matters that are primarily political in nature and best resolved by the politically accountable branches of government.

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* Research Fellow in Constitutional Law, University of Milan-Bicocca

1. Introduction: Constitutional Courts and politics

The relationship between Constitutional Courts and politics has always been problematic. The existence of the Courts themselves is justified within those political systems centered on the liberal conception of authority and protection of fundamental rights as they ensure overall respect of the legal system, including the natural law principles adopted by it[1]. The relationship between the constitutional review and democratic processes represents a crucial problem of every modern legal system[2]. The delicate relation between the Constitutional Courts and Parliament clearly reveals the political nature of constitutional justice into the mechanism of every contemporary form of State[3].

The development of the Courts' role accelerates the maturing process of the legal system by ensuring respect for the constitutional basis of State bodies and rights[4]. Simultaneously, they find themselves compelled to review the acts of authorities representing the will of the people raising questions on their legitimacy. Therefore, when tension between political subjects rises, the Court judgment will inevitably generate complaints that overrun the field of another body and accusations on whether they are usurping a function that does not pertain to constitutional justice[5].

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[1] See for example R. George, *Natural law*, in 1 Harv. J. L. & Pub. Pol. 165 (2008); A. Catelani, *Indirizzo politico e giusnaturalismo nelle interpretazioni della Corte costituzionale*, in 2/3 Perc. Cost. 92 (2010); J. Stout, *Truth, Natural Law, and ethical theory*, in R. George (ed.), *Natural law theory: contemporary essays* (1992).

[2] Cf. E. Rostow, *The Democratic Character of Judicial Review*, in 2 Harv. L. Rev. 158 (1952); G. Zagrebelsky, *Il diritto mite. Legge, diritti, giustizia* (1997); N. Olivetti-Rason, *La dinamica costituzionale negli Stati Uniti d'America* (1984).

[3] A. Chen, *The Global Expansion of Constitutional Judicial Review: Some Historical and Comparative Perspectives*, in 1 U.H.K. Fac. L. Leg. St. Res. P. Ser. 211 (2013), A. Stone-Sweet, *Governing with Judges: Constitutional Politics in Europe* (2000); G. de Vergottini & T.E. Frosini, *On the myth of the Constitutional Court in politics*, in 2/3 Perc. Cost. 17 (2010).

[4] Cf. P. Sagues, *El Consejo de la magistratura en Argentina. Ilusiones constitucionales y las ecuaciones de poder entre el consejo, la Corte Suprema y la clase política*, in 2/3 Perc. Cost. 212 (2010). G. Vanberg. *Legislative-Judicial relations. A game-theoretic approach to constitutional review*, in 3 Am. J. Pol. Sc. 346 (2001)

[5] Compare to S. Freeman, *Constitutional democracy and the legitimacy of judicial review*, in 4 L. & Phil. 327 (1990); T. Groppi, *La legittimazione della giustizia costituzionale. Una prospettiva comparata*, in 2/3 Perc. Cost. 121 (2010)

For these reasons, most of the democratic legal systems that are governed by the rule of law, have always tried to separate these two spheres. The provision for a body vested of the power to review legislation delineates a form of control that on the one hand, is substantively political as it aims at eliminating decisions taken by political authorities, such as law. On the other hand, it is formally judicial in that it is exerted in the manner of a trial before an impartial Court[6]. As a result, the ruling of unconstitutionality very seldom (never) resolves the problem but leads to a dialogue with Parliament, that is called to change its previous measure in cooperation with the Constitutional Court[7].

Within this context, the term "political question" commonly indicates a set of problems concerning the freedom of assessment and discretionary power of public authorities in the discharge of their public duties[8]. This means that a "political question" is a dialectically constructed resolution that weighs on the public sphere[9]. It generally corresponds to a legislative decision that coordinates different parliamentary positions, in order to select and regulate democratic values[10].

In dealing with the "political question", the decisions of the Italian Constitutional Court deserve to be carefully analyzed for more than one reason. Firstly, they allow to reflect on the constant relationship between law and politics. Secondly, they show what role is truly played by the Constitutional Court in the Italian legal

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[6] A. Brewer-Carias, *Judicial review in comparative law*, Cambridge, 1989; E. Cheli, *Il ruolo politico della Corte costituzionale nella prospettiva comparatistica*, in *Percorsi costituzionali*, n. 2/3 2010, p. 31 ss. V. Ferreres-Comella, *Constitutional courts and democratic values: a European perspective*, (2009).

[7] See especially P. Hogg & A. Bushell, *The charter dialogue between Courts and Legislatures (or perhaps the charter of rights isn't such a bad thing after all)*, in 35 Osgoode Hall L. J. 76 (1997). The preventive action of the French *Conseil Constitutionnel* may be read in this light, which obliges the French Parliament to comply with its decision, ensuring that the two bodies – Constitutional Council and Legislative Assembly – end up cooperating in the final enactment of a law that in this way should be devoid of elements of unconstitutionality. See G. Guidi, La divisione dei poteri nelle grandi decisioni del *Conseil Constitutionnel*, in 2/3 Perc. Cost. 185 (2010).

[8] See A. Cerri, *Inammissibilità assoluta e infondatezza*, in 5 Giur. Cost. 1219 (1983).

[9] Compare to L. Pesole, *L'inammissibilità per discrezionalità legislativa di una questione fondata*, in 1 Giur. Cost. 406 (1994).

[10] Nevertheless, not every "political question" involves choices strictly assigned to parliamentary discretion R. Gatti, *Politica*, in 9 Enc. Fil. 8760 (2006).

system. Finally, they raise the problem of the legitimacy of the constitutional justice[11].

The scientific debate on this dilemma initiated particularly in the United States, where scholars and judges coined the notion of "political question", above all, to face the so-called counter-majoritarian difficulties[12]. In the American legal system, the "political question doctrine" refers to certain matters that are primarily political in nature and best resolved by the politically accountable branches of government. Although a constitutional violation is asserted, political questions are inappropriate for judicial consideration and immune from judicial review[13]. This doctrine provides the judiciary with means of avoiding controversial constitutional question[14] by allocating decision to the branches with the most appropriate expertise[15]. It keeps the Court from reviewing the constitutional amendment process because of possible conflict of interest if the amendment is to overturn the Court's decision[16] and it should also minimize Constitutional Court intrusion into operational issues of other branches of government[17].

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[11] L. Favoreu, *Constitutional review in Europe*, in L. Henkin & A. Rosenthal (eds.), *Constitutionalism and rights: The Influence of the United States Constitution abroad*, (1990). Cf. E. Cheli, *Atto politico e funzione d'indirizzo politico* (1961) and C. Dell'Acqua, *Atto politico ed esercizio di poteri sovrani* (1983).

[12] For a widespread analysis see for example O. Field, *The doctrine of political question in the Federal Courts*, in 8 Minn L. Rev. 485 (1924); M. Finkelstein, *Judicial self-limitation*, in 37 Harv. L. Rev. 338 (1924); H. Wechsler, *Toward neutral principles of Constitutional law*, in 73 Harv. L. Rev. 1 (1959); R. Fallon, *Of justiciability remedies and public law litigation: notes on the jurisprudence of Lyons*, in 59 N.Y.U. L. Rev. 1 (1984); M. Redish, *Abstension, separation of powers and the limits of the judicial junctions*, in 94 Yale L. J. 94/1984, p. 71; F. Weston, *Political questions*, in 38 Harv. L. Rev. 296 (1959). See also *Luther v. Borden*; *Pacific Tel. & Tel. Co. v. Oregon*; *Coleman v. Miller*, *Baker v. Carr*.

[13] F. Scharpf, *Judicial review and the political question: a functional analysis*, in 4 Yale L. J. 75 (1960).

[14] A. Bickel, *The least dangerous branch: The Supreme Court at the bar of politics*, (1986).

[15] See especially L. Tribe, *Constitutional choices* (1985).

[16] *Gilligan v. Morgan*. See also R. Jackson, *The Supreme Court in the American system* (1955).

[17] *Colegrove v. Green*. Cf. C. Warren, *The Supreme Court in the United States history*, (1932).

2. "Political question" and "constitutional tone"

In the Italian legal system, something similar to the notion of "political question" may be found in Article 28, Law 87/1953[18]. The latter attempts to reconcile the apparent contradiction inherent in constitutional review by balancing the respective role of the legislative power and the Court.

According to this provision the constitutional review must observe two limits. Article 28 forbids the Italian Constitutional Court from both carrying out any political assessment and controlling the exercise of parliamentary discretion[19]. Regarding these aspects, it is necessary to examine if – as it happens in North American legal system – "political question" actually indicates a "non-justiciable area"[20] that prevents the Court from deciding on the substance of the case, when the question of unconstitutionality concerns aspects entrusted to political bodies[21]. In order to do so, it is important to retrace the notion of "political question" in the Italian legal system, lingering on the role of procedural decisions in the Italian constitutional review.

In particular, the first limit precludes the Italian Constitutional Court from making a political consideration in its judicial assess but it merely appears to reaffirm the nature of constitutional review as a legal proceeding. It calls to mind the famous statement by Hans Kelsen who identified the

[18] According to art. 28, Law 87/1953: "*The constitutional review on a law or on enactments having the force of law excludes any assessment of political character and any judicature of parliamentary discretion*".

[19] See, for example, A. Tesauro, *La Corte costituzionale*, in 2 Rass. Dir. Pubbl. 205 (1950) and G. Guarino, *Abrogazione e disapplicazione delle leggi illegittime*, in 2 Jus 356 (1951), L. Favoreau, *American and European model of constitutionalism*, in D. Clark (ed.), *Comparative and private constitutional law. Essays in honor of John Henry Merryman* (1990).

[20] G. Zagrebelsky & V. Marcenò, *La giustizia costituzionale* (2012); M. Cappelletti, *The judicial process in comparative perspective*, (1989). For a comparison with the Canadian legal system see G. Cowper & L. Sossin, *Does Canada need a "political questions doctrine"?*, in 4 Sup. Ct. L. Rev. 321 (2002); P. Monahan, *Politics and the Constitution. The Charter, Federalism and the Supreme Court of Canada* (1987); B. Flemming, *Tournament of Appeals: Granting Judicial Review in Canada*, (2004). Cf. also *Penikett v. R.*; *Native Women's Assn. of Canada v. Canada*; *Schachter v. Canada*

[21] See A. Ruggeri & A. Spadaro, *Lineamenti di giustizia costituzionale* (2013).

Constitutional Court simply as a "*negative law-maker*"[22]. However, this prohibition can be inferred from constitutional provisions, thus, Article 28 does not seem to add any new interdiction to the Court[23]. This indicates that the rule in Article 28 does not carefully define the area of "political question". Furthermore, while deciding disputes concerning the constitutional legitimacy of laws and enactments having the force of law, the Court always looks at the political effects connected to its judgments[24]. Consequently, when reviewing the constitutionality of a contested measure, the Italian Court is forbidden from making a political assessment concerning the merits of a statute law[25].

The second limit codified in Article 28 excludes any kind of judicial control over parliamentary discretion. Seemingly, drawing from administrative law the origin of the concept of discretion, the earliest legal doctrine interpreted this provision to restrict the application of Article 134 of the Italian Constitution[26] preventing the Constitutional Court from judging on "legislative misuse of power"[27]. On the other hand, current legal doctrine interprets this rule as prohibiting the Court from reviewing the merits of a statute, effectively ignoring the theory of the "abuse of legislative power" and restricting constitutional jurisdiction[28]. Hence, Article 28 only precludes the Court from scrutinizing appropriateness or substantive issues of political choices and from enquiring into the objectives pursued by the Parliament in carrying out its legislative functions[29]. This scrutiny could transform constitutional review into political control, which evaluates in the abstract the

[22] Compare to H. Kelsen, *La giustizia costituzionale* (1928). See also H. Hausmaninger, *Judicial referral of constitutional question in Austria, Germany and Russia*, in 12 Tulane Eur. & Civ. L. Forum 25 (1997).
[23] G. Zagrebelsky, *La giustizia costituzionale* (1977).
[24] Cf. F. Pierandrei, *Corte costituzionale*, in 10 Enc. Dir. 906 (1962).
[25] Compare to C. Mortati, *Le leggi provvedimento* (1968).
[26] Article 134 of the Italian Constitution statutes that: "*The Constitutional Court shall pass judgement on: controversies on the constitutional legitimacy of laws and enactments having the force of law issued by the State and the Regions. Conflicts arising from allocation of powers of the State and those powers allocated to State and Regions, and between Regions. Accusations made against the President of the Republic and the Ministers, according to the provisions of the Constitution*".
[27] See G. Guarino, *Abrogazione e disapplicazione delle leggi illegittime*, cit. at 19
[28] Cf. A. Ruggeri & A. Spadaro, *Lineamenti di giustizia costituzionale,* cit. at 21
[29] Compare to L. Paladin, *Osservazioni sulla discrezionalità e sull'eccesso di potere del legislatore ordinario*, in *Rivista trimestrale di diritto pubblico*, 1956, p. 993.

correspondence between the contested measure and its main objective established by the Constitution[30]. In practical terms it is however possible to test its reasonableness[31].

