The rule of law and constitutional justice in the modern world

I. The different concepts of the rule of law/Les différents concepts de l'Etat de droit

Question no. 1

What are the relevant sources of law (e.g. the Constitution, case-law, etc.) which establish the principle of the rule of law in the legal system of your country?

There is no equivalent in Italian to the concept of the "rule of law" that can render the full complexity of its meaning in one single expression.
The distinctive features of a legal system that respects the "rule of law" consist in: the subjection of the public authorities to legal rules; clear and understandable legislation; respect for the principle of legal certainty and the legitimate expectations of those subject to the law; a guarantee of fundamental rights; and the existence of a judicial system with adequate powers and material resources, which must be comprised of independent and impartial third-party judges who guarantee protection for rights within the context of a fair trial.
Under Italian law, which, as is the case for other modern legal systems, is characterized by multiple sources of law, the main source - from which the fundamental principles of the rule of law may be inferred - is the Constitution.
In fact, numerous constitutional provisions indicate that the "rule of law" provides the basis for our legal system.
In the first place, the Constitution asserts as one of the supreme principles of our legal system first and foremost the principle of legality, the applications of which are specified in various Articles of the Constitution. To summarize briefly, these include Article 97, on the legality of administrative action, including the right of judicial relief in respect of the activities of the public administration (Articles 113 and 101) and the responsibility of public sector officials and civil servants for any acts carried out in breach of rights (Article 28); Article 101(2) of the Constitution, which subjects the judiciary to the requirements of legality, stipulating that the courts are subject only to the law; and Articles 70, 117(1) and 134, which assert the principle of constitutional legality within the legislative sphere.
The "rule of law" is also specifically applied in the area of fundamental rights, which are guaranteed by the reservation of particular matters to the legislative and judicial competence respectively (Articles 13 *et seq* of the Constitution).
It is also important to note: Articles 24, 111 and 113 of the Constitution on the justiciability of rights, the right to a defence and the principle of a fair trial; Article 25, which lays down the principle of legality within criminal trials, alongside the requirement that the court must be established by law; and Articles 102, 104, 105, 106, 107 and 108 of the Constitution, which guarantee the independence of the judiciary and the judges from the special courts.

Question no. 2

How is the principle of the rule of law interpreted in your country? Are there different concepts of the rule of law: formal, substantive or other?

Alongside the institutes that fall under a formal notion of the "rule of law", Italian law also features rules that are premised on a substantive conception of the principle.

Regarding the formal aspect, we note the principle of legislative preference (which asserts the superiority and inderogability of the law vis-à-vis executive action) and the principle of formal legality (which subjects administrative and judicial activity to the requirement of compliance with the law).
As regards the regulatory power of the executive, in terms of positive law the priority of the law is apparent from Article 4 of the Provisions on the Law in General, which provides that "[r]egulations may not lay down rules that run contrary to statutory provisions"; on a more general systematic level, this priority may be inferred from the fact that the Constitution refers exclusively to primary sources (Article 70 *et seq* of the Constitution). Moreover, the constitutional basis for regulatory powers may be inferred from Articles 70, 101 and 117(6) of the Constitution.
As regards the substantive aspect, it is important to recall first and foremost the principle of substantive legality, which stipulates that the law must intervene to regulate the conditions under which the rights of individuals may be affected by the public authorities. Thus, in Judgment no. 115 of 2001, in line with its consolidated case law, the Court reiterated "the indispensable requirement that any conferral of administrative powers must comply with the principle of substantive legality underlying the rule of law. According to this principle, the powers granted by law to the administrative authorities must not be "absolutely indeterminable, which would in practice have the effect of granting "complete freedom" to the individual or body vested with the function (see Judgment no. 307 of 2003; followed, *inter alia*, by Judgments no. 32 of 2009 and no. 150 of 1982). It is not sufficient for the law to stipulate that the power must pursue the goal of protecting an interest or value; by contrast, it is essential that its exercise is specifically regulated in terms of content and procedure, in such a way as to maintain at all times legislative cover - albeit elastic - for administrative action". The most significant institute, which may be classed under a substantive notion of the "rule of law", is the reservation to primary legislation.

Reservation to primary legislation
A principle which, indirectly, impinges upon the level of protection for the rights of individuals is that of the reservation to primary legislation.
This is the instrument by which, when regulating the interaction between sources of law within the regulation of a specific matter, the Constitution on the one hand requires the legislator to make specific provision, whilst on the other hand prevents such rules from being laid down by an act of secondary legislation. The principle is rooted in the guarantee of individual freedoms, above all within a legal system incorporating an inflexible Constitution: as a genuine act of restraint imposed by the constituent legislator, constitutional law cannot be set aside by ordinary legislation and a constitutional amendment is, by contrast, required.
Since Italian law lacks a unitary type of reservation to primary legislation, various classifications have been proposed for the notion.
A first distinction turns on the type of source which is empowered to legislate in the area of law; a distinction is thus drawn between a reservation to primary legislation and a reservation to legislation of different status (for example, when the source of law empowered to legislate in the area is constitutional law); distinctions have also been drawn between a reservation to formal primary enactments (in order to indicate the cases in which law may only be created in a particular area by an act adopted according to the legislative procedure) and a reservation to primary sources of law (in which case, alongside ordinary legislation, law may also be created by other acts with equivalent status).
However, the most important distinction is that focusing on the level of intervention reserved to primary legislation, namely between absolute and relative reservations to primary legislation. Under the former scenario, it is prohibited to create law through any sub-legislative sources in the specific area, which must therefore be regulated in its entirety by primary legislation; on the other hand,

under the latter scenario, whilst it is accepted that the area of law may also be regulated by secondary legislation, it is essential that primary legislation regulate in advance at least the principles with which the subordinate legislation must comply.

Question no. 3

Are there specific fields of law in which your Court ensures respect for the rule of law (e.g. criminal law, electoral law, etc.)?

One specific area, of the many sectors in which the case law of the Court has from the outset taken particular care to reiterate the need to respect the principles that guarantee the rule of law, is criminal law. This area of the law is governed by the principle of legality, along with its three corollaries: the prohibition on retroactivity, the requirement of certainty and the reservation to primary legislation. This principle is governed in detail by Article 2 of the Criminal Code, which stipulates that solely and exclusively conduct that is expressly asserted by law to be an offence at the time it was committed will constitute a criminal offence; according to the prevailing interpretation within both scholarship and the case law of the Constitutional Court, the principle may also be inferred from Article 25 of the Constitution (read in conjunction with a variety of other constitutional provisions) which, in providing that "[n]o person may be punished except by virtue of a law that was in force at the time the offence was committed", refers not only to the prohibition on retroactivity but also to the other two corollaries of the principle of legality.
Examining specifically each of the three corollaries, it may be noted summarily that: the principle of reservation to primary legislation operates on the level of legal sources and entails that the national legislator (see Judgment no. 487 of 1989) has a monopoly over the creation of criminal law; on the other hand, the principle of legal certainty regards the manner in which a criminal offence is provided for and requires that it be described with an adequate degree of certainty so as to enable individuals to understand which conduct will attract criminal liability and which conduct will be penally irrelevant; finally, the prohibition on retroactivity pertains to the validity of the criminal law over time and stipulates that an individual may only be punished under the terms of a law that entered into force before the conduct classified as an offence occurred.
One specific area within which the problem of compliance with the principles mentioned above has arisen is that relating to the admissibility of interventions before the Constitutional Court that have an effect on the criminal law.
The rulings that have had favourable effects for the accused (where they have eliminated a criminal offence, reduced the applicable sentence, or expanded the situations in which grounds for exemption from punishment or excuses apply) have not given rise to particular problems as they are consistent with the principle of *favor libertatis*; on the other hand, there has been some debate as to whether it is possible to ask the Court to issue rulings that may entail detrimental effects for the offender, which on a theoretical level could be difficult to reconcile with the principle of the reservation to primary legislation and the prohibition on retroactivity.
The case law of the Constitutional Court has evolved over time as regards its view of the reservation to primary legislation.
It initially tended to regard any rulings *in malam partem* to be inadmissible on strictly procedural grounds, finding that such questions lacked relevance precisely with reference to the prohibition on retroactivity. In fact - according to the provision referred to above, to the effect that "no person may be punished for conduct which, according to the law in force at the time when it was carried out, did not constitute an offence" (Article 2 of the Criminal Code) - any judgment in such proceedings, including a judgment accepting to hear the question of constitutionality, could not in any case result

in any detrimental effects for the accused within the criminal trial pending before the referring court (see Judgment no. 85 of 1976).
However, it subsequently adopted a more nuanced view of the guarantees afforded to the accused by constitutional principles in the area of criminal law, distinguishing between the efficacy of rulings that more favourable criminal legislation is unconstitutional and the constitutional review to which such provisions must nonetheless be subject, in order to avoid the creation of free zones entirely unregulated by the Constitution, thereby concluding that it was not prohibited from examining the merits of the contested legislation (see Judgment no. 148/1983). However, the change in position concerning the relevance of such issues did not render questions concerning more favourable criminal legislation automatically admissible; it has been clarified that the preclusion on decisions that rule legislation unconstitutional where the effect thereof is detrimental for the offender results not merely from procedural considerations – on the grounds of lack of relevance, in the sense clarified above – but rather from a substantive level, being closely related to the principle of reservation to primary legislation laid down by Article 25(2) of the Constitution.
Nevertheless, the contrast with the reservation to primary legislation is apparent in cases in which the Court's decision to extend punishability to conduct not envisaged by the legislator or by increasing punishment ends up making a genuine choice of criminal policy, which by contrast falls within the exclusive competence of the legislator. On the other hand, as was clarified in the recent Judgment no. 394 of 2006, in the event that more favourable criminal legislation is ruled unconstitutional (i.e. provisions which, by repealing or amending previous criminal law, result in more favourable treatment for the offender), the resulting effect *in malam partem* will not impinge upon the reservation to the legislator of criminal policy choices. This is because it "does not result from the enactment of new legislation or interference with existing legislation by the Court" but "(…) by contrast is an automatic consequence of the re-expansion of the general or ordinary rule laid down by the legislator"; this re-expansion "is a natural reaction by the legal system - resulting from its unitary nature - to the disappearance of the unconstitutional provision, and would occur just the same even if the exception struck down were to result in more serious punishment; in this latter case, it would be the less serious general criminal rule that re-expanded, and such a scenario could not be considered to involve any creative or supplementary intervention by the Court in relation to punishment".
Finally, these principles have been reiterated in recent judgments by the Court, which was requested to rule on questions concerning the constitutionality of criminal law providing for more favourable treatment (see Judgments nos. 5, 32, 46 of 2014), in which the need to respect the central role of Parliament was highlighted - as the supreme expression of political representation by virtue of its election by universal suffrage by the entire national collectivity - as the body vested with law-creating power in this area insofar as it impinges upon the fundamental rights of the individual (and in particular on personal freedom).
As regards judgments *in malam partem* that are compatible with the reservation to primary legislation, it is then necessary to carry out a review of their compatibility also with the principles governing the enactment of criminal legislation at different points in time. It is necessary to distinguish between two scenarios.
In the event that the offence was committed whilst the more favourable provision was in force, the Court is precluded from adopting judgments that are detrimental for the offender as they may entail the application of a more severe rule, which would be at odds with the principle that no person may be punished for an act which, at the time it was committed, was not classed as an offence or was classed as a less serious offence.
The position is however different in the event that the act was committed specifically at the time when the more severe ordinary rule was in force and the Court finds a subsequent more favourable rule to be unconstitutional, thereby preventing its retroactive effect: in such an eventuality, there are

no apparent obstacles that would render inadmissible any ruling by the Court, as the offender will suffer the punishment that was applicable at the time when he or she freely decided to break the law.

Question no. 4

Is there case-law on the content of the principle of the rule of law? What are the core elements of this principle according to the case-law? Please provide relevant examples from case-law.

The Constitutional Court has frequently referred to the concept of the rule of law since the outset of its activities in order to stress the common substrate which includes the principles that guarantee the essential freedoms of citizens and which must be considered to be fundamental and essential for current democratic systems.
In relation to the keystone principle of the system, the Court has held that, within a state governed by the rule of law, a legal interest can only be afforded protection in accordance with the objective rules laid down within constitutional law (see Judgment no. 155 of 1990). There is a vast case law on this issue. This concept is perfectly exemplified by the assertion that any rule that has the effect of endorsing situations brought about by the violation of the principle of *neminem laedere* will be inconsistent with the framework of values upon which the rule of law is founded (see Judgment no. 16 of 1992). As far as the right to security is concerned, the Court takes the view that it consists in "orderly civil cohabitation", which is undoubtedly the ultimate goal of a liberal and democratic state governed by the rule of law (see Judgment no. 2 of 1956). As regards the constitutional principles that legitimize the power of the government to adopt secondary legislation (decrees), the Court has held that these are fundamental and traditional constitutional principles of any state governed by the rule of law, which are now expressly provided for under Articles 70 and 77(1) of the Constitution (see Judgment no. 37 of 1957). In order to appreciate the meaning and scope of the right to a defence, the Court has held that it is fundamental within any legal system based on the indispensable requirements of justice and on the linchpins of the rule of law (see Judgment no. 46 of 1957) and that within a free and democratic state governed by the rule of law citizens may be afforded sufficient means to defend themselves against arbitrary action (see Judgment no. 121 of 1957). The principle of legality applies in every state governed by the rule of law, and manifests itself, *inter alia*, in the principle of culpability which – in requiring that criminal responsibility cannot be imputed without at least fault on the part of the agent in relation to the most significant constituent elements of the offence – guarantees individuals "the certainty of free choices with regard to their actions", namely the certainty that "they will be held criminally responsible only for actions under their control and never for conduct that only give rise by chance to consequences that are prohibited under criminal law, and, in any case, never for acts carried out in the non-culpable, and hence inevitable, ignorance of the rule". Thus, Judgment no. 364 of 1988 which – in ruling unconstitutional Article 5 of the Criminal Code insofar as it does not exclude inevitable ignorance from the bar on ignorance of the criminal law as an excuse – elevated the effective possibility of awareness of the criminal law to "a further minimum subjective prerequisite for guilt" (which may be inferred from the combined provisions of Articles 2, 3, 25(2) and 73(3) of the Constitution) and held that, "within the context of the rule of law", the principle of reservation to primary legislation, the principle of legal certainty and the prohibition on retroactive criminal law that provides for new offences "are an expression of the consideration (to use a contractual analogy) which the state offers in return for the mandatory status of the criminal law: the state guarantees to individuals that it will not punish them without having previously informed them about what is prohibited or required, but requires individuals to comply with particular duties (…) aimed at realizing the principal rules

relating to criminally acts". The rule of law moreover ensures a suitable guarantee against abuses and excesses by the public administration (see Judgment no. 100 of 1987). Out of the various rulings made by the Court in order to protect individuals against a possible arbitrary exercise of public power, it is important to note Judgment no. 115 of 2011, which will be considered in greater depth in the answer to question no. 17. Again, the proper management of public funds obtained from taxpayers as a whole and destined for the satisfaction of public needs is a general principle of our legal order, and may be traced back to a fundamental principle of the rule of law (see Judgment no. 1007 of 1988). Military service has been classified as the personal service *par excellence* and the most burdensome that may be admitted within a civil and democratic society and a state governed by the rule of law (see Judgment no. 41 of 1990).

With specific reference to the enactment of legislation, the case law of the Court within proceedings concerning the constitutional review of retroactive legislation has frequently referred to the legitimate expectation in legal certainty, which is a fundamental and indispensable element of the rule of law (see Judgments nos. 209/2010, 236/2009 and 349/1985). The principle was most recently reiterated in Judgment no. 56 of 2015, where it was clarified that "the value of the legitimate expectation in legal certainty may be inferred from Article 3 of the Constitution, although not in absolute and inderogable terms. Retroactive legislation is permitted, except within the criminal law, but must be justified by reasons in the general interest (see *inter alia*, Judgment no. 78/2012). On the one hand, in fact, the legal position that gives rise to a legitimate expectation in the continuing validity over time of a particular regulatory framework must be adequately consolidated, both by virtue of its extension over a sufficiently long period of time and also by virtue of it having arisen within a substantive legal context capable of establishing reasonable reliance on the part of addressees that it will be maintained. On the other hand, supervening public interests may call for the enactment of legislation that is intended to have a detrimental effect also on consolidated interests, subject to the sole limit of the proportionality of the encroachment having regard to the public interest objectives pursued". It is thus clear that the legislator is not absolutely barred from adopting provisions that alter the rules applicable to long-term relationships in a manner that is detrimental to the addressees, even if they create perfected individual rights; however, this is possible upon condition "that these provisions do not go so far as to become irrational, thereby frustrating the expectations of private individuals in legal certainty with regard to substantive situations based on previous legislation, which must be regarded as a fundamental element of the rule of law (see Judgments no. 302 of 2010, no. 236 and no. 206 of 2009, Order no. 31 of 2011)". With regard to one specific category of retroactive legislation, namely laws laying down an authentic interpretation, it has been asserted that this is commonly accepted within legal systems governed by the rule of law and democratic states, and that their enactment does not necessarily impinge upon the principle of the separation of powers (see Judgment no. 118/1957).

