

### **Presentation**

Paolo Grossi\*

The Italian Constitutional Court has recently shown an intensifying tendency to establish ongoing relations with various European and non-European constitutional courts, certain that such a dialogue will contribute to a proficient cross-fertilization in the realm of constitutional law. In historical times such as these, during which obtuse and close-minded legal nationalism poses several threats, a better technical and cultural awareness necessarily presupposes the knowledge of a variety of case laws.

With this in mind, I cannot but express a wholehearted support for the idea to include, within the 'Italian Law Journal', a section seeking to provide adequate information on the most significant judgments handed down by the Italian Court in the previous year.

Their publication in English, which is the most common language, will facilitate familiarity with a body of decisions that fully deserves being used and valued.

This will make it easier to compare the styles and traditions of different national courts, which is a first step in the difficult road towards a future case law aiming to harmonize differences.

I would like to express, also on behalf of the whole panel of constitutional justices, sincere gratitude to the Section's Founders and Editors, along with best wishes for their successful work.

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### **Methods and Purposes of the Constitutional Court Watch**

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1. The Italian Constitutional Court is the fundamental guardian of the 1947 Constitution. Its case law gives expression to the Constitution as it lives, not only because of the position of the Court as its most qualified interpreter, but also because ordinary courts – as well as political bodies – refer to the Court and to its case law to find solutions to any legal issue related to the Constitution. The impact of the Court's judgments, therefore, goes far beyond the specific cases decided. This is uncontested with regard to judgments declaring the unconstitutionality of the challenged legislation, since the declaration results in the annulment of such legislation. However, other judgments also have general impact, precisely because of the authority that all Italian courts and political bodies recognize to the Constitutional Court and to its interpretation of the Constitution.

2. The Constitutional Court wields two kinds of power: the power to decide special constitutional controversies, and the power to perform constitutional review of legislation. The special controversies are those that arise from the distribution of power among the supreme bodies of the State, or between the central State and the Regions (Art 134, para 2, of the Constitution). The Constitutional Court also has the power to decide whether a referendum can be held, depending on whether its object falls within the domain determined by Art 75 of the Constitution. Finally, the Court decides on charges of high treason or attack on the Constitution brought against the President of the Republic (Art 90 of the Constitution).

The most important power is, however, that to review legislation, which can be carried out in an abstract or in a concrete form.

Abstract review addresses either appeals from the national government against a Regional legislative act or appeals lodged by a Region against a national legislative act. In this direct review of constitutionality, complaints must be filed within sixty days following the publication of the challenged act(s).

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When concrete review is performed, ordinary courts are empowered to refer a question to the Constitutional Court when there are doubts as to the constitutionality of a legislative provision that should be applied in proceedings before them. Thus, the Constitutional Court reviews the provisions' constitutionality on the basis of the case in which the issue arose and the concrete review takes the form of an incidental review of constitutionality.

Established in 1956, the Court delivers an average of three to four hundred judgments and orders each year. As a result, over six decades, an extremely rich body of case law was created, concerning all of the most significant issues arising in law and society, especially thanks to the incidental review of constitutionality.

Despite the quality of the judgments, their importance from a legal point of view, and their impact on society, knowledge of the activity of the Constitutional Court rarely crosses national borders, such that with only a few exceptions, the Court does not appear to play the role that it deserves in global judicial dialogue – the importance of which is underscored by President Grossi in his *Presentation* – and in the implementation of cross-fertilization processes that follows.

Several reasons explain why the transnational impact of the Constitutional Court's case law is not comparable with the longstanding tradition of the Court itself. Among these reasons, it is fair to include the relatively restricted knowledge of Italian among foreign scholars and the difficulties relating to a highly technical and complex style in drafting judgments.

3. The main purpose of this new section relates precisely to these two reasons. Indeed, the *Italian Law Journal* aims to contribute to spreading knowledge of and stimulating interest in Italian constitutional case law among foreign scholars.

Rather than providing a translation of entire judgments, brief presentations of salient decisions are provided, to highlight the main legal issues dealt with by the Court. Readers who are interested in examining such issues in further detail may access the link, provided wherever available, to the Constitutional Court's English translation of the relevant *Conclusions on points of law*.

This first issue concerns the case law of 2016. Among the two hundred ninety-two judgments and orders delivered last year, a selection was made taking into account the significance of the legal reasoning, the impact of the Court's statements, and the interest of the subject from a comparative point of view. Indeed, given the purpose of the section, the idea was to feature those judgments that, in our view, are more capable than others to give the Court a chance to have a say in legal issues that are common to different systems. In this regard, the selection focused mostly on fundamental rights, although some crucial aspects of government and of the lawmaking process were also considered.

4. The judgments selected dealt with a wide range of subjects.

Some judgments fell within the scope of family law, because they related to stepchild adoption (Judgment no 76), the relationship between a child and the same-sex partner of its biological parent (Judgment no 225) and the choice of a child's surname (Judgment no 286).

The bioethical issues arising were the fate of supernumerary embryos in medically assisted reproduction (Judgment no 84) and the regulation of advance directives (Judgment no 262).

Freedom of religion was taken into account with regard to agreements between the State and religious denominations (Judgment no 52) and to the establishment of places of worship (Judgment no 63).

The welfare State and social security is another field in which the Court rendered significant judgments, concerning the social contribution for out-of-work persons (Judgment no 173), survivors' pensions (Judgment no 174), assistance to persons with disabilities (Judgment no 213) and the right to education of disabled persons (Judgment no 275). The protection of workers was examined with specific regard to the staff of public schools employed on the basis of fixed-term contracts (Judgment no 187).

One of the most significant issues relating to free competition dealt with public transportation (Judgment no 265), while the freedom to use illicit substances was considered with reference to the cultivation of cannabis plants for personal consumption (Judgment no 109). The law on illegal substances was also examined in Judgment no 94; in that case, however, the key issue was the relationship between the contents of a decree-law and the provisions of the law that converted it into a law itself.

The judicial protection of rights was involved in judgments relating to the excessive length of legal proceedings (Judgment no 36), the limits of the exclusive jurisdiction conferred to administrative courts (Judgment no 179) and the protection against double jeopardy (Judgment no 200).

The public administration was also dealt with. In particular, the cases concerned a provision that introduced a special position in the civil service but that was subsequently abolished (Judgment no 214) and the impact, on the powers of the Regions, of a national reform concerning several aspects of the public administration (Judgment no 251).



## Italian Constitutional Court's Selected Judgments of 2016

### Judgment 13 January – 19 February 2016 no 36\*

*(Incidental Review of Constitutionality)*

**KEYWORDS:** *Excessive Length of Judicial Proceedings – Infringements of Art 6 ECHR – Law Establishing the Maximum Length of Judicial Proceedings – Application to Just Satisfaction Proceedings – Partial Unconstitutionality.*

1. The issue raised before the Constitutional Court by the Court of Appeal of Florence concerned the validity of Art 2, paras 2-*bis* and 2-*ter*, of Law 24 March 2001 no 89 (just satisfaction in case of violation of the reasonable length of judicial proceedings), as amended by the Decree-Law 22 June 2012 no 83 (converted by Art 1, para 1, Law 7 August 2012), which defines as 'reasonable' a period of three years in the first instance, of two years in the second instance, and of one year for proceedings before the Court of Cassation. The entire judicial proceedings must not exceed, in any case, six years.

2. To address the multitude of breaches found due to the excessive length of judicial proceedings inflicted by the European Court of Human Rights (or ECtHR, according to which this was a 'practice incompatible with the Convention': Eur. Court H.R., *Bottazzi v Italy*, Judgment of

27 July 1999), Parliament passed Law no 89 of 2001 (also known as the 'Pinto Law'), which established a compensatory mechanism for those who suffered damages due to the infringement of the reasonable length of proceedings required by Art 6, para 1, of the European Convention on Human Rights (ECHR). However, the law only shifted the dispute to the national level, and '(did not change) the substantive problem, namely, the fact that the length of the proceedings in Italy continue to be excessive' (Eur. Court H.R., *Scordino v Italy*, Judgment of 29 March 2006). Although the law had a limited purpose, the ECtHR held that the mechanism it established was acceptable, provided that the compensatory judgment was handed down in a short period of time. This principle was implemented by the Court of Cassation, the case law of which imposed a maximum length of one year for first-degree proceedings for just satisfaction; the same limit applied for proceedings before the Court of Cassation, such that the maximum length of the proceedings for just satisfaction could not exceed two years.

3. In 2012, with the entry into force of amendments to Law no 89 of 2001 to introduce Art 2, paras 2-*bis* and 2-*ter*, the time limits established by the new provisions were applied to all types of proceedings, and also, therefore, to just satisfaction proceedings, as no exception was provided. As a result, the maximum length

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of just satisfaction proceedings was extended with respect to the two-year period required by previous case law.

The question of constitutionality raised by the Court of Appeal of Florence focused on this very extension. In this regard, the ECtHR requires that just satisfaction for damages deriving from the excessive length of previous proceedings be granted in a shorter period of time compared to that required for ordinary proceedings, which are generally more complex.

4. Taking this principle into account, when defining the reasonable length of judicial proceedings, the national law could not apply the time limits established for ordinary proceedings to proceedings initiated to decide the issue of just satisfaction. The contested provisions were there-

fore held to be unconstitutional due to their breach of Arts 111, para 2, and 117, para 1, of the Constitution, as a result of the infringement of Art 6, para 1, ECHR, as interpreted by the ECtHR.

In particular, the Constitutional Court declared that the provisions of Law no 89 of 2001 were unconstitutional, insofar as they considered reasonable the three-year period for first-instance proceedings concerning just satisfaction.

5. On the contrary, the Constitutional Court declared the unfoundedness of the question of constitutionality concerning the application of the general time limits to proceedings for just satisfaction before the Court of Cassation: the maximum length of one year was deemed consistent with the rules established by the ECtHR.

### **Judgment 27 January – 10 March 2016 no 52\***

*(Conflict of Attribution Between Branches  
of the State)*

*KEYWORDS: Religions other than Catholicism – Agreement Between Religious Denominations and State – Government’s Refusal to Launch Negotiations – Governmental Discretion – Non-Justiciability.*

1. The Constitutional Court was called to rule upon the constitutional dispute between the President of the Council of Ministers and the Court of Cassation with regard to Judgment no 16305 delivered by the Joint Civil Divisions of the same Court of Cassation on 28 June 2013.

The Council of Ministers had decided to refrain from launching negotiations

aiming to reach an agreement (*intesa*) with the Union of Atheists and Rationalist Agnostics (*Unione di Atei e Agnostici Razionalisti*, hereafter, UAAR) pursuant to Art 8, para 3, of the Constitution. According to this provision, relations between the State and religions other than Catholicism ‘are regulated by law on the basis of an agreement concluded between their respective representatives’. The Government asserted that the practice of atheism could not be considered equivalent to a religious faith. The UAAR filed a lawsuit to challenge this refusal and the Court of Cassation, in its aforementioned Judgment, concluded that the Government is under a legal obligation to engage in negotiations pursuant to Art 8 of the Constitution due to the sole fact that an association has made such a request.