When the Court judges on a question concerning legislative discretion, it will not rule on the controversy. In such cases, the question of unconstitutionality in order to be eligible must not only be relevant to the case ("*rilevante*") and show no signs of being groundless ("*non manifestamente infondata*"), but it will also require another requirement conventionally named "constitutional tone" ("*tono costituzionale*")[32]. A concrete case will therefore have a "constitutional tone" only if it does not entail political assessments. Should any political evaluations be involved, the Constitutional Court must declare the question inadmissible for it lacks "constitutional tone" [33].

Notwithstanding, every Constitution has a political content and therefore every "political question", by nature, has some constitutional relevance[34]. The absence of "constitutional tone" means that the constitutional review cannot provide a solution to a concrete case and it may not be solved through a constitutional proceeding. Hence, it will require other branches of government to make the necessary political decisions. In this strict sense, Article 28, Law 87/1953 directly evokes the notion of "political question" adopted in the North-American legal systems, because it highlights the requirement issued by the Constitution to find a

[30] Cf. *ex plurimis* L. Pegoraro, *Le sentenze-indirizzo della Corte costituzionale italiana*, Padova, 1984, p. 90.

[31] See P. Costanzo, *Legislatore e Corte costituzionale. Uno sguardo d'insieme sulla giurisprudenza costituzionale in materia di discrezionalità legislativa dopo cinquant'anni di attività*, in www.giurcost.org

[32] This notion was coined by the scholars, especially to define a particular aspect of the conflicts between branches of government, but nowadays the Italian Constitutional Court does not commonly use it. See F. D'Onofrio, *L'oggetto dei giudizi sui conflitti costituzionali di attribuzione*, in 5 Rass. Dir. Pubbl. 812 (1963).

[33] See for example A. Pisaneschi, *I conflitti di attribuzione tra i poteri dello Stato* (1992); R. Bin, *L'ultima fortezza (teoria della costituzione e conflitti di attribuzione* (1996); M. Mazziotti, *I conflitti di attribuzione fra i poteri dello Stato* (1972); L. Elia, *Dal conflitto di attribuzione al conflitto di norme*, in 1 Giur. Cost. 263 (1965); F. Sorrentino, *I conflitti di attribuzione tra i poteri dello Stato*, in 2 Riv. Trim. Dir. Pubbl. 472 (1967).

[34] F. Pierandrei, *L'interpretazione della Costituzione* (1952).

political settlement to the specific case[35]. This peculiar mechanism of justiciability should reinforce the separation of power prescribed by the Constitution, preventing the Courts from interfering with the competences assigned to the other branches of government. By judging on the justiciability of cases and controversies with a political trait, the Courts necessarily deliver their jurisdiction and this inevitably redefines the principle of the separation of powers[36].

As previously mentioned, the non-justiciability of a "political question" is not measureable in abstract terms[37], given that it is influenced by political choices and by the Courts' self-restraint. In other words, it is unrealistic to identify *a priori* selection criteria for every single "political question". The notion of a "political question" is extremely variable and it is connected to the historical, social and economic background. Therefore, it could happen that a particular case initially distinguished by political aspects, might not be political and *vice-versa*[38]. In this perspective, the "political question doctrine" appears as an interpretation of the constitutional provisions that are relevant for

[35] R. Fallon, *Of justiciability remedies and public law litigation: notes on the jurisprudence of Lyons,* cit. at 12; M. Redish, *Abstension, separation of powers and the limits of the judicial junctions,* cit. at 12; H.S. Reinhardt, *Limiting the access to the Federal Courts: round up the usual victims*, in 6 Whittier L. Rev. 967 (1984). Compare also to K. Swinton, *The Supreme Court and the Canadian Federalism* (1990); L. Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada* (1999); J. Cameron, *The Written Word and The Constitution's Vital Unstated Assumptions*, in P. Thibault, B. Pelletier & L. Perret (eds.), *Essays in Honour of Gérald A. Beaudoin* (2002). See also *Sibbeston v. Canada*; New *Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*; *Canada (Auditor General) v. Canada (Minister of Energy, Mines & Resources)*

[36] See L. Brilmayer, *The jurisprudence of article III: perspective on the case or controversy requirements*, in 93 Harv. L. Rev. 297 (1979); M. Tushnet, *The sociology of article III: a response to Professor Brilmayer*, in 93 Harv. L. Rev. 1698 (1980).

[37] See G. Zagrebelsky & V. Marcenò, *La giustizia costituzionale*, *cit.* at 20, 67. Compare to E. Chermeninsky, *Constitutional law, principles and politics* (1997); I. Unah, *The Supreme Court in American politics* (2009).

[38] Compare to A. Sperti, *Corti supreme e conflitti tra poteri* (2002); W. Dellinger, *The legitimacy of constitutional change: rethinking the amendment process*, in 75 Harv. L. Rev. 386 (1985).

the solution of that concrete case and useful to determine the competence of each branches of government[39].

In practice, the notion of "constitutional tone" linked with "political question" defines when and how the Court can decide a question of unconstitutionality, because its existence makes it admissible and it allows the Constitutional Court to decide on the substance of the case. On the contrary, if a question concerns political discretion, it will never be justiciable and its settlement will involve other institutions. In these situations, the legal system itself needs a political solution and consequently the Court is excluded from passing judgment. When a "political question" arises, the Italian Constitution Court is forced to adopt a procedural decision to certify the absence of the "constitutional tone" and to refuse to make decisions on the substance of the case. Unfortunately, this is a self-referential concept because it relies, above all, on a Court decision that defines a "non-justiciable area" in the specific case[40]. This means that a question of unconstitutionality is only considered political if the Constitutional Court decides it is so in concrete terms[41]. The Court may therefore decline its jurisdiction when its judgments are counter-productive, for example, due to its interference with Parliamentary discretion. The presence of a "non-justiciable area" – concurring approximately with legislative discretion – represents a constitutional value that, as such, must be balanced with every other constitutional principle[42].

In this sense, the "political question doctrine" establishes one of the main criteria for the case selection. If the Court qualifies a controversial matter as political, it should decline its jurisdiction, referring the solution of that specific case to the Parliament. On the contrary, if the case is qualified as non-political the Court

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[39] G. Hughes, *Civil disobedience and the political question*, in 1 N.Y.U. L. Rev. 43 (1968). See also *Dames & Moore v. Reagan*; *Goldwater v. Carter*; *United States v. Belmont* and *Lamont v. Woods*

[40] See C. Mezzanotte, *Le nozioni di potere e di conflitto nella giurisprudenza della Corte costituzionale*, in 1 Giur. Cost. 110 (1979) and A. Bickel, *Foreword the passive virtues. The Supreme Court 1960 term*, in 40 Harv. L. Rev. 54 (1961).

[41] R. Bin, *L'ultima fortezza,* cit. at 33, 125; L. Henkin, *Is there a "political question" doctrine?*, in 5 Yale L. J. 597 (1976).

[42] Cf. L. D'andrea, *Ragionevolezza e legittimazione del sistema* (2005); H. Wechsler, *Toward neutral principles of Constitutional law,* cit. at 12; L. Hand, *The bill of rights* (1958)

should decide on it. This manoeuvring is closely related to the legitimacy of every Constitutional Court and to the obligation to state the reasons on which the decision is grounded[43].

3. An historical perspective

These are the reasons why the Italian Constitutional Court has never defined the limit between political power and constitutional review in positive terms. This trait becomes more evident when the procedural decisions through which the Court declares the "non-justiciability" of a "political question" are taken into account[44].

From 1956 – the inaugural year of the Italian Constitutional Court – to 1988, constitutional jurisprudence highlighted the existence of parliamentary discretional power mainly by taking decisions of inadmissibility ("*decisioni di inammissibilità*"). In these three decades, the existence of a "political question" determined the Court's lack of competence as the provisions concerned choices strictly reserved to the national Parliament[45]. In this way, the "political questions doctrine" expressed the need, bound by the Constitution, to find a political settlement for a legal dispute [46]. As it still occurs in the United States[47], the "political questions" pinpoints a limit to constitutional review, reinforces the separation of powers and prevents judiciary from assuming competences entitled to other branches of government[48]. In these cases, the "political question doctrine" constitutes the main expression of

[43] See C. Douglas-Floyd, *The justiciability decision of the Burger Court*, in 60 Notre Dame L. Rev. 862 (1984).

[44] A. Ruggeri, *La discrezionalità del legislatore tra teoria e prassi*, in 1 Dir. e Soc. 1 (2007)

[45] Compare to A. Anzon, *Nuove tecniche decisorie della Corte costituzionale*, in 6 Giur. Cost. 3199 (1992) and R. Romboli, *Il giudizio di legittimità delle leggi in via incidentale*, in R. Romboli (ed.), *Il giudizio in via incidentale. Aggiornamenti in tema di processo costituzionale 1990-1992* (1993); V. Gunther, *The subtle vices of the passive virtues. A comment on principle and expediency in judicial review*, in 1 Colum. L. Rev. 64 (1964).

[46] A. Bickel, *The least dangerous branch,* cit. at 14

[47] Compare to D. Laycock, *Notes on the role of judicial review, the expansion of federal power and the structure of constitutional rights*, in 97 Yale L. J. 1711 (1990).

[48] See *ex multis* D. Shapiro, *Jurisdiction and discretion*, in 3 N.Y.U. L. Rev. 342 (1985) and O. Field, *The doctrine of political question in the Federal Courts,* cit..at 12

those "passive virtues", which should influence every Constitutional Court in its relation with the legislative power[49].

Initially, the Italian Constitutional Court made decisions on the substance of the case ("*decisioni di infondatezza*"), however, by stating reasons in a rapid manner and at times disregarding the question so much so the specific case was not analyzed in depth[50]. These judgments were soon replaced by decisions of inadmissibility, which despite being procedural in nature, often indicated the unconstitutionality of the challenged measure[51]. During the Seventies, decisions of inadmissibility increased, especially when the question forced the Court to adopt judgments in subject matters strictly reserved to parliamentary discretion. Therefore, the question did not challenge provisions concerning matters reserved to Parliament by constitutional rules[52]. In the Eighties, with respect to the "political question", the difficulties in differentiating between the adoption of procedural decisions ("*decisioni di inammissibilità*") and decisions on the substance of the case ("*decisioni di infondatezza*") became even more evident. In this period, the legislative discretion clause was used broadly in order to reduce the backlog stockpiled in the *Lockheed* proceeding[53]. The Court adopted these decisions, in an interchangeable way, often

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[49] Cf. A. Bickel, *Foreword the passive virtues,* cit. at 40 and J. Choper, *The Political Question Doctrine: Suggested Criteria*, in 65 Duke L. J. 1466 (2005).

[50] See for example C. cost. sent. 111/1968 annotated by L. Elia, *La guerra di Spagna come "fatto ideologico": un caso di political question?* (1968).

[51] C. cost. sent. 102/1977 and C. cost. sent. 137/1981. Cf. also L. Carlassare, *Le decisioni d'inammissibilità e di manifesta infondatezza della Corte costituzionale*, in Aa. Vv. *Strumenti e tecniche di giudizio della Corte costituzionale. Atti del convegno svoltosi a Trieste, 26-28 maggio 1986* (1988).

[52] A. Pizzorusso, *Nota a Corte costituzionale sentenza 1977, n. 102*, in 5 Foro It. 1607 (1977).