The rulings within the case law concerning the different scope of jurisdiction are equally significant. The principle of a court established by law is considered to be rooted in the traditional concept of the natural judge, which has been forcefully and continuously asserted as one of the guarantees of the rule of law (see Judgment no. 88 of 1962). The guarantee of judicial relief assured to "all persons" is an expression of a principle that is coessential with every type of state governed by the rule of law (see Judgment no. 44 of 1968). The proper conduct of the judicial function is recognized as being one of the fundamental aspects in the life of a state governed by the rule of law, and the principle of legality is classified as a fundamental requirement of the rule of law (see Judgment no. 100 of 1981). According to the case law of the Constitutional Court, the limits on the jurisdiction of the ordinary courts must be interpreted narrowly. Reference may be made in this regard to: rulings issued within jurisdictional disputes between branches of state, concerning the issue of substantive immunity, with regard to the notion of the functional link between the opinions expressed and the votes cast and the exercise of parliamentary functions (see Judgments nos.

10/2000 and 11/2000); the assessment of the ministerial status of offences under the competence of the judiciary (see Judgments nos. 87/2012 and 88/2012); the immunity from criminal prosecution of individuals holding high offices of state for acts committed prior to their assumption of office and for the full period of their term in office (see Judgment no. 24/2004); the suspension of criminal proceedings against individuals holding the high offices of state (see Judgment no. 262/2009). For a broader discussion of the rulings mentioned above, see the answers given to questions no. 5 (regarding parliamentary privilege) and no. 14 (regarding the remaining issues).
Finally, the constitutional case law (see, *inter alia*, Judgments nos. 1146/1988, 232/1989, 238/2014) that has laid down a hierarchy of values within the sources of constitutional law, placing at the pinnacle of the legal order the supreme principles of constitutional law and the inalienable rights of the individual, is particularly significant. In fact, these principles and rights are immune, as regards their essential content, from the valid exercise of the power of constitutional review and moreover operate as "counterlimits", that is as insurmountable barriers on the incorporation into national law of provisions of European law, customary international law and provisions specifically referred to in the Constitution (Articles 7 and 8 of the Constitution on relations with religious faiths). To date, the case law has classified, under the aforementioned principles, the right to judicial relief (Judgments nos. 18 of 1982 and 238 of 2014), the right to free and secret communication (see Judgment no. 366 of 1991), the right to life (see Judgment no. 35 of 1997) and the principle or secularism (see Judgment no. 508 of 2000). The catalogue of supreme principles has also been variously enriched by scholarship, which normally includes amongst them not only the republican form of the state (the only limit on amendment that is expressly stated in the Constitution, in Article 139) but also the full range of principles that appear to be indispensable in order for a given particular system to be regarded as democratic: popular sovereignty, the elective and representative nature of institutions, free and equal voting, freedom of information and the whole body of inviolable human rights, and the unitary and indivisible nature of the Republic.

Question no. 5

Has the concept of the rule of law changed over time in case-law in your country? If so, please describe these changes referring to examples.

Within the Italian legal experience, the concept of the rule of law has shifted and has been adapted in line with the different interpretations of the concept at different points in time.
In some cases, this has been due to reasons pertaining to more specifically historical and political aspects, such as for example in situations in which a provision adopted prior to the entry into force of the Constitution has been interpreted differently when subjected to constitutional review precisely in the light of supervening constitutional law. In other cases on the other hand, a *revirement* in constitutional case law has been noted not as the result of the adoption of new parameters but rather due to a reconsideration of positions expressed in the past.

Decisions adopted by prefects
As regards the former scenario, we may mention by way of example the different interpretation of Article 2 of the Consolidated Text of Laws on Public Security [TULPS] (contained in Royal Decree no. 773 of 1931).
Article 2 TULPS provides that "the Prefect shall have the right, in case of emergency or serious public need, to adopt measures that are indispensable in order to protect public order and public security". During the years immediately following the entry into force of the Constitution the

constitutionality of the provision was questioned on the grounds that it contrasted with Articles 76 and 77, which lay down within strict limits the procedure applicable to the adoption of legislation and acts having the force of law, or in any case on the grounds that it undermined the regulation of public powers by encroaching upon the competence of the legislative branch and the freedom of the general public. Initially, in Judgment no. 8 of 1956, the Court rejected the question of constitutionality on the grounds that the contested provision "must be interpreted, for the purpose of establishing its constitutionality, not within the system out of which it was historically created but rather within the current system in which it operates". Following the entry into force of the Constitution, the case law of both the ordinary and the administrative courts had been settled in finding that the measures in question had the status of administrative acts, which were adopted by the Prefect in the course of the exercise of his/her official powers, were strictly limited in time having regard to the requirements of necessity and urgency and were required to comply with the general principles of the legal system. At any rate, the Court stated its hope that - in order to safeguard Article 2 from any interpretation at odds with the spirit of the Constitution - the legislator would take steps to introduce into the text of the provision an express reference to the principles mentioned above, with which such measures would be required to comply and which provision, as reformulated, would state a requirement to provide reasons and of publication in the event that the measure did not relate to a specific individual.
However, notwithstanding the Court's judgment, several court rulings departed from the principles and guarantees indicated; in addition, despite the passage of time, the text of the legislation remained unchanged, as the legislator did not take steps to amend the legislation. In view of this situation, and in order to prevent any official from adopting measures under Article 2 of the Law on Public Security that could violate the rights guaranteed under the Constitution, the Court intervened once again in this area in Judgment no. 26 of 1961, finding that the provision was unconstitutional insofar as it granted Prefects the power to issue orders without any requirement to comply with the general principles of the legal system, having construed this expression in the manner indicated above.
A specific remark was dedicated to the relationship between such measures and the reservation to primary legislation, which is provided for under the Constitution with the clear function of guaranteeing rights: "In cases in which the Constitution stipulates that the law shall make provision in order to regulate a specific area (for example Article 13(1)), it is inconceivable that, in that area, Article 2 may allow for the issue of administrative acts containing stipulations that are at odds with the law laid down in the Constitution. As regards the areas in which the Constitution has specified a reservation by adopting the wording "according to law" or another phrase of equivalent meaning, it must be recalled that, according to the settled case law (…), which has arisen predominantly in relation to Article 23 of the Constitution, it is admissible for ordinary legislation to grant the administrative authorities the power to take decisions, including acts with the force of law, provided that the law lay down suitable criteria for delineating the sphere of discretion of the body to which such power has been granted".

The adoption of decree-laws
With regard to cases in which previously established positions have been revisited within constitutional case law, of particular note is the issue concerning the amenability to review of the prerequisites for the adoption of decree-laws.
According to 77(2) of the Constitution, "When the Government, in case of necessity and urgency, adopts under its own responsibility a temporary measure with the force of law, it shall on the same day introduce such measure to Parliament for transposition into law. During dissolution, Parliament shall be convened for that purpose within five days of such introduction". This provision therefore subjects the exercise of the power by the executive to the fulfilment of the prerequisites of necessity

and urgency. An interpretative problem has arisen in relation to these aspects, namely as to whether the Court may review the issue of whether the prerequisites were fulfilled, or whether by contrast the assessment of the actions of the Government is a matter for Parliament only when converting the decree-law into law.
The initial position of the Constitutional Court was to remit the issue as to whether the prerequisites were met to exclusive assessment by the Government; it was only at a later stage, in particular after Judgment no. 29 of 1995, that the Court concluded that "the prior existence of a factual situation entailing an urgent need to make provision through an exceptional instrument, such as the decree-law, is a prerequisite for the validity of the adoption of such an act, such that any evident non-compliance will not only mean that the decree-law will breach constitutional law, having been adopted under this scenario outside the scope of the possible applications provided for under the Constitution, but will also constitute a procedural flaw within the conversion law since, under the presumed scenario, the latter will also have mistakenly supposed that the prerequisites for validity were met, whilst they were in actual fact not, and therefore converted into law an act that could not have been a legitimate candidate for conversion. Therefore, the Constitutional Court is not precluded from examining the decree-law and/or the conversion law with reference to the issue of respect for the prerequisites for constitutional validity vis-à-vis the fulfilment of the prerequisites of necessity and urgency since the respective examination by the Houses upon conversion will entail an entirely different assessment, which is strictly political both with regard to the content of the decision as well as to its effects". Subsequent rulings (Judgments nos. 220/2013, 22/2012, 128/2008, 171/2007) have not only consolidated the position set out but have also developed it further: it has been held that decree-laws and conversion laws represent different moments within one single procedural sequence and that upon conversion Parliament cannot approve any type of amendment, but only amendments that are homogeneous with the object and purposes of the decree-law.

The extent of the judiciary's power of scrutiny

a) Opinions expressed by Members of Parliament

According to Article 68(1) of the Constitution, members of Parliament may not be held accountable for the opinions expressed or the votes cast in the performance of their functions. This provision constitutes the reference parameter for resolving jurisdictional disputes between branches of state, which may be raised by the courts against resolutions adopted by the Houses or Parliament asserting the immunity from review of the opinions expressed by a Member of Parliament, which may have the effect of paralysing civil or criminal proceedings in which those opinions are being assessed by the courts with a view to establishing potential responsibility or liability. Following an initially reticent approach to this matter, the case law has now clearly defined the functional nexus between the opinions of Member of Parliament and parliamentary activity, which is relevant for the purposes of the availability of immunity, and has clarified the relations between the guarantee of the function on the one hand and the legitimate exercise of judicial scrutiny on the other.
Judgment no. 1150 of 1988 has fully delineated the scope for intervention of the Court in relation to such matters, clarifying that the prerogative of parliamentary privilege grants the House of origin the power to assess any conduct alleged against its members. However, under the Constitution, which recognises inviolable human rights as fundamental values of the legal system and provides for a judicial guarantor of the Constitution, that power is subject to constitutional review, which may be launched by a jurisdictional dispute pursuant to Article 134 of the Constitution and Article 37 of Law no. 87 of 1953. The dispute will not arise in terms of a *vindicatio potestatis* (as Parliament's power of assessment cannot be objected to in abstract terms), but rather as an objection to the specific power of the other body on the grounds of defective procedure or the failure to assess

or the incorrect assessment of the prerequisites required from time to time for the valid exercise of that power. The first case involving the annulment of a parliamentary resolution concerning privilege dates back to Judgment no. 289 of 1998, in which it was held that the prerogative in question did not extend to all conduct of Members of Parliament, but only to conduct that is functional to the exercise of the powers of the legislator; thus, the functional element is decisive for differentiating between the overall body of declarations, judgments and criticisms, which recur frequently in the political activity of deputies and senators, and opinions that benefit from the special guarantee provided for under the Constitution. Starting from Judgments nos. 10 and 11 of 2000, the Court adopted a strict interpretation of the necessary functional link between opinions in relation to which proceedings are pending against the Member of Parliament and activities carried out in that capacity, finding that a simple link in terms of subject matter or context was not sufficient, but rather that the declaration itself must be identifiable as an expression of parliamentary activity. Within this perspective, opinions expressed whilst exercising parliamentary functions include those asserted during the course of the business of the House and its various bodies or in acts, including individual acts, comprising a manifestation of the prerogatives of the Member of Parliament qua member of that body. Outside of this scope, the opinions of the Member of Parliament rather amount to an exercise of the right of freedom of expression enjoyed by all persons and cannot in themselves be protected by the immunity which the Constitution intended to reserve, as an exception to the general principle of legality and the justiciability of rights, to the opinions expressed whilst exercising parliamentary functions.

b) The domestic jurisdiction of constitutional organs (so-called autodichia [i.e. self-adjudicatory powers vested in a non-judicial body])

An interesting development within the case law in the direction sketched out above of an extension of the judiciary's power of review has concerned the issue of self-adjudicatory powers, that is the systems of domestic justice which constitutional bodies have put in place, by an exercise of their autonomous powers, to regulate relations both with their own employees and with third parties.

Having been requested to review the constitutionality of the provisions of parliamentary regulations that granted judicial powers to bodies from the Chamber of Deputies and the Senate of the Republic over employment disputes with employees, Judgment no. 154 of 1985 ruled the relative questions inadmissible on the grounds that parliamentary regulations were not included in the list of legislative acts laid down in the first paragraph of Article 134 of the Constitution, with the result that they were not amenable to review. In fact, in adopting that Article the constituent legislator rigorously set out the precise and insurmountable boundaries to the competence of the Constitutional Court, in line with the underlying choice in favour of a parliamentary democracy and the central institutional role played by Parliament. The logic of that system requires that the Houses of Parliament be entitled to and be recognized a level of independence that is guaranteed against any other branch of state, which must therefore be precluded any power to review the acts of legislative autonomy adopted by them, including any provisions attributing self-adjudicatory powers. Subsequently, owing to the increased awareness of the principle of equality before the law and the courts and of the right to a defence as supreme principles of the constitutional order, the Court reconsidered its previous rejection and opened up space for reviewing the constitutionality of self-adjudicatory powers. Whilst confirming the inadmissibility of the interlocutory questions concerning provisions adopted by parliamentary regulations on the grounds that they did not fall within the class of acts that are amenable to review under Article 134 of the Constitution, Judgment no. 120 of 2014 recognized that such regulations are not purely internal sources of law but sources of law within the general legal system of the Republic, and as such give rise to provisions that are subject to ordinary canons of interpretation. However, the independence of the Houses of Parliament may not compromise fundamental rights or undermine the implementation of mandatory

principles, as the "overriding rule" of the rule of law must prevail along with the resulting judicial regime to which all legal interests and all rights are normally subject. Respect for fundamental rights, including the right of access to justice (Article 24 of the Constitution), and the implementation of mandatory principles pertaining to the judiciary (Article 108 of the Constitution) are assured by the guarantee function assigned to the Constitutional Court, which may within jurisdictional disputes between branches of state clarify the boundary between the two distinct values of the autonomy of the Houses of Parliament on the one hand and legality-jurisdiction on the other hand, thereby ensuring respect for the limits to prerogatives and the principles of legality which underpins the rule of law. In the wake of this statement of willingness to intervene, a number of disputes raised by the courts in relation to the systems of self-adjudicatory powers of the two Houses of Parliament and the Office of the President of the Republic have been received and ruled admissible (see Orders nos. 91 of 2016, 137 and 138 of 2015) . Proceedings concerning these questions are still pending resolution on the merits.

Question no. 6

Does international law have an impact on the interpretation of the principle of the rule of law in your country?

As noted above, international law (including both treaties and the rulings of international courts) is playing an increasingly significant role within the sources of law that are important in defining and implementing the principles underlying the rule of law.
On various occasions the national legislator has made changes to the text of treaties in order to clarify and render more incisive certain principles that are already present within the Constitution.
These include for example the introduction of the principle of a fair trial through the amendment to Article 111 of the Constitution and the complete abolition of the death penalty by the amendment of Article 27 of the Constitution, although also the rulings from constitutional case law on the retroactivity of more favourable provisions of criminal law.

The right to a fair trial (Article 111, of the Constitution)
The right to a fair trial is one of the principles which the Constitution laid down from the outset in relation to the judiciary. First, Article 25 recognises the principle of a court established by law (referring also to the principle of a lawful court), stipulating that "no case may be removed from the court seized with it as established by law"; Article 24 guarantees the right to take court action in order to protect one's own legitimate rights and interests and asserts that the right to a defence is an inviolable right throughout all stages and instances of proceedings; protection for these individual legal interests is moreover actionable, according to Article 113 of the Constitution, both against private individuals and against the state or other public bodies. The assertion of the above principles entails that it is necessary for trials to recognize the right of the parties to make representations along with the impartial and independent status of the judge.
By Constitutional Law no. 2 of 1999 the principle of the fair trial was introduced into the Constitution, which encapsulates in a unitary formula the principles that were already present within the text adopted in 1948. Moreover, the principle of a fair trial also includes the principle that the length of trials must be reasonable, which is modelled on Article 6 ECHR. Subsequently, in order to implement the new constitutional principle, the legislator enacted Law no. 89 of 2001 (known as the "Pinto Law"), which provides for the right to fair compensation (financial and non-pecuniary) for any person who has been involved in an excessively long trial.