2. In articulating objections to the Court of Cassation’s ruling, the President

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of the Council of Ministers argued that it encroached upon the function of policy-making in the area of religious matters, which the Constitution vests in the Government (Arts 7, 8, para 3, 92 and 95 of the Constitution). This function is ‘absolutely free as regards its ends’ and thus ‘not subject to review by the ordinary courts’.

The Government’s refusal to accept an association’s request to launch negotiations cannot be subjected to judicial review. It is a discretionary matter for the Executive, on the grounds of Arts 8, para 3, and 95 of the Constitution. Moreover, the actionability of the legal entitlement to launch negotiations was stated to be a corollary of the equal freedoms guaranteed to all religions under Art 8, para 1, of the Constitution. It would prevent the exercise of absolute governmental discretion in this area from giving rise to arbitrary discrimination.

3. Before the Constitutional Court, the President of the Council of Ministers argued that it was not for the Court of Cassation to assert that the ordinary courts were empowered to review the Council of Ministers’ refusal to launch negotiations for an agreement pursuant to Art 8, para 3. The Court overturned the Cassation’s ruling for the following reasons.

The Italian legal system is characterized by the principles of secularism, impartiality and equidistance with regard to each religion. Thus, agreements are not a requirement imposed by the public authorities to enable religions to enjoy freedom of organization and action, or to benefit from the application of the legal provisions addressed to them.

Notwithstanding the conclusion of agreements, equal freedom of organization and action is guaranteed to all religions by the first two paragraphs of Art 8 and

by Art 19 of the Constitution. Furthermore, it is incorrect to assert that Art 8, para 3, of the Constitution, which provides for the extension of the ‘bilateral method’ to non-Catholic beliefs, is a procedural provision that merely serves the first two paragraphs. The third paragraph has the self-standing meaning of enabling the extension of the bilateral method to relations between the State and non-Catholic beliefs. The reference to that method reflects the common intention of both parties, and applies from the very moment of the decision to launch negotiations.

To establish a legally enforceable claim to launch negotiations, ordinary courts cannot review the Government’s refusal of a request submitted by an association, alleging that it is religious in nature (on this point, see Judgment no 346 of 2002). Thus, the reservation to the Council of Ministers of the competence to decide whether or not to launch negotiations has the effect of establishing the possibility of an effective control by Parliament, from the preliminary stage to the actual launching of negotiations. Considering a reasonable balancing of the interests protected by Arts 8 and 95 of the Constitution, there is no judicially enforceable claim – for any association that so requests, asserting that it is a religion – to the launching of negotiations pursuant to Art 8, para 3, of the Constitution.

In any case, the refusal at issue cannot produce additional negative effects for the applicant association. It is one matter to identify, on an abstract level, the characteristics that distinguish a social group pursuing religious purposes as a faith; the Government’s decision to launch negotiations pursuant to Art 8, para 3, is quite another. Indeed, this choice depends on delicate assessments of appropriateness,

which Arts 8, para 3, and 95 of the Constitution place under the responsibility of the Government. Within this limited context, and only within it, the Council of Ministers is thus vested with political discretion, under any possible control of Parliament, which cannot be brought before the courts for review.

4. For these reasons, the Constitutional Court ruled that it was not for the Court of Cassation to decide that the resolution by which the Council of Ministers refused to initiate negotiations with the Union of

Atheists and Rationalist Agnostics, concerning the conclusion of an agreement pursuant to Art 8, para 3, of the Constitution, was subject to judicial review. Therefore, the Court annulled Judgment no 16305 of the Joint Civil Divisions of the Court of Cassation of 28 June 2013.

*The full text of the English translation of the Conclusions on points of law is available at [www.cortecostituzionale.it/documenti/download/doc/recent\\_judgments/S52\\_2016\\_en.pdf](http://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S52_2016_en.pdf).*

### **Judgment 23 February – 24 March 2016 no 63\***

*(Direct Review of Constitutionality)*

*KEYWORDS: Freedom of Religion – Establishment of New Places of Worship – Requirements – Regional Law – Partial Unconstitutionality.*

1. The President of the Council of Ministers raised a question of constitutionality concerning Arts 70 and 72 of Lombardy's Regional Law 11 March 2005 no 12, establishing principles governing the planning of facilities for religious services. The claimant argued that the contested provisions infringed freedom of religion, which is protected by the Constitution as well as by international and supranational law, and that they exceeded the Region's legislative competences.

2. Longstanding constitutional case law has construed the principle of secularism not as disregard for religious experience, but rather as a safeguard of reli-

gious freedom in a context of confessional and cultural diversity (Judgments nos 508 of 2000, 329 of 1997, 440 of 1995, and 203 of 1989). The Constitution grants freedom of practice to all religions, regardless of the existence of an agreement (*intesa*) with the State (Judgment no 52 of 2016). On the contrary, these bilateral agreements are designed either to meet specific needs of the religious denominations (Judgment no 235 of 1997), to grant them advantages and impose restrictions (Judgment no 59 of 1958), or to recognize their actions within the legal system (Judgment no 52 of 2016). To this end, the number of adherents to the religion in question is of no importance (Judgment no 329 of 1997).

To establish new places of worship, the authorities cannot demand prior agreements, which are required only if and to the extent that religious bodies seek to attach legal consequences to their acts (Judgment no 59 of 1958). This is not to say that all denominations must enjoy equal access to public funding and available spaces. For this purpose, all relevant public interests must be weighed,

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and due consideration must be given to the religion's presence on the territory, its social impact and local religious needs.

The Court examined Art 70, as amended by Regional Law 3 February 2015 no 2, which divides religions into three categories for the purposes of building places of worship and religious facilities: the Catholic Church (para 1); religions that have signed agreements with the State (para 2); and all other religions (para 2-*bis*). The latter are subject to the provisions set forth in said Arts 70-73, provided that they are present throughout the territory and comply with the principles and values enshrined in the Constitution. A regional authority must verify that all requirements have been fulfilled and issue a non-binding opinion (para 2-*quater*).

The provisions at issue fall within the concurrent competence of 'land-use planning', under Art 117, para 3, of the Constitution. Such competence is restricted to ensuring the balanced and cohesive development of residential areas and improving public services, including religious facilities (Judgment no 195 of 1993). However, when exercising this competence, regional lawmakers are not entitled to obstruct or compromise freedom of religion, thus overstepping into an area in which the need to maintain equality applies. For instance, they cannot impose stricter requirements for the allocation of places of worship to religions that have not signed agreements with the State. For these reasons, Arts 70, paras 2-*bis* and 2-*quater*, were held unconstitutional.

3. The claimant challenged, *inter alia*, Art 70, para 2-*ter*, that states that religious bodies other than the Catholic Church must enter a town-planning agreement with the Municipality containing a termination clause in the event that activities were

conducted but not provided for in such agreement.

The question was declared to be unfounded. The provision complies with the principle of proportionality, which requires that the least restrictive individual right be chosen among equally effective means, and forbids exceeding that which is necessary to attain a balance between conflicting interests. In any case, recourse to the termination clause shall be limited only to cases in which no viable alternatives are available.

4. The claimant also contested Art 72, para 4 and para 7, letter e), which require that, during the development of a construction plan for religious facilities, the opinions of law enforcement and citizens' committees be obtained for security purposes, and surveillance cameras be installed outside religious buildings such that these may be monitored by police officers.

The Court found the provisions to be unconstitutional and considered that freedom of worship must be balanced with issues of security, public policy and peaceful coexistence. However, in these matters, the Constitution confers exclusive competence upon the State (Art 117, para 2, letter h), while the Regions may only cooperate, enacting measures that fall within their competences (Judgment no 35 of 2012).

5. The question raised with regard to Art 72, para 4, second sentence, was found to be inadmissible. The provision allows Municipalities to hold referenda on construction plans for religious facilities. Nevertheless, it does not amend the procedure to approve the plan, and therefore does not affect the rules governing referenda: it simply refers to and confirms the provisions set out in the applicable local and national regulations.

6. Last, the claimant challenged Art 72, para 7, letter *g*), which stipulates that the construction plan for religious facilities must ensure the architectural and dimensional congruity of religious buildings with the general and specific characteristics of the landscape of Lombardy, as laid down in the Regional Territorial Plan.

The Court ruled the question to be unfounded. The challenged provision does not loosely require that religious buildings meet certain unspecified characteristics of the landscape of Lombardy; rather, it

refers to the characteristics set out in the Regional Territorial Plan. Considering the provision at issue in its entirety, the assessment of conformity relies not on general reasons that could lead to arbitrariness and discrimination, but on standards established in the relevant provisions of the Regional Territorial Plan.

*The full text of the English translation of the Conclusions on points of law is available at [www.cortecostituzionale.it/documenti/download/doc/recent\\_judgments/S63\\_2016\\_en.pdf](http://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S63_2016_en.pdf).*

### **Judgment 24 February – 7 April 2016 no 76\***

*(Incidental Review of Constitutionality)*

*KEYWORDS: Stepchild Adoption – Same-Sex Couple – Italian Recognition of Foreign Judgments – Breach of the Public Order – Inadmissible Questions of Constitutionality.*

1. The issue raised before the Constitutional Court concerns the constitutionality of Arts 35 and 36 of Law 4 May 1983 no 184, and was brought by means of an incidental review.

2. In 2004, after a long period of cohabitation, a same-sex couple composed of two American women wished to become parents and, to this end, decided to resort to artificial insemination. After their children thus conceived were born, each of the women adopted the other's child.

In 2013, the two women were married in New York State and moved to Bologna, Italy, with their children. As one of them was a dual US and Italian citizen, she appealed to the referring court, the Juvenile

Court of Bologna to seek the recognition of adoption decree obtained in Oregon, to enable her wife's biological daughter to obtain Italian citizenship.

First, given that the petitioner was an Italian citizen, the referring court qualified the adoption as an international one and held that Art 41 of Law 31 May 1995 no 218 (concerning private international law) and Art 36, para 4, of Law no 184 of 1983 applied.

To decide upon the recognition of the foreign decree in Italy, therefore, the referring court gave preeminent importance to the fact that the adoption had taken place within a family in which the parents were of the same sex, and therefore the principle of compliance with public order had to be addressed. In this vein, it raised a question on the constitutionality of Arts 35 and 36 of Law no 184 of 1983 with regard to Arts 2, 3, 30, 31, and 117 of the Constitution – the latter in relation to Arts 8 and 14 European Convention on Human Rights (ECHR) (on the child's right to a family). The question concerned the fact that those provisions did not allow the judge to actually assess whether recog-

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nizing the foreign adoption decree issued in favour of a biological mother's homosexual partner met the interests of the adopted minor.

3. The Constitutional Court did not address the merits of the case, because it found that the provisions claimed to be unconstitutional did not apply. In the Constitutional Court's opinion, the referring court did not give a correct and complete interpretation of Art 41 of Law no 218 of 1995. Art 41 consists of two distinct provisions. The first provides for the automatic recognition of foreign decrees and recognizes the Registrar General as the competent officer for registration of such decrees. The second, which deals with international adoption, refers to the special law on adoption (Arts 35 et seq of Law no 184 of 1983), and recognizes the judge who addresses the merits of the case as possessing the requisite competence to decide upon the admissibility of a foreign decree in Italy.