[53] Compare to F. Bonini, *Storia della Corte costituzionale* (1996); C. Rodotà, *Storia della Corte costituzionale*, (1990) and F. Sacco, *L'impatto della giurisprudenza costituzionale nella tutela dei diritti fondamentali: una prospettiva storica*, in R. Bin, G. Brunelli, A. Pugiotto & P. Veronesi (eds.), *Effettività e seguito delle tecniche decisorie della Corte costituzionale*, (2006). Similarly see F. Saja, *La giustizia costituzionale nel 1987. Conferenza stampa del 8 febbraio 1988*, in www.cortecostituzionale.it and E. Cheli, *Il giudice delle leggi. La Corte costituzionale nella dinamica dei poteri* (1996). For further information on the backlog see especially R. Romboli, *Il processo costituzionale dopo l'eliminazione dell'arretrato*, in 3 Quad. Cost. 592 (1991).

considering them equivalent and motivating them in the same way[54].

Nevertheless, in the Nineties, the Italian Constitutional Court dealt with "political question" along with decisions of inadmissibility ("*decisioni di inammissibilità*") and with decisions that declared the question unfounded ("*decisioni di infondatezza*"). Through these judgments, the Court dismissed the question, but, at the same time, it decided also on the substance of the case, concluding that the discipline challenged by the lower Court was constitutional; the subject matter was up to parliamentary discretion and it could not be reviewed[55]. At the same time, the Court made decisions of inadmissibility ("*decisioni di inammissibilità*") and it established legislative authority to regulate that particular sector, resolving that the lawmaker had made a reasonable choice. Through this reasonableness test, the Italian Constitutional Court indeed opts for the merits of the case[56]. In other particular cases, it emphasizes the limits of legislative discretion, declaring doubts over constitutionality as manifestly unfounded ("*decisioni di manifesta infondatezza*")[57]. These decisions were often justified in an uneven and tautological way and the Court declared the question unfounded, simply by asserting that the challenged provision was reasonable and that Parliament used its discretion in conformity with the Constitution[58].

It can be stated in general, that the Italian Court appears to use decisions of inadmissibility ("*decisioni di inammissibilità*"), when judging on matters traditionally covered by legislative discretion (i.e. substantive criminal law; immigration law; scientific basic; tax law and procedural law). It declares unfounded any doubts over constitutionality ("*decisioni di infondatezza*")., if parliamentary options do not appear irrational or arbitrary after a reasonableness check on concrete use of

[54] A. Cerri, *Corso di giustizia costituzionale globale* (2012)

[55] F. Felicetti, *Discrezionalità legislativa e giudizio di costituzionalità*, in 5 Foro It. 22 (1986) and A. Cerri, *Inammissibilità assoluta ed infondatezza*, in 5 Giur. Cost. 1219 (1983).

[56] For example, see C. cost. ord. 262/2005 and C. cost. ord. 401/2005.

[57] This concerns sectors in which the Court has always shown particular deference towards the political choices exercised by the legislator. Amongst these questions must be included criminal law, the discipline of the court institutions and basic tax law.

[58] Compare also to C. cost. ord. 215/2005.

legislative discretion[59]. Nonetheless, this is a tendential difference given those cases where the Court by making decisions of inadmissibility, examines also the reasonableness of the challenged rule[60]. Depending on the specific case, the Court indifferently uses both decisions of inadmissibility and decisions on the substance of the case by declaring doubts over constitutionality unfounded. The only difference lies in the effects that they produce on the other branches of government[61].

Decisions by which the Court declares unfounded doubts over constitutionality ("*decisioni di infondatezza*").produce legal effects on the referring judge ("*giudice a quo*"), because they do not prevent him from raising a new question grounded on different constitutional principles[62]. This particular opportunity to raise the question again allows the Constitutional Court to make another decision depending on new or changed circumstances[63]. On the other hand, decisions of inadmissibility ("*decisioni di inammissibilità*") produce substantive effects also on the legislative power and civil society, because they trigger a public debate on constitutional judgment and its grounds for the decision[64]. Bearing in mind the concrete case and its relationship with the other branches of government, the terms of the decision should be adopted only when the Court cannot declare unfounded the question of unconstitutionality through a decision on the substance of the case[65]. We should also consider that although decisions of inadmissibility can avoid an institutional conflict between the Court and Parliament, they frequently deny

[59] See L. Pesole, *L'inammissibilità per discrezionalità legislativa di una questione fondata,* cit. at 9.

[60] M. Luciani, *Le decisioni processuali e la logica del giudizio costituzionale incidentale* (1984).

[61] A. Cerri, *Inammissibilità «assoluta» e infondatezza*, in 5 Giur. Cost. 1223 (1983).

[62] See A. Pizzorusso, *Il controllo dell'uso della discrezionalità legislativa*, in Aa. Vv. *Strumenti e tecniche di giudizio della Corte costituzionale. Atti del convegno svoltosi a Trieste, 26-28 maggio 1986* (1988).

[63] C. Capolupo & C. Rastelli, *Le decisioni di infondatezza*, in M. Scudiero & S. Staiano (eds.), *La discrezionalità del legislatore nella giurisprudenza della Corte costituzionale (1988-1998)* (1999).

[64] Compare to P. Carrozza, *L'inammissibilità per discrezionalità del legislatore. Spunti per un dibattito sui rischi di una categoria "a rischio"*, in 5 Reg. 1703 (1994).

[65] Cf. L. Carlassare, *Le "questioni inammissibili" e la loro riproposizione*, in Aa. Vv., *Scritti su la giustizia costituzionale in onore di Vezio Crisafulli* (1985).

constitutional justice in main proceedings because they do not decide on the merits of the case. Therefore, the Italian Court prefers to include the referring judge, declaring unfounded the question of unconstitutionality or making an inadmissibility decision. This could suggest an interpretation in conformity with the Constitution ("*interpretazione costituzionalmente conforme*") or, possibly, adopting an additive judgment, indicating the principle that should be followed by Parliament in integrating statute law ("*sentenza additiva di principio*")[66].

This constant fluctuation between procedural decisions ("*decisioni di inammissibilità*") and decisions on the merits of the case ("*decisioni di infondatezza*") also indicates that the Italian Constitutional Court does not permanently decline its jurisdiction. Through these decisions, the Court does not affirm its lack of competence, but rather recognizes that the decisions and instruments in its hands cannot adequately solve the concrete question[67]. Indeed, parliamentary discretion is not the one and only principle that the Constitutional Court must consider in its judgment. This must be balanced with other interests protected by the Constitution, such as the fundamental rights of the parties involved in the main proceeding[68].

4. A "skeleton key" for constitutional review

In accordance with this brief review, it seems that in the Italian legal system the presence of a "political question" generally represents a procedural ground for making a decision on the

[66] L. Carlassare, *Le decisioni d'inammissibilità e di manifesta infondatezza*, cit. at 51.

[67] Cf. G. Silvestri, *La Corte costituzionale nella svolta di fine secolo*, in L. Violante & L. Minervini (eds.), *Storia d'Italia. Annali XIV. Legge, diritto, giustizia* (1998) and R. Romboli, *Ragionevolezza, motivazione delle decisioni ed ampliamento del contraddittorio nei giudizi costituzionali*, in Aa. Vv., *Il principio di ragionevolezza nella giurisprudenza della Corte costituzionale, Atti del Seminario svoltosi presso la Corte costituzionale nei giorni 13 e 14 ottobre 1992* (1994).

[68] C. Capolupo, *Le decisioni di inammissibilità*, in M. Scudiero & S. Staiano (eds.), *La discrezionalità del legislatore nella giurisprudenza della Corte costituzionale (1988-1998)*, (1999) and G. Silvestri, *Le sentenze normative della Corte costituzionale*, in Aa. Vv., *Scritti sulla giustizia costituzionale in onore di Vezio Crisafulli* (1985). Compare to A. Bonfield, *The guaranty clause of article IV, par. 4. A study of Congressional desuetude*, in 46 Minn. L. Rev. 513 (1962); L. Pollak, *Judicial power and the politics of the people*, in 81 Yale L. J. 72 (1962).

substance of the case. The absence of matters covered by legislative discretion constitutes a necessary requirement for the question of unconstitutionality or a logic premise for analyzing the merits of the case[69]. A procedural decision is necessary as it states the lack of constitutional jurisdiction, due to the need to avoid an assessment on parliamentary freedom of choice[70]. It seems to be the only way of complying with regulations prescribed by Article 28, l. 87/1953 and Article 134 of the Constitution, preventing the Court from exercising powers belonging to political institutions[71].

So much so that, in order to respect parliamentary discretion, decisions of inadmissibility are more frequent in particular cases. We must recognize that a constitutional decision is eventually oriented by specific cases and by questions of unconstitutionality concretely raised by the referring judge[72]. Such decisions allow the Court to choose between different terms, depending on the case and the matters entrusted to political discretion[73]. For this reason, the same Constitutional Court does not identify exactly a "non-justiciable area" totally covered by legislative power, but in these circumstances, it reserves itself the right to carry out a "reasonableness test" on the challenged provision[74].

This type of decisions is therefore used as a sort of "skeleton key", allowing the Italian Constitutional Court to set

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[69] G.P. Dolso, *Le decisioni di inammissibilità nella recente giurisprudenza della Corte*, in A. Barbera & T.F. Giupponi (eds.), *La prassi degli organi costituzionali* (2008); C.R. Sunstein, *One case at a time. Judicial minimalism in the Supreme Court* (1997).

[70] G. Silvestri, *Legge (controllo di costituzionalità)*, in 11 Dig. Disc. Pubbl. 354 (1994).

[71] See M. Carducci, *Impostazione del petitum e inammissibilità della questione*, in 4 Giur. Cost. 1090 (1992). Cf. also L. Pesole, *Sull'inammissibilità delle questioni di legittimità costituzionale sollevate in via incidentale: i più recenti indirizzi giurisprudenziali*, in 5 Giur. Cost. 1566 (1992).

[72] Compare to M. Montella, *La tipologia delle sentenze della Corte costituzionale*, (1992); E. Cohen, *The American perspective on the interface between Politics and the Court*, in 2/3 Perc. Cost. 163 (2010).

[73] See R. Pinardi, *Osservazioni a margine di inammissibilità (ovvero quando la Corte utilizza la necessita di rispettare la discrezionalità legislativa quale argomento non pertinente*), in 6 Giur. Cost. 3559 (1993).

[74] A. Ruggeri, *La discrezionalità del legislatore tra teoria e prassi*, in 1 Dir. & Soc. 49 (2007). Compare to C. Knechtle, *Isn't every case political? Political questions on the Russian, German, and American high courts*, in 26 Rev. Cent'l & East Eur. L. 134 (2000)

aside legislative provisions[75] especially when it makes a "reasonableness check" over the contested measure and the related parliamentary/political decision[76]. In order to justify its unlimited jurisdiction, the Court clarifies that in such circumstances its legal assessment is not well founded and it only concerns the manifestly reasonable aspects of the challenged rule[77]. When taken as a syllogistic comparison between similar circumstances, often, this use of the "rule of reason" is not a simple test on the equality of different situations. The reason being, that by using this particular yardstick, the Italian Court frequently judges the suitability, proportionality and logic coherence of the contested measure. The constitutional assessment concerning the adequacy of a statute law corresponds to a test of the balance between all constitutionally involved values[78]. The Court decides whether legal restraint of a fundamental right should be considered reasonable to protect another constitutional principle. The result of this "reasonableness test" depends primarily on concrete cases.

It must be excluded that the lawmaker distinguishes between the inalienable conditions of every human being. On the contrary, it must be accepted that, theoretically speaking, Parliament makes every other distinction, because this possibility falls within legislative discretion[79]. Firstly, the Constitutional Court should verify if the different regulations adopted by Parliament to approve the statute challenged by the lower Court

[75] See F. Felicetti, *Discrezionalità legislativa e giudizio di costituzionalità*, in 5 Foro It. 23 (1986), T. Martines, *Motivazione delle sentenze costituzionali e crisi della certezza del diritto*, in T. Martines (ed.), *Opere, Fonti del diritto e giustizia costituzionale* (2000) and R. Romboli, *La mancanza o l'insufficienza della motivazione come criterio di selezione,* in A. Ruggeri (ed.), *La motivazione delle decisioni della Corte costituzionale* (1994).

[76] See for example M. Giampieretti, *Tre tecniche di giudizio in una decisione di ragionevolezza*, in 1 Giur. Cost. 173 (1998) or C. cost. sent. 28/1998.