The death penalty (Article 27, of the Constitution)

The Italian Constitution of 1948 abolished the death penalty for all ordinary offences and for military offences committed during peacetime. However, the death penalty still remains under the Wartime Military Code. Following the ratification by Italy of Protocol no. 13 to the European Convention on Human Rights (hereafter, ECHR or the Convention) concerning the abolition of the death penalty in all circumstances, Constitutional Law no. 1 of 2007 amended Article 27 of the Constitution by removing the residual provision relating to wartime military laws.

The principle of the retroactive effect of more favourable criminal legislation

Confirmation of the increasingly important role performed by international law may be observed in the judgments in which the Court has dealt with the issue of the scope and consistency of the principle of the retroactivity of criminal legislation that is more favourable to the accused.

For example, the Court has been called upon on several occasions to review the constitutionality of transitory legislation on time barring laid down by Article 10(3) of Law no. 251 of 2005 on trials already pending on appeal or before the Court of Cassation, which precluded the applicability of more favourable time limits.

Although in Judgment no. 72 of 2008 it initially ruled unfounded a question that had been raised in relation to an alleged violation of Article 3 of the Constitution, in Judgment no. 236 of 2011 it subsequently rejected a question concerning the constitutionality of that provision, which had been raised on this occasion with regard to an alleged violation of Article 117(1) of the Constitution in relation to Article 7 ECHR, as interpreted by the Strasbourg Court in the judgment of 17 September 2009 (*Scoppola v. Italy*). On that occasion, the Court referred as a preliminary matter to its own case law, according to which the foundation for the principle of the retroactivity of more favourable legislation was to be found not in Article 25(2) of the Constitution but rather in the principle of equality. It not only "requires, as a matter of principle, that identical conduct be treated in the same manner irrespective of whether it occurred before or after the entry into force of the provision which repealed the offence or which provided for less severe punishment (see Judgment no. 394 of 2006)", but also amounts to a limit on the retroactive applicability of more favourable legislation, which may be subjected to exceptions or limitations in order to protect "countervailing interests of similar significance". It also reiterated the ruling previously enshrined in Judgment no. 393 of 2006, namely that the principle of the retroactivity of more favourable legislation has taken on self-standing value also by virtue of the reference to international and Community legislation and has acquired through Article 117(1) of the Constitution "a new basis through the interposed Article 7 ECHR, as interpreted by the Strasbourg Court". However, as the case law of the ECtHR has by no means precluded the possibility of introducing exceptions from or limits on the application of the principle under examination where these are supported "by a valid justification", in this case the Court held that a justified exception applied since the contested provision was based on the need to avoid the dissipation of procedural activity carried out prior to the entry into force of the law, thereby affording protection to the constitutional interests furthered by the trial, such as its efficacy and the safeguarding of the rights of persons with an interest in the judicial proceedings, as well as "the principle of the efficacy of the criminal law".

Finally, in the same decision the Court clarified that the principle of the retroactivity of more favourable legislation recognized by the Strasbourg Court has a more limited scope than that applicable under internal law. Whilst Article 2 of the Criminal Code applies that principle to any rule of criminal law subsequently adopted that results overall in more favourable treatment for the accused, the principle enshrined in Article 7 ECHR, as interpreted by the European Court, concerns "exclusively the provision establishing the criminal offence and the penalty" and thus does not extend to situations in which "there is not any change in society's assessment of the offence that is more favourable for the accused, resulting in the conclusion that it is permitted under criminal law,

or in any case less serious". Therefore, that principle cannot be applied to subsequently enacted legislation providing for more favourable time barring periods.

The bis in idem prohibition and the principle of legality within criminal trials
Please refer to the answer given to question no. 12 for the relative constitutional case law.

II. New challenges to the rule of law/De noveaux défis pour l'Etat de droit

Question no. 7

Are there major threats to the rule of law at the national level or have there been such threats in your country (e.g. economic crises)?

Public order
The greatest hazards facing the Italian legal system in relation to public order have concerned the internal terrorism emergency, which was limited to a specific period of time and has now been resolved, and also organized crime.
In order to counter the former type of danger, which afflicted the country for around fifteen years from the start of the 1970s, Law no. 152 of 1975 made provision for a special investigation procedure in relation to offences committed by law enforcement officials, officers from the investigating police or members of the armed forces performing public security duties for acts carried out whilst in service that involved the use of weapons or any other form of physical constraint. Judgment no. 87 of 1976 held that the special legislation introduced for offences committed by the armed forces did not establish any unjustified privileges, and thus did not violate the principle of equality. The rationale underlying the contested provisions was: "to prevent members of the law enforcement authorities from being exposed to the risk of criminal prosecution resulting from baseless accusations of offences concerning the use of weapons or any other form of physical constraint whilst performing their duties". The Court added that, having regard to the public order situation at the time, "which was considered by the legislator to be particularly serious, the difference in treatment introduced for members of law enforcement authorities was fully justified, having been vested with the weighty and risky task of preventing and suppressing the commission of offences and of guaranteeing orderly civil cohabitation through public security".
The Court has also been required to examine the consistency with the rule of law of emergency measures adopted in relation to the danger brought about by organized crime. Judgment no. 103 of 1993 reviewed Law no. 55 of 1990, which permits the administrative authorities to dissolve municipal (or provincial) councils if any direct or indirect links between administrators and organized crime come to light or, in the event that such persons are subject to influence that is liable to compromise the freedom of action of elected bodies and the proper conduct of administrative activity, such as to cause serious and lasting damage to the state and to public security. Whilst the Court accepted the judicial review of dissolution orders, ruling that they did not have the status of political acts, on the merits it held that "once fundamental rights and the principle of equality have been safeguarded in relation to the administration and the relative judicial protection has been assured", the interests of local politicians in objecting to the dissolution must be weighed up against all of the other constitutional principles in play.
On the other hand, as far as inviolable human rights are concerned, including in particular the right to a defence, the Court has intervened on various occasions in order to review the constitutionality

of Article 41-*bis* of Law no. 354 of 1975 (as enhanced by Law no. 94 of 2009) introducing so-called "hard prison" for individuals convicted of certain offences involving major social danger. Most recently, Judgment no. 143 of 2013 held that the provision was unconstitutional insofar as it allowed face-to-face discussions between the prisoner and his or her defence lawyer to be prohibited. The constitutional guarantee of the right to a defence includes professional representation "and hence also the right – which is a necessary corollary – to confer with a defence lawyer: this serves the purpose of defining and preparing defence strategies, and first and foremost gaining information regarding one's own rights and the opportunities offered by the legal order to protect them and to avoid or mitigate the detrimental consequences to which prisoners are exposed". As far as prison inmates are concerned, the right in question takes on particular significance because, since such persons only enjoy "limited scope for direct interpersonal contacts with the outside, they are in a position of inherent weakness with regard to the exercise of their defence rights".

State security

The serious threat resulting from international Islamic terrorism has also driven Italy to adopt legal instruments to combat it. Law no. 438 of 2001 adopted urgent measures to prevent and combat offences committed for the purpose of international terrorism, introducing the new offence of "association for the purpose of international terrorism" (Article 270-bis of the Criminal Code). Decree-law no. 144/2005 (converted into Law no. 155/2005) introduced Articles 270-*quater* and 270-*quinquies* into the Criminal Code ("recruitment" and "terrorist training"), along with Article 270-*sexies*, which defines "conduct intended to promote terrorism". Finally, the Paris attacks in 2015 led the legislator to enact further legislation to combat international terrorism, also in order to bring Italian law into line with numerous supranational decisions (including first and foremost UN resolution no. 2178/2014). In addition, Decree-Law no. 7/2015 (converted into Law no. 43/2015) extended liability to punishment to any individual who enrols as well as those who engage in "self-training". Article 270-*quater* also introduced the offence of the "organization of travel for the purposes of terrorism", extending the preventive measures established under the anti-mafia code to so-called "foreign fighters". More recently, Law no. 153 of 2016, laying down "Provisions to combat terrorism", amended the Criminal Code (Articles 270-*quinquies* and 280-*ter*) to introduce three new offences: "the financing of conduct to promote terrorism"; "the seizure of assets or money that have been frozen"; and "acts of nuclear terrorism".

Whilst the ordinary courts have not yet adopted a homogeneous view concerning the application of these provisions (although see the recent Judgment no. 598 of 13 May 2016 of the Judge for Preliminary investigations at the Court of Milan), the Court has in the past been called upon to rule on the constitutionality of acts adopted in the name of national security that in actual fact violated individual freedom rights. Judgment no. 106 of 2009 concerned a jurisdictional dispute between branches of state initiated by the government against the judiciary, which had launched a prosecution in relation to the kidnapping of an Egyptian national who was suspected by members of the intelligence services of having links with Islamic terrorism, disregarding the government's classification of the matter as a state secret. The judgment held that "the supreme interest of the security of the state as an international actor" predominates over any other "and is expressed within the Constitution through the solemn wording contained in Article 52, which asserts that it is the sacred duty of the citizen to defend the Homeland". It therefore follows that, according to a balanced weighing of the constitutional principles, "the invocation of an official secret by the President of the Council of Ministers cannot have the effect of preventing the public prosecutor from investigating criminal conduct to which a *notitia criminis* in his possession refers (…), but only that of preventing the courts from obtaining and in consequence using any information and evidence that is classified as an official secret". "The procedures according to which the power to

classify matters as official secrets is exercised are therefore subject to review by Parliament, this being the natural forum for control of the merits of the most high-ranking and serious decisions of the executive, since it is carried out before the body representing the people, in which the sovereignty which could be undermined is vested".
Also Judgment no. 40 of 2012 dealt with the issue of interference between state secrets and another constitutional value of primary standing comprising one of the fundamental human rights: the right to a defence. A jurisdictional dispute between branches of state had arisen following the discovery at a SISMI (Italian Military Intelligence and Security Service) office of "an archive (...) containing numerous files relating to the lives, activities and political orientations of judges, state functionaries, journalists and members of Parliament and the activities of trade union movements and associations of judges". According to the prosecution, in the light of the documents seized, the purpose of the said collection of information was to discredit by defamation, slander and abuse of office the interested parties, who were deemed to be "hostile" by virtue of their political ideas. However, the government classified the matter as a state secret, as governed by Law no. 124 of 2007. According to the Court, "the principles laid down in case law relating to the basis in constitutional law of the institution of official secrets are evidently not pliable or amenable to alteration in the light of possible changes in circumstances brought about by the passage of time". In fact, the foundation for the legitimation of official secrets "may be found exclusively in the requirement to safeguard the supreme interests of the state and the community, in that it operates as a necessary instrument for achieving the goal of the internal and external security of the state and for guaranteeing its existence, integrity and democratic framework: these are values which are expressed within a complex body of constitutional provisions, including in particular those laid down in Articles 1, 5 and 52 of the Constitution". It is precisely the rationale of safeguarding the "*salus rei publicae*" that enables official secrets "to operate as a "bar" on the exercise of judicial powers, including specifically those seeking to establish individual responsibilities for conduct classified by law as an offence". The Court thereby reiterated the broadly discretionary and inherently political nature of the assessment – which falls to the President of the Council of Ministers – as to which means are suitable and necessary in order to guarantee state security.

Economic equilibria and fundamental rights
The need to deal with the economic crisis in recent years has resulted in the adoption of emergency financial measures, which have had a profound effect on the resources and the autonomy of local government bodies, and also indirectly on the social rights guaranteed by them. As a result, the Court has been seized with numerous questions of constitutionality, and has been required in each case to ascertain the best balance between economic requirements, which are focused on the recovery of the public accounts, and social requirements, which constitute a direct expression of the constitutional project. Judgment no. 36 of 2004 asserted that "it cannot be disputed that state legislation may impose budgetary policy restrictions on local government bodies for the purpose of financial coordination in relation to national objectives, as resulting also from obligations under Community law, even where these inevitably translate into indirect limitations on the spending autonomy of such bodies". It is therefore possible that state legislation may exercise the discretion available to it to impose limits on spending by self-governing bodies, even where such spending pursues welfare objectives, provided that it is not exercised in an irrational manner, occurs on a transitory basis and pursues the specific objectives of rebalancing the public finances.

a) Anti-crisis measures affecting pensions and employment contracts
Certain measures to contain spending which have been adopted in relation to the economic crisis have been held not to comply with principles of constitutional law. In fact, the financial emergency

cannot under any circumstances legitimize legislative choices that are irrational or not based on a reasonable balancing of conflicting values or interests.
Judgment no. 116 of 2013 held that measures intended "to pursue a general cooling of wage dynamics within public sector employment, in addition to temporary measures to reduce pay and solidarity measures" cannot however have a detrimental effect only on one certain category of individual, such as specifically persons in receipt of pension income. In fact, the equalization initiative is fiscal in nature as it involves "a definitive reduction of the pension payment, and the allocation of the relative amount to the state budget, which fulfils all of the prerequisites required by this Court in order for the levy to be classified as a tax", and is therefore unconstitutional because the Constitution requires "an inseparable link with capacity to pay tax, within the context of a system inspired by the principles of progressive taxation, as a further manifestation within the specific field of taxation of the principle of equality, which is related to the task of removing *de facto* financial and social obstacles to the freedom of and equality between people, within a spirit of political, economic and social solidarity (Articles 2 and 3 of the Constitution)".
Judgment no. 70 of 2015 declared unconstitutional a provision which, for 2012 and 2013, limited the automatic revaluation of pension income in respect of the full amount thereof for pensions worth an overall amount of up to three times the minimum INPS (Italian National Institute for Social Security) pension, with the result that pensions higher than that threshold (1,217.00 euros net) were excluded from any revaluation. In failing to comply with the reference legislation enacted both previously and subsequently (both in respect of the duration of the measure for more than one year and also due to the fact that it applied to pensions that were not particularly high), the contested provision breached the limits of reasonableness and proportionality because it limited itself to recalling generically the "contingent financial situation", and the overall design did not make it clear why financial requirements should prevail over the countervailing rights of pensioners, which had been affected by such a far-reaching initiative.
Judgment no. 178 of 2015 ruled unconstitutional a further extension in the freeze on collective bargaining procedures for public sector workers, which had already been ordered for the 2010-2014 period. The provisions contested by the referring courts and those subsequently enacted in the Stability Law for 2015, which applied without any interruption and shared an analogous purpose, violated trade union freedom (Article 39(1) of the Constitution) in making clear the structural design of the "block". In fact, whilst the financial emergency can be used as justification for measures with a limited temporal horizon, it cannot also justify measures destined to continue *ad libitum*. The emergence of the structural nature of the suspension of bargaining procedures meant that the sacrifice of the fundamental right protected under Article 39 of the Constitution was no longer tolerable and had the effect of rendering the legislation concerned unconstitutional. Having thereby removed the limits to the implementation of procedures relating to wage bargaining, the Court recommended to the legislator, without any obligation as to the result, to provide a new impulse to the ordinary contractual dialectic, in accordance with spending limits, and without prejudice to the financial effects resulting from the provisions examined for the period that has already elapsed.

b) The remuneration of judges

According to settled case law, the gravity of the economic situation may allow salary increases to be curtailed, provided that this is limited to the period of time necessary in order to satisfy the requirements of budgetary rebalancing and that it occurs within the context of similar sacrifices imposed both on public sector employment (through a block on bargaining procedures) and on taxpayers in general. By Judgment no. 223 of 2012, the Court ruled unconstitutional certain provisions concerning the removal of the mechanism for automatic salary adjustments for judges

and the reduction of their judicial allowance on the grounds that these measures had unreasonably breached the limits set for them, to the detriment to one single class of public sector employee.

c) State initiatives to support situations of particular distress

Judgment no. 10 of 2010 provided that a state initiative involving the provision of a prepaid shopping card intended for the purchase of essential goods and services to individuals suffering from financial distress did not violate the regions' competences over social security on the grounds that it fell under the legislative competence of the state over the "determination of essential service levels" within the extraordinary, exceptional and urgent situation of international economic and financial crisis that affected also our country in 2008 and 2009. In the same way, Judgment no. 62 of 2013 reasserted that intervention by the state will be "admissible when, in addition to complying with the principles of equality and solidarity, it relates to extraordinary, exceptional and urgent circumstances such as those resulting from the situation of economic and financial crisis which has affected our country", and that accordingly it will be justified whenever it occurs "either with the aim of protecting individuals in situations of extreme vulnerability or in relation to the extreme seriousness of the economic crisis that has affected our country".

Question no. 8

Have international events and developments had a repercussion on the interpretation of the rule of law in your country (e.g. migration, terrorism)?

The unstable geopolitical situation in recent years has affected national legal systems on various levels. In particular, questions have arisen concerning the access to welfare and civil rights by illegal non-EU immigrants.