The difference is appreciable if it is related to specific situations regarding same-sex couples. According to the Court, such cases should be considered as adoptions 'internal to a foreign State' rather than as 'international adoptions'. As a result, what ought to be enforced is Art 41, para 1 of Law no 218 of 1995, which refers to Arts 64 et seq of the same measure (which aim to promote the continuity of a legal situation that was validly established in foreign jurisdictions) instead of special provisions, such as Arts 35 et seq of Law no 184 of 1983.

4. Although the Court did not explicitly address the issue of the compatibility of a foreign decree of adoption granted to same-sex parents with the Italian legal system and with the principle of public order, the issue nevertheless underlies the entire Judgment.

International public order, considered as a limitation upon the validity of foreign laws and judgments, constitutes the core of a fundamental principle that characterizes the very essence of a legal system.

A deeper examination of the issue is also recommended in light of the evolving trends in case law, which appears to move towards recognition of the fact that the international public order cannot pose an obstacle to the registration of foreign decrees concerning adoptions made by same-sex couples. In addition, above all, it is necessary in order to protect the capacity to rely upon the preservation and continuation of private family life.

Judicial precedents include the decisions of the Courts of Appeal of Milan (16 October 2015) and Naples (5 April 2016), which established the validity of a foreign decree's registration that allows the one to adopt the biological child of one's same-sex partner, thus holding that adoptions by same-sex couples granted in a foreign country do not breach the public order.

The cases concerned the registration of two foreign orders of 'national' adoption, such that the Court enforced the provisions of Law no 218 of 1995 instead of those of Law no 184 of 1983, which address the registration of foreign decrees of international adoption.

Despite the legislator's failure to act, judicial decisions are increasingly admit the possibility of maternity and paternity by same-sex couples; first among such decisions are those handed down by the Supreme Court (Court of Cassation) and the civil courts. In particular, the Juvenile Court of Rome, since its well-known Judgment of 30 July 2004, has allowed special adoption by same-sex couples under Art 44, letter *d*), of Law no 184 of 1983, thus placing a greater emphasis on

*de facto* families.

The Supreme Court of Cassation's Judgment no 601 of 2013 is also important, because it denied that sexual orientation could be sufficient to exclude one's ability to become a parent: 'to believe that living in a family based on a same-

sex couple could impede a child's healthy growth is nothing but a prejudice'.

5. Due to the improper choice of the provisions to be applied in the case at hand, the questions of constitutionality concerning Arts 35 and 36 of Law no 184 of 1983 were thus declared inadmissible.

### **Judgment 22 March – 13 April 2016 no 84\***

*(Incidental Review of Constitutionality)*

*KEYWORDS: Medically Assisted Reproduction – Supernumerary Embryos – Scientific Research – Legislative Discretion – Inadmissible Questions of Constitutionality.*

1. The question raised before the Constitutional Court concerned Art 13 of Law 19 February 2004 no 40 (provisions on medically assisted reproduction), which provides for the absolute prohibition on experimental research on supernumerary embryos, although these may not be implantable.

2. The possibility to create embryos that will not be born – embryos which commonly defined as excess or residual – was established on a legal basis by the Constitutional Court's Judgment no 151 of 2009, which declared the unconstitutionality of Art 14, para 2, of Law no 40 of 2004 insofar as it prohibited the production of more than three embryos while in any case requiring that they be destined to a single and simultaneous implantation. Consequently, the Court departed from the prohibition on cryopreservation generally enshrined in para 1 of the same provision.

The number of supernumerary embryos that are not transferred, in particular on the grounds that they are diseased, was virtually expanded as a result of the subsequent Judgment no 96 of 2015, which declared the unconstitutionality of Art 1, paras 1 and 2, and Art 4, para 1, of Law no 40 of 2004 insofar as they did not permit resort to medically assisted reproduction (MAR) techniques on part of fertile couples who are carriers of inheritable genetic diseases that are classified as serious.

Finally, in Judgment no 229 of 2015, the Court held the unfoundedness of a question concerning the constitutionality of Art 14, paras 1 and 6, of the same Law, which imposed a criminal prohibition on the destruction of embryos, including those affected by a genetic disease.

The prohibition on experimentation with embryos enshrined in Art 13 of Law no 40 of 2004 was challenged in parallel before the Strasbourg Court, which decided the case (*Parrillo v Italy*) with the Grand Chamber's Judgment of 27 August 2015. The Judgment stated that Art 8 European Convention on Human Rights (ECHR) had not been violated, on the grounds that the right invoked by the applicant to donate the embryos (produced from her gametes) for the purposes of scientific research was not covered by that provision, as 'it does not concern a particularly important aspect of the ap-

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plicant's existence and identity.'

3. The question before the Constitutional Court addressed highly sensitive issues and required balancing conflicting principles, such as – for instance – the implementation of scientific research that can save human lives, on the one hand, and the protection of human dignity by preventing the use and manipulation of human embryos, on the other.

The Court was confronted with what was defined as 'a tragic choice': respecting the principle of life (which embraces the embryo, albeit affected by disease) or the requirements of scientific research – a choice that has created deep divisions on ethical and scientific levels, and for which significantly uniform solutions have not been found, not even within European legislation. Accordingly, the Court recognized that the reconciliation between opposing interests that may be perceived within the contested provisions pertains to the sphere of legislation within which the legislator, acting as the interpreter of the general will, is required to strike a balance. Such balance should be achieved between the conflicting fundamental values applicable, taking into account the views and calls for action that it considers to be most deeply entrenched at any given moment in time within the social conscience.

Thus, the choice made by the contested legislation is one of such considerable discretion – due to the axiological issues surrounding it – that it is not amenable for review by the Constitutional Court.

Furthermore, a different weighing of the conflicting values, involving a greater openness to the requirements of society at large as associated with the prospects of scientific research, could not in any case be introduced into the legislative

framework through an expansive ruling by the Court (as was requested by the referring court), given that such a ruling would not have been mandatorily required.

In fact, the striking of any other balance between the conflicting values, which the constitutional review seeks to achieve by replacing the balance enshrined in the legislation under review, could not fail to consider (and to engage with) a range of multiple intermediate options, which would also inevitably be reserved to the legislator.

Indeed, it is the legislator that must assess the appropriateness (also on the basis of 'scientific evidence' and the extent of endorsement on a supranational level) of, *inter alia*: whether use may be made, for the purposes of research, only of embryos affected by disease – and which diseases –, or also of those that cannot be discovered through a biopsy; the selection of the specific research objectives and goals capable of justifying the 'sacrifice' of the embryo; the possibility, and if so the duration, of a prior period of cryopreservation; whether it is appropriate (after such a period) to discuss the matter subsequently with the couple or with the woman, to confirm the intention to abandon the embryo and donate it for experimentation; and the most suitable precautions to avoid the 'commercialization' of residual embryos.

4. The question concerning the constitutionality of Art 13 was thus declared inadmissible.

*The full text of the English translation of the Conclusions on points of law is available at [www.cortecostituzionale.it/documenti/download/doc/recent\\_judgments/S84\\_2016\\_EN.doc](http://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S84_2016_EN.doc).*

**Judgment 20 April –  
6 May 2016 no 94\***

*(Incidental Review of Constitutionality)*

*KEYWORDS: Drug Law – Decree-Law – Conversion into Law – New Provisions Lacking Links with the Others – Unconstitutionality.*

1. The question raised before the Constitutional Court concerned the alleged violation of Art 77, para 2, of the Constitution by Art 4-*quarter* of the Decree-Law 30 December 2005 no 272, as converted, with amendments by Art 1, para 1, of the Law 21 February 2006 no 49, which added Art 75-*bis* to the Presidential Decree 9 October 1990 no 309. The controversial issue was that Art 75-*bis* introduced a criminal offence for non-compliance with preventive measures against drug users, an offence that was not envisaged in the original text of the decree-law.

2. The main issue concerned the validity of a provision introduced by the Parliament when converting into law a decree-law (a temporary legislative measure adopted by the Government in cases of exceptional necessity and urgency), as required by Art 77, para 2, of the Constitution.

The provisions introduced in the converting law must comply with the principle of homogeneity with respect to the decree-law's existing provisions. The Constitutional Court identified the conditions under which a decree-law can be amended when it is converted into law, emphasizing that the converting law should not have heterogeneous contents or purposes with respect to the converted measure itself. The reason for this assumption lies in the functional interaction between a decree-law, as envisaged by the Govern-

ment and issued by the President of the Republic, and the converting law, characterized by a specific, rather than an ordinary, process of approval.

In Judgment no 32 of 2014, the Court stated that the existence of a link between the contents of a decree-law and the ensuing converting law should be assessed on a case-by-case, examining their inner coherence, as well as the decree-law's primary purposes. As a result, if the provisions are heterogeneous but share the same policy framework (for example, in the case of an economic crisis, there may be the same necessity and urgency, but also the need for objectively heterogeneous interventions), the homogeneity of the purpose is constitutionally consistent with Art 77, para 2, of the Constitution.

In particular, the Court noted that the purpose of Art 4 of Decree-Law 30 December 2005 no 272, supported by the requirements of necessity and urgency, was to ensure the continuity of recovery programs for certain categories of drug offenders through a procedural rule. On the contrary, the provisions introduced by the converting law (Arts 4-*bis* and 4-*vicies ter*) exceed that purpose for two main reasons: (1) they concerned drugs, and not drug users; and (2) they dealt with the terms of the indictments and penalties. This assessment of criminal policy would require a proper parliamentary debate under Art 25 of the Constitution, following the ordinary legislative procedure in accordance with Art 72 of the Constitution and within the constitutional checks and balances governing relations between the Government, Parliament and the President of the Republic in the exercise of legislative power. The two measures therefore showed heterogeneous standards with regard to contents and purposes.

3. The Constitutional Court confirmed

\* By Mimma Rospi.

the most recent line of its case law, holding that the challenged Art 4-*quarter*, as amended upon conversion, was inconsistent ‘with the formal content and overall purpose of the original Decree-Law’.

This provision did not even share the same purpose as Art 4, which aimed to prevent the interruption of the program to rescue drug-addicted criminals and thus ensure the continuity of the ongoing therapeutic program, through the introduction of rules related to the execution of sentences. According to the Court, only

provisions pursuing that purpose would have satisfied the requirements of necessity and urgency under Art 77, para 2, of the Constitution. Conversely, Art 4-*quarter*, as introduced by the converting law, establishes new provisions to protect public safety; it has nothing to do with recovery.

4. Because of their lack of homogeneity and of the absence of functional link with the purposes of the Decree-Law, the provisions introduced by the Parliament in the converting law violate Art 77, para 2, of the Constitution.

### **Judgment 9 March – 20 May 2016 no 109\***

*(Incidental Review of Constitutionality)*

*KEYWORDS: Drugs and Psychotropic Substances – Cultivation of Cannabis Plants – Purpose of Personal Consumption – Criminal Offence – Unfounded Questions of Constitutionality.*

1. The Constitutional Court decided the merits of two orders issued by the Court of Appeal of Brescia, which raised the question of the constitutionality of Art 75 of Presidential Decree 9 October 1990 no 309, on the grounds that – according to the well-established case-law of the Court of Cassation – it does not include, among the courses of conduct subject to mere administrative sanctions, the cultivation of cannabis plants, even if aimed exclusively at the personal use of the drug.