[77] C. cost. sent. 273/2010.

[78] Cf. V. Onida, *Giudizio di costituzionalità delle leggi e responsabilità finanziaria del Parlamento*, in Aa. Vv., *Le sentenze della Corte costituzionale e l'art. 81 comma ult. Cost. Atti del seminario svoltosi in Roma, Palazzo della Consulta, nei giorni 8 e 9 novembre 1991* (1993). See also above all A. Morrone, *Il custode della* ragionevolezza (2001); C. Colapietro, *La giurisprudenza costituzionale nella crisi dello Stato sociale* (1996).

[79] T. Ancora, *La Corte costituzionale e il potere legislativo*, in 6 Giur. Cost. 3826 (1981).

represent the better way of honoring another constitutional principle. Secondly, it is necessary to consider if a restriction upon one right challenged in the main proceeding is proportionate to the protection of another fundamental right[80]. Only in this way, according to a comparative judgment reviewed on the grounds of Article 3, paragraph 1, of the Italian Constitution, a constitutional defect may be considered a limit to legislative discretion[81].

4.1. Some paradigmatic cases.

Decisions of inadmissibility grounded on legislative discretion are not so numerous[82], they concern above all regulations wherein every legal option needs also a political assessment that necessarily falls into Parliament[83]. In general, such

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[80] L. Carlassare, *Le decisioni di inammissibilità e di manifesta infondatezza della Corte costituzionale*, in 5 Foro It. 293 (1985); G. Scaccia, *Gli "strumenti" della ragionevolezza nel giudizio costituzionale* (2000) and L. Paladin, *Corte costituzionale principio generale di uguaglianza: aprile 1979-dicembre 1983*, in Aa. Vv., *Scritti in onore di Vezio Crisafulli* (1985).

[81] Article 3, paragraph 1, of the Italian Constitution statutes that: "*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*". See especially F. Modugno, *Ancora sui controversi rapporti tra corte costituzionale e potere legislativo*, in 1 Giur. Cost. 19 (1988) and A. D'Andrea, *Ragionevolezza e legittimazione del sistema* (2005). Compare *ex plurimis* to C. cost. sent. 282/2010; C. cost. sent. 161/2009; C. cost. ord. 41/2009; C. cost. sent. 324/2008; C. cost. ord. 71/2007; C. cost. ord. 30/2007; C. cost. sent. 22/2007; C. cost. sent. 394/2006; C. cost. sent. 110/2002; C. cost. sent. 144/2001; C. cost. sent. 313/1995.

[82] R. Basile, *Le decisioni di manifesta inammissibilità e infondatezza per rispetto della discrezionalità del legislatore*, in A. Ruggeri (ed.), *La ridefinizione della forma di governo attraverso la giurisprudenza costituzionale* (2006). After an increase of 20% in the inadmissibility rulings in 1992, we can observe a progressive reduction equal to 6/7% during 2000, and settling in 2006 at 12%.

[83] C. cost. ord. 119/2009; C. cost. ordd. 4/2011; 274/2011; 336/2011; C. cost. ord. 138/2012; C. cost. sentt. 202/2008; 240/2008; 251/2008; 325/2008; 376/2008 and 431/2008; C. cost. sent. 257/2010, C. cost. sent. 117/2011; C. cost. sent. 274/2011; C. cost. sent. 36/2012 and C. cost. sent. 134/2012.". C. cost. sent. 109/2005, C. cost. sent. 163/2005C. cost. sent. 125/1992, annotated by R. Pinardi, *Discrezionalità legislativa ed efficacia temporale delle dichiarazioni di incostituzionalità: la sent. 125 del 1992 come decisione di incostituzionalità accertata ma non dichiarata*, in 4 Giur. Cost. 1083 (1992); C. cost. sent. 431/1993, C. cost. sent. 72/1997; C. cost. sent. 332/2003; C. cost. sent. 175/ 2004; C. cost. sent. 109/2005; C. cost. sent. 61/2006 and C. cost. sent. 22/2007 C. cost. sent. 202/2008; C. cost. sent. 325/2008; C. cost. sent. 376/2008 e C. cost. ord.

decisions involve all those cases where the Court is not able to review the substance of the case, because, by its nature, the matter must be regulated by another branch of government[84]. In this case, a judicial declaration exhibiting a "political question" reflects those constitutional provisions, which the Court and ordinary judges cannot freely interpret as they assign explicit duties to political bodies, using their political discretion[85]. These provisions determine a "non-justiciable area", which changes according to the rights protected and to the specific case. Consequently, the Court will prefer interpretations that uphold legislative power and political institutions[86]. In this perspective, the "political question doctrine" represents a particular technique of interpretation[87] that allows the Court to define the competences of each constitutional body[88].

When considering for example criminal law, legislative discretion determines respectively *quid* and *quomodo* for choices regarding criminal policy. On the one hand, Parliament discretionally individuates punishable acts and criminal offences[89]. On the other hand, it identifies the quality and degree of punishment to be inflicted for unlawful acts[90]. As a result, the

369/2006. See also L. Elia, *La guerra di Spagna come "fatto ideologico": un caso di* "political question", *cit.* at 50, 1749; C. cost. ord. 346/2006; C. cost. ord. 233/2007; C. cost. ordd. 31/2008; 58/2008; 116/2008; 177/2008; 186/2008; 270/2008; 293/2008; 299/2008; 316/2008; 333/2008; 379/2008; 406/2008; 421/2008

[84] C. Mortati, *Istituzioni di diritto pubblico* (1991).

[85] See N. Olivetti-Rason, *La dinamica costituzionale*, cit. at 2.

[86] Compare especially to P. Dionisopoulos, *A commentary on the constitutional issues in the Powell and related cases*, in 17 A. J. P. L. 103 (1968).

[87] Cf. M. Redish, *Judicial review and the "political question"*, in 79 N.Y.U. L. Rev. 1031 (1984) and L. Seidman, *The secret life of the political question doctrine*, in 37 John Marshall L. Rev. 441 (2004).

[88] See G. Hughes, *Civil disobedience and the political question*, cit. at 39

[89] Cf. *ex plurimis* C. cost. sent. 57/2013; C. cost. sent. 175/2012; C. cost. ord. 125/2012; C. cost. sent. 31/2012; C. cost. sent. 289/2011; C. cost. ord. 72/2011; C. cost. sent. 355/2010; C. cost. sent. 273/2010; C. cost. sent. 47/2010; C. cost. ord. 23/2009; C. cost. ord. 270/2008; C. cost. ord. 264/2007; C. cost. ord. 501/2002 and C. cost. ord. 140/2002.

[90] See for example C. cost. sent. 23/2013; C. cost. sent. 134/2012; C. cost. sent. 286/2011; C. cost. sent. 183/2011; C. cost. ord. 196/2008; C. cost. ord. 245/2003; C. cost. ord. 234/2003; C. cost. ord. 172/2003 and C. cost. ord. 254/2005 and C. cost. sent. 394/2006. Compare also to C. cost. sent. 68/2012; C. cost. ord. 336/2011; C. cost. sent. 84/2011; C. cost. ord. 32/2011; C. cost. sent. 294/2010; C.

Constitutional Court seems to be extremely cautious and sometimes even reluctant to intervene in an issue which, by definition, is completely covered by Parliament[91]. Only in a few cases may it assign some operative duties to the legislative power. However, it usually considers the Chambers as the only institutions entitled to make assessments about criminal policy[92]. The only limit the lawmaker has in this subjective matter is to link every criminal offence to a real danger to society. Otherwise, Parliament is completely free, especially when identifying legal goods to protect with criminal penalties[93]. Namely, Parliament is not bound by the Constitution to pursue particular interests[94], having, therefore, a wide margin of discretion to define a criminal offence[95].

In the same way, the Constitutional Court makes decisions of inadmissibility when questions raised by the lower Court call for "manipulative judgments" ("*sentenze manipolative*"), called *in malam partem*[96]. The statutory reserve prescribed by Article 25, paragraph 2, of the Constitution prevents the Italian Court from creating or extending offence, because only Parliament can make assessments concerning punishment and criminality[97].

Another aspect related to the fragile relation between constitutional review and legislative discretion in criminal law

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cost. sent. 250/2010; C. cost. sent. 161/2009; C. cost. ord. 424/2008; C. cost. sent. 145/2002; C. cost. ord. 262/2005 and C. cost. sent. 225/2008.

[91] Compare to A. Ruggeri, *Introduzione ai lavori*, in E. D'Orlando & L. Montanari (eds.), *Il diritto penale nella giurisprudenza costituzionale*, *Atti del seminario di studio del Gruppo di Pisa. Udine 7 novembre 2008* (2009) and G. Vassalli, *Diritto penale e giurisprudenza costituzionale,* in 1 Riv. It. Dir. Proc. Pen. 3 (2008) p. 3.

[92] C. cost. sent. 409/1989; C. cost., sent. 225/2008.

[93] A. Bonomi, *La discrezionalità assoluta del legislatore,* in E. D'orlando & L. Montanari (eds.), *Il diritto penale nella giurisprudenza costituzionale. Atti del seminario di studio del Gruppo di Pisa. Udine 7 novembre 2008* (2009).

[94] Cf. C. cost. sent. 71/1978.

[95] C. cost. sent. 225 /2008.

[96] Compare to C. Cost. ord. 187/2005; C. Cost. ord. 164/2007 and C. Cost. ord. 407/2007.

[97] See C. Cost. ord. 164/2007; C. cost. sent. 183/2000; C. cost. sent. 49/2002 and C. cost. sent. 61/2004. Article 25 of the Italian Constitution statues that: "*No one may be withheld from the jurisdiction of the judge previously ascertained by law. No one may be punished except on the basis of a law in force prior to the time when the offence was committed. No one may be subjected to restrictive measures except in those cases provided for by the law*".

pertains to the connection between criminal provision and the "rule of offensiveness" (so called "*principio di offensività*")[98]. This principle had always represented a constitutional limit to parliamentary discretion in substantive criminal law[99]. Nevertheless, constitutional decisions related to "rule of offensiveness" do not go through the substance of the case, and this provision is not a trenchant parameter in constitutional proceedings concerning the merits of substantive criminal law. The Court very rarely used this rule as a unique or autonomous parameter to strike down contested measures[100] and habitually prefers to use it together with other more specific constitutional principles[101]. In this way, the Court avoids interfering directly with parliamentary discretion in criminal policy, involves ordinary judges, develops the doctrine of interpretation in conformity with the Constitution, and asks them to interpret, as far as possible, criminal provisions in conformity with the "rule of offensiveness"[102].

In all cases regulating substantive criminal law, the sole limit to a free use of legislative discretion is due to strict observance of the "rule of reasonableness"[103]. In fact, the adoption of an unreasonable criminal provision represents a symptomatic example of misuse of discretionary power constitutionally given to Parliament[104].

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[98] M. Donini, *Teoria del reato*, in 16 Dig. Disc. Pen. 267 (1999). See also F. Palazzo, *Offensività e ragionevolezza nel controllo di costituzionalità sul contenuto delle leggi penali*, in G. Giostra & G. Insolera (eds.), *Costituzione, diritto e processo penale. I quarant'anni della Corte costituzionale* (1998).

[99] C. cost., sent. n. 360 del 1995, punto 7 del considerato in diritto.

[100] See C. cost. sent. 354/2002 and C. cost. sent. 263/2000.

[101] *Ex multis* cf. C. cost. sent. 370/1996.

[102] See A. Morrone, *Il custode della ragionevolezza*, Milano, cit. at 71, 229.

[103] Cf.. C. cost. sent. 291/2010; C. cost. sent. 250/2010; C. cost. sent. 324/2008; C. cost. sent. 74/2008; C. cost. sent. 22/2007; C. cost. sent. 361/2007; C. cost. ord. 394/2006; C. cost. sent. 206/2006; C. cost. ord. 212/2004; C. cost. ord. 262/2005; C. cost. ord. 234/2003; C. cost. sent. 206/2003; C. cost. sent. 313/1995; C. cost. sent. 144/2001; C. cost. sent. 409/1989 and C. cost. sent. 144/1970. See also A. Bevere, *Ragionevolezza del trattamento sanzionatorio penale nella legislazione e nella giurisprudenza*, in A. Cerri (ed.), *La ragionevolezza nella ricerca scientifica ed il suo ruolo specifico nel sapere giuridico. Atti del convegno di studi Roma, 2-4 ottobre 2006* (2007).