As far as protection for fundamental human rights is concerned, the Court has reviewed the constitutionality of a series of provisions which, in attempting to regulate immigration on various levels, including in particular illegal immigration, have often attempted to impose limits on, or in any case to condition, the exercise of fundamental rights by persons originating from non-EU countries. In general, Judgment no. 105 of 2001 ruled in relation to inviolable rights "that these are vested in individuals not by virtue of their membership of a particular political community but as human beings".

Within the area of criminal law, the manifestation of the above principle has resulted in a balancing of the various general interests involved. Judgment no. 249 of 2010 reiterated that "the legal status of foreign nationals must not be considered – as far as the protection of such rights is concerned – as a legitimate basis for different and less favourable treatment, especially under criminal law, as the area of law most directly related to fundamental human freedoms, which are safeguarded in the Constitution by the guarantees laid down in Articles 24 et seq, which regulate the position of individuals with regard to the state's punitive powers". Consequently, the aggravating circumstance of having committed an offence whilst an illegal immigrant was ruled unconstitutional on the grounds that "the contested provision is not consistent with the logic of causing of greater harm or greater danger to the interest protected by the criminal law provisions establishing and punishing individual offences". On the contrary, when considering a provision introducing into the legal system the offence of "illegal entry into and stay in the country", Judgment no. 250 of 2010 asserted that the power "to regulate immigration amounts to an essential feature of state sovereignty as an expression of control of the territory". It thus held that the offence did not punish "a manner of being of the person, but specific conduct in breach of applicable legislation", which violates the state's legal interest "in the control and management of migratory flows in accordance with a

specific legislative framework", which is in turn essential for "an advanced form of protection for the entire body of final public interests – of certain constitutional significance – that are liable to be negatively affected by uncontrolled immigration". Regarding the issue of immigration, the Court concluded that "the requirements of human solidarity cannot be asserted unless a correct balance of the values in play is struck (...) [and that] the requirements of solidarity be protected", *inter alia*, by "the applicability to illegal immigrants of the legislation on support for refugees and international protection", in accordance with Community law.

On the other hand, as far as the exercise of welfare rights is concerned, the Court struck out from the legal order provisions that sought to render their exercise conditional upon the holding of a residence card or on a period of residence of a certain duration. In Judgment no. 252 of 2001 it was recognized that "the right to healthcare treatment that is necessary in order to protect an individual's health is conditioned under constitutional law by the requirement that it be balanced against other interests protected under constitutional law, subject in any case to the guarantee of an irreducible core of the right to health protected by the Constitution as an inviolable aspect of human dignity, which requires that no situation may be brought about in which protection is lacking", and that this irreducible core "must be recognized also to foreign nationals, irrespective of their status under the legislation regulating the entry into and stay within the state, although the legislator may provide for different arrangements for its exercise as "a foreign national who is present, even unlawfully, within the country has the right to benefit from all services that are non-deferrable and urgent […] as this is a fundamental human right".

A particular group of significant judgments has concerned Article 80(19) of Law no. 388 of 2000 which, in providing in general that "income support and financial benefits, which are individual rights under applicable legislation on social services, shall be granted in accordance with the conditions laid down in the legislation to foreign nationals who hold a residence card" (now the long-term EC residence permit), pursued the aim of restricting the provision of social benefits to non-EU nationals. In fact, the provision had a direct effect on the prerequisites for entitlement to receive social benefits by limiting the class of recipient non-EU nationals to those holding a residence card, the issue of which besides requires lawful residence within the country for at least five years. As a result, following the entry into force of the legislation, the previous equal treatment of Italian nationals and foreign nationals holding a valid residence permit no longer applied. The long series of decisions regarding this matter started with the issue of several rulings dealing with the income limits imposed on non-EU nationals in order to be able to receive a residence card. The Court held that it was unreasonable to subject the provision of welfare benefits to the receipt of a specific minimum income. The Court subsequently reviewed the provision with regard to the different issue of unjustified discrimination against non-EU nationals in relation to the different types of benefit from time to time considered. Such benefits are intended to assist individuals suffering from highly incapacitating disabilities, and their award was thus intended to satisfy different values of constitutional significance, such as the protection of health, the guarantees to be afforded to the disabled, and the safeguarding of acceptable living conditions. The Court thus branded as intolerable a system that subjected the receipt of benefits of that nature to the holding of a residence card, i.e. a merely temporal prerequisite which was entirely incompatible with the urgent and pressing nature of the relative needs.

On the other hand, the Court has recognized that the prerequisite of ongoing residence may be reasonably imposed as a requirement for the receipt of a social benefit due to the limited availability of resources in relation to non-essential benefits or support for members of the community that requires a certain level of residential stability, provided however that the prerequisite is applied at all times in accordance with the goals which the legislator seeks to pursue. Similarly, the situation of individuals with no status, who nonetheless have legitimately established a strong connection with the community within which they live and into which they have integrated, having established

there stable prospects of employment, family life and emotional ties, has also been held to deserve protection.

Question no. 9

Has your Court dealt with the collisions between national and international legal norms? Have there been cases of different interpretation of a certain right or freedom by your Court compared to regional/international courts (e.g. the African, Inter-American or European Courts) or international bodies (notably, the UN Human Rights Committee)? Are there related difficulties in implementing decisions of such courts l bodies? What is the essence of these difficulties? Please provide examples.

It is now a settled fact that the legal space within which the Italian state operates is no longer that circumscribed solely by the national territory and that it overlaps with a "European legal space" within which various actors operate, guaranteeing multi-level protection for fundamental rights. This has made it necessary for the Court to define its relations with two other organs entrusted with the protection of rights, namely the Court of Justice of the European Union and the European Court of Human Rights (hereafter, ECtHR). These relations now appear to be well-defined, following the adoption of important judgments.

Relations between Italian law and EU law
As regards the relationship between national law and EU law, the Court has asserted that the latter prevails. In fact, whilst Judgment no. 14 of 1964 held that Article 11 of the Constitution permitted the "conclusion of treaties entailing restrictions on sovereignty" but that in the event of any conflict between the national provision implementing the Community provision and the subsequent conflicting provision, it should be resolved "according to the principles applicable to legislation adopted at different points in time", Judgment no. 232 of 1975 by contrast held that whilst "Community law prevails over national law", the Italian courts do not have the power to set aside subsequently enacted internal legislation, but are "required to refer a question concerning their constitutionality". Finally, Judgment no. 170 of 1984 established the current settled position, under which national law may be set aside by the national courts. Thus, in the event that "there is an irreducible incompatibility between the national provision and the Community provision, it is the latter that must under all circumstances prevail" since "the two systems are structured as autonomous and distinct, albeit coordinated, systems according to the division of powers laid down and guaranteed by the Treaty", provided under all circumstances that they do not violate fundamental principles of the legal order or inalienable human rights (theory of so-called "counterlimits").

"Counterlimits"
Judgment no. 183 of 1973 specified that the restrictions on sovereignty permitted under Article 11 cannot, under any circumstances, vest the European institutions with an "inadmissible power to violate the fundamental principles of our constitutional order or inalienable human rights" and that, "should such an aberrant interpretation ever emerge (…) in such an eventuality the guarantee of constitutional review by this Court of the continuing compatibility of the Treaty with the said fundamental principles would always be guaranteed". The incorporation of any European provision at odds with indispensable constitutional values would thus result in a declaration that the provision implementing the Treaty was unconstitutional insofar as it permitted the operation of the former provision within the legal system, obviously according to the time-scales and ordinary procedures

applicable to the conduct of constitutional proceedings. This is the heart of the "doctrine of counterlimits", by which the Court has sought to impose limits on the increasing dissemination of Community legislation in order to protect the identity of the republican legal order.
By Judgment no. 238 of 2014, the Court applied the theory of counterlimits to a rule of customary international law. The question arise in relation to a request for compensation for damages suffered during the Second World War by three Italian nationals who, after being captured in Italy by German military forces, were deported to Germany and required to perform forced labour in concentration camps. The International Court of Justice had previously ruled on this point, asserting the existence of a rule of customary international law, which included under the *iure imperii* acts that are immune to cognizance by the courts also war crimes and crimes against humanity in breach of human rights committed by forces of the Third Reich during the 1943-1945 period in Italy and in Germany against Italian nationals. Whilst the Court acknowledged that "at the international law level, the interpretation by the ICJ (…) is particularly qualified and does not allow further examination by national governments and/or judicial authorities", it nonetheless specified that it is "clear that another issue has to be examined and resolved, namely the envisaged conflict between the norm of international law (...) incorporated and applied in the domestic legal order, as interpreted in the international legal order, and norms and principles of the Constitution, to the extent that their conflict cannot be resolved through interpretation", which conflict "occurs with the qualifying essential principles of the state constitutional order, including the principles of safeguard protection of fundamental human rights. In those situations it is up to the national judge, and in particular exclusively to this Court, to exercise the constitutional review, in order to preserve the inviolability of fundamental principles of the domestic legal order, or at least to minimize their sacrifice". In the case under examination, it was acknowledged that the international provision, as defined by the ECJ, violated the right to take action and to defend court action seeking to uphold rights recognized under Article 24 of the Constitution.

Relations between the Constitutional Court and the European Convention on Human Rights
Starting from Judgments no. 348 and no. 349 of 2007, the Italian Constitutional Court has defined as follows the relations between national law and the ECHR system: adherence to the ECHR did not entail any limitations on sovereignty, with the result that neither Article 11 of the Constitution nor the constitutional case law on the prevalence of directly applicable EU law can apply to the provisions of the ECHR; Article 117(1) of the Constitution is the route by which the provisions of the ECHR have been incorporated into national law, with the result that they first limit the discretion of ordinary legislation (since the commitment made by the state at international level has effect *pro futuro*) and, secondly, that they amount to an interposed norm for assessing the constitutionality of legislative acts; since Article 117(1) of the Constitution does not allow the conclusion that the ECHR has been incorporated into EU law, it requires the ordinary courts to refer a question for constitutional review in the event of any contrast between national law and the Convention that cannot be resolved through interpretation, which in such cases will be subject to constitutional review, and such review will not be limited to principles and fundamental rights (the counterlimits that preclude the incorporation of EU law into national law), but will rather extend to the full body of constitutional law; this framework remains valid following the entry into force of the Lisbon Treaty, pending the EU's accession to the ECHR.
In this way, the Constitutional Court has corrected the tendency – which had become apparent within the case law of the Court of Cassation – to apply directly the ECHR, at the same time setting aside any contrasting provisions of national law, and reasserted its role as the ultimate guardian of fundamental rights and of the compatibility of ordinary legislation with the Constitution within a system of centralized control.

Given the specific application to the same disputed matter of two separate systems for protecting fundamental rights – having clarified that the supplementation of the constitutional parameter laid down in Article 117(1) of the Constitution must not be construed as a hierarchical subordination, to the provisions of the ECHR, of ordinary legislation, nor less of the Constitution – the Italian Constitutional Court elaborated the theory of the "maximum expansion of guarantees" for all relevant rights and principles considered overall, whether constitutional or supranational, which must always have a relationship of reciprocal integration in order to achieve the necessary "integration of protection".
According to the position adopted within Italian constitutional case law, the minimum levels of protection for the fundamental rights laid down in the ECHR, as interpreted by the ECtHR, constitute an inderogable limit pursuant to Article 117(1) of the Constitution for the Italian legislator only "downwards", but not "upwards"; respect for international obligations can never be the cause for a reduction in protection below that already available under national law, but may and must constitute an effective instrument for expanding such protection; the overall result of the integration of the guarantees provided under the legal system must be positive, in that the impact of the individual ECHR provision on Italian law must result in an increase in protection for the entire system of fundamental rights.
On the other hand, Article 53 of the ECHR expressly provides that the interpretation of the provisions of the Convention may not limit or derogate from any of the human rights recognized under the laws of any High Contracting Party: in doing so, it confirms that the system of guarantees under the Convention seeks to reinforce the protection offered at national level, without ever imposing any limitations on it.
In addition, according to the settled position stated by the Italian Constitutional Court, the provisions of the Constitution and of the Convention must be considered jointly, in order to enable a "systemic and non-fragmented assessment of the rights affected by the relevant provision examined, in such a manner as to ensure the fullest guarantees for all relevant constitutional and supranational rights and principles, considered as a whole, which are at all times reciprocally integrated with one another" (see most recently Judgment no. 191 of 2014).
The necessary balancing with other interests protected under constitutional law, that is with other constitutional provisions, which in turn guarantee fundamental rights that are also liable to be affected by the expansion of an individual system of protection, is realized to the fullest in the national "margin of appreciation" elaborated by the Strasbourg Court in order to offset the rigidities of the principles formulated on European level. It falls to the ECtHR to decide on individual cases and individual fundamental rights, whilst the national authorities (legislature, constitutional court, ordinary court) are under a duty to assess how and to what extent the result of the interpretation by the ECtHR interacts with the Italian constitutional order in order to prevent the protection for certain fundamental rights from developing in an imbalanced manner, resulting in the sacrifice of other rights likewise protected by the Constitution and the ECHR.
Finally, as was clarified in Judgment no. 80 of 2011, the framework sketched out for relations between the national law and the Convention system has not altered as a result of the entry into force of the Lisbon Treaty and pending the EU's accession to the ECHR.

Difficulties and solutions in the application of ECHR law
Generally, relations between the national legal order and the ECHR system operate in terms of harmonious competition. However, the growing impact – and increasingly activist nature – of European case law on states' internal choices requires constitutional courts to put in place a variety of solutions, ranging from acceptance and compliance through to various forms of "resistance" (application of the margin of appreciation reserved to states; use of the technique of

"distinguishing", which enables the binding force of a prior ruling to be circumvented; or the granting of preference to internal parameters and the use of European case law *ad adiuvandum*).
The following paragraphs set out four significant manifestations of difference in stance concerning relations between the Constitutional Court and the Strasbourg Court.
Following a review of a criminal trial which was held by the ECtHR not to be fair (report by the European Commission of Human Rights of 9 September 1998, *Dorigo v. Italy*; Constitutional Court, Judgment no. 113 of 2011), the Italian Constitutional Court fully implemented a judgment of the Strasbourg Court in relation to an institute, the review of final judgments in criminal proceedings, which had been regarded as a linchpin of our system of criminal procedure.
The issue of so-called "Swiss pensions" (see Constitutional Court, Judgment no. 172 of 2008; ECtHR, judgment of 31 May 2011, *Maggio and others v. Italy*; Constitutional Court, Judgment no. 264 of 2012; ECtHR, judgment of 15 April 2014, *Stefanetti and others v. Italy*) by contrast concerns a "conflictual" relationship in which the Constitutional Court objected to the decision taken by the ECtHR, applying the "margin of appreciation" recognized to states. The court rulings were made in relation to the enactment of legislation stipulating an authentic interpretation by the Italian legislator which re-weighted the relevant remuneration, for pension purposes, of the reduced contributions actually paid by an individual who had worked in Switzerland. The Constitutional Court's Judgment of 2008, upholding as reasonable the interpretative option chosen by the legislator, was followed by the *Maggio* judgment of the ECtHR which, whilst finding the legislation to be proportional having regard to the intention of ensuring the sustainability of the pension system, held that Italy had violated the right to a fair trial by adopting a retroactive rule which had a direct effect on disputes to which the public administration was a party. The Constitutional Court's Judgment of 2012, which was issued in relation to the same contested provision with regard to a different reference parameter (Article 117(1) of the Constitution), also rejected the question, following a careful balancing between the Convention value of a fair trial and the constitutional principles of budgetary equilibrium, and above all, of equality and proportionality, which justified the rules that sought to establish equality of outcome in terms of pension for contributions of an equal amount. The fact that the two rulings reached the opposite result is testament to the different roles of the two courts. The Strasbourg Court assesses compliance with the Convention guarantees in the specific individual case brought before it and, where it finds that a violation has occurred, awards financial compensation to the interested party; on the other hand, the Constitutional Court is required to uphold the Constitution as a whole by striking a balance between principles of equal standing, which may conflict with one another, and to that end may end up finding that the Convention provision is not amenable to incorporation through Article 117(1) of the Constitution and of operating as a parameter for assessing the constitutionality of national legislation.
In relation to the right of an adoptive child to know his or her origins (see ECtHR, Judgment of 25 September 2012 in *Godelli v. Italy*; Constitutional Court, Judgment no. 278 of 2013), the two courts were in full agreement concerning the merits of the question. However, the Italian Constitutional Court – which had been requested by the referring court to depart from its previous case law on the basis of the judgment handed down in *Godelli v. Italy* – effectively decided to reconsider its previous position and to accept the question of constitutionality raised, on the basis however exclusively of a new and different reading of the principles of internal law, thereby finding the Convention to be moot.
In the case concerning heterologous fertilization (see ECtHR, Judgment of the Grand Chamber of 3 November 2011 in *S.H. and others v. Austria*; Constitutional Court, Order no. 150 of 2012; Constitutional Court, Judgment no. 162 of 2014), having been apprised of a question of constitutionality, the Constitutional Court initially decided to give effect to the Convention principle over and above national law, going so far as to remit the case to the referring courts for a reassessment of the relevance of the question, following the ECtHR's change in position; however,

it subsequently decided to base the decision that the absolute prohibition on heterologous fertilization was unconstitutional exclusively on parameters of national law, thereby rendering the Convention moot.
More recently, Judgment no. 49 of 2015 held that the national courts are not bound to abide by any judgment whatsoever of the Strasbourg Court, but rather only by the judgments of the Grand Chamber, those constituting "settled law" and "pilot judgments". Whilst the last word in relation to questions concerning the interpretation and application of the Convention and its protocols does indeed fall to the Strasbourg Court, the application and interpretation of the general system of rules is a matter in the first instance for the Contracting Parties' courts, acting in accordance with the substance of the case law of the Strasbourg Court, and without prejudice to the margin of appreciation falling to each Contracting Party.