2. The Court illustrated the main policy features concerning drugs and psychotropic substances, characterized by a clear distinction – with significant conse-

quences in terms of the applicable sanctions – between the consumer’s position on the one hand, and the producer’s and the dealer’s positions on the other. Indeed, criminal penalties are only imposed upon the producer and the dealer.

Accordingly, as mere consumption of the substances does not amount to a crime, the legislator differentiated the sanctions regime by refraining from punishing conduct preparatory to consumption, while punishing conduct aiming to market drugs.

The implementation of this two-fold policy produced three different classes of conduct:

- sale and transfer, which were inherently incompatible with the consumption of the substance on part of the agent;
- the ‘neutral’ courses of conduct of production and cultivation (which were compatible with both the purpose of personal use and that of transfer to third parties), which results in the capacity to increase the amount of banned substances in circulation; and
- ‘neutral’ conduct (compatible with both the purpose of personal use and that

\* By Angelo Rubano.

of transfer to third parties) that has no impact on the total amount of drugs in circulation, such as mere possession.

Unlike the first two classes of conduct, which are subject to harsher penalties, for the third class the law provides either administrative sanctions or penalties, depending on whether the conduct is aimed at personal use. Initially limited to purchase and possession, the third class was later extended to include the import, export and receipt of drugs for any reason. Therefore, if aimed at personal consumption, also the import and export of drugs are subject to the administrative sanctions regime, and not to a criminal penalty.

3. On the basis of the abovementioned legal framework, the Court declared the questions raised to be unfounded, and in particular the alleged unreasonable unequal treatment – in accordance with Art 3 of the Constitution – given to the person who cultivates the drug, according to whether he or she does so for personal consumption or, rather, holds the product of his own cultivation for consumption.

It is reasonable that the prior course of conduct consisting in cultivation, which is a criminal offence, be absorbed by the subsequent possession for personal use, which is a mere administrative offence. Therefore, no compelling grounds could be found for the disparity in treatment between the holder of the drug ‘harvested’ for the purpose of personal consumption and the cultivator ‘in progress’, as they are both subject to a criminal penalty for their respective courses of conduct.

The Court then analyzed the reasons why cultivation is a crime *tout court*, regardless of the aim pursued. Although cultivation is a neutral act, being logically compatible with the purpose of personal use (*inter alia*), neutrality cannot conceal

the fact that the conduct is in any case capable of increasing the amount of drugs in existence and in circulation, thus indirectly facilitating its spread. Precisely this is the peculiarity that distinguishes mere possession from cultivation, endowing the latter with greater dangerousness, irrespective of whether the purpose was personal consumption.

4. With regard to the complaint concerning the principle of offensiveness of the conduct, the Constitutional Court confirmed that this is a twofold principle. It is indeed a criminal policy rule that the legislator should observe (offensiveness in abstract terms) and, at the same time, a hermeneutic criterion for judges to follow (offensiveness in practice).

The judge must therefore establish whether the individual conduct of unauthorized cultivation, with which the agent is charged in this case, results in the breach of any interests and values protected by the law, as no criminal liability could be established.

5. In Judgment no 148 of 2016, the Court again ruled upon the illegal production, trafficking and possession of drugs, with specific regard to the minimum penalty established by the law. The question of constitutionality was declared inadmissible, due to the fact that the referring court had merely asked for the contested penalty to be declared unconstitutional, without specifying which penalty would be consistent with the Constitution. Consequently, the Court was asked to decide which penalty should be imposed: unless such a decision flows directly on the basis of the Constitution (eg by extending the penalty provided for an equivalent conduct), it falls within the powers reserved to the legislator.

**Judgment 5 July –  
13 July 2016 no 173\***

*(Incidental Review of Constitutionality)*

*KEYWORDS: Social Security – Workers Out-of-Work and Without Social Benefits – Solidarity Contribution – Withdrawal from Highest Pensions – Unfounded Questions of Constitutionality.*

1. The questions of constitutionality raised before the Constitutional Court concerned Art 1, paras 483, 486, 487, of Law 27 December 2013 no 147 (the 2014 Finance Act).

The challenged provisions withdrew a solidarity contribution drawn for three years (2014-2016) from all compulsory pensions which exceeded certain pecuniary limits, which were established proportionally to the minimum INPS (*Istituto Nazionale di Previdenza Sociale* – National Social Security Institute) pensions. The limits were as follows: six per cent for pensions with a gross annual amount at least fourteen times higher than the minimum INPS annual pension; twelve per cent for the part of the total amount exceeding by twenty times the minimum annual INPS pension; and eighteen per cent for the part of the total amount exceeding the minimum annual INPS pension by thirty times. The contributions, acquired by deductions from the payments made by the bodies managing compulsory social security benefits, sought to financially support pension protection provisions in favour of those workers who were out of work but were not yet able to access any pension or other social security benefits (the so-called *esodati*).

2. Several regional sections of the na-

tional Court of Auditors raised questions of constitutionality with reference to Arts 136, 2, 3, 36, 38 and 53 of the Constitution. The Constitutional Court declared all of these questions to be unfounded, because no constitutional provision was infringed.

Art 136 was not breached, because no contrast was found with previous constitutional judgments. The challenged provisions did not affect pensions paid in 2011 and 2012, which were affected by the previous equalizing contribution provided for by Art 18, para 22-*bis* of Decree-Law 6 July 2011 no 98 (converted into Law 15 July 2011 no 111), which was declared unconstitutional in Judgment no 116 of 2013.

The solidarity contribution is not a tax, because it is not acquired by the State, nor is it assigned to the general taxation system. On the contrary, it is directly withdrawn by INPS as well as by the other social security bodies involved. These entities are freed from paying a sum to the Treasury as withholding agents; nevertheless, they withhold the sums for their own internal management, with specific social security and solidarity aims (and, in this case, in particular for payments to workers who are out of work but are not yet able to access any pension or other social security benefits).

The solidarity contribution is, therefore, a withdrawal pertaining to property obligations imposed by the law, under Art 23 of the Constitution, which breached neither Art 53 nor Art 3.

Therefore, the solidarity contribution is a measure that the legislator is empowered to issue, as long as it complies with the principles of proportionality and reasonableness. In specific case, according to the Court, the need to financially support the *esodati* should be balanced with the

\* By Micaela Caloja.

principle of legitimate expectation enjoyed by those pensioners subjected to the withdrawal.

Indeed, although these pensions are considered high, the withdrawal must be limited, in any case, and, pursuant to the principle of sustainability, must not exceed a reasonable level under Arts 3, 38 and 36 of the Constitution.

The need to financially support the *esodati* must fall within the limit of an acceptable sacrifice on part of those who receive so-called ‘golden pensions’ (ie pensions which are considered to be very high).

3. Indeed, the contribution is justified in the context of intergenerational solidarity, which is necessary to face the crisis afflicting the pension system due to a combination of several factors, including the international financial crisis, its impact on the national economy, unemployment and the scarcity of social security benefits. Therefore, it implements the principle of solidarity, which operates within the social security context as a remedy to refine the social security system and to provide social security support even to the weakest individuals.

4. The measure in question passes the test of constitutionality because it is an extraordinary, contingent and temporary provision. Indeed, its operation was limited

to the years 2014, 2015 and 2016.

Furthermore, a similar instrument had already been issued by the legislator, by means of Art 37 of Law 23 December 1999 no 488 (the 2000 Finance Act), which provided for a solidarity contribution for three years to be drawn from the social security benefits, issued by the bodies managing the compulsory social security system, exceeding the maximum annual amount stipulated under Art 2, para 18, of Law 8 August 1995 no 335, which the Court itself deemed to not be inconsistent with the Constitution (see Orders no 22 of 2003 and no 160 of 2007).

5. However, the Court’s judgment appears to direct a warning to the legislator. While declaring that the eligibility requirements for the solidarity contribution were met, the Court noted that the legislator had brushed with unconstitutionality. In this vein, the Court noted that the legislator should establish remedies that: (1) operate within the social security system; (2) are impellent due to a serious and contingent crisis; (3) affect the highest pensions; (4) can be considered as sustainable withdrawals; (5) observe the principle of proportionality; and (6) are temporary. Remedies that fail to meet these requirements would seriously risk being declared unconstitutional.

### **Judgment 15 June – 14 July 2016 no 174\***

*(Incidental Review of Constitutionality)*

*KEYWORDS: Social Security – Survivor’s Pension – Reduction Based on the Age of the*

\* By Irma Sasso.

*Spouses – Unreasonableness – Unconstitutionality.*

1. The Constitutional Court declared the unconstitutionality of Art 18, para 5, of Decree-Law 6 July 2011 no 98, converted into Law 15 July 2011 no 111, which provides for a reduction of a

spouse's survivor's pension when the insured person was older than seventy years of age at the time the wedding was celebrated and the age difference between the spouses exceeded twenty years.

2. The challenged provision, akin to many others seeking to reform the pensions and social security system, introduced a further limit upon pension payments: the selective parameter of the spouses' respective ages.

The purpose of the provision, which was generically linked to a specific international economic situation, consisted in the legislator's intent to discourage and prevent fraudulent marriages. Such fraudulent intent would lie in the short duration of the marriage bond, the young age of the surviving spouse, and the lack of children who were minors, disabled or still studying (the existence of whom would disallow the reduction of the pension).

The legislator thus created an absolute presumption – without the possibility to admit any evidence to the contrary – that marriages contracted between a person of over seventy years of age and another person twenty years his or her junior sought to defraud the Treasury, unless the family included children who were minor, disabled or still studying.

3. The Constitutional Court considered that constraints on pension benefits related to natural facts, such as the age of the surviving spouse or the length of the marriage, were unreasonable.

Limitations of social security rights are viable only when they comply with the principles of equality and reasonableness, and cannot affect an individual's life choices (at any moment of their lives, even in old age), because they are the expression of their fundamental rights.

The challenged provision, as noted by the referring judge and by the Court itself,

violated Art 3 of the Constitution, because it linked the amount of the survivor's pension to future, uncertain and accidental factors, thus breaching the principle of equal treatment between spouses. Moreover, the reduction of benefits resulted in the infringement of the survivor's right to continuous family support even after the death of the spouse, a right that has been recognized by the Constitutional Court on several occasions (see Judgment no 286 of 1987).

4. The Court also found a breach of Arts 36, para 1, and 38 of the Constitution, since the reduction of pension benefits constituted a violation of workers' rights to social protection. In particular, the challenged Art 18, para 5, was inconsistent with the principle of proportionality between pension benefits and the nature and the amount of work, and – even more seriously – failed to take into account the need to grant workers and their families a free and dignified existence.

The purpose of survivor's pensions, granted to surviving spouses, is linked to a specific reason of solidarity: indeed, the survivor's pension is a symbol of the continuity and strength of marital solidarity, which remains even after the death of the other spouse (see Judgments nos 18 of 1998 and 419 of 1999). This bond cannot be compressed due to extrinsic and naturalistic elements, such as the age of the spouses or the short duration of the marriage between them due to the death of the older spouse.

Although the legislator may have to balance several relevant factors to guarantee a cohesive structure to the social security system, it cannot interfere with individual choices, since individuals have the right to fully and freely develop the affective and emotional spheres of their lives.