[104]. C. cost. sent. 161/2009; C. cost. sent. 234/2007; C. cost. sent. 224/2006; C. cost. sent. 364/2004; C. cost. sent. 117/2003; C. cost. sent. 287/2000; C. cost. sent.

In many respects, immigration law is fairly similar to substantive criminal law. In this subject matter the Italian Constitutional Court, at least formally, gives Parliament a wide margin of discretion[105]. According to the Court, entry and residence regulations governing a foreign citizen in national territory must be balanced with several general interests, i.e. public security, public health, public policy and international obligations, which above all imply a political assessment[106]. Those considerations lie exclusively with Parliament that is free to regulate this specific subject matter. The one and only limit fixed by the Constitution is that discretionary political choices must not be manifestly unreasonable or arbitrary[107].

When a decision on the substance of the case entails scientific and technical evaluations, the Constitutional Court declines its jurisdiction to preserve legislative discretion[108]. These are sector-based assessments which go beyond constitutional jurisdiction and which are usually regulated by specialized auxiliary parliamentary bodies. Therefore, the Constitutional Court considers that this need to make technical evaluations prevents it from deciding the merits of the case[109]. Even in these

58/1999 and C. cost. sent. 104/1969. Compare also to C. cost. sent. 148/2008; C. cost. sent. 394/2006; C. cost. ord. 234/2003; C. cost. ord. 144/2001; C. cost. ord. 297/1998 and C. cost. sent. 133/1995.

105 C. cost. sent. 148/2008. See also C. cost. sent. 172/2012; C. cost. sent. 245/2011; C. cost. sent. 64/2011; C. cost. sent. 299/2010; C. cost. sent. 249/2010; C. cost. ord. 218/2007; C. cost. sent. 206/2006; C. cost. ord. 44/2006 and C. cost. sent. 62/1994.

106 C. cost. sent. 202/2013; C. Cost. sent. 110/2012; C. cost. sent. 307/2011; C. cost. sent. 144/2011; C. cost. ord. 32/2011; C. cost. sent. 250/2010; C. cost. 139/2010: C. cost. sent. 148/2008; C. cost. sent. 206/2007; C. cost. ord. 126/2005 and C. cost. sent. 5/2004.

107 See C. cost. sent. 250/2010. *Ex multis* cf. also C. cost. sent. 57/2013; C. cost. sent. 172/2012; C. cost. sent. 299/2010; C. cost. sent. 245/2011; C. cost. sent. 231/2011; C. cost. sent. 265/2011; C. cost. sent. 164/2010; C. cost. sent. 249/2010; C. cost. sent. 148/2008; C. cost. ord. 218/2007; C. cost. ord. 44/2007; C. cost. sent. 206/2006; C. cost. sent. 62/1994; C. cost. sent. 144/1970 and C. cost. sent. 104/1969,

108 Cf., for example, C. cost. sent. 20/2012; C. cost. sent. 323/2008; C. cost. sent. 342/2006;C. cost. ord. 246/2003; C. cost. sent. 282/2002; C. cost. sent. 185/1998; C. cost. ord. 300/2001 and C. cost. sent. 139/1982;.

109 Compare to C. cost. sent. 271/2008; C. cost. sent. 338/2003; C. cost. sent. 226/2000; C. cost. sent. 372/1998; C. cost. sent. 258/1994; C. cost., sent.

circumstances parliamentary discretion could be reviewed through a "reasonableness check"[110]. Questions of unconstitutionality that present both scientific evaluations and ethical aspects are more problematic. In these particular cases, decisions of inadmissibility constitute a special "technique of avoidance", through which the Court chooses to decline jurisdiction in order to prevent rifts in its relationships with all political bodies. This is particularly manifest when scientific evidence is controversial and ideological views are much divided[111].

Finally, the Constitutional Court grants Parliament a wide margin of discretion in procedural law[112]. According to constitutional jurisprudence, the Italian Constitution does not provide a binding model for trials[113], so Parliament is free to define procedural rules. Procedural guarantees given by the

170/1982 and C. cost., sent. 22/1967 e.. See *passim* G. D'amico, *Scienza e diritto nella prospettiva del giudice delle leggi* (2008).

[110] Cf. C. cost. sent. 273/2011; C. cost. sent. 151/2009; C. cost. sent. 333/1991; C. cost. sent. 87/1989; C. cost. ord. 386/1987 and C. cost. sent. 180/1982.

[111] For example, regarding assisted reproductive technology, see C. cost. ord. 369/2006. L. Trucco, *La procreazione medicalmente assistita al vaglio della Corte costituzionale*, in www.giurcost.org; A. Morelli, *Quando la Corte decide di non decidere. Mancato ricorso all'illegittimità consequenziale e selezione discrezionale dei casi*, in www.forumcostituzionale.it and A. Celotto, *La Corte costituzionale "decide di non decidere" sulla procreazione medicalmente assistita*, in 6 Giur. Cost. 3846 (2006). In general compare to V. Barsotti, *L'arte di tacere strumenti e tecniche di non decisione della Corte suprema degli Stati Uniti* (1999).

[112] *Ex multis* see C. cost. sent. 119/2013; C. cost. ord. 276/2012; C. cost. ord. 270/2012; C. cost. sent. 304/2011; C. cost. ord. 31/2011; C. cost. sent.216/2011; C. cost. sent. 17/2011; C. cost. sent. 329/2009; C. cost. sent. 266/2009; C. cost. sent. 240/2008; C. cost. sent. 237/2007 and C. cost. ord. 305/2001. Especially through decisions which declare unfounded doubts over constitutionality, compare to C. cost. ord. 286/2012; C. cost. sent. 237/2012; C. cost. sent. 117/2012; C. cost. sent. 254/2011; C. cost. ord. 141/2011; C. cost. ord. 74/2011; C. cost. sent. 230/2010; C. cost. sent. 50/2010; C. cost. ord. 446/2007; C. cost. ord. 67/2007; C. cost. ord. 389/2005; C. cost. sent. 379/2005 and C. cost. sent. 427/1999

[113] C. cost., sent. 341/2006, Cf. also C. cost. ord. 88/2013; C. cost. ord. 26/2012; C. cost. ord. 290/2011; C. cost. sent. 220/2011; C. cost. sent. 130/2011; C. cost. ord. 343/2010; C. cost. sent. 221/2008; C. cost. sent. 417/2007 and C. cost. ord. 101/2006.

lawmaker must only be reasonable and must ensure the right to a fair hearing and equality of arms[114].

5. Decisions of inadmissibility and their dual nature.

The Italian Constitutional Court makes decisions of inadmissibility grounded on the respect of legislative discretion also when the case in question should be resolved by a plurality of legal assessments, all in conformity with the Constitution. The selection between all those solutions falls into Parliament.

These decisions justify better than others the adoption of a verdict of inadmissibility. The presence of subject matter covered by legislative discretion, regarding which there is no binding solution under the Constitution, ensures that Parliament is the unique institution, which is able to balance all the constitutional interests involved. Therefore, the Court declines its jurisdiction because it cannot stay within the "prescribed verses" (or the so called "*rime obbligate*")[115]. As emphasized by eminent scholars, the Constitutional Court, especially in judgments based on Article 3 of the Constitution, may add only those clauses that the Constitution requires. When the choice amongst a variety of solutions depends on a discretionary balancing of values, the Court stated that it may not try to establish the law[116].

Focusing on latest constitutional jurisprudence[117], it is worth mentioning the decision 138/2010. This judgment hereby

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[114] C. cost. sent. 295/1995 and C. cost. sent. 180/2004, See also C. cost. ord. 240/2012; C. cost. ord. 194/2012; C. cost. ord. 290/2011; C. cost. sent. 17/2011; C. cost. sent. 229/2010; C. cost. sent. 52/2010; C. cost. sent. 50/2010; C. cost. ord. 162/2009; C. cost. ord. 134/2009; C. cost. sent. 221/2008; C. cost. sent. 237/2007; C. cost. sent. 341/2006; C. cost. sent. 116/2006 and C. cost. sent. 376/2001.

[115] Cf. C. cost. sent. 134/2013; C. cost. sent. 301/2012; C. cost. ord. 138/2012; C. cost. sent. 134/2012; C. cost. ord. 113/2012; C. cost. sent. 36/2012; C. cost. sent. 274/2011; C. cost. sent. 271/2010; C. cost. ord. 77/2010; C. cost. ord. 182/2009 and C. cost. ord. 83/2007

[116] V. Crisafulli, *Lezioni di diritto costituzionale* (1974). Compare to D. Schkade, L. Ellman, A. Sawicki & R. Sunstein (eds.), *Are judges political? An Empirical Analysis of the Federal Judiciary* (2006).

[117] See C. cost. ord. 287/2009. Compare also to C. cost. sentt. 58, 103, 138, 250, 256, 257, 271, 294/2010; C. cost. sent. 274/2011; C. cost. sent. 36/2012; C. cost. sent. 134/2012 and. C. cost. ordd. 22, 105, 164, 276, 318, 321, 322, 336 e 335/2010; C. cost. ord. 44/2011 and C. cost. ord. 336/2011.

stands out not so much for the case in question, but for the procedural choices made by the Constitutional Court. It made a decision of inadmissibility, by individuating a discretionary power covered by Parliament. Starting from a comparative analysis of legislation about the legal recognition of same-sex marriages in the EU countries, the Italian Court highlights a variety of solutions, which depend on a discretionary balance between values, all of which are theoretically in conformity with the Constitution. Therefore, the choice among those legal solutions is left to parliamentary discretion, while the Constitutional Court can only intervene in order to protect particular cases[118]. Considering the topical and sensitive issue, it can be affirmed that the Court avoided a decision on the substance of the case and thus made a procedural decision, representing a compromise between all the ideological positions involved[119].

In this case, the "political question doctrine" seems to be a particular "technique of avoidance" that allows the Court to define constitutional problems, which, by their nature, are not justiciable because they involve specific subject matters covered by Parliament, departments of Government or voters[120].

The Italian Constitutional Court makes decisions of inadmissibility grounded on observance of legislative discretion, also when it is not able to adopt a "manipulative judgment" ("*sentenza manipolativa*"). On the one hand, the Court usually declares a law to be violating the Constitution to the extent that it lacks a norm that is constitutionally necessary and then it adds the missing rule to the statute ("*sentenze additive*"). On the other hand, it could also happen that instead of simply striking down the law,

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[118] Cf. for example R. Romboli, *Il diritto "consentito" al matrimonio ed il diritto "garantito" alla vita familiare per le coppie omosessuali in una pronuncia in cui la Corte dice "troppo" e "troppo poco"*, in *Giur. cost.*, 2010, p. 1629; A. Pugiotto, *Una lettura non reticente della sent. n. 138/2010: il monopolio eterosessuale del matrimonio*, in Aa.Vv., *Scritti in onore di Franco Modugno* (2011); I. Massa Pinto & C. Tripodina, *Le unioni omosessuali non possono essere ritenute omogenee al matrimonio. Tecniche argomentative impiegate dalla Corte costituzionale per motivare la sentenza n. 138 del 2010*, in 2 Dir. Pubbl. 471 (2010) and B. Pezzini, *Il matrimonio same-sex si potrà fare. La qualificazione della discrezionalità del legislatore nella sent. n. 138 del 2010 della Corte costituzionale*, in 4 Giur. Cost. 2715 (2010).

[119] C. cost. sent. 138/2010.

[120] See M. Finkelstein, *Judicial self-limitation,* cit. at 12; L. Henkin, *Is there a "political question" doctrine?,* cit. at. 41 and G. Zagrebelsky, *Il diritto mite*, cit. at 7.

the Constitutional Court carries out the substitution itself and fills a legal *vacuum* that would be created if the Court simply issues a judgment of acceptance ("*sentenze sostitutive*")[121]. It is clear that when there are a variety of legal solutions, each one being in conformity with the Constitution, a "manipulative judgment" could never be made and only Parliament is able to find a legal solution[122]. In this perspective, the question could be considered political because it concerns an assessment covered by legislative power and the pre-emptive analysis of the political aspect represents a necessary requirement[123]. In these situations, political decision-makers must resolve the case[124].