III. Le droit et l'Etat/The law and the state

Question No. 10

What is the impact of the case-law of your Court on guaranteeing that state powers act within the constitutional limits of their authority?

The decisions of the Constitutional Court have had, and continue to have, a significant impact on ensuring that State organs and, more generally, every local subdivision of the Republic, act within the limits of their respective powers, as established by the Constitution.
All the Court's competences, designated by Article 134 of the Constitution, are ultimately intended to ensure that the subjects and organs endowed with public power carry out their duties with respect for the constitutional norms and principles. The Court's interlocutory jurisdiction, through which it reviews the constitutionality of laws and measures that have force of law, is in place as protection of the correct exercise of the lawmaking activity carried out by the institutions that wield this power – the Parliament, the Government, and the Councils of the Regions and of the Autonomous Provinces. This helps to ensure that such lawmaking activity is limited by the correct observance of overarching constitutional norms, both procedural and substantive. Interlocutory proceedings traditionally guaranteed and guarantee the rights of citizens against possible abuses by legislative authorities, since questions concerning the constitutionality of laws are brought forward within ordinary judicial procedures accessible to interested parties who claim to have been injured by a law that does not comply with the Constitution. The Court is not infrequently called upon on an interlocutory basis to speak on questions concerning respect for the Constitutional division of legislative powers between the State and the Regions and for the constitutional procedures for the adoption of legislative acts on the part of the Government (legislative decrees and decree-laws).
The competences that are most indicative of the Court's arbitral role in the area of the relationship between the various branches of the State and between the State and the Regions are its review of the constitutionality of laws by direct seizure (Article 127 of the Constitution) and the resolution of conflicts on the allocation of powers between branches of the State (Articles 37 and 38 of Law no. 87 of 1953) and between the State and the Regions (Articles 39-42 of the same law). In these cases, the Court most markedly assumes the role of defining the powers allotted to the parties to the case, resolving mainly conflicts of powers, focusing on identifying the State organ or entity that is endowed with a constitutionally established power, and interpreting constitutional provisions that may be scant or intentionally flexible in order to guarantee an indispensible degree of elasticity and adaptability for the changeable political-institutional equilibria within the legal order.

Some relevant examples can demonstrate the Court's crucial role in correctly defining the relationships between the State and the Regions, and between the various branches of the State. First, the case law that, through a perceptible evolution over time, has highlighted the margins for review of the legitimate exercise of the power to issue emergency decrees is of interest. This is a complex topic because it concerns the very form of the Republic's parliamentary government, as well as the distribution of state legislative power between the Parliament and the Government. For more on this point, see the answer to question no. 5.

Proceedings concerning the constitutionality of laws in which the Court is seized directly
The Court has often been directly seized for constitutional proceedings by entities endowed with legislative power raising issues that have called into question the entire organizational structure of the Republic into territories and the very functionality of the design put in place by the Constitutional amendment of 2001.
Judgment no. 303 of 2003 is illustrative: the Court, seized by a number of Regions in an action brought against State-level measures dealing with infrastructure and key industrial facilities that also implicated regional powers, systematically interpreted the constitutional division of legislative and administrative powers (Articles 117 and 118 of the Constitution), defining the legal institution of the invocation of subsidiarity (the *chiamata in sussidiarietà*), which mitigates the rigid divisions between state and regional powers and allows the State to legally regulate administrative functions characterized by greater exigencies of unified exercise. Thus the Court forestalled risks of division in the legal order caused by potential competition within the same area by the central legislator and the twenty territorial legislatures, and recovered margins for uniform regulation of sectors characterized by non-divisible interests.
Other landmark decisions from recent years have examined the many applications of the principle of loyal cooperation, which a great deal of case law has interpreted toward outcomes involving the least possible conflict in the relationships between the various constitutional bodies of the Republic, each of which is endowed with constitutionally guaranteed independence. This principle, although mentioned explicitly in Article 120 of the Constitution with regard to the Government's extraordinary substitutive power, was laid out with all its practical implications by the Court, which raised it up as an immutable tenet of the right and orderly fulfillment of said relationships. In particular, loyal cooperation must permeate all the many cases of overlapping or concurrent legislative or administrative powers, the regulation of ordinary substitutive powers, and instances of application of the principle of subsidiarity. Judgment no. 51 of 2008 held that the principle in question "must become concrete at times of reciprocal institutional involvement and of necessary coordination of the state and regional levels of government," and that "the principal tool that allows the Regions to play a role in the determination of the contents of state legislative acts that bear on matters of regional competence comes from the system of Conferences," which "realizes a form of cooperation of an organizational kind and is one of the most qualified points for elaborating rules for the implementation of the criterion of loyal cooperation." Judgment no. 33 of 2011 also affirmed that the preceptive potential of the principle of loyal cooperation "is entirely manifested in the areas of government action where interests and needs of different kinds overlap," such that concurrence of competences is followed by "the application of the tenet of loyal cooperation, which obliges the state law to utilize appropriate tools for involving the Regions."

Conflicts between bodies
Concerning proceedings for conflicts on the allocation of powers between governing bodies, Judgment no. 31 of 2006 specified that the principle of loyal cooperation (*collaborazione*) "must preside over all the relationships that exist between the State and the Regions. Its elasticity and adaptability make it particularly suitable for regulating the relationships in question in a dynamic

way, diminishing the risk of dualism and avoiding excessive rigidity. The generic nature of this parameter (…) nevertheless requires constant clarification and concretization. These may be of a legislative, administrative, or judicial nature (…). Currently one of the most competent sources for the enunciation of rules intended to implement the parameter of loyal cooperation is the system of State-Region and Local Autonomy Conferences. The meeting between the two great organizational structures of the Republic takes place within it, and as a result, agreed-upon solutions to controversial issues may be reached."

Conflicts between branches

The arbitral role of the Court can be seen particularly in the resolution of conflicts on the allocation of powers among the branches of the State. The constitutional organization of the Italian State, like other contemporary democratic systems, is marked by a complexity that goes beyond the traditional tripartite model of the liberal State. Beside the three traditional branches (legislative, executive, and judiciary), there are oversight bodies, such as the President of the Republic and other figures authorized to participate in various ways in procedures described or governed by the Constitution. Constitutional case law has, in practice, expanded the notion of government "branch" entitled to bring a claim concerning a conflict or defend against it, holding that every subject endowed with powers that are directly or indirectly traceable to the Constitution has this ability. In the exercise of its oversight function, the Court has defined the spheres of competence of the branches that have come into conflict, contributing to the improved functioning of the form of government through the interpretation of the (sometimes sparse) constitutional rules or the constitutionally satisfactory conformity of the relationships governed by ordinary law. An important example of the role carried out by the Court may be seen in Judgment no. 200 of 2006, raised by petition of the President of the Republic against the Minister of Justice's refusal to carry out a presidential decision to grant a pardon to a prisoner. In implementing Article 87 of the Constitution, which endows the President of the Republic with the power to grant pardons, ordinary legislation establishes a complex procedure including many important preliminary duties falling to the Minister of Justice. The conflict settled by the decision originated in the divergent opinion of the two branches concerning the grant of the pardon, something not expressly governed by the law in force. The decision clarified the matter, recreating a clear and perceptible border between the competences at stake and acknowledging that the act of clemency is an expression of a power entrusted to the Head of State, as a *super partes* institution, representing the unity of the nation, external to the circuit of the political-governing role, intended to impartially evaluate the concrete existence of the humanitarian preconditions that justify its adoption. Therefore, if the President of the Republic requested that the procedure be initiated or directly took the initiative to grant a pardon, the Minister of Justice, not having power to refuse to initiate the procedure and bring it to conclusion, so as to halt the procedure, can only give notice of the reasons considered to be obstacles to the grant of pardon. A contrary finding would give rise to an unacceptable power to inhibit or veto the adoption of a decree of a grant of pardon issued by the Head of State. The President of the Republic, for his or her part, in the case that he or she does not agree with the Minister's reasoned assessments running against the adoption of the act of clemency, may directly adopt the decree, clearly stating the reasons for which he or she decides to grant the pardon anyway, notwithstanding the disagreement expressed by the Minister.

Equally interesting is Judgment 1 of 2013, in which the Court considered a petition by the President of the Republic against the investigatory activities of the office of a public prosecutor, which had captured, by chance, telephone conversions between the President and third parties. The Court found that the effective fulfillment of the role of safeguarding the constitutional balance and as a "body of influence" obliges the President to entertain a network of relations for the purpose of harmonizing possible positions of conflict and harsh divisions and to indicate to officials in

constitutional institutions the principles on the basis of which the most widely shared solutions to potential problems can and must be found. The President, therefore, in addition to his or her formal powers expressly provided for by the Constitution, must constantly engage in a discrete use of the power of persuasion, made up of informal activities. These informal activities may precede or follow the adoption (by the President or other constitutional institutions) of specific provisions, either to evaluate their institutional opportuneness ahead of time, or to understand, after the fact, the impact on the system of relations between the branches of the State. The activity of maintaining relations and influence must be evaluated, positively or negatively, on the basis of its outcomes and not in an incomplete and fragmentary way based on partial and undue extrapolations. The effectiveness of the maintenance of relations would be inevitably compromised by indiscrimatory and random publication of the contents of single communications. On the basis of the finding that the discretion and confidentiality of the communications of the President of the Republic are coessential to his or her role in the constitutional legal system, the Court obliged the prosecutor to immediately destroy the accidental recordings made of the President's telephone conversations.

Question No. 11

Do the decisions of your Court have binding force on other courts? Do other/ordinary courts follow/respect the case-law of your Court in all cases? Are there conflicts between your Court and other (supreme) courts?

The Law in Force

The issue of the binding effect of the Court's decisions for other judicial authorities is grounded in two fundamental provisions, Article 101(2) and Article 136(1) of the Constitution, and on the different kinds of decisions the Court may adopt.

Under Article 101(2), "Judges are subject only to the law." Article 136(1) provides that, "When the Court declares the constitutional illegitimacy of a law or enactment having the force of law, the law ceases to have effect from the day following the publication of the decision." The quoted provisions give rise to the fact that the only derogation to the general principles of the judges' exclusive subordination to the law regards judgments upholding a constitutional challenge, in which the operative parts belong to the "context of a constantly-evolving legal system" (Judgment no. 42 of 1979) and amount to "sources of innovation in the living law" (Judgment no. 62 of 1971). On the other hand, the effectiveness of other holdings on the merits, rejecting constitutional challenges, have an impact limited to the particular proceedings.

Judgments rejecting a constitutional challenge do not establish that a given rule conforms to the Constitution, but merely declare that the constitutional challenge by the referring judge is not founded, and that the referring judge must apply the law that was subjected to review in the underlying proceedings. Their effect, limited to the confines of the proceedings, as mentioned above, consists in prohibiting the same judge from raising the same question again while the proceedings are at the same level. Indeed, raising the same question again would amount to an improper request for the Court to reexamine one of its decisions, a possibility precluded by the prohibition against challenging constitutional judgments (Article 137(3) of the Constitution). The same limited preclusive effect, typical of pronouncements that a question is unfounded, also characterizes the specific typology of interpretative judgments rejecting a constitutional challenge (be they implicit or explicit, containing the formula "for the reasons given in the reasoning section"

found in the operative part). Similar decisions reject the challenges of the referring judge because they are based on an erroneous interpretative assumption and indicate an interpretation of the challenged provision that is held to conform to the Constitution. However, this is simply an interpretive suggestion, albeit an authoritative one, which does not carry binding effect even for the judge in the pending proceedings, who remains subject exclusively to the law. Nor does it have binding effect for other judges, who are not affected by a decision which merely has *inter partes* impact.

The matter changes radically in the case of judgments upholding a constitutional challenge, which have *erga omnes* [general] effect upon all subjects of the legal system, as enshrined in Article 136(1) of the Constitution, and further explained by Article 30(3) of Law no. 87 of 1953. According to that law, "the laws declared unconstitutional cease to have effect the day following the publication of the decision." Upholding a constitutional challenge is a finding of fault with the law that amounts to a contrast with the overriding Constitution. The Court's decision has constituitive value and determines the removal of the invalid provision according to a mechanism similar to annulment, rather than repeal. Indeed, constitutional and ordinary law forbids all subjects charged with enforcing the law (judicial and administrative bodies) to apply laws declared unconstitutional. This applies not only to the legal relationships arising after the decision, but also those that came to be prior to it, provided that they are not definitively regulated by a finalized decision or otherwise crystallized by the passage of time. The effect of declarations of unconstitutionality is thus usually described in retroactive terms, although limited to legal relations that are still pending, and mark a clear break from the common repeal of legal rules, which, belonging to the ordinary succession of laws over time, does not prevent an earlier rule from continuing to regulate legal relations that were formed under it. The retroactive effect of judgments upholding a constitutional challenge is, however, limited to the letter of Article 30(4) of Law no. 87 of 1953, with specific application to criminal matters, according to which, "When an irrevocable guilty sentence is declared in the application of a law declared unconstitutional, its execution and all the related punishments must cease." The same retroactive effect has also sometimes been mitigated by the Court itself (see, among many, Judgment no. 10 of 2015), which, for interests of balancing the parameters in question with other fundamental constitutional principles (e.g. equality, solidarity, or balancing of public finances) has applied a merely *ex nunc* [from now on] effect for judgments upholding a challenge.

Historical Development

Compliance with the Court's decisions and its relationship with other judicial organs has undergone different phases. The current phase of cooperative dialogue represents the conclusion of an evolving journey which has also included harsh clashes.