5. The Constitutional Court also noted

that the challenged provision was unreasonable because it undermined the purpose of the survivor's pension and led to the limitation of the rights of the youngest

surviving spouse; such a limitation was not justified by a significant necessity, especially taking into account the fact that life expectations are constantly increasing.

**Judgment 15 June –  
15 July 2016 no 179\***

*(Incidental Review of Constitutionality)*

*KEYWORDS: Administrative Justice – Exclusive Jurisdiction – Code of Administrative Procedure – Urban Development Agreement – Unfoundedness.*

1. The issue raised before the Constitutional Court concerned the validity of Art 133, para 1, letter a), number 2), and letter f), of Legislative Decree 2 July 2010 no 104 (Code of Administrative Procedure), which delegates legislative power to the Government, providing that any dispute relating to 'acts and provisions adopted by the public administration in the areas of city planning and development' fall under the exclusive jurisdiction of the system of administrative justice.

2. Usually, in disputes involving the public administration, civil courts have jurisdiction concerning subjective rights, while it is for administrative courts to adjudicate cases based upon legitimate interests. The difficulty in establishing a clear-cut distinction between subjective rights and legitimate interests led the Legislature to define a number of specific areas of exclusive jurisdiction in which cases concerning subjective rights may fall within the jurisdiction of administrative courts.

The Constitution provides legal grounds

for this distinction at Arts 103 and 113. Pursuant to Art 103, '(t)he Council of State and the other bodies of judicial administration have jurisdiction over the protection of legitimate rights before the public administration and, in particular matters laid out by law, also of subjective rights'; Art 113 stated that '(t)he judicial safeguarding of rights and legitimate interests before the bodies of ordinary or administrative justice is always permitted against acts of the public administration'.

3. Among the areas of exclusive jurisdiction, Art 133 of Legislative Decree no 104 of 2010 includes disputes over agreements between private parties and the public administration. According to the case law, these agreements (and particularly 'urban development agreements') cannot be defined as 'purely civil agreements': they can only be used to replace or supplement an administrative measure based on a discretionary power of the public administration, and are therefore supposed to be public in nature.

The public nature of these agreements formed the basis of the exclusive jurisdiction of administrative courts. Indeed, exclusive jurisdiction is connected with the exercise – albeit indirect or mediated – of public power.

4. According to the referring court, the challenged provision was inconsistent with Arts 103 and 113 of the Constitution, which appear to limit access to administrative courts only to actions brought by private parties who suffer harm due to a

\* By Antonello Lo Calzo.

decision of the public administration; on the contrary, the exclusive jurisdiction was also established for cases in which the public administration would have to bring an action against a breach of an agreement caused by the private party.

5. The Constitutional Court declared the question of constitutionality to be unfounded, because although the administration is usually the respondent in administrative justice proceedings, it could also be the applicant when it seeks to enforce performance of agreements signed with private entities. Arts 103 and 113 of the Constitution do not imply that only private entities may resort to administrative courts, nor that administrative justice proceedings cannot be initiated by the public administration. This is all the more true if one considers that administrative justice was conceived not only to protect legitimate private interests, but also to care for public interests. The legal system does not allow for 'split jurisdiction' cases, namely cases which fall within the jurisdiction of either civil or administrative courts depending on the different nature of the litigants. There-

fore, the main factor relates to the objectively public nature of the matters assigned to the administrative courts, and not the private or public nature of the litigant. Any other solution would have unreasonable effects: if, concerning matters of exclusive jurisdiction, appeals either to ordinary courts or to administrative courts were prevented, the public administrative body affected by a breach of an agreement by a private party could react only by means of administrative self-protection, such that judicial protection would depend only on the decision of the private party.

6. The Constitutional Court emphasized the need for coherence within the framework of judicial protection: protecting private parties against acts of the public administration and the establishment of exclusive jurisdiction cannot deprive said administration of judicial protection against private parties' conducts.

*The full text of the English translation of the Conclusions on points of law is available at [http://www.cortecostituzionale.it/documenti/download/doc/recent\\_judgments/179\\_2016.doc](http://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/179_2016.doc).*

### **Judgment 15 June – 20 July 2016 no 187\***

*(Incidental Review of Constitutionality)*

*KEYWORDS: Public School Staff – Fixed-Term Contracts – Abuse – Breach of EU Law – Partial Unconstitutionality.*

1. The issue raised before the Constitutional Court concerned the abuse of fixed-term contracts in filling school staff posi-

tions.

The Court declared Art 4, para 1, of Law 3 May 1999 no 124 (urgent provisions concerning school staff) unconstitutional, insofar as it authorized the potentially unlimited renewal of fixed-term employment contracts to fill vacant teaching posts, as well as administrative, technical, and auxiliary staff positions, without placing effective limits on the maximum total duration of successive work relationships and without being justified by objective reasons. This provision was

\* By Micaela Caloja.

deemed inconsistent with Art 117, para 1, of the Constitution, which compels the State to comply with international obligations, due to the breach of Clause 5, point 1, of the European Union (EU) Framework Agreement concerning fixed-term jobs, under which the EU Member States must provide appropriate measures to avoid any abuses deriving from the use of a sequence of fixed-term contracts or work relationships.

2. The Court's judgment was the consequence of the fact that the EU provision lacked direct effect, due to which Italian courts could not disapply inconsistent national legislation, and had no choice but to raise the question of constitutionality. Indeed, the declaration of partial unconstitutionality was the final step of a long process that had also involved the Court of Justice of the European Union (CJEU).

The Constitutional Court itself referred to the CJEU for a preliminary ruling on the interpretation of the abovementioned provision of the EU Framework Agreement.

On 26 November 2014, the CJEU issued judgment in *Mascolo and Others*, according to which Clause 5, point 1, of the Framework Agreement concerning fixed-term work must be interpreted as precluding national legislation such as that at issue in the main proceedings, which, pending the completion of competitive selection procedures for the recruitment of tenured staff of schools administered by the State, authorizes the renewal of fixed-term employment contracts to fill posts of teachers and administrative, technical and auxiliary staff that are vacant and unfilled without stating a definite period for the completion of those procedures and while excluding any possibility, for those teachers and staff, of

obtaining compensation for any damage suffered on account of such a renewal.

The declaration of unconstitutionality of Art 4, para 1, of Law no 124 of 1999, was the direct result of the CJEU's judgment.

3. By recognizing the autonomy and discretionary powers of Member States in issuing appropriate, powerful and dissuasive sanctions to punish abuses arising from the use of successive fixed-term employment contracts or relationships, the CJEU emphasized the total absence of provisions of this nature in the Italian legal system. Therefore, before the Constitutional Court delivered its judgment, the Italian legislator filled the gap in legal protection noted by the Court of Justice. Indeed, Law 13 July 2015 no 107, in fact, provided for appropriate compensation to be paid for the damages caused to the people suffering said abuse.

The Constitutional Court thus had to take this legal occurrence into account, as it addresses past abuses at least in part.

Pursuant to Art 1, para 131, of Law no 107 of 2015, from 1 January 2016, fixed-term contracts for teaching, educational, administrative, technical and auxiliary personnel at public schools concluded to fill vacancies cannot exceed a duration of thirty-six months. A fund was established to pay the compensation for damages deriving from the renewal of fixed-term contracts that, overall, were of a longer duration than the term now fixed by law.

Moreover, Art 1, para 95, allows the Ministry of Education, Universities and Research to set up an extraordinary plan for the recruitment of permanent teachers for state schools, to fill all the common and support staff positions established by law that are vacant and available after permanent personnel for the same school year have been recruited.

4. The legislator chose to provide different remedies for different categories of workers.

For teachers, a stabilizing measure was introduced as the result of an extraordinary plan to ‘cover all common and staff-supporting posts established by law’. This plan aimed to guarantee to all fixed-term contract teachers the chance of gaining privileged access to public employment until the end of the list of qualified candidates, thus allowing them to access the abovementioned stabilization by means of an automatic mechanism (the lists) or public competitions. They were therefore granted significant chances to obtain permanent positions, which was indeed one of the alternatives explicitly taken into account by the CJEU.

On the contrary, for administrative, technical and auxiliary personnel (ATA), no extraordinary recruitment plan was provided, which resulted in the application of the ordinary measures governing monetary compensation.

5. Considering the progress made by the legislator, while recognizing, for the past, the Italian State’s responsibility for the breach of EU law, as declared by the CJEU, the Constitutional Court considered, for the future, the position of school workers to be protected and the abuses remedied.

*The full text of the English translation of the Conclusions on points of law is available at [http://www.cortecostituzionale.it/documenti/download/doc/recent\\_judgments/187\\_2016.doc](http://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/187_2016.doc).*

### **Judgment 31 May – 21 July 2016 no 200\***

*(Incidental Review of Constitutionality)*

*KEYWORDS: Criminal Procedure – Second Trial on the Same Facts – Protection Against Double Jeopardy – Definition of the Idem Factum Test – Partial Unconstitutionality of Art 649 of the Code of Criminal Procedure.*

1. The question raised before the Constitutional Court concerned Art 649 of the Code of Criminal Procedure, which forbids trial of a defendant on the same charges on the same facts after his or her legitimate acquittal or conviction (protection against double jeopardy).

The principle applies under two conditions. First, a final judgment is required; second, there must be the identity

of parties, such that the defendant who has already been tried must be the person who is now charged with the ‘new’ crime and facts. To the latter purpose, various criteria have been defined. On one hand, the identity of facts was interpreted to mean the existence of a coincidence between the different constitutive elements of the legal provisions concerned (*idem legale*), while, on the other, it has also been taken to indicate the possibility to overlap facts on a historical-naturalistic ground (*idem factum*). The issue has been very controversial.

2. At the European level, the rule against double jeopardy is embodied in Art 4, Protocol VII of the European Convention on Human Rights (ECHR). The European Court of Human Rights (ECtHR) adopted the historical-naturalistic approach exclusively. In *Serguei Zolotukhine v Russia* (Judgment of 10 February 2009),

\* By Chiara Marani.

the Court stated that the trial should focus on those factual circumstances which are inextricably linked to each other in time and space, the existence of which is decisive to secure a conviction or, at least, to institute a criminal proceeding. Indeed, the Court further noted that the consideration of the legal characterization of the offences results in an excessive limitation of the rights of the individual, because, if the Court was satisfied that the person had been prosecuted for offences having a different legal classification, it would risk undermining the protection accorded.

In the case brought before the Constitutional Court, the judge of pre-trial examinations received the request of committal for trial of a defendant charged with the murder of two hundred fifty-eight people, who died from asbestos-related diseases. The same conduct had already been the subject of a trial in relation to intentional disaster (Art 434, para 2, of the Criminal Code) and intentional omission of precautions to prevent accidents at work (Art 437, para 2, of the Criminal Code). The previous proceedings resulted in an acquittal because the time specified in the statute of limitation had elapsed. In the new proceedings, the judge of pre-trial examinations considered the facts to be identical. Indeed, from an historical-naturalistic point of view, the course of conduct in question was the same, because only the legal qualification of the courses of conduct had changed. As a result, the commencement of a new trial appeared to be incompatible with Art 4 of Protocol VII ECHR and its interpretation provided by the ECtHR. Nonetheless, the judge of pre-trial examinations raised the question of constitutionality before the Constitutional Court, because the Court of Cassation's case law clearly established a

different doctrine, according to which the rule against double jeopardy did not operate if the same fact was related to different legal provisions and no final judgment had been handed down.