Through these decisions, the Italian Constitutional Court acknowledges the inadequacy of its traditional judgment in order to resolve the particular case[125]. This element stresses the dual nature of decisions of inadmissibility. They represent a safe and simple mechanism of avoiding a decision on the substance of the case, especially when concrete cases are controversial and, by delivering these decisions, the Court testifies to its inability to protect fundamental rights in the concrete situation. A decision of inadmissibility represents a sort of *extrema ratio* adopted by the Court when it cannot make a decision on the substance of the case[126]. When the Constitutional Court is not able to guarantee a reasonable balance between legislative discretion, constitutional review and concrete case solutions, it will probably adopt decisions of inadmissibility**,** underlining the defect of its legal instruments to deal with "political question"[127].

6. "Political question" and concrete case resolution

Decisions through which the Court decides on a "political question" are very flexible and allow it to measure the impact of

[121] Compare to V. Crisafulli, *Lezioni,* cit. at 116.
[122] P.A. Capotosti, *Matrimonio tra persone dello stesso sesso: infondatezza vs. inammissibilità nella sentenza n. 138 del 2010*, in 3 Quad. Cost. 361 (2010).
[123] Cf. C. cost. sent. 256/2010 and C. cost., sent. 109/1986.
[124] See C. Piperno, *La Corte costituzionale e il limite della* political question (1991).
[125] Compare to L. Paladin, *La giustizia costituzionale nel 1985. Conferenza stampa del 23 gennaio 1986*.
[126] Cf. A. Ruggeri & A. Spadaro, *Lineamenti di giustizia costituzionale*, cit. at 21, 168.
[127] R. Romboli, E. Malfatti & S. Panizza, *Giustizia costituzionale* (2011).

its judgments when these concern its relationships with Parliament[128]. They represent an interest in the resolution of the concrete case precisely because they confirm the substantial insufficiency of the ordinary regulatory instruments available to the Court in satisfying the applications put forward by the parties in the main proceeding[129]. For these reasons, the Court often decides on the way in which its own decisions affect concretely on the contested measure, especially in cases where it considers that a completely automatic application of its judgment could be excessively serious for the intervener's interest.

From this point of view, the development of the Italian constitutional jurisprudence and the judicial creation of new types of judgments could be reconnected to the provisions adopted in several legal systems – for instance, Germany or Austria – that allows the Constitutional Courts to modulate the consequences of their assessment[130]. This approach gives to Parliament the opportunity to better-regulate the contested measure, it protects the legislative discretion, and it also makes acceptable to politics the decision through which the Court declares the challenged provision to be unconstitutional.

This new trend increased in Italy during the Nineties, when the bipolarization of national parties forced the Court to decide on the constitutionality of recent and politically controversial statute law, or on proceedings concerning a jurisdictional dispute between branches of state highly characterized by a particular political tone, or finally on ethically sensitive issues[131]. The Court has thus progressively identified both technical means that would allow it to limit the retroactivity of its judgments and means,

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[128] M. Luciani, *Le decisioni processuali e la logica del giudizio costituzionale incidentale*, cit. at 60, 209.

[129] See for example C. Mezzanotte, *Il contenimento della retroattività degli effetti delle sentenze di accoglimento come questione di diritto costituzionale sostanziale*, in Aa. Vv., *Effetti temporali delle sentenze della Corte costituzionale anche con riferimento alle esperienze straniere, Atti del seminario di studi tenuto al palazzo della consulta il 23 e 24 novembre 1988* (1988).

[130] Especially distinguishing between the time when a provision is ruled unconstitutional and when the ruling becomes effective, See H. Schwartz, *The new East-European Constitutional Courts*, in A. Howard (ed.*), Constitution making in Eastern Europe* (1993) and C. Landfried, *Constitutional review and legislation. An international comparison* (1988).

[131] T. Groppi, *La legittimazione della giustizia costituzionale,* cit. at 5.

which project its effects largely into the future, delaying the consequences of the judgments of acceptance ("*sentenze di accoglimento*"). In this way, the Constitutional Court allows the Parliament to intervene and rule on the matter in accordance with its own political timings and its own discretionary options[132].

A particular nuance of the latter decision-making technique is certainly represented by the so-called judgments of "*incostituzionalità accertata ma non dichiarata*" or "*inammissibilità con dichiarazione di incostituzionalità*" (i.e. "confirmed but not declared unconstitutionality" or by "inadmissibility with a declaration of unconstitutionality"), by which the Court underlines the unconstitutionality of a challenged provision but, at the same time, it dismisses the claim proposed by the referring judge, in order to preserve parliamentary discretion[133], retaining in the legal system a rule which is surely unconstitutional[134]. Hence, by using these decisions the Italian Court, on the one hand, prevents the possibility of creating a lack of legislation and respects parliamentary discretion, preferring to keep, at least temporarily, the unconstitutional provision to enable the Parliament to adhere to the judgement rules[135], but, on the other hand, it would appear to contradict its own function. Indeed, the constitutional review of a legal provision cannot be excluded because of the simple fact that a judgment of acceptance needs a further legislative

[132] A. Ruggeri & A. Spadaro, *Lineamenti di giustizia costituzionale*, cit. at 21.

[133] Compare for example to C. cost. sent. 466/2002; C. cost. sent. 18/2003; C. cost. sent. 467/1991; C. cost. sent. 125/1992 and C. cost. sent. 256/1992. V. Onida, *Giudizio di costituzionalità delle leggi e responsabilità finanziaria del Parlamento*, cit. at 78, 36. Cf. to A. Stone, *Abstract constitutional review and policy making in Western Europe*, in D. Jackson & N. Tate (eds.), *Comparative judicial review and public policy* (1992).

[134] E. Rossi, *Corte costituzionale e discrezionalità del legislatore*, in R. Balduzzi, M. Cavino & J. Luther (eds.), *La giustizia costituzionale vent'anni dopo la svolta. Atti del Seminario svoltosi a Stresa il 12 novembre 2010* (2011); L. Carlassare, *Un inquietante esempio di «inammissibilità» a proposito dell'imputato infermo di mente*, in 3 Giur. Cost. 1314 (1981). See also V. Ferreres-Comella, *Constitutional courts and democratic values: a European perspective* (2009).

[135] See R. Pinardi, *L'*horror vacui *nel giudizio sulle leggi. Prassi e tecniche decisionali utilizzate dalla Corte costituzionale allo scopo di ovviare all'inerzia del legislatore* (2007).

intervention or because there is the potential risk, that the political debate does not start quickly[136].

In order to preserve the overall coherence of the legal system, the Court has developed new decision-making techniques allowing it to intervene again, especially in cases of parliamentary inaction. In this case, the unconstitutionality of a challenged rule induces the Court to accompany the decision of inadmissibility by an exhortation to Parliament[137], to intervene to adequate the law to constitutional precepts[138]. The consistency of the exhortation is determined by both the degree of actual discomfort perceived regarding the failure of a specific regulation to conform to the principles of the Constitution and the results of the legal prognosis concerning the jurisdictional remedies, which can possibly be effected in concrete terms in the case of prolonged inactivity by the lawmaker[139]. The exhortation can represent either the harbinger of a future declaration of unconstitutionality or a useful mechanism to plead to Parliament to find a remedy to a situation regarding which the Court cannot respond in appropriate terms[140]. Concerning future legislative options, the so-called "*moniti*" (or "exhortative judgments") respect parliamentary prerogatives, leaving to the representative bodies the right to comply with the requests contained in the judgment. This type of judgments seems to represent the most useful option to safeguard political discretion. Given that, it openly institutes a collaboration between the Constitutional Court and Parliament, indicating to the legislative power the problematic aspects of a particular rule, leaving to the political process the possibility of defining the most appropriate solutions to remove the situation of

136 L. Elia, *Le sentenze additive e la più recente giurisprudenza della Corte costituzionale (ottobre '81-luglio '85)*, in Aa. Vv., *Scritti in onore di Vezio Crisafulli* (1985); G. D'Orazio, *Le sentenze costituzionali additive tra esaltazione e contestazione*, in 3 Riv. Trim. Dir. Pubbl. 82 (1993); G.P. Dolso, *Le sentenze additive di principio: profili ricostruttivi e prospettive*, in 6 Giur. Cost. 4111 (1999).

137 G. Zagrebelsky & V. Marcenò, *La giustizia costituzionale*, cit. at 20, 305. See for example C. Cost. sent. 230/1987 and C. cost. sent. 266/1988.

138 Cf. C. cost. sent. 22/2007.

139 Compare to V. Marcenò, *La Corte costituzionale e le omissioni incostituzionali del legislatore: verso nuove tecniche decisorie*, in 4 Giur. Cost. 1985 (2000).

140 L. Elia, *Il potere creativo delle Corti costituzionali*, in Aa. Vv., *Le sentenze in Europa. Metodo tecniche e stile* (1988).

unconstitutionality underlined by the Court[141]. On the contrary, these verdicts temporarily privilege the timings and the methods of the political process regarding the demand for constitutional justice lodged by the parties in the concrete case[142].

For this reason, the Constitutional Court often prefers to adopt decisions, which manage at the same time to protect legislative discretion and a settlement in the concrete case, without having to apply a rule, which is clearly in contrast with the constitution. In this sense, the Constitutional Court developed a new type of judgments that declare provisions unconstitutional because of an omission, but instead of adding the rule that is missing, as it would with a conventional additive judgment, it simply indicates the principle that should be followed by Parliament in integrating the statute law (so-called "*sentenze additive di principio*")[143]. In these cases, the object of the justiciable act moves from the law to the exercising or failure to exercise of legislative power[144].

A cooperative relationship is thus established between the Constitutional Court, Parliament and ordinary judges, according to which, while the first abstains from effecting "manipulative judgments" ("*sentenze manipolative*") directly on the challenged

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[141] Cf. C. cost. sent. 179/1976, C. cost. sent. 148/1981, C. cost. sent. 212/1986, C. cost. sent. 215/1987, C. cost. ord. 176/1988, C. cost. ord. 586/1988, C. cost. sent. 826/1988, C. cost. sent. 202/1991, C. cost. sent. 284/1995, C. cost. sent. 436/1999, C. cost. sent. 526/2000, C. cost. sent. 310/2003, C. cost. sent. 32/2004, C. cost. sent. 155/2004, C. cost. sent. 61/2006. Among the scholars see L. Carlassare, *Le decisioni d'inammissibilità e di manifesta infondatezza della Corte costituzionale*, cit. at 51

[142] A. Ruggeri, Vacatio sententiae, "*retroattività parziale" e nuovi tipi di pronunzie della Corte costituzionale*, in Aa.Vv., *Effetti temporali delle sentenze della Corte costituzionale anche con riferimento alle esperienze straniere* (1989).

[143] R. Romboli, *Sull'esistenza di scelte riservate alla discrezionalità del legislatore*, in 2/3 Perc. Cost. 67 (2010).

[144] Compare to C. cost. sent. 215/1987, C. cost. sent. 560/1987, C. cost. sent. 406/1988, C. cost. sent. 497/1988, C. cost. sent. 277/1991, C. cost. sent. 88/1992, C. cost. sent. 204/1992, C. cost. sent. 232/1992, C. cost. sent. 109/1993, C. cost. sent. 243/1993, C. cost. sent. 455/1993, C. cost. sent. 218/1994, C. cost. sent. 284/1995, C. cost. sent. 171/1996, C. cost. sent. 52/1998, C. cost. sent. 417/1998, C. cost. sent. 26/1999, C. cost. sent. 61/1999, C. cost. sent. 270/1999; G. Salerno, *Una sentenza additiva di prestazione (rimessa al legislatore) in tema di indennità di disoccupazione involontaria*, in 2 Giur. It. 776 (1989); G. Parodi, *Le sentenze additive di principio*, in 5 Foro It. 160 (1998).

provision in observance of legislative discretion, the Parliament is openly exhorted to review the contested measure. In a contrary case, the ordinary judges can intervene promptly, by applying to concrete cases the principle indicated by the Court, without any need for further legislative intervention. In this way, the Parliament retains its own freedom of intervention unaltered. The lawmaker can freely choose the timing of the implementation of the principle indicated by the Court, because of the various requirements of a political nature, which arise in a specific situation. Parliament can legitimately decide from a ruling on that particular matter, without fear of leaving the protection of the different positions involved devoid of protection, given the self-applicative character of the principle set out. Again, the Chambers can decide on the methods of effecting the principle. Finally, Parliament can act freely also in relation to the amount, especially in a case where it a question not so much of redefining the matter of a specific right, but establishing the degree, when the constitutional provision is breached by an incongruous or disproportionate ruling[145].