During the first years of the Court's activity, it sought, wherever possible, to preserve the laws enacted before 1948 by proposing modernizing interpretations of the law in interpretive judgments rejecting the constitutional challenge. However, the fact that the effect of this kind of judgment was limited to the specific dispute, and the judiciary's assertion of its autonomy from the decisions of the Constitutional Court have occasionally led to situations where the challenged provisions continued to be applied in unconstitutional ways. In this respect, two cases are particularly good examples, one dealing with the authority of Prefects to enforce order (Judgments no. 8 of 1956 and 26 of 1961) and the basic rights of defence in preliminary criminal investigations (Judgments no. 11 and 52 of 1965), which followed the same pattern of an interpretative decision rejecting a challenge and an interpretive decision upholding a challenge. With the first, the Court indicated the interpretation that would render the challenged provision constitutional; with the second, aware of

the persistence of divergent practices or judicial trends, albeit permitted by the constitutional rule subjecting judges to the law alone, it prohibited, with the effectiveness proper to rulings of unconstitutionality, the extrapolation of the provision determined to be illegitimate from the rule. Later, the elaboration of the doctrines of "living law" (*diritto vivente*; see, among many, Judgments no. 276 of 1974 and 56 of 1985) and of "adaptive interpretation" (*interpretazione adeguatrice*) (Judgment no. 256 of 1996) established a relationship of active cooperation between the constitutional judges and ordinary judges, all engaged in the delicate and complex work of interpreting the law in a way that conforms to the Constitution. With the "living law" doctrine, which refers to the norm consistently gleaned from the legal provision and its application by the judicial bodies, especially at the highest level, the Court relinquished the idea of finding adaptive interpretations that could not be imposed on divergent trends in the case law of other courts and has recalibrated its role as geared to ascertain the existence of the living rule referred to it and its conformity to the Constitution. With the doctrine of adaptive interpretation, according to which, "As a matter of principle, laws are not declared unconstitutional because it is possible to interpret them to be unconstitutional (and some judges believe they do), but because it is impossible to interpret them to be constitutional," the Court has required referring judges to seek to resolve potential doubts concerning the constitutionality through interpretation, provided that the letter of the rules allows for it, emphasizing the tenet of conforming interpretation (*interpretazione conforme*) and the principle of conservation of legal acts. Therefore, where a constitutionally valid interpretation of a provision the constitutionality of which is being questioned is available, the Court has refused to hear claims asking for mere confirmation of that interpretation, or claims not preceded by due preliminary attempts to find an adaptive interpretation of the questioned law. Vice versa, in the absence of living law, or in light of a consistent exegetic trend open to doubts as to its constitutional legitimacy, the Court has stimulated, wherever possible, the endeavour to find interpretations that conform to the Constitution. Only in cases where this solution is not possible, the Court intervenes to remove the rule. Another element that has helped strengthen relations between the Constitutional Court and ordinary judges was the advent, in the 1980s and 1990s, of supplementary judgments of principle (*sentenze additive di principio*). In these judgments, the Court, abandoning its earlier approach of respectful self-restraint toward a Parliamant that was not reacting to its requests to fix situations of potential unconstitutionality, began to punish the lack of legislative initiatives concerning principles or mechanisms the existence of which was deemed to be constitutionally necessary but which were entrusted in their concrete configuration to the discretionary choices of the legislator. The impact of such pronouncements, in the waiting period prior to the necessary interventions on part of the lawmaker, is, therefore, entrusted to ordinary judges, who have often been offered more or less specific instructions useful for making determinations in concrete cases, which otherwise would have remained non-justiciable due to extended inertia by the legislator. The issue of involving ordinary judges to participate, albeit on a transitory basis, in the functioning of the system of constitutional justice has frequently appeared in decisions of the Constitutional Court (see, among many, Judgments no. 32, 179, and 270 of 1999, and 113 of 2011). The positive ties between the Constitutional Court and the judiciary in recent years was importantly documented in Judgment no. 119 of 2015, which stated that, "the system's general interest in constitutionality" was also fulfilled "through encounter and dialogue between two jurisdictions" (the constitutional one and that of the Court of Cassation [*Corte di Cassazione*], which assesses the legitimacy of laws) which "always work together (…) to define the objective law."

To give a complete picture, it is necessary to mention the occasional conflicts as well. For example, the Court of Cassation's Judgment no. 4377 of 2012, on the crime of gang rape, established that where serious evidence of guilt exists, it is not mandatory to adopt the precautionary measure of remanding the accused into custody, because the judge may well decide to apply a different

measure that is less restrictive but equally suitable for meeting the need for precaution in the concrete case. This decision, although it repeated the holding of Judgment no. 265 of 2010 of the Constitutional Court, which had transformed the presumption of the suitability of detention with reference to other sexual crimes from absolute to relative, offered an adaptive interpretation of the relevant provision of the Code of Criminal Procedure that was detached from its unequivocal literal meaning. This derogated somewhat from the principle of unity of constitutional jurisdiction. The proof of this arose from the fact that, one year later, Judgment no. 232 of 2013 declared unconstitutional *in parte qua* (and in the sense prefigured by the Court of Cassation) the aforementioned provision with reference to the same crime. Nevertheless, the common outcomes cannot obliterate the profoundly different roles of the Court of Cassation and the Constitutional Court: the the former is, in any case, required to raise the question of the constitutionality of any laws it suspects of being unconstitutional, where the ordinary hermeneutical criteria do not permit it to carry out an adaptive interpretation. The latter is the only authority permitted to eradicate unconstitutional provisions *ex tunc* from the body of law, with universal effect.

Question No. 12

Has your Court developed/contributed to standards for law-making and for the application of law? (e.g. by developing concepts like to independence, impartiality, acting in accordance with the law, non bis in idem, nulla poena sine lege, etc.).

The Court has made a substantial contribution both to lawmaking activity, and to the way laws are applied.

Lawmaking Activity
a) Reasonableness and Balancing of Interests
The Constitutional Court, subsequent to frequent requests by referring judges and remaining in line with a strong evolutionary trend in its case law, has increasingly become the adjudicator of the reasonableness of laws, with an awareness of the need to be coherent and proportional in its choices. The power to adjudicate the reasonableness of laws comes from two sources. First, an extended interpretation of the principle of equality (Article 3 of the Constitution), which, by requiring equal treatment in the same or similar cases, and, conversely, different regulations for different situations, implies the need to probe the internal coherence of provisions. Second, through the duty to balance opposing constitutional values, as a costitutional court is often called upon to do, because of the need to weigh principles often formulated by the Constitution in absolute terms and without a hierarchy of importance, which are embedded within and reciprocally influenced by complex social matters as well as the legislative choices which intend to govern them. In adjudicating the reasonableness of laws and balancing competing interests, the Court addressed, to the state's holders of legislative power, prescriptions of fundamental importance for the stability of the legal system and the establishment of constitutional legality. Judgment no. 204 of 1982 pointed to the "coherence among the parts of a legal system of a civilized country as an essential value": a "value that, when disregarded, turns rules into a flock without shepherd: the canon of coherence in the legal field is an expression of the principle of equality of treatment between equal situations affirmed in Article 3." Judgment no. 10 of 2015 stressed that the institutional task attributed to the

Court requires that "the Constitution be guaranteed as a unitary whole in such a manner as to ensure systematic and unbroken protection (…) for all rights and principles involved in the decision. If this were not the case, one of the rights would end up expanding and would thereby become dominant over the other legal interests recognised and protected under the Constitution: for this reason, the Court normally strikes a reasonable balance between the values affected by the legislation brought before it for examination since [t]he Italian Constitution, as is the case for other contemporary democratic and pluralist constitutions, requires an ongoing mutual balancing between fundamental principles and rights, none of which may claim to have absolute status". The Court, in keeping with this approach, made clear the criteria for judgment which it has articulated in several tenets concerning the constitutionality of legislation (among many, see Judgments no. 23 of 2015, 1 of 2014, and 1130 of 1988). Especially in areas characterized by wide discretional legislative power, checking for reasonableness requires that one "verify that the balance between constitutionally significant interests has not been struck in such a manner as to cause one of these interests to be sacrificed or impaired to an excessive degree, such as to render it incompatible with the requirements of the Constitution. Such assessments must involve a consideration of the proportionality of the means chosen by the legislator when exercising its absolute discretion vis-à-vis the objective requirements to be met or the goals it intends to pursue, taking account of the specific circumstances and restrictions that obtain". At the same time, the test of proportionality can also be used, which "requires an assessment as to whether the provision under review, along with the arrangements stipulated for its application, is necessary and capable of achieving legitimately pursued objectives by requiring that the measure chosen out of those most appropriate is the least restrictive of the rights in play and imposes burdens that are not disproportionate having regard to the pursuit of those objectives." The assessment of reasonableness, therefore, cannot use "evaluative criteria that are absolute and predetermined in an abstract way" and must take into account the legal context in which the law under examination is placed and the conditions which, in the concrete, characterize the topic and the area in which it operates.

b) Procedural aspects of governmental measures having the force of law

Judgment no. 360 of 1996, which attempted to act as a brake on the then-spreading practice of reissuing non-converted decree-laws, also included a consideration of the practical difficulties deriving from the declaration of unconstitutionality contained therein, rendered necessary to preserve the principles of primary relevance enshrined in Article 77 of the Constitution and intended to protect not only the "proper functioning of lawmaking procedures," but also the fundamental balance of the system of government. In that decision, the constitutional judges gave the Parliament and the Government the opportunity to expound on the reasons that had led to the expansion of the practice of reissuing and that would have been able to be contained and removed through a more rigorous respect, on behalf of the Government, for the requirements of necessity and urgency and through the appropriate initiatives Parliament could adopt. Subsequent Parliamentary activity showed a marked decrease in the reissuing of decrees, a practice that currently appears to have been relegated to the past. Judgment no. 22 of 2012 stressed that the so-called "*milleproroghe*" (thousand-extensions) decrees, although relating to different and varied material purposes, must still respect the unifying purpose of intervening with urgency on elapsing terms the expiration of which would be harmful to the relevant interests of the Government and of the Parliament, or intervene in situations that require the institution of a fixed timeline. The well-established principle of substantial uniformity within the law of conversion led to the denial of the possibility to add amendments to it that are completely extraneous to the object and purposes of the original text of the emergency measure, in accordance not only with the "requirements of good lawmaking techniques," but also with what Article 77 of the Constitution, paragraph 2, requires.

On the relationships between Parliament and the Government in the exercise of the legislative function, abundant case law insists on the issues raised in reference to Article 76 of the Constitution, which makes delegations to the executive conditional upon the passage of a law by Parliament with instructional principles and criteria, with a limited time frame and for a specific purpose. The Court, examining bans on excessive delegation of authority, has frequently sketched the boundaries of the delegated legislator's interventions with respect to the cogent instructions coming from the delegating legislator (see, among many, Judgments no. 98 of 2015, 229 of 2014, and 98 of 2008). The constitutional obligations pertaining to the delegated exercise of the legislative function do not prevent the Government from issuing rules that represent a coherent development or a completion of the choices expressed by the delegating legislator, since the role of the delegated legislator cannot be limited to a mere linguistic articulation of ideas previously established by the first. Otherwise, a quasi-regulatory function would be reserved to the delegated legislator, deprived of rulemaking autonomy, openly contradicting the all-important character of regulation by the delegated legislator. Therefore, legislative delegation does not deny to the delegated legislator some measure of discretion, which is intended to be more or less broad, depending on the specific criteria fixed by the delegatory law. And as the delegated authority is executed, it is possible to evaluate the legal situations to be regulated and make the choices that follow therefrom, in the regular activity of filling in the necessary details that links the two regulatory levels.

c) Retroactive laws

Equally important are the suggestions the Court has made to the legislator concerning the proper adoption of retroactive laws.

Article 11 of the Preliminary Provisions to the Civil Code states that, "The law only provides for the future: it does not have retroactive effect." Nevertheless, one of the Court's ongoing tenets (most recently, see Judgments no. 132 of 2016, and 146 and 150 of 2015) makes clear that the prohibition of the retroactive effect of the law, established by a rule of ordinary rank, though embodying a fundamental value of law-based civilization, was not raised to the constitutional level, except for Article 25 of the Constitution in the area of criminal law. Therefore, the legislator is not precluded from making retroactive rules, both new and consisting in authentic interpretation, "provided that the retroactivity is sufficiently justified by the need to protect principles, rights, and goods of constitutional importance, which amount to imperative reasons of overriding public interest under the meaning found in the case law of the ECtHR." With specific regard for the laws of authentic interpretation, the law Court holds that the conditions of constitutionality are fulfilled when the rule pursues the purpose of clarifying situations of objective uncertainty concerning an existent rule, either due to an unresolved judicial debate or to reestablish an interpretation more faithful to the original will of the legislator and restate the original intent of the Parliament, in order to protect the certainty of the law and the equality of citizens. Respect for constitutional limits upon the adoption of retroactive laws, therefore, guarantees citizens' reliance upon legal certainty and is a condition for the effective functioning of the coessential principles of the rule of law. As the Court observed in Judgment no. 236 of 2015, outside of the area of criminal law, "laws may act retroactively, respecting a series of limits (…) intended to vouchsafe, among other things, fundamental values of law-based civilization, put in place to protect the beneficiaries of a law and of the legal order. These include respect for the general principles of reasonableness and equality, protection of legitimate expectations of individuals as a principle inherent to the rule of law and respect for the functions reserved for the judicial power by the Constitution."

The application of the law

No less relevant are the Court's pronouncements concerning the application of the law, specifically regarding the principles of the independence and impartiality of judges, the prohibition of reaching a second judgment on the same facts (double jeopardy or *ne bis in idem*), and the principle of legality of punishments (*nulla poena sine lege*) or, more generally, of the sanctions imposed.

a) The independence and impartiality of the judge

Constitutional Law no. 2 of 1999 dealt with the area of the independence and impartiality of judges. In laying out the principles of fair proceedings, it introduced the new Article 111(2) of the Constitution, according to which, "All court trials are conducted with adversary proceedings and the parties are entitled to equal conditions before an impartial judge in a third-party position." Also in the original constitutional text, the values of the neutrality and impartiality of the judge found adequate description in a series of provisions regarding the exclusive subjection of judges to the law (Article 101(2) of the Constitution), to the autonomy and independence of the judiciary (Article 104), the protection of magistrates from removal (Article 107), and to the safeguards granted to special jurisdictions (Article 108(2)). Already Judgment no. 8 of 1962 affirmed that Articles 101, 102, 104, and 111 of the Constitution "grant the freedom and independence of the judge in the sense of binding his or her activity to the law, and only the law, so that he or she is called upon to apply it without interference or interventions external to it, which may affect the formation of his or her free opinion." According to Judgment no. 355 of 1996, "Among the principles of due process, a central place is occupied by the impartiality of the judge, without which the rules and procedural safeguards would become meaningless. The impartiality is, therefore, inherent to the essence of the judiciary, and requires that the function of adjudicating be assigned to a third-party subject, not only without an interest that could prevent him or her from carrying out the rigorous application of the law, but also free from earlier convictions about the subject to be decided, which may have arisen during the many earlier phases of the proceedings in which he or she played a role." These examples confirm how these values already held constitutional rank prior to the 1999 amendment, also because of their coessential status along with the right to defence guaranteed by Article 24 of the Constitution (see, among many, Judgment no. 78 of 2002). The later case law of the Court demonstrated a full awareness of this fact. Orders no. 75 and 168 of 2002 affirmed that, "evoking the further parameter represented (…) by Article 111 of the Constitution, in its new formulation, does not introduce (…) new or different profiles for unconstitutionality, since the neutrality and impartiality of the judge (…) were fully protected in the constitutional charter, even prior to the new section." Furthermore, "the recognition expressed by the principle of impartiality (…) adds nothing to the substance the principle already had, nor does it affect the way of understanding the specific aspect of impartiality tied to the requirement that the judge not undergo the pressure of prejudgments coming from prior evaluations related to the same case *res judicanda*." Still more importantly, Judgment no. 240 of 2003 underscored that "the newly added Article 111 of the Constitution does not introduce any substantial innovation or emphasis (…). Therefore, the argument that, conversely, would detract from the words 'impartial judge in a third-party position' seems a mere formality, almost as if it expressed a new constitutional value and not the summary of a series of values that connote the way in which, in its entirety, the legal order must ensure that the judge faces *res iudicanda*."

*b) The prohibition of double jeopardy (*ne bis in idem*)*

Specifically concerning the illegality of submitting someone already acquitted or convicted with a final sentence to criminal proceedings on the same facts (even if under different charges, due to severity or circumstances) (no double jeopardy, or *ne bis in idem*), constitutional case law has raised it to the level of a "principle of law-based civilization with extremely broad application" (Order no. 150 of 1995). It has also highlighted its relationship with the need for judicial decisions to be final

and certain, a value enshrined in the Constitution, because it is traceable both to the right to judicial protection and to the principle of the reasonable duration of proceedings (Order no. 501 of 2000). Most recently, Judgment no. 200 of 2016, in assising the conformity of Article 649 of the Code of Criminal Procedure to the identical safeguard established by Article 4 of ECHR Protocol no. 7, stated that the internal system aligns to the Convention's prescripts in that it incorporates the interpretation of the principle in question that is most favourable to the accused, recognizing the identity of the "fact," which precludes a new judgment, where there is a historical-natural correspondence in the configuration of the crime, considered in all its constitutive elements (conduct, event, and causal connection) and with regard to the circumstances of the time, the place, and the person. The incorporation of the notion of *idem factum*, in place of an otherwise inadmissible legal *idem*, has not, moreover, prevented the Court from declaring the unconstitutionality of the aforementioned provision, in the part in which, according to the living law, it rejected the conclusion that two facts are rendered identical by the mere existence of a formal overlap between the crime already adjudicated with a final sentence and the charges that are the object of new proceedings. The mandatory evaluation of the empirical criterion – according to which only a naturally different fact (in terms of the conduct, object, or event) allows the legitimate recommencement of a criminal action – led the Court to conclude that the judicial authority must always compare the historical fact, according to the identity taken from the outcome of the finalized proceedings, with the historical fact giving rise to the new charges, as presented by the prosecutor, taking no notice whatsoever of the existence of any formal overlap.

c) The principle of legality in criminal law

Equally relevant is the case law dealing with the principle of legality of offences and punishments established by Article 25(2) of the Constitution. According to Judgment no. 447 of 1998, this is "an essential principle of criminal law and a basic guarantee for the individual," on the basis of which no one may be charged with a crime for conduct different or other than that explicitly proscribed by a law in force at the moment of the commission of the act. "Only the legislator may, with respect for constitutional principles, identify the goods to be protected through criminal punishments and the actions injurious to said goods, so as to subject persons to punishments as well as to establish the quality and quantity of the relative decreed punishments. It is the *nullum crimen, nulla poena sine lege* (no punishment without a crime) principle, which gives rise both to the exclusive power to legislate in the area of criminal law, and to the principle of specificity of a crime (...), as well as to the inability to apply criminal laws by analogy. Outside the confines of the categories of offence, as defined by law, the general ban on incrimination is in force, even where there may be alternative hypotheses of illegality and liability that are not criminally sanctioned." The case law then specified the field of application of the principle of legality. Judgment no. 157 of 1972 stressed the extension effected by Article 25(3) of the Constitution, of the principle of legality to include preventative security measures that may legitimately be applied even for non-punishable acts. According to Judgment no. 419 of 1994, "the constitutionality of preventative measures, which limit personal freedom to varying degrees, must be adhere, above all, to the legality principle enshrined in Article 13(2) of the Constitution as well as Article 25(3) of the same Charter, which, although referring expressly to security measures, has typically been understood as confirming the principle for all preventative measures, given the ends (prevention of crimes) pursued by both provisions (considered to be two species of the same genus), which presume that the individual in question is a a threat to society." Judgment no. 196 of 2010 emphasized how the principle that "all measures that are punitive/afflictive in nature must be subject to the same rules that apply to criminal sanctions in

the strict sense" may be drawn from the case law of the Strasbourg Court on the interpretation of ECHR Articles 6 and 7, as well as from the Constitution. Moreover, the completeness of the formulation found at Article 5(2) of the Constitution allows for an interpretation in the sense that, "every intervention involving sanctions, the primary function of which is not the prevention of crimes (and is, therefore, a real and true security measure, strictly speaking) is applicable only if the law providing for it was already in force at the moment of the commission of the act being punished." Therefore, even for sanctionatory measures different from punishments, there is "the need to establish *ex lege* rigorous criteria for exercising the power relative to the application (or non-application) of it" and the requirement "that it be the law which configures, in a way sufficient and specific to the offence, the actions to be punished" derives from Article 25(2) of the Constitution, including in the case of administrative sanctions.