3. The Constitutional Court was first asked to establish whether Art 649 of the Code of Criminal Procedure was consistent with Art 4 of Protocol VII ECHR with regard to the identity of fact criterion. According to the referring judge, the European and the national provisions imposed different tests: the European provision simply required consideration of the action or omission by the agent, whereas the national provision should be interpreted as also taking into account the chain of causation between the course of conduct and the event.

The Constitutional Court adopted an extensive notion of the *idem factum* approach. It specified that there is no reason to consider that the relevant factual circumstances must be limited to the actor's course of conduct. Indeed, according to the ECtHR's historic-naturalistic approach, the inquiry should also include the event and the chain of causation, which should always be considered in empirical terms. To this extent, there is no conflict between Art 649 of the Code of Criminal Procedure and Art 4 of Protocol VII ECHR.

The choice of the *idem factum* approach led the Constitutional Court to identify a contrast between these articles on a different ground, in particular in relation to situations in which the identity of facts is excluded for one course of conduct that gives rise to several offences (*concoirs idéal d'infractions*), which may be tried in separate proceedings. As a matter of fact, in the ECtHR's view, Art 4 of Protocol VII of the ECHR must be interpreted as impeding the holding of a new trial for facts which are essentially

the same as those forming the subject matter of the first trial, notwithstanding their different qualifications from a legal point of view. The rule applies not only to the right to not be punished twice for the same offence, but also to the right to not be prosecuted twice for the same offence. However, the 'living law' (the settled interpretation of a legal provision) adopted by the Italian courts was based on the *idem legale* approach; therefore, the double jeopardy clause was not triggered in case of *concorso idéal d'infractions*, because an acquittal or conviction on one charge would not prevent the holding of a new trial on the different offences that had arisen from the same actions. The Constitutional Court considered this approach to be unacceptable. Indeed, for the purposes of double jeopardy, only the identity of facts is relevant, as resulting from the

three elements of the course of conduct, the chain of causation and the naturalistic event. As a result, the principle of double jeopardy is not breached whenever a charge concerns another offence arisen from a course of conduct that has already been tried, since other elements must be taken into account.

4. In conclusion, the Constitutional Court declared Art 649 of the Code of Criminal Procedure to be unconstitutional insofar as it provided that a fact should not be deemed to be the same solely on the basis of a different legal qualification (*concorso idéal d'infractions*).

*The full text of the English translation of the Conclusions on points of law is available at [www.cortecostituzionale.it/documenti/download/doc/recent\\_judgments/S200\\_2016.doc](http://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S200_2016.doc).*

### **Judgment 5 July – 23 September 2016 no 213\***

*(Incidental Review of Constitutionality)*

*Keywords: Persons with Serious Disabilities – Right to Receive Assistance – Monthly Paid Work Leave for the Helper – Exclusion of the Disabled Persons' Cohabiting Partners – Unconstitutionality.*

1. The question raised by the Court of Livorno before the Constitutional Court concerned Art 33, para 3, of Law 5 February 1992 no 104, concerning the assistance, social integration and rights of disabled persons, as modified by Law 4 November 2010 no 183, insofar as the provisions excluded cohabiting partners

from the category of eligible beneficiaries of monthly paid work leave for assisting persons with serious disabilities.

2. The language of Art 33 was the result of a series of reforms.

In its original version, it recognized, on one hand, the right to three days of work leave per month of mothers or fathers assisting seriously disabled under-age children and, on the other, the same right of persons (employees) who were living with and, at the same time, assisting relatives or relatives-in-law within the third degree.

Law 8 March 2010 no 53 modified Art 33 in a way that was interpreted by administrative courts as no longer requiring cohabitation, but as introducing the new requirement of continuous and exclusive assistance to be provided to disabled per-

\* By Riccardo Perona.

sons by their relatives or relatives-in-law for the latter to be eligible for the leave.

With a further reform, introduced by Law no 183 of 2010, the eligible beneficiaries of the leave were only the spouses and the relatives or relatives-in-law within the second degree of the persons to be assisted (the same benefit was also granted to relatives or relatives-in-law within the third degree only under particular circumstances). Law no 183 also abolished the requirement of continuity and exclusivity; however, it introduced the principle of the 'sole referent', according to which only one person assisting another person with serious disabilities would be eligible to benefit from paid work leave.

3. In raising the question before the Constitutional Court, the Court of Livorno challenged the constitutionality of Art 33, para 3, as resulting from the above-mentioned reforms.

In particular, the Court of Livorno challenged the exclusion of cohabiting partners from the category of beneficiaries of the leave, which invoked several provisions of the Constitution: Art 32 (protection of health), Art 2 (protection of the inviolable rights of the person) and Art 3 (principle of equality).

The Constitutional Court preliminarily sought to ascertain the rationale behind the legal framework governing the monthly paid leave. Such rationale was identified as consisting in the need, for the seriously disabled, to be assisted within his/her family. According to the definition provided by Art 3, para 3, of Law no 104 of 1992, a person is to be considered seriously disabled when s/he requires permanent, continuous and comprehensive assistance in his or her individual and relational life. Taking this definition into account, the provisions of Art 33, para 3, align perfectly with the general purposes

inspiring Law no 104 of 1992, especially as far as the protection of the health of the disabled is concerned.

This specific purpose corresponds, in the opinion of the Court, to a fundamental right that is protected under Art 32 of the Constitution, which is also to be included among the inviolable rights of the person enshrined in Art 2, both as an individual and as a part of communities in which his or her personality may develop. Indeed, providing assistance to persons and the fulfillment of their need for socialization (in relation to any form of community, whether simple or complex) are fundamental aspects of such development and are adequate means to protect health. The notion of health is to be understood in the broader sense of mental and physical health (Judgments no 158 of 2007 and no 350 of 2003).

Against this backdrop, the exclusion of cohabiting partners from the category of eligible beneficiaries of the leave was found to be unreasonable under Art 3 of the Constitution.

The Court did not refer to Art 3 in its 'equalizing' dimension, but insofar as it prohibits logical contradictions. Indeed, although cohabitation cannot be considered equal to marriage from the constitutional perspective, both situations share elements that can be taken into account when it comes to apply the reasonableness test under Art 3 (Judgments nos 8 and 416 of 1996, Order no 121 of 2004). In the case at hand, the element unifying the two situations could be found, according to the Court, in the need to protect the disabled person's mental and physical health, which would otherwise be compromised as a result of mere legislative choice and not of the absence of a personal relationship.

4. In view of these considerations, ac-

cording to the Court, the contested provision violated Art 3, because it unreasonably excluded the cohabiting partner from the category of eligible beneficiaries of the leave for assisting a seriously disabled

person, and Arts 2 and 32, in so far as the mental and physical health of a person with serious disabilities is concerned, both as individual and as part of communities where her/his personality develops.

**Judgment 6 July –  
3 October 2016 no 214\***

*(Incidental Review of Constitutionality)*

*KEYWORDS: Public Administration – Provision Introducing the Position of Deputy Director – Non-Execution of the Judgment Imposing the Implementation of the Provision – Subsequent Abolition of the Position of Deputy Director – Unfounded Questions of Constitutionality.*

1. The Council of State raised, before the Constitutional Court, questions concerning the constitutionality of Art 5, para 13, of Decree-Law 6 July 2012 no 95, providing for urgent measures to review public spending, converted with amendments into Art 1, para 1, of Law 7 August 2012 no 135.

The contested provision repealed Art 17-bis of Legislative Decree 30 March 2001 no 165, according to which collective bargaining arrangements concerning the ministerial sector should govern the establishment of a separate position of deputy director to include university graduates employed in staff grades C2 and C3 and who had acquired a total of five years of service in those positions, on the basis of guidelines issued by the Ministry for the Civil Service to the Representative Agency for the Public

Administrations within Bargaining Procedures (ARAN).

Opposing the Public Administration's failure to act in issuing such indications, several civil servants affected took the case to the Regional Administrative Court of Lazio, which rendered a judgment that later became final and that ordered the competent bodies within the Public Administration to undertake the actions attributed to its competence.

During the enforcement proceedings, after the nomination of a special commissioner by the Court to address the delay, the legislator intervened and, issuing Art 5, para 13, of Decree-Law 95 of 2012, repealed the provision setting up the deputy director.

In this context, the Council of State was required to rule on the appeal against the judgment declaring that the continuation of the enforcement proceedings was procedurally barred due to the supervening lack of interest deriving from the abolition of the position of deputy director. The Council of State declared that the real objective of the legislator was to prevent the implementation of the judgment favouring the civil servants.

Given this premise, the Council of State questioned the constitutionality of the contested provision, alleging that it breached Arts 3, 24, 97, 101, 102, para 1, 103, para 1, 111, paras 1 and 2, 113 and 117, para 1, of the Constitution, the latter in relation to Art 6 of the European Conven-

\* By Micaela Caloja.

tion for the Protection of Human Rights and Fundamental Freedoms (ECHR) and Art 1 of the Additional Protocol thereto.

2. The Constitutional Court declared unfounded all the questions of constitutionality.

First, the Court found no violation of the right to a fair trial. Art 6 of the ECHR does guarantee the right to the execution of a final judgment; however, the European Court of Human Rights' (ECtHR) case law admits that non-execution may be justified under certain circumstances, as in the case at hand.

The non-execution of the judgment that obliged the Public Administration to provide indications to ARAN was fully justified by the fact that the law applied to a setting that was not covered by the judgment, and that regulated a matter that fell entirely within the competence of the legislator (public employment).

Besides, contrary to the arguments put forth by the Council of State, the challenged provision originated from the need for a spending review, due to the serious financial crisis that affected Italy at the end of 2011 and at the beginning of 2012; it was not intended to influence the outcome of a specific judicial dispute to be settled.

In light of these findings, the non-execution of the judgment was not considered to infringe the right to a fair trial, guaranteed by Art 6 of ECHR.

3. The Court also denied that the challenged provision violated Art 1 of the Additional Protocol of ECHR, that protects property. The judgement did not attribute ownership of a protected good under Art 1 of the Additional Protocol of the ECHR. It did not recognize that the claimants held the qualification of deputy director; rather, it simply confirmed a legally protected expectation that the

indications given to ARAN would be adopted.

4. Nor did the Court accept as well-founded a second group of questions, regarding Arts 3, 24, 97, 101 and 113 of the Constitution. These questions challenged the law because it allegedly had the nature of an individual measure, with the purpose of preventing the implementation of the Administrative Court's final ruling. However, held the Constitutional Court, the challenged provision was not addressed to specific individuals; moreover, with regard to its object, it did not have concrete and special contents, but rather provided for an abstract rule under which deputy directors are no longer to be envisaged in the organization of public employment contracts.

5. Finally, the Court declared unfounded the questions raised referring to Arts 102, para 1, and 103, para 1, of the Constitution, because the rule established by the challenged provision operated exclusively on the level of general and abstract sources, without any effect on the powers reserved to the judicial branch.

6. With this judgment, the Constitutional Court appears to have stated its final word on the issue of the survival of the position of deputy director, declaring its abolition to be lawful. The position thus disappeared before it even saw the light: although it was established in 2002, the establishing provision was never implemented, because the indications required to set up the positions of deputy director were never drafted.