Obviously, the presumption for similar decisions rests on a declaration of unconstitutionality accompanied by the identification of a plurality of possible remedies likely to solve the issue. The restoration of a situation of constitutionality requires therefore the precise identification of a solution that, because of the changing nature of the criteria used and the means adopted to reconcile opposing interests, must necessary be submitted to political evaluation[146]. In this way, the Constitutional Court and the Parliament are able to each exercise their own roles: the former by making the necessary judgment of acceptance; the latter through the addition of the statute law, confirming the principle indicated by the Court and balancing the interests involved[147].

The judicial creation of all these new types of decisions tries to reconcile both the urgency to preserve legislative discretion, related to the legitimacy of the constitutional review, and the need

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145 See A. Guazzarotti, *L'auto-applicabilità delle sentenze additive di principio*, in 5 Giur. Cost. 3437 (2002) and A. Cerri, *Corso di giustizia costituzionale*, cit. at 54.

146 Cf. C. cost. sent. 215/1987 and C. cost. sent. 277/1991.

147 Compare to G. Silvestri, *Le sentenze normative della Corte costituzionale*, cit. at 68 and A. Anzon, *Modello ed effetti della sentenza costituzionale sul caso Di Bella. Nota a C. cost. sent. 185/1998*, in 3 Giur. Cost. 1510 (1998).

to safeguard the protection of rights in the specific case. From this point of view, this trend could be compared with the recent attempt made in the "*New Commonwealth Model of Constitutionalism*" that is to say in legal systems, which is intermediate between the "weak forms of judicial review" and the "strong form of judicial review"[148]. This phenomenon lately developed in some "common law" Countries, such as Canada, New Zealand, Australia and Israel – but also in the United Kingdom – after the adoption of their respective "Bill of rights". It gives to Parliament the opportunity to intervene in regulating the contested measure, according to their different ways. Along these lines, the Courts provide a resolution for the specific case, protecting the rights of the parties, but, at the same time, the lawmaker could easily reverse the decision, regulating differently the subject matter[149].

7. Procedural decisions and case selection

As mentioned above, the use of the decisions by which the Constitutional Court confirm the existence of a matter reserved for parliamentary discretion, also constitutes a particular "technique of avoidance" regarding extremely delicate questions on the socio-political level[150]. Usually case selection refers to those operations that enable a judge to choose between several pending proceedings, to be able to concentrate its attention on those cases and controversies most suitable for a judicial review[151]. Such a similar power does not seem, at least on the surface, to be assigned to the Italian Constitutional Court[152].

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148 S. Garbaum, *The new Commonwealth model of constitutionalism*, in 34 Am. J. Comp. L. 707 (2001).

149 See R. Hirschl, *Towards juristocracy. The origins and consequences of new constitutionalism* (2004)

150 Cf. P. Calamandrei, *La illegittimità costituzionale delle leggi nel processo civile* (1950). Compare to R. Hirschl, *The question of case selection in comparative constitutional law*, in 4 Am. J. Comp. L. 125 (2005) T. Koopmans, *Courts and political institutions. A comparative view* (2003).

151 Compare to P. Bianchi, *Le tecniche di giudizio e la selezione dei casi*, in Aa.Vv., *L'accesso alla giustizia costituzionale: caratteri, limiti, prospettive di un modello* (2006).

152 F. Tirio, *Il* writ of certiorari *davanti alla Corte Suprema* (2000).

Article 1, paragraph 1, of the Constitutional Law 1/1948[153] seems to institute a real obligation for the Italian Court, setting out that the question of unconstitutionality must be referred to the Court for its decision. The aim of the constitutional proceeding is to lead to a ruling on the constitutional consistency of laws and enactments having the force of law. Therefore, the natural conclusion of the constitutional review must always coincide with a decision of the Court. In addition, Article 18 of the so-called "*Norme Integrative*" provides that the suspension, interruption or time limitation in the main proceeding do not have effects on the constitutional proceeding. This fact emphasizes the fundamentally *ex officio* nature of the *incidenter* proceeding and the associated requirement that once started should lead to a final and conclusive judgment[154]. In the same way, Article 27 of Law 87/1953[155], stating the perfect correspondence between the question of unconstitutionality put to the Court and the answer it gives in its judgment, leaves an obligation for the Court to respond to the doubts of constitutionality, which are, from time to time, submitted to it[156]. It follows that, not only there is no trace of a provision, which specifically expresses a "case selection", but also a systematic analysis of the statutes makes one incline towards the existence of an opposite rule, which also creates, *vis-a-vis* the Constitutional Court, a sort of obligation to provide an answer to all the questions submitted to it[157]. Given the above mentioned, it

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153 According to Art. 1, l. cost. 1/1948: "*The question of unconstitutionality regarding a law or enactments having the force of law referred ex officio or suggested to the Judge by one of the parties in the main proceedings and that is considered relevant to the case and show no signs of being groundless, has to be decided by the Constitutional Court for its decision*".

154 According to art. 18, Norme Integrative per i giudizi di fronte alla Corte costituzionale: "*The suspension, the interruption and the extintion of the main proceeding do not affect the constitutional review*".

155 According to art. 27, Law 87/1953 "*The Constitutional Court, when granting a referral order or a question regarding a law or enactments having the force of law states, according to the appeal, which are the provisions contrary to the Constitution. It also states which are the other legislative provisions whose illegitimacy derives from the main judgement of unconstitutionality*".

156 Compare to E. Catelani, *La determinazione della "questione di legittimità costituzionale" nel giudizio incidentale* (1993).

157 A positive case selection can be recognized in Article 37, par. 3, of Law 87/1953 concerning any conflict of responsibility between branches of the State, regarding which: "… The Court decides on the admissibility of the questions

appears useful to see if the Italian Constitutional Court retains further margins of manoeuvre that would permit it to indirectly proceed to a case selection using solutions derived from case law[158].

Evidently, this power could certainly emerge when dealing with "political question" which lead the Court to choose what would be the most suitable branch of government to resolve the controversy and the flexibility, which marks procedural decisions, enables in practice the adoption of real filtering mechanisms[159]. Therefore, even if the Constitutional Court does not systematically have the use of decisions, which would allow it to effect a case selection in the technical sense, it could still use its own range of decisions to select the cases to be decided on their substance[160]. In other words, even though none of the procedural decisions normally used by the Italian Court to effect case selection in the presence of one or more "political question" were to be created, several techniques effectively able to perform this function may be identified.

Firstly, decisions of inadmissibility that allow the Italian Constitutional Court to settle rapidly the question of unconstitutionality without having to examine the merits of the case must be considered. Nevertheless, it is rather complicated to identify with certainty those cases in which the Court uses a procedural decision, which considers it not appropriate to deal with a controversy featuring issues of a political nature. Only by closely examining the grounds can one obtain a more or less clear

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with order adopted in closed session on the *La Corte decide con ordinanza in Camera di consiglio sulla ammissibilità del ricorso …*".

158 A. Pizzorusso, *Verfassungsgerichtsbarkeit or Judicial Review of Legislation?*, in 5 Foro It. 1933 (1979).

159 Compare to D. Provine, *Case Selection in the United States Supreme Court* (1980); H. Abraham, *The judicial process: an introductory analysis of the courts of the United States, England, and France* (1980) and E. Mak, *Judicial decision making in a globalized world. A comparative analysis* (2013).

160 P. Bianchi, *La creazione giurisprudenziale delle tecniche di selezione dei* casi (1997). See also A. Hellman, *Case selection in the Burger Court: a preliminary inquiry*, in 37 Notre Dame L. Rev. 947 (1985); M. Cordray & R. Cordray, *Philosophy of certiorari: jurisprudential considerations in Supreme Court case selection*, in 2 Wash. Univ. L. Rev. 389 (2004).

legal assessment on the suitability of the challenged political choice[161].

Secondly, in order to avoid an examination of one or more cases considered politically controversial, the Court often argues a failure to state reason in the question of unconstitutionality. This expedient presents the undoubted advantage of assigning to the lower Court the formal reasons that are preventing an analysis of the substance of the case. It also allows the Constitutional Court to establish a dialogue with the judiciary that, following the indications of the Court, can reformulate its own question of unconstitutionality[162].

Moreover, the Constitutional Court seems to use, as a technique of indirect cases selection, those decisions which, when dealing with a matter falling within the discretion of the lawmaker, demur at an absent or inadequate attempt at interpretation in conformity with the Constitution[163]. This vague intention appears obvious especially in a case where the Court, by adopting a decision of inadmissibility, enables it to be over-ridden by an interpretation in conformity with the Constitution, which itself intends to indicate[164]. However, the situation can assume much more problematic overtones when it refers to a legislative omission regarding which the Constitutional Court prefers to assign the judiciary the task of balancing the individual principles involved in concrete terms. By refusing to identify the most suitable rule for resolving this specific dispute, the Court

[161] G.P. Dolso, *Giudici e Corte alle soglie del giudizio di costituzionalità* (2003).

[162] Compare to R. Romboli, *La mancanza o l'insufficienza della motivazione come criterio di selezione dei giudizi*, in A. Ruggeri (ed.), *La motivazione delle decisioni della Corte costituzionale* (1994).

[163] Cf. *ex plurimis* G. Sorrenti, *L'interpretazione conforme a Costituzione* (2006); G.U. Rescigno, *Quale criterio per scegliere una sentenza interpretativa di rigetto anziché una ordinanza di inammissibilità per mancato tentativo di interpretazione adeguatrice?*, in 6 Giur. Cost. 3362 (2008); V. Marcenò, *Le ordinanze di manifesta inammissibilità per insufficiente sforzo interpretativo: una tecnica che può coesistere con le decisioni manipolative (di norme) e con la dottrina del diritto vivente*, in 2 Giur. Cost. 785 (2005). See also C. cost. sent. 347/1998, C. cost. ord. 448/2007 and C. cost. ord. 205/2008.

[164] F. Tirio, *Selezione discrezionale dei casi davanti alla Corte Suprema federale statunitense*, in P. Costanzo (ed.), *L'organizzazione e il funzionamento della Corte costituzionale* (1996).

safeguards the legislative discretion, yet invites the judge to provide a settlement in the concrete case[165].

In practice, the procedural decisions enable the Constitutional Court to modify the response to give to a question, which touches upon political aspects according to the needs of the concrete case. This approach to practical effects of the decision can be presented differently according to specific requirements. On one side, there are decisions that vigorously argue for the effective presence of a political choice, which lies outside the proper duties of the Court. On the other, there are decisions, which use the discretionary clause in a merely rhetorical and assertive manner.

The Court will thus be able to filter the questions to be decided and to withdraw when it risks to clash with prerogatives of legislative power. The need not to interfere with the functioning of another institutional activity must be reconciled appropriately with the nature of the Court in the system. It does not lie to the Court to establish whether to decide, what to decide and when to decide, as any other political body should do[166].

Therefore, even when case selection takes place independently, the Italian Constitutional Court must in any event have in mind the task to administer constitutional justice in a concrete case, in cooperation with his own institutional interlocutors. This aspect is once again strictly linked to the problem of legitimacy and to the role of constitutional justice in modern societies. With this regard, a comparison with other legal systems could be useful to understand their substantial implications. By analysing foreign experiences, even if only apparently different from each other, it is possible to identify a common trait.

Managing political questions and selecting cases is generally easier in countries where Constitutional Courts enjoy particular legitimateness and thus have a strong power in the public opinion and in civil society (such as the US and in some cases also Germany whereby however there is no notion of "political question")[167]. From time to time Courts may therefore

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[165] See R. Bin, *Giudizio «in astratto» e delega di bilanciamento «in concreto» (nota a Corte cost. 419/1991)*, in 5 Giur. Cost. 3754 (1991).