Question No. 13

Do you have case-law relating to respect for the rule of law by private actors exercising public functions?

The Court has, on some occasions, been asked to deal with private entities endowed with public functions or services and to expound on the broader notion of the "rule of law," and particularly on the duties of impartiality and non-discrimination.

Arbitrators

One emblematic case concerned arbitrators, i.e. private citizens invested with the power to settle disputes with the typical forms and effects of judicial power by the agreement of the parties to the dispute. According to constitutional case law (Judgments no. 223 of 2013 and 376 of 2001), "arbitration is a procedure envisaged and regulated by the Code of Civil Procedure for the objective application of the law to the case at issue, for the purpose of settling a dispute, with the guarantees of hearing both sides and of impartiality which are typical of the ordinary civil jurisdiction. […A]rbitral proceedings are not different from those heard by state organs also as concerns the relevant law and its application to the case" and, "the finding of the arbitrators is possibly fungible with that of the judicial organs." The Court, by recognizing the legitimacy of arbitrators in requesting interlocutory constitutional review, found the character of pending proceedings in the arbitral process, that is, the "exercise of adjudicating functions through the neutral application of the law by entities which, although outside the judicial organization, are nevertheless *super partes* [above the parties]".

Lawyers

The activities carried out by lawyers are also characterized by public interest. Judgment no. 35 of 1973 maintained that the duty to provide free legal aid to those without financial means "derives from the natural public interest involved in the legal profession's essential cooperation with the judicial bodies, for the purpose of ensuring the best exercise of judicial functions." According to Judgment no. 137 of 1975, lawyers, "in view and because of the fact of the practice of their profession, are in a position which has specific aspects that objectively distinguish them from all other intellectual professionals […] and which is certainly different from that of all other citizens. In fact, they have to pass a national bar exam or meet certain requirements concerning their qualities

or age, in order to be admitted to bar associations and be allowed to practice. They are also obliged, in carrying out their work, to comply with certain written and unwritten rules, being subject both in their conduct and in their professional ethics to the control of the council of the bar they belong to. These preconditions, limits, and limitations are put in place in the interest of all citizens, and in particular of those […] seeking a lawyer or an attorney for their judicial defence, in extrajudicial matters." More recently, Judgment no. 171 of 1996 declared that the regulatory regime on the right to strike in fundamental public services violated the Constitution because it did not envision sufficient safeguards in case of collective abstention of lawyers from the judicial practice. It stated that such abstention, although it could not be framed as a right to strike (Article 40 of the Constitution) enjoys the *favor libertatis* which "inspires the first part of the Constitution and is the fundamental orienting criterion […], granting the freedom of every social group and at the same time postulating the concurrent protection of other constitutional values". When the freedom of association of lawyers is exercised against fundamental rights (such as the right to bring a claim and that of defence) of the recipients of the judicial function and of the beneficiaries of a fundamental public service, such as the administration of justice, it has to step back in favour of the fundamental rights. Law no. 146 of 1990 "originated to grant fundamental public services, and, therefore, the life essentials which they aim at protecting" did not include the regulation of "situations that – like a strike – can cause irremediable damage to those essentials" and did not provided for "specific measures suitable for avoiding that the primary goods of civilized coexistence, which does not tolerate the paralysis of the judicial function, and therefore, requires provisions intended to grant fundamental services during abstentions from legal practice".

Notaries

Concerning notaries (to whom Judgment no. 52 of 2003 denied approval to petition the Court on an interlocutory basis, given that their activities do not involve issuing decisions and, as such, bear no similarity to the judicial function), Judgment no. 75 of 1964 recognized that "the activities of notaries consist in the exercise of a public function;" thus "the establishment of fees, which falls to the legislator, is not only intended to establish the professional's compensation, but also to fix the price of the public services performed by notaries, in relation to the requirements of the service itself and the interests of the general population to be served by the notary activities. It is, therefore, perfectly legitimate that, in carrying out this determination entrusted to the ordinary legislator, it must take into account specific social purposes, whatever they may be, provided that they do not contradict the Constitution. In so doing the legislator does not arbitrarily create situations that disadvantage one category, or some members of a category, but, in the legitimate exercise of the power to regulate notary activity, it fixes the compensation for the drafting of public records, considering, in addition to the interests of the professional entrusted with said drafting, the function and goals of the records themselves." Judgment no. 234 of 2015 saw the notary as "a figure intended to guarantee the security of legal transactions, which is an important interest of the State of Rights as well."

Public services

Judgment no. 90 of 1982 dealt with the matter of public services in general and the specific features connected with their exercise, including when carried out by private entities. The Court held that the railway transportation system "forms a normative body which is, under Article 1680 of the Civil Code, a special law, compared to the regulation of the transportation contract described generally by the same code." Special regulations concerning the responsibility of the conductor were held to be neither arbitrary nor in violation of Article 3 of the Constitution, "both because the specific

requirements and conditions of rail traffic justify regulations that differ from the ones adopted by the code, and because its regulation falls reasonably within the context of a specific regulatory framework for railroad transporation, which grants equal treatment to all users of that service." Judgment no. 303 of 1988 clarified that Article 43 of the Constitution "established a strict link between the notion of essential public service and the notion of enterprise," so that, "all essential public services must be organized and managed in the form of a business enterprise, that is (…) under the criteria of economics, which include configuring the relationships with the users according to contracts, which are essentially subject to private law." Finally, in the complex area of audiovisual transmissions, Judgment no. 112 of 1993 observed that broadcasting concessions made to private entities "assume a complex character, since, while for certain aspects (e.g. assignment of radio frequencies) there are similarities with the concession of public services, for others (checks on the provided service and the organization of the enterprises), on the other hand, there are an organizational tool applied to faculties and obligations connected with the constitutional right to freely express one's thoughts (Article 21) and freedom of private economic enterprise (Article 41), as well as the related limits intended to protect goods of general public interest." In particular, the distribution of radio frequencies to private entities must be made, according to Article 21 of the Constitution, so as to ensure the maximum objectivity and impartiality, from the moment that "the safeguard of the core values of the Constitution expressed by the free expression of thought certainly cannot be rendered vain, altered, or transformed into some form of privilege on account of discretionary acts on the part of the public administration, not bound by precise legal parameters." Therefore, "more rigorous limits on enterprises operating within that sector [have been considered] fully justified in order to grant adequate protection to the primary values connected with the free expression of thought through the medium of television." Indeed, the freedom of choice of the enterprises cannot "diminish the pluralism and impartiality of televised information."

Question No.14

Are public officials accountable for their actions, both in law and in practice? Are there problems with the scope of immunity for some officials, e.g. by preventing an effective fight against corruption? Do you have case-law related to the accountability of public officials for their actions?

The responsibility of elected officials

With regard to the responsibility of elected officials in the Italian legal system, there is an overall trend toward minimizing the role of immunities connected with holding an elected position. This is true at the levels of both Constitutional and ordinary law as well as in the case law of the courts. Constitutional Law No. 3 of 1993 radically altered Article 68 of the Constitution, abolishing the blanket need for the chamber to which an official belongs to obtain authorization in order to investigate him or her and in order to execute a definitive indictment. Currently, the competent parliamentary Assembly must provide authorization (except for cases where the suspect was arrested in the course of the illegal act) in order to perform inspections, stop and detain the suspect, and take other actions involving the deprivation of personal freedom, the tapping of conversations and communications, and the seizure of correspondence. Early on, Constitutional Law No. 1 of 1989 altered Article 96 of the Constitution, which removed members of the government from

ordinary criminal jurisdictions for ministerial crimes, and instead required a preliminary investigation by a Commission of Investigation, formed by members of the Parliament, with a judgment on the merits by the Constitutional Court. Current constitutional provisions opt for full expansion of the ordinary jurisdiction so that cases of ministerial crime may fall under either an authority that is part of the ordinary criminal structure or a Tribunal of Ministers. The Tribunal of Ministers has both investigatory and adjudicatory functions for the sole purpose of bringing the case before a judge according to standard procedure, if authorized by the Parliament. At the same time, the case law of the Court has affirmed a greater degree of rigour, on the one hand reconsidering its own trend on the matter of freedom of opinions of members of Parliament, and, on the other hand, striking down some provisions of ordinary law which were expanding the areas of immunity through the ordinary system. The Court found challenges against the recent regulations concerning non-candidacy for government office and the prohibition against taking elected or government positions in the case of conviction for certain intentional crimes to be unfounded.

a) Immunity from review

See the answer to question 5.

b) The suspension of criminal proceedings against the highest State officials.

The smooth unfolding of the functions of the highest public positions of the State is a good that the ordinary legislator is permitted to protect, provided that it respects the principle of equality before the law and the courts. This is what Judgments no. 24 of 2014 and 262 of 2009 held when they declared unconstitutional two unrelated regulations which provided unusual mechanisms for suspending criminal proceedings against officials in constitutional bodies. The Court held that the regulations unduly enlarged the area of immunity established by the Constitution. The Court made clear that the constitutional prerogatives are to be understood in the context of the *genus* of the institutions intended to safeguard the functioning of the constitutional bodies, through the protection of the public officials connected with them. This gives rise to special statuses which are necessary for the ordinary functioning of the State, and yet, at the same time, exceptions to the principle of equality of citizens. Finding the limits of these prerogatives takes on particular importance in the rule of law, because, on the one hand, the principle of equality of treatment before the law lies at the origin of its formation and, on the other, there are institutions of protection. The latter not only necessarily imply an exception to the abovementioned principle, but are also intended to effect a delicate and essential balance between the different State powers. The overall institutional framework, inspired by principles of the division and balancing of power, requires that the regulation of prerogatives contained in the text of the Constitution be understood as a specific system of rules resulting from a specific balancing and structure of constitutional interests that the ordinary legislator cannot modify, neither for better nor for worse.

c) *Ministerial crimes*

Judgments no. 87 and 88 of 2012 pointed out that the legal powers undergirding the institutional dynamics of the constitutional State are only those that derive legitimacy from their conformity to the superior norms of the constitutional legal system, and shape its safeguards in light of the need to preserve the integrity of that system through the serene and balanced fulfillment of the functions of said legal powers. Prerogatives, instead of being protections of the persons in question, are constitutive elements of the functions they carry out. For these reasons, which lie at the foundation of the constitutional State, immunities cannot overflow into privileges, and deviations from ordinary procedural rules are tolerated for public officers only as strictly necessary.

Specifically concerning the regulation of ministerial crimes, the only exceptions embodying the prerogative under Article 96 of the Constitution apply to the phase in which proceedings are authorized. This phase is totally independent from the final phase of determining criminal liability, and from the assignment of the action for preliminary investigations to the Tribunal of Ministers rather than to the public ministry or a judge. Thus the constitutional legislator preferred not to deprive the judiciary of its institutional role, but rather to create within it a procedural mechanism that it deemed to be particularly effective. This mechanism attributes both the investigatory and the adjudicatory functions to the same exceptional entity, for the purpose of establishing a privileged link with the Parliament and granting extensive powers difficult to fit into the body of ordinary criminal procedure.

Both decisions recognized that the judicial authority has the power to proceed against members of the Government for common crimes without giving information to the competent branch of the Parliament.

d) *Non-candidability and the prohibition against taking elected and government office in cases of conviction for certain intentional crimes*

Judgment no. 236 of 2015 pointed out that the legislator, in regulating the requirements for having access to and keeping a position that involves the exercise of public functions, is obliged to find a reasonable balancing between the right to run for office, on the one hand, and, on the other hand, the proper functioning and impartiality of the administration. This latter interest, in particular, falls under the duty that Article 54(2) of the Constitution imposes on citizens who have been entrusted with public functions to fulfill them with discipline and honour. In light of this framework, the Court considered the provision that a conviction for certain crimes, even when not yet final, renders the suspicion of contamination to be reasonable. Therefore, just as a final conviction might justify the termination of a public official's ongoing mandate, so a non-final conviction (under a law that stands up to scrutiny as valid) can raise the precautionary need to suspend the elected official temporarily from carrying out his or her mandate.

e) *Responsibility of regional council members for the management of public funds*

Judgment no. 235 of 2015 outlined the prerogative of the immunity from review of votes and opinions of Regional Council members, whose administrative (and, in certain cases, criminal) liability was reaffirmed in cases of conduct relating to the management of funds designated as public financing reserved for groups of Council members. Had the Court decided in the opposite way, it would have given rise, "in a paradoxical and absolutely unjustified way, [to] an immunity from review for the opinions of regional councillors that was broader than the one afforded to the members of the national Parliament (…), going against the principle of responsibility for acts that lies at the basis of administrative activity (Articles 28 and 113 of the Constitution), as well as the principle that gives to the law of the State the preconditions, positive and negative, for criminal liability."

Liability of public officials and employees

Article 28 of the Constitution provides that "[o]fficials and employees of the State and public entities shall be directly liable, under criminal, civil and administrative law, for acts performed in violation of rights. In such cases, civil liability shall extend to the State and the public entities." This

provision establishes a fundamental prerogative for the rights of citizens and an important concretization of the essential contents of the rule of law. Indeed, the obligation that the public powers and the physical persons working in them and for them to respect the legal rules relative to their organization and activity is enforced by the civil, criminal, and administrative sanctions put in place for violations of interests and entitlements protected by the legal system. The different forms of liability or responsibility are not mutually exclusive given the fact that the same illicit conduct can implicate the criminal level of public or private interests, which are considered worthy of the strongest sanctions, the civil level concerned with making reparations for the damaging consequences of the acts sustained by private entities, and also administrative liability for the harm caused to the entity to which the transgressor belonged. To strengthen the protection of injured parties, the Constitution has extended civil responsibility (which, being civil, is not governed by the strict criminal law principle of limitation to personal liability) to the administration. The provision, although it does not prevent this liability from being eliminated completely, allows for the adoption of different regulatory schemes for specific categories or situations. In any case, the fact that it has been included in a broad catalogue of crimes against the public administration (Articles 314 et seq. of the Criminal Code) and, in particular, among those attributable to public officials and persons charged with carrying out public services, as well as the forms of liability for damages involving public funds, constitutes a plain proof of the inexistence of areas of immunity or of judicial obstacles to effectively combatting corruption.