*The full text of the English translation of the Conclusions on points of law is available at [www.cortecostituzionale.it/documenti/download/doc/recent\\_judgments/S214\\_2016.doc](http://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S214_2016.doc).*

**Judgment 5 October –  
20 October 2016 no 225\***

*(Incidental Review of Constitutionality)*

*KEYWORDS: Same-Sex Partnership – Termination of Partnership – Relationship Between the Minor Child and the Former Partner of the Biological Mother – Alleged Lack of Protection against Interruption – Unfounded Question of Constitutionality.*

1. The question raised before the Constitutional Court concerned Art 337-ter, para 2, of the Civil Code, a provision introduced by Art 55 of the Legislative Decree 28 December 2013 no 154 (reform of the existing legislative framework on filiation), aiming to regulate the exercise of parental responsibility after the termination of the marriage between the parents. The rule at issue introduced the right of minor children to ‘maintain significant relationships with ascendants and relatives of each parental branch’, thereby conferring upon the judge the power to adopt measures for the purpose ‘with exclusive concern to the moral and material interest’ of the child.

2. The petitioner, a former same-sex partner of the biological mother of two children, asked the judge to be authorized to associate with the children on a continuous basis, against the will of the biological mother. The children considered the petitioner as a ‘second mother’, due to the relationship of affection and material care that developed during the relationship with the biological mother. The Court of Appeal of Palermo, hearing the appeal filed against the decision of the court of first instance, submitted the question of constitutionality to the Constitutional Court, challenging Art 337-ter of the Civil

Code insofar as it does not include the former partner of the biological parent among the beneficiaries of the right ‘to maintain significant relationships’ with the minor child.

3. For the third time in its history, the Constitutional Court scrutinized the reasonableness of the norms applying to the legal regulation of same-sex relationships, after Judgements nos 138 of 2010 and 170 of 2014. In those rulings, the Court had examined the constitutionality of the provisions that, respectively, excluded the right of same-sex couples to marry and that regulated the effect of sex changes on an existing marriage.

4. The case at hand was related to the new concept of ‘social parent’, a notion that does not explicitly appear in case law but was developed by legal scholars to identify an individual who entertains, with the minor child, a significant, parent-like relationship, although said individual does not belong to the parental branch. In this regard, the fact that Art 337-ter of the Civil Code grants the right to ‘maintain significant relationships’ with the minor child only to ‘ascendants and relatives’ and not to the former partner of the child’s biological parent raised questions of constitutionality on two different grounds. On one hand, the provision was challenged due to an alleged infringement of Arts 2, 3, 30 and 31 of the Constitution. According to the referring Court, a literal interpretation of the provision would result in a discrimination between children depending on whether they were born within a heterosexual relationship or a same-sex relationship, because the latter could never fall within the scope of Art 337-ter. This interpretation, in particular, was assumed to violate the principles of reasonableness and equality before the

\* By Stefano Deplano.

law. On the other hand, Art 337-ter of the Civil Code was allegedly inconsistent with Art 117, para 1, of the Constitution, in relation to Art 8 European Convention on Human Rights (ECHR), which protects the right to family life and requires judges, when interpreting the law, to prioritize the best interest of the child. In this regard, it is noteworthy that in the *Oliari case (Oliari and Others v Italy – Application nos 18766/11 and 36030/11)*, the European Court of Human Rights (ECtHR) had decided against Italy for failing to implement the measures established by Art 8 ECHR to ‘secure respect for private or family life even in the sphere of the relations of individuals between themselves’.

The referring Court shared the view that the contested provision of the Civil Code applies only to individuals who were kin of the minor child, thereby requiring the Constitutional Court to deliver an ‘additive declaration of unconstitutionality’, ie a declaration to introduce new content into the legislative provision. Due to said new content, the position of the ‘social parent’ was equalized to that of the ‘relatives’, thus guaranteeing that the relationship of affection and protection

would be maintained, in the best interest of the child.

5. The Constitutional Court did not find any ‘legal gap’ to fill in the pertinent legislation. As a matter of fact, the referring Court did not consider that the interruption of ‘significant relationships’ between the minor child and individuals other than relatives is deemed as parent’s conduct which causes ‘prejudice to the child’, thus falling within Art 333 of the Civil Code. This provision, which has a residual scope of application, confers upon judges the power to adopt all ‘appropriate measures’ in relation to the case, on the basis of the appeal filed by the prosecutor (*pubblico ministero*). According to Art 336 of the Civil Code, the prosecutor may also act upon request by the adult (the non-biological parent) involved in the relationship that was allegedly interrupted. Therefore, in the case at hand, although the former same-sex partner of the biological parent did not have standing to sue, she could obtain protection by means of the appeal filed by the prosecutor. Thanks to this appeal, the interest of the child was properly protected; consequently, the question of constitutionality was declared unfounded.

### **Judgment 9 November – 25 November 2016 no 251\***

*(Direct Review of Constitutionality)*

*KEYWORDS: Public Administration – Legislative Reform Concerning Various Aspects – Impact on Regional Legislative Powers – Cooperation Required between National Government and Regions in the Law-*

\* By Laura Uccello Barretta.

### *Making Process – Partial Unconstitutionality.*

1. The question raised before the Constitutional Court by the Veneto Region concerned certain provisions of Law 7 August 2015 no 124, which enabled the Government to adopt legislative decrees to reform the public administration, at national and at regional and local levels, under several aspects: digitalization, the

work of civil servants, public shareholdings and local public services.

2. The Region complained that Law no 124 of 2015 did not provide appropriate avenues through which the Regions could participate in the decision-making process resulting in the adoption of legislative decrees, although they were supposed to regulate matters which fell also under their concurring and residual legislative competence, pursuant to Art 117, paras 3 and 4, of the Constitution.

3. The constitutional framework governing the allocation of legislative competences – Art 117, paras 2, 3, and 4 – empowers the State to regulate exclusively certain matters, which are listed in Art 117, para 2. The matters noted in para 3 of Art 117 are defined as matters of concurring competence: in these cases, it is for the central State to establish the relevant principles, while it is for the Regions to provide for more detailed rules. Finally, according to the residual clause of para 4, all matters that are not listed in paras 2 and 3 fall within the competence of the Regions.

All of the Constitutional Court's case law on the field concerned cases in which the subject matter of a law did not concern one single matter, such that the legislative competences of the State and of the Regions coexisted. In these cases, the Constitutional Court had applied the so-called 'doctrine of prevalence': if a legislative provision may fall within different subject matters – some of which belong to the State's legislative power and some to the Regions' concurring or residual competence – and one of these matters prevails over the other, then that prevailing matter applies. On the contrary, when it is not possible to establish any such prevalence, then the cooperation between the central and the regional governments

must be ensured, mainly within the framework of the 'system of the Conferences' (the State-Region Conference, the State-Municipalities-Local Autonomies Conference and the Unified Conference), in which representatives of the central, regional and local Executives discuss the measures to be adopted and examine the measures proposed by the State.

The instruments drawn up to carry out this collaboration are opinions (*pare-ri*) and understandings (*intese*), which allow the Regions to have a say in the decision-making process and thus shape, to some extent, the State's legislation. The national Government is required to call either opinions or understandings, depending on how the prospective legislative measure affects regional attributions. The difference between opinions and understandings lies in the potential impact of the Regions' point of view on the final decision. With opinions, the Regions may express their views on the measure before its adoption, but the Government is not bound by them. On the contrary, with an understanding, the national Government and the Regions must agree on the contents of the measure; if an agreement is not reached, the national Government can nonetheless adopt the measure, but must provide the reasons why the measure is being adopted despite the failure to reach an agreement.

4. Law no 124 of 2015, challenged before the Constitutional Court, was declared partially unconstitutional, because almost all the questions were declared to be well-founded.

The only exception was the question concerning the provisions which delegated the Government the power to adopt a legislative decree on the digitalization of the public administration: in this regard, the Court found a close connection to a

matter listed in Art 117, para 2. As a matter of fact, the provisions aiming to introduce a common digital language for public offices all over the country, as well as to enable communicability between the IT systems of the public administration, were predominantly an expression of the State's legislative power. Thus, no infringement of the Regions' competence was found.

All the other provisions, which required the Government to obtain an opinion by Regions on the legislative decrees to be enacted, were found unconstitutional.

Because of their connection to the subjects listed in Art 117, para 3, or falling within the residual clause of para 4, and because of their impact on the Regions' autonomy, the national legislator should have required the Government to ask for understandings, rather than opinions, which were deemed inadequate to protect the legislative prerogatives of the Regions in those matters.

Furthermore, the contested provisions had required the Government to obtain

the opinion in the Unified Conference, a body that represents both Regions and local authorities. The Constitutional Court declared that the right context within which to obtain the understanding would be the State-Region Conference, because all of the decrees – concerning the work of civil servants, public shareholdings, and local economic public services – have no effect on the competences and the interests of local autonomies.

Finally, the Court made some comments on the impact of its declaration of unconstitutionality on the decrees that had already been adopted on the basis of the provisions declared unconstitutional. Since the decrees were not challenged before the Court, they could not be considered as having been declared unconstitutional. In any case, if the decrees are challenged before the Court, their review will also take into account measures adopted by the Government to ensure consistency with the principle of 'fair cooperation' between the State and the Regions.

### **Judgment 18 October – 14 December 2016 no 262\***

*(Direct Review of Constitutionality)*

*KEYWORDS: Advance Directives – Organ and Tissue Donation – Regional Laws Regulating the Subjects – Infringement of the State's Competences and of the Principle of Equality – Unconstitutionality.*

1. The President of the Council of Ministers raised questions of the consti-

tutionality of the Regional Laws of Friuli-Venezia Giulia 13 March 2015 no 4 and 10 July 2015 no 16. The former established a regional register of advance directives and regulated the donation of organs and tissue; the latter subsequently amended and supplemented Law no 4 of 2015. The claimant alleged that the impugned laws violated Arts 3 and 117, para 2, letter l), and para 3, Constitution, inasmuch as they fell within the State's exclusive legislative competence ('civil law' and 'criminal law') and impinged upon fundamental principles in matters of

\* By Luca Ettore Perriello.

health protection (including informed consent), which are vested in the State. The regional legislation allegedly also infringed the principle of equality, by establishing different rules on the exercise of fundamental rights throughout the national territory.

2. The contested laws were adopted to implement Arts 2, 3, 13 and 32 of the Constitution, Art 9 of the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine, signed in Oviedo on 4 April 1997 (ratified by Italy with Law 28 March 2001 no 145), and Art 3 of the Charter of Fundamental Rights of the European Union.

They established a regional register of advance directives, which was accessible through the regional services card. These directives applied to citizens having their place of residence or domicile in the Region Friuli-Venezia Giulia, although they remained valid if the patient changed his or her residence or domicile, even to a location outside the Region.

The directives also laid down specific provisions concerning the form, content and recipients of the advance directives. Art 2 stipulated that the directives had to be made in writing, on a certain date, and bear a handwritten signature; they could be registered on the regional services card and the personal health card; they had to contain express provision as to whether the patient accepted or refused medical treatments in the event of persistent or irreversible unconsciousness caused by illness or brain damage; the directives could contain a list of people to whom the same could be disclosed; and the patient could appoint 'fiduciaries', to be consulted by the Regional Health Service when the directives were to be executed.