[166] G. Silvestri, *La Corte costituzionale nella svolta di fine secolo*, cit. at 67

[167] Compare to D. Kommers, *Constitutional jurisprudence of the Federal Republic of Germany* (1999); T. Frank, *Political question/Judicial answer. Does the rule of law*

get involved in the judicial resolution of political questions or, alternatively, may decide to intervene in those topics particularly relevant without needing to provide specific arguments to support their choice[168]. On the contrary, in countries where Constitutional Law is particularly weak or not quite settled (such as the Russian Federation or more generally in Courts in Eastern Europe) it is highly likely they are involved in political disputes[169]. Very often in such countries, Courts cannot even choose cases where they may pronounce themselves, but having to second the contingent majorities' orientations, they ought to renounce to their traditional function as counter-majoritarian[170]. On the other hand, as it will be highlighted subsequently, the same Constitutional Courts are more willing to cover cases with particular political significance in countries where the political party system appears fragile or delegitimized [171]. At this juncture, Courts are triggered to balance the interests at stake and guarantee the respect of fundamental rights in place of political power and of an inert law-maker[172].

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apply to foreign affair?, (1992) and A. Brewer-Carias, *Judicial review in comparative law*, cit. at 6

[168] M. Cappelletti, *Judicial Review in the Contemporary World* (1970). See especially *Dames & Moore v. Reagan*; *United States v. Prink*; *United States v. Belmont*; *Missouri v. Holland*; *Holtzman v. Schlesinger*; *Lamont v. Woods*; *Nixon v. United States*;

[169] Cf. R. Sharlet, *The Russian Constitutional Court: The first term*, in 1 Post-Soviet Aff. 27 (1993); P. van den Berg, *Human rights in the legislation and the draft Constitution of the Russian Federation*, in 18 Rev. Cent'l & East Eur. L. 207 (1992) and A. Blankenagel, *Towards constitutionalism in Russia*, in 2 Rev. Cent'l & East Eur. L. n. 25 (1992).

[170] K. Lach & W. Sadurski, *Constitutional Courts of Central and Eastern Europe: Between Adolescence and Maturity*, in 3 J. Comp. L. 212 (2011); H. Schwartz, *The Struggle for Constitutional Justice in Post-Communist Europe*, (2000) and Z. Ovsepian, *Constitutional judicial review in the Russian Federation*, in *Russian Politics and Law*, 5/1996, p. 46 ss.

[171] Compare to J. Henderson, *The Constitutional Court of the Russian Federation. The Establishment and Evolution of Constitutional Supervision in Russia*, in *Journal of Comparative Law*, 3/2011, p. 138 ss. A. Trochev, *Implementing Russian Constitutional Court decisions*, in *East European Constitutional* Review, 11/2002, p. 95; S. Pashin, *A second edition of the Constitutional Court*, in *East European Constitutional Review* 4/1994 p. 82 ss.

[172] For widespread analysis of the constitutional jurisprudence in this particular context see C. Knechtle, *Isn't every case political? Political questions on the Russian, German, and American high courts,* cit. at 74.

8. "Political question" and constitutional rights: the case of the Italian electoral law

Assumed their extreme flexibility, judgments with which the Italian Constitutional Court faced parliamentary discretion recently enabled the same Court to openly decide on matters traditionally covered by legislative freedom of choice and of which the constitutional case law regarded them as such. The main reason for these interventions is twofold. On the one hand, given the pressing need to fill this systemic *vacuum* created by the prolonged parliamentary inactivity. On the other hand, given the need to guarantee the protection of fundamental rights[173].

A similar tendency may also be recognised in other European experiences (see for example the Austrian case)[174]. In such a hypothesis, the Constitutional Courts seem to exceed the limit of their powers to rectify the defect of the Parliament's failure to act or to minimize the consequences of a political decision on the individual rights. In the two cases under comparison, both the Italian and Austrian Constitutional Courts ought to force their contested decisions in such a way to commit an effective *overruling*. This was justified mainly by the need to guarantee the safeguarding of the fundamental rights and freedoms of the given matter. The outcome was the adoption of a political solution through legal means, as the Court believed it to be more relevant and sustainable for the entire legal system than the one prefigured by the lawmaker through the ordinary parliamentary discussion[175].

By its judgement of December 13th 2001, n. 404, the Austrian Constitutional Court repealed not only two administrative measures regulating toponymy in Carinthia, but also parts of the 1976 Federal Law on ethnic groups[176]. The original wording of the second paragraph of the law on ethnic groups provided that, in

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[173] See M. Tushnet, *Weak Courts strong rights. Judicial review and social welfare rights in comparative constitutional law* (2008); F. Weston, *Political questions*, cit. at 12; F. Scharpf, *Judicial review and the political question: a functional analysis*, cit. at 13

[174] Cf. A. Gamper & F. Palermo, *The Constitutional Court of Austria: Modern. Profiles of an Archetype of Constitutional Review*, in 3 J. Comp. L. 64 (2011).

[175] M. Redish, *Judicial review and the "political question"*, cit. at 71

[176] Compare to U. Haider-Quercia, *Oltre Kelsen: la Corte costituzionale austriaca come legislatore positivo*, in 2/3 Perc. Cost. 173 (2010).

order for the local toponymy to be translated for linguistic minorities, 25% of those living in "mixed populated" regions should belong to one of the territorial minorities allocated by that municipality[177].

Through a complex motivation, the Austrian Court declared the provision unconstitutional establishing that the translation into minor languages had as reference value 10% of those belonging to linguistic minorities. This, however, was made with neither legal nor constitutional reference, which prescribed it. Consequently, through this judgement the Court not only declares the norm unconstitutional, but also replaces itself completely with discretionary law by arbitrarily fixing the level of protection of the nationals' fundamental rights[178]. The choice to adjust the percentage value to safeguard the protection of linguistic minorities unequivocally belongs to the political realm and therefore its concrete assessment ought to belong to Parliament. The Court, however, by exploiting the presence of indefinite legal notions (i.e. the notion of "mixed population"), has taken on a political assessment which differs from that of the lawmaker[179].

Similarly, with judgment 1/2014, the Italian Constitutional Court essentially rewrote the national electoral law[180]. Not only, by openly discharging its previous jurisprudence on the matter, but also by replacing itself to the previous prescriptions adopted by a Parliament unable to find a political agreement in this subject[181]. Just as the Austrian Constitutional Court, also the

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[177] *Ibidem*.

[178] See G. Bongiovanni, *Rechtsstaat and Constitutional Justice in Austria: Hans Kelsen's Contribution*, in C. Costa – D. Zolo (eds.), *The Rule of Law. History. Theory and Criticism* (2007).

[179] H. Hausmaninger, *Judicial referral of constitutional question in Austria, Germany and Russia*, cit. at 22

[180] Law, December 21st, 2005, n. 270.

[181] See *ex multis* F. Sgrò, *Garanzie e preclusioni nei processi di riforma del sistema elettorale italiano*, in 3 Rass. Parl. (2013); B. Caravita, *La riforma elettorale alla luce della sent. 1/2014*, in www.federalismi.it; G. Guzzetta, *La sentenza n. 1 del 2014 sulla legge elettorale a una prima lettura*, in www.forumcostituzionale.it; I. Nicotra, *Proposte per una nuova legge elettorale alla luce delle motivazioni contenute nella sentenza della Corte costituzionale n. 1 del 2014*, in www.consultaonline.it; A. Poggi, *Politica "costituzionale" e legge elettorale: prime osservazioni alla sentenza n. 1 del 2014*, in www.confronticostituzionali.it and F. Dal Canto, *Corte costituzionale, diritto di voto e legge elettorale: non ci sono zone franche*, www.confronticostituzionali.it

Italian one justified its intervention on a political matter on the basis of both the Parliament's inertia and the need to guarantee the respect of fundamental rights.

Leaving aside the numerous faults of assignment of the case and the multiple possible solutions – all abstractly compatible with the Constitution – the Italian Court should have dismissed the question by declaring on the inadmissibility of the case[182]. Yet, in front of a legislative omission, the Court decided to intervene directly on the matter avoiding to leave the system with no instrument to exercise a fundamental right such as the right to vote[183].

The argumentative technique used is the reasonableness check. In particular, the Court believes the question concerning the fundamental right safeguarded by the Constitution, connected with the interest of the social body as a whole. The need to ensure constitutional principles is an indispensable justification for affirming the Court's power to review. The Court ought to include also laws, which would rarely be referred to it. The result would be the creation of a "free zone" in the constitutional legal system within a context strictly intertwined with the democratic order. Moreover, given the failure of Parliament to act, the Court often times renewed its call to the lawmaker to reconsider attentively the issues of national electoral provision[184]. It also repeatedly stressed the irrationality of allocating a majority premium with no minimum threshold[185].

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[182] Cf. A. Anzon, *Un tentativo coraggioso ma improprio di far valere l'incostituzionalità della legge per le elezioni politiche (e per coprire una "zona franca" del giudizio di costituzionalità)*, in 1 Nomos 21 (2013) and F. Conte, *Un ricorso (quasi) diretto a tutela dei diritti fondamentali? Brevi considerazioni sull'ordinanza 12060/2013 della Cassazione Civile*, in www.forumcostituzionale.it

[183] Compare for example to P. Carnevale, *La Cassazione all'attacco della legge elettorale. Riflessioni a prima lettura alla luce di una recente ordinanza di rimessione della Suprema Corte*, in 1 Nomos 43 (2013); R. Dickmann, *La Corte dichiara incostituzionale il premio di maggioranza e il voto di lista e introduce un sistema elettorale proporzionale puro fondato su una preferenza*, in www.federalismi.it; H. Schmit, *La sentenza 1/2014 e i diritti elettorali garantiti dalla Costituzione*, in www.forumcostituzionale.it; and G. Scaccia, *Riflessi ordinamentali dell'annullamento della legge n. 270 del 2005 e riforma della legge elettorale*, in www.confronticostituzionali.it

[184] C. cost. sent. 1/2014, 2 cons. dir.

[185] C. cost. sent. 1/2014, 3.1 cons. dir.

In areas characterized by a wide margin of appreciation, the judgment of constitutionality requires that the balance of interests in the relevant case does not excessively determine the reduction of either of them. This judgment must be undertaken by weighs that are proportionate to the instruments chosen by Parliament in its indisputable discretion with respect to the objective needs to satisfy or to the targets to pursue, taking into consideration the circumstances and the prevailing limits[186].

This test of proportionality requires to evaluate if the norm subject to scrutiny, by complying with measures and requirements laid down, is necessary and appropriate for the fulfilment of legitimate objectives. Moreover, this norm should prescribe the least restrictive of all measures in terms of rights and avoid disproportionate charges in compliance with the pursuit of those objectives. In the absence of this proportionality, the Court declares the unconstitutionality of the electoral law. It will thus insert in the legal system a totally new and different law from the original one pursuing diametrically opposed objectives.

9. Some concluding remarks

Despite the indirect instrument of procedural decisions, the "political question doctrine" seems to have been established also in the Italian legal system. As highlighted before, in the North-American legal systems the "political question doctrine" mainly acts as a privileged instrument to re-affirm the separation of powers. On the contrary, in the Italian system this canon is characterized mostly as a peculiar technique of constitutional interpretation, assigning relevance to the resolution of the concrete case and guaranteeing the maximum integration as possible of individual rights.

In the Italian constitutional jurisprudence the recognition of matters exclusively reserved to the legislator is not only a "technique of avoidance" but it also urges the Court to asses if, by considering the concrete case, the Parliament represents the main institutional body qualified to fulfil the interests of the legal system from the specific case. In order to scrutinize which state body is most suitable, the Court mainly uses the "skeleton key"

[186] C. cost. sent. 1/2014, 4 cons. dir.

represented by the "reasonableness check". It therefore evaluates the proportionality and adequacy of the instruments designed by the legislator. Should these turn out disproportioned or irrelevant, the Court will intervene in the specific matter despite being assigned to the legislative power until that moment so as to avoid any undefended protection of rights.

The Italian constitutional case law does not seem to have drawn a real and proper "non-justiciable area" which neatly marks the differences in competences between the Court and Parliament. This area changes given the decisions of the Constitutional Court according to the circumstances of the concrete case, of the socio-political context and of the lawmaker's attitude. This area will therefore expand or reduce based on the different systemic needs and on the competence of the various State bodies to cooperate in order to implement the Constitution. In order to avoid any impression of usurping powers or competences, which do not belong to its duties, the Court must convincingly motivate its interventions in particularly sensitive in political terms. This will highlight the "loyal cooperation" between the state bodies in the implementation of the Constitution and it will enable it to legitimize more and more itself vis-à-vis the society.