Art 4 provided for the validity of the

directives over time and the powers to amend or revoke them. The directives did not need to be confirmed once they had been validly created.

While patients could determine which treatments they would or would not undergo, they could also consent to organ or tissue donation upon their death (Art 1, para 3).

The local health authorities were responsible for collecting and retaining such information in a specific database (Art 6), which could be accessed by authorised personnel only.

3. The Court ruled the questions raised with regard to Art 117, para 2, letter *d*), Constitution, to be founded.

The laws of Friuli-Venezia Giulia were clearly intended to fill the current gaps in the legal framework, thereby anticipating the national Parliament. According to the original wording of Law no 4 of 2015, the regional law was supposed to harmonise, on the regional territory, the rules on advance directives, pending the adoption of national rules on the subject (Art 1, para 4). While a final clause allowed for amendments to be introduced at a later date, depending on the rules enacted by the State, the intent of the Regional lawmaker was obviously to fill the legal gap.

The Court dismissed the Region's contention that the regional rules did not change the legal system, for they were intended merely to encourage or educate citizens to make a choice in the eventuality that they would fall into a state of unconsciousness due to disease or a sudden injury. Nor did the Court uphold the Region's argument that the regional legislation provided for a service that was supposed to be 'merely ancillary to the healthcare services provided by the regional health service ordinarily', thereby being of an administrative nature and

falling within the Regional competence in health protection.

Indeed, the regional legislation at issue contained a comprehensive and articulated framework for advance directives, reflecting the principle of freedom of medical care (Judgments nos 438 of 2008, 282 of 2002, 185 of 1998, 307 of 1990) and requiring a complex body of rules. It diverted the advance directives from the private to the public domain, by establishing rules on their form and their mention and registration in a public database. While the Region assigned public relevance to the advance directives, it had overstepped into an area – that of ‘civil law’ – which Art 117, para 2, letter *l*), of the Constitution confers to the State’s exclusive legislative competence.

4. The question raised with regard to Art 3, Constitution, was also ruled to be founded.

### **Judgment 8 November – 15 December 2016 no 265\***

*(Direct Review of Constitutionality)*

*Keywords: Non-Scheduled Public Transport Service – Regional Law – Exercise Limited to Authorized Operators – Impact on Free Competition – Unconstitutionality.*

1. The President of the Council of Ministers challenged, before the Constitutional Court, Art 1 of Piedmont’s Regional Law 6 July 2015 no 14, concerning non-scheduled public transportation services.

The provision amended the general regulation on these services (Regional Law

The principle of equality enshrined in said Art 3, requires that the rules governing consent or refusal of medical treatments at the end of life – and the donation of organs and tissue, likewise – be uniform over the entire national territory, for they affect essential aspects of human identity and integrity. It is for this reason that the exclusive legislative competence for matters of ‘civil law’ is vested in the State.

While the State has already enacted legislation on the donation of tissue and organs (Law 1 April 1999 no 91), to date, it has not dealt with the issue of the advance directives. Parliament has struggled to find a common solution and the path to reaching such a solution remains long. However, the absence of national legislation could not excuse the Region from legislating on an area of competence that is reserved to the State alone.

23 February 1995 no 24), and introduced a new Article regarding the ‘Exclusiveness of transport service’, according to which public transportation by reservation of a vehicle through any means in exchange for payment could only be exercised by licensed taxi drivers or by individuals or companies that offered limousine services.

The President of the Council of Ministers questioned the provision, alleging an infringement of exclusive State legislative competences. As a matter of fact, the provision limited the supply of transport services by introducing a ban on all new economic operators other than taxi and limousine drivers, and thus regulated competition, an area that was exclusively reserved to the State’s legislative compe-

\* By Annalisa Cocco.

tence (Art 117, para 2, of the Constitution). Moreover, with regard to its contents, the provision breached the principle of competition under European Union (EU) law, which allows limitations upon the free market only if strictly necessary and in ways that are concretely tailored to the pursuit of legitimate public interest goals.

To support its challenge, the applicant highlighted that the new regulation obstructed the development of the market because it prevented new kinds of transportation and public mobility making use of technological innovation from developing. Also taking into account the growth of new services offered by non-professional drivers, such as ‘car sharing’ and ‘Uber’, which were available with the ‘UberPop’ smartphone application, the prohibition established by the challenged provision was disproportionate in light of public social needs and interests, also because their development through technological evolution was thus precluded.

2. The Region claimed – in response – that the real effect of the contested provision was not to limit market development and innovation in any way, but simply to limit and prevent unauthorized drivers from entering the regulated transport market. In this regard, the regional law solely reproduced and emphasized the pre-existing general regulations regarding public transport (national Law 15 January 1992 no 21): to guarantee public security and safety, public transport services were allowed only if they were carried out by licensed drivers and other operators with an *ad hoc* authorization issued by the State.

Specific reference was made to Uber International Holding and Raiser Operations. These companies had developed a ‘radio-taxi’ service using Global Positioning Systems that made booking through

smartphones readily accessible. This system resulted in the growth of a taxi-like service without any official license or authorization and, consequently, in the spread of abusive marketing techniques. The regional provision aimed to prevent violations of the rights and the work of authorized and licensed traditional taxi drivers, and protected the safety of private citizens.

3. The Constitutional Court issued a declaration of unconstitutionality.

Regional Law no 14 of 2015, establishing a rigorous definition of the economic operators who were allowed to offer public transport services, limited the initiative of all other economic operators and prevented them from competing in the market.

Thus, it fell entirely under the broad notion of competition (the regulation of which is reserved to the State according to Art 117, para 2, letter e), of the Constitution), that includes (as the Court itself ruled in Judgment no 125 of 2014) both negative and affirmative legislative measures. The first ones are actions and practices that are capable of damaging the competitive structure of markets, while the second aim to enlarge the market by reducing the obligations connected with the economic activities, such as barriers to entry and obstacles preventing freedom of expression of entrepreneurial ability and competition.

Furthermore, with specific regard to non-scheduled public transportation services (involving buses), the power to protect open competition, and to define a balance between free exercise of economic activities and the public interests that interfere with them, falls under the exclusive legislative competence of the State (Judgment no 30 of 2016).

As clear from ongoing debates in the

European Union, many Member States and other countries throughout the world, new needs for market regulation require satisfactory responses. The Court, therefore, called for a prompt legislative intervention.

In view of those considerations, the Court ruled that, although the new regulation was consistent with the national legislative framework, it prevented market development by banning new operators from offering their transport services. It also constituted an obstacle to the en-

trance of new and innovative technologies into the market and therefore had a negative impact on free competition among economic operators. This area, according to Art 117, para 2, letter e), of Constitution, is reserved to the State's competence and cannot be regulated by the Regions.

*The full text of the English translation of the Conclusions on points of law is available at [www.cortecostituzionale.it/documenti/download/doc/recent\\_judgments/S\\_265\\_2016.pdf](http://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S_265_2016.pdf).*

### **Judgment 19 October – 16 December 2016 no 275\***

*(Incidental Review of Constitutionality)*

*KEYWORDS: Persons with Disabilities – Right to Education – School Transportation – Allowances Subject to Discretionary Decisions – Unconstitutionality.*

1. The issue raised before the Constitutional Court by the Regional Administrative Court of Abruzzo concerned Art 6, para 2-*bis*, of Regional Law 15 December 1978 no 78, as modified by Art 88, para 4, of Regional Law 26 April 2004 no 15. The challenged provision concerned the possibility of limiting regional financial grants to Provinces intended to cover allowances to implement the right to education. The limitation affected Art 5-*bis* of Regional Law no 78, according to which the Regional Government guarantees the coverage of half the costs borne by Provinces for school transportation services granted to students with disabilities.

\* By Matteo Monti.

2. The referring Court argued that Art 6, para 2-*bis*, breached Art 10 of the Constitution (in relation to Art 24 of the Convention on the Rights of Persons with Disabilities ratified and executed by Law 3 March 2009 no 18), which incorporates international law in the national system, and Art 38 of the Constitution, which guarantees the right to education for persons with disabilities. The provision was challenged because it subordinated the funding of school transportation for students with disabilities to decisions merely concerning the allocation of resources, namely to discretionary decisions that had a direct impact on the protection of the right to education for disabled persons. In the Court's view, the importance of the right is incompatible with a protection depending on mere budget provisions.

Contesting this conclusion, the Abruzzo Region claimed that the right to education of disabled persons must be balanced with the requirement of budgetary equilibrium expressed in Art 81 of the Constitution.

3. The issue before the Constitutional Court concerned the need to balance two

conflicting principles: the fundamental right to education for persons with disabilities, on the one hand, and the need to ensure budgetary stability, on the other. The Court emphasized that legislative discretion cannot be exercised in such a way as to compromise the essential and irreducible core of a fundamental right, as is the right to education for persons with disabilities (this principle was established in Judgment no 80 of 2010).

According to the Court, the contested provision violated Art 38 of the Constitution, since it unlawfully affected the actual provision of the transportation service to persons with disabilities – which lies at the core of their fundamental right to education. As a matter of fact, by subordinating the allocation of resources to decisions taken when drawing up the annual budget, the provision made the very transportation funding discretionary and hence uncertain.

The reference to Art 81 of the Constitution was unjustified: the essential core of the right to education for persons with disabilities should not be compromised by budgetary concerns.

In any case, the Court found that allowances concerning school transportation appeared unlikely to affect budgetary equilibrium, as its costs were already covered in previous years. The real issue was not the lack of resources, but their use: in

this regard, the Court recently confirmed the principle according to which decisions on resource allocation lie within the scope of judicial review (Judgment no 10 of 2016).

The Constitutional Court also rejected the Region's arguments according to which the possibility to limit financial grants was linked to financial support that could be asked of those beneficiaries who were able to pay for the service, so that the law could allow for a prior consideration for the real need for funding in the school year. These arguments were not persuasive: it was precisely the scant attention to its impact in practice that had negatively affected the law. As a matter of fact, according to available data of the period 2006-2012, the Regional Government had not complied with the obligation to cover half of the costs for school transportation: against this backdrop, the challenged provision, by strengthening the discretion available in decision-making, further undermined the right to education of persons with disabilities.

For all these reasons, the Court declared Art 6, para 2-*bis*, of the Abruzzo Regional Law no 78 of 1978 unconstitutional.

*The full text of the English translation of the Conclusions on points of law is available at [www.cortecostituzionale.it/documenti/download/doc/recent\\_judgments/S\\_275\\_2016.pdf](http://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S_275_2016.pdf).*

### **Judgment 8 November – 21 December 2016 no 286**

*(Incidental Review of Constitutionality)*

*KEYWORDS: Child – Attribution of Father's Surname – Impossible Attribution of Mother's Surname – Principle of Equality*

*between Husband and Wife – Unconstitutionality.*

For the analysis of the Judgment, please refer to L. Tullio, 'The Child's Surname in the Light of Italian Constitutional Legality, in this Volume, at page 221.

*The full text of the English translation of the Conclusions on points of law is available at [www.cortecostituzionale.it/documenti/download/doc/recent\\_judgments/S\\_286\\_2016.pdf](http://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S_286_2016.pdf).*