Among the most important cases in this area is Judgment no. 4 of 1965, which held that any law containing regulations that more or less clearly excluded the liability described by Article 28 of the Constitution was manifestly unconstitutional. The subordination to an administrative authorization of the implementation of that kind of liability is equivalent to allowing the discretionary exoneration of what is forbidden under criminal law, the exceptions to the principle of mandatory criminal indictment by the public prosecutor being enumerated according to constitutional rules. According to Judgment no. 64 of 1992, the constitutional rule, the "result of a difficult debate by the Constituent Assembly," "modified the interpretation of the case law and scholarly writing prior to the Constitution," according to which, "the public administration was liable to third parties for acts by a public employee that violated rights, except in cases where the intentional wrong recurred." The constitutional legislator, however, intended, "to affirm, in order to better guarantee the legality of administrative actions and afford greater protection to citizens, the direct responsibility of public employees and of the public administration for all acts committed in violation of rights (...)." This was "in reference to "the ordinary laws for the configuration of said responsibility, intended to give the legislator a degree of dscretion that, taking into account the complexity of the needs and interests involved, allowed the legislator both to limit the direct liability of public employees in relation to psychological damages, as well as to exclude it entirely, with reference to predetermined conditions, for certain specific categories of subjects. Finally, stating that, in cases in which there is direct responsibility on the part of public employees, this is extended to the State and to public entities, the legislator intended to establish that in said cases direct liability even of the public administration itself cannot be entirely excluded."

a) Civil liability of magistrates

Specific applications of the principle found at Article 28 of the Constitution regard the various regulations, put in place over time, of the civil liability of magistrates. According to Judgment no. 2 of 1968, Article 28 of the Constitution, "by saying that both officials/employees and the State are liable for violations of individual rights, applies to the activity of both administrative offices and

judicial ones. (…) The autonomy and independence of the judiciary and judges obviously do not place the first beyond the State, nearly above the law, or the other outside of the organization of the State." The Constituent Assembly "intended to extend to anyone acting on behalf of the State the same personal responsibility that earlier was expressly envisaged only for some of them (judges, chancellors, and real estate registers). In this way, both things now fall under the same regulatory scheme, affirming a principle now valid for all those who, although magistrates, are carrying out state activities. This general principle, on the one hand, renders them personally responsible, but, on the other hand, does not exclude the possibility that this responsibility may be regulated differently depending on the category or circumstances of the act in question, given the fact that the rule refers to ordinary laws." Precisely "the peculiarity of the judicial function, the nature of judicial decisions, and the very same *super partes* position of the magistrate might suggest (…) preconditions and limits on its liability. However, they do not legitimate, let us say, its total denial, which would openly contradict with the principle or would be unreasonable either *per se* (Article 28) or in light of the non-immunity of public employees" (Article 3). Moreover, the responsibility of the State goes along with the responsibility of public functionaries and employees, so that "a law, which denies to a citizen injured by a judge the ability to make any claim against the state administration would be contrary to justice in a legal order, which, even at the constitutional level, grants the right to bring a claim at least to parties injured by administrative activity." The regulatory framework of the Code of Civil Procedure, which was challenged at the time, was held to conform to the Constitution because its apparent silence did not amount to an exclusion of State responsibility. More recently, Judgment no. 18 of 1989 affirmed that the new regulations established by Law no. 117 of 1988, "correctly appling the principles affirmed (…) in the quoted decisions no. 2 of 14 March 1968 and no. 26 of 3 February 1987 (according to which, in relation to the unique nature of the judicial function, responsibility under Article 28 of the Constitution must be regulated by including preconditions and limitations geared to protect the independence and impartiality of the judge) envisioned direct responsibility or liability of the judge only in cases of damages deriving from facts amounting to a crime." Indirect responsibility toward the State, "which was intended to correct so broad a limitation of the judge's direct responsibility is, in turn, limited to certain strictly defined cases." These cases involve grave fault on the part of the judge due to inexcusable negligence, or the denial of justice. Judgement no. 38 of 2000 has also pointed out that the regulations of 1988 "despite having as their object acts or behaviours performed by magistrates in the exercise of their functions and the responsiibilty deriving therefrom, gives precedence to direct action against the State both (…) in order to guarantee the interest of citizens in reparation, as well as to determine, on the basis of a discretionary evaluation, a point of balance between said interests and the constitutional need to vouchsafe the independence and integrity of the judicial function."

Lastly, Law no. 18 of 2015, which also reflects suggestions coming from the case law of the European Court of Justice (Judgment of 24 November 2011, Case C-379/10, and of 13 June 2006, Case C-173/03, *Traghetti del Mediterraneo* [Mediterranean Ferries]), redesigned the regulation of magistrates' civil responsibility. It also expressly provided for the crime of manifest violation of the law and the law of the European Union. There are already many challenges pending concerning the constitutionality of the new regulatory scheme.

b) Liability of members of the armed forces and police.

As far as the liability of members of the police and armed forces are concerned, Judgment No. 94 of 1963 found that the possibility for the Minister of Justice to allow or deny the authorization to

prosecute officials and private parties for acts performed in the line of duty, and those involving the use of weapons or other means of physical coercion, violated Article 28 of the Constitution's principle of direct responsibility of officials and employees of the State and of other public entities. Judgment No. 123 of 1972 pointed out that Article 28 of the Constitution "does not speak in generic terms but expressly grounds the concept of responsibility in the provisions of the criminal, civil, and administrative law (…), which regulate said responsibility in a variety of ways according to the category or situation (…). This reliance on the ordinary laws means, furthermore, reliance on the positive regulatory scheme governing the responsibility of officials and employees, within the laws themselves, even with regard to specific rules, which, derogating from the common rules, determine the contents and the limits of said responsibility. (…) This is, indeed, to give a paradigmatic example, (…) the category and situation of the bodies in question, which, like the Corps of Carabinieri, are a part (directly or through equivalency) of the Military Administration of the State. Particular rules apply to these bodies that make a lower-ranking official's obedience to his or her superiors of prime importance, restrict the power to question orders, and punish refusals, omissions, and delays in their execution".

IV. The law and the individual

Question no. 15

Is there individual access to your Court (direct or indirect) against general acts/individual acts? Please briefly explain the modalities/procedures.

The Italian legal order does not provide for direct access to the Constitutional Court by individuals or groups of persons, like associations, committees, and so on. The ways of accessing the Court vary according to the type of judgment.

Concerning judgments on constitutionality, access to the Constitutional Court may be on an interlocutory basis or the Court may be seized directly.
Access on an interlocutory basis involves sending the question, with a referral order, through a judge who is in the process of hearing a case in which he or she must apply the rule the constitutionality of which is being questioned. In the judgment before the Constitutional Court (called interlocutory), the parties of the case that gave rise to the constitutional question (called *a quo* or pending proceedings) may appear. In addition, parties who have a qualified interest that is directly inherent to the substantial relationship involved in the trial may also intervene in the judgment.
Directly seizing the Court is a form of access reserved for judgments of constitutionality brought in the form of a petition for certiorari by the State against regional laws, or, conversely, by the Regions or Autonomous Provinces against State laws. Intervention is only permitted by parties endowed with legislative authority.
Proceedings concerning jurisdictional disputes and disputes concerning conflicts of powers between branches of the State are initiated through an application from public entities alleging invasion of their constitutionally guaranteed sphere of competence by other public entities. In both types of proceedings, no parties may intervene aside from those authorized to initiate the proceedings or defend against the claims; nevertheless, there is an exception to the rule in the case that the decision handed down in the constitutional judgment would preclude judicial protection of the subjective legal situation that is enjoyed by the intervening party, without said party being afforded the possibility of presenting his or her reasons.

Question no. 16

Has your Court developed case-law concerning access to ordinary / lower courts (e.g. preconditions, including costs, representation by a lawyer, time limits)?

The Constitutional Court has issued many decisions on matters involving the guarantee of free and equal access to the judicial system. Some notable examples are provided below, organized by topic.

The prerequisite attempt to resolve the issue through recourse to administrative remedies

Italian constitutional case law recognizes the legislator's power to enforce the fulfillment of duties, such as the requirement that a prior attempt be made to resolve the issue through recourse to administrative remedies, which being a condition for bringing a claim, may entail its deferral, as long as they are grounded on the exigencies of general order or overriding interests of justice. In any case, the legislator is asked to respect three mandatory requirements: to avoid making access to judicial protection excessively difficult, to limit the burden of duties to the least weighty extent possible, and to appropriately balance the need to ensure the protection of rights with the other needs that the deferral of access to the same intends to satisfy (Judgments no. 403 of 2007, 251 of 2003, 276 of 2000, 132 of 1998, 81 of 1998, 62 of 1998, 113 of 1997, 233 of 1996, 56 of 1995, 360 of 1994, 255 of 1994, 406 of 1993, 154 of 1992, 82 of 1992, 530 of 1989, and 130 of 1970).
More recently, Judgment no. 98 of 2014, which reviewed Legislative Decree (d.lgs.) no. 546 of 31 December 1992 with reference to the institutions of "complaint" (*reclamo*) and mediation in disputes involving amounts not greater than 20,000 euro relating to acts enunciated by the *Agenzia delle Entrate* [the tax authority], highlights very well the concrete application of said criteria. The Court held that the delegated legislator, by introducing the preventative institutions of complaint and mediation, pursued the general interest in deflating tax-related litigation in a reasonable way. Indeed, complaints and tax mediation, by favouring the definition of controversies in a pre-judicial phase, tend to satisfy the general interest in two ways: by assuring, on the one hand, the faster and less costly resolution of the concrete situations, to the advantage of both the taxpayer and the financial agency, and, on the other hand, by reducing the number of proceedings burdening the tax commissions, with the result that the timeframes are more contained and the cases that do come under review can be examined with greater attention. Nevertheless, the provision was declared unconstitutional for its violation of the right of defence, the specific rule that punished the failure to seek prior recourse through administrative proceedings by rendering an appeal to the judicial tribunal inadmissible, an exception that can be raised *ex officio* in every moment and at every level of the proceedings. Indeed, the provision entailed the loss of the right to bring a claim, and, therefore, the denial of judicial protection. Holding this provision unconstitutional for violation of Article 24 of the Constitutuion is in line with past decisions of the Court, including no. 296 of 2008, 360 of 1994, 406 of 1993, 40 of 1993, 15 of 1991, and 93 of 1979.

Another relevant case, no. 403 of 2007, held that a rule stating that, in disputes concerning telecommunications between users and an authorized entity or license holder, access to judicial proceedings was conditioned upon the prior, mandatory attempt to resolve the dispute before the Communications Authority, did not violate the right to seek interim measures by a court. The Court denied that such a duty may also refer to the possibility of seeking interim relief, since interim

jurisdiction is ancillary to effective protection before a judge, as well as to the needs that one is seeking to protect by means of interim procedures, needs which require an immediate response.

Imposition of financial duties

With reference to financial duties imposed as a condition for access to justice, the Italian Court, since its inception, has declared this unconstitutional when it compromised the exercise of the right to action and defence that is guaranteed by the Constitution on an equal basis to everybody. Judgment no. 21 of 1961, dealing with access to tax courts, declared the *solve et repete* [first pay and then request reimbursement] method unconstitutional. It involved the imposition of a duty to pay a tax first, as a necessary precondition for bringing a judicial claim for the purpose of ascertaining the illegitimacy of that tax (Article 6, paragraph 2 of Law no. 2248, Annex E, of 1865). The Court held that this contradicted the principle of equality in that it discriminated against taxpayers on the basis of their economic status, allowing only wealthy people to seek justice, and also contradicted the constitutional principles that grant access to courts to all citizens on an equal basis. Judgment no. 67 of 1960, on the topic of civil procedure, declared unconstitutional Article 98 of the Code of Civil Procedure, which gave judges the freedom to impose the obligation to pay a deposit for legal fees (*cautio pro expensis*) upon claimants not eligible for free legal aid. The Court held that, because this institution depended upon the economic status of the claimant, applying it unduly limited the freedom of lower-income individuals to bring a claim to protect their rights. On the contrary, Judgment no. 95 of 2015 declared unfounded the question of the constitutionality of rules (Article 13, paragraph 2-bis, of Legislative Decree no. 74 of 2000), which, in relation to income and capital gains taxes, made access to a plea deal contingent upon the extinction, through payment, of the tax debts relating to the alleged crimes. The Court held that the legislative cancellation of this alternative measure (plea deals) does not diminish the right of defence, since the possibility to ask for alternative procedures is one of the most defining and important ways of exercising the right of defence, and that, moreover, the financial duties imposed were justified by objective reasons, and it is in the general interest to eliminate the harmful consequences of the crime, one of the reasons being the value of the repentance of the guilty party, as well as the concrete public interest in the full payment of taxes.

The duty to provide a defence attorney

Constitutional case law upholds the principle according to which the assistance of a lawyer during a trial is a normal condition for the effective exercise of the right of defence enshrined in Article 24 of the Constitution.

The right to a public defender serves the fundamental right to defence, which plays out in any judicial proceeding where a legal position protected by the legal system is at issue (Judgment no. 18 of 1982 and 53 of 1968), and which must be guaranteed in its effectiveness (Judgments no. 220 of 1994 and 144 of 1992).

Moreover, the assistance of a defence attorney cannot be regulated in a uniform way, as an absolute and unavoidable necessity in every type of proceeding and in every procedural phase, but rather should be regulated according to the particular characteristics and ways of realizing every individual act in a way that ensures its substantive ends (Judgments no. 63 and 159 of 1972). In this sense, Judgment no. 150 of 1972, by reiterating the holding of Judgment no. 29 of 1962, observed that the right to defence is not always identified with the need for the assistance of a defence lawyer, since in uncomplex proceedings it suffices that the parties have the possibility to consult a lawyer. For example, in civil proceedings, where the legal system envisages the possibility of *pro-se* defence as an exception to the general rule of defence by a lawyer, to appear in a trial without the assistance of a lawyer is allowed by the legislator for mediation proceedings. Similarly, in proceedings for the declaration of the status of adoptability, the assistance of a defence lawyer is

admitted and allowed, and is, therefore, discretionary, because the special characteristics of those proceedings support a conclusion that the right of defence is sufficiently protected by the "possibility to bring legal action on one's claims with the assistance of a lawyer, without making said assistance mandatory" (Judgment no. 251 of 1989). On the contrary, the mandatory nature of appearing with a lawyer, with the resulting requirement that the judge nominate a public defender in cases where no private lawyer is present, is in force when it comes to criminal proceedings, and to proceedings concerning safety and preventetive measures, where the fundamental value of personal freedom is at stake.

The essentialness of public defence for the purposes of conforming to Article 24 of the Constitution, particularly in criminal proceedings, is emphasized by the mandatory nature of nominating a public defender even in cases where the defendant refuses any form of assistance. Judgment no. 125 of 1979 rejected as unfounded the claim that Articles 125 and 128 of the Code of Criminal Procedure were unconstitutional. In confirming the possibility of a full and personal defence, to which the accused is entitled throughout the duration of litigation as well as at its conclusion, the Court reaffirmed the requirement of public defence as the proper tool permitting the exercise of the inalienable (and, as such, non-renouncible) right of defence, without compromising the flexibility of the relationships between the accused and the defence lawyer, and, above all, without compromising the full independence of defensive choices, positive or negative. Judgment no. 498 of 1989 declared that the requirement of having a defence lawyer during proceedings is absolute and mandatory, since the assignment of a defence lawyer, even against the defendant's will, is intended to assure that he or she has the technical-legal knowledge, procedural experience, and detached clearheadedness that allows for a suitable evaluation of the matter being tried. Thus the fullest freedom of the defendant to be the one to determine choices of procedural initiatives and actions is protected. In other words, the defence attorney guarantees the freedom and independence of the accused in the course of a trial and is the counselor of his or her self-defence, such that breaking any law having to do with this *ratio* is, under the Code of Criminal Procedure, cause for a total mistrial and annulment of proceedings.

Constitutional case law has also clarified that the particular nature of criminal proceedings and of the interests involved therein require the possibility of the accused's direct and personal involvement. The right of defence guaranteed by Article 24(2) of the Constitution, therefore, includes *pro-se* defence as well as public defence, as a primary right of the accused, inherent to the entire procedural *iter*, from the pre-trial phase to the judgment phase, until the moment of closing arguments, in which the accused must have the last word (Judgment no. 205 of 1971), and as aids in the correct dialectical development of the proceedings and a more certain search for the material truth (Judgment no. 186 of 1973).

The right to public defence also includes (Judgments no. 125 of 1979 and 80 of 1984) the right to consult with a lawyer (Judgment no. 216 of 1996), for the purpose of preparing the defence and choosing a defence strategy, and still earlier for the purpose of knowing his or her rights and having the opportunities offered by the legal system for the purpose of their protection and to avoid or assuage the detrimental consequences of which he or she is at risk.

For this reason, according to the Court, the right of defence, understood as the effective opportunity to seek the assistance of a public defender, is breached in any case in which a fixed time period is established for the accused to exercise procedural options, which involve "full knowledge of the technical elements falling under the specific skills of the defense attorney," and which entail the loss of the right to that option if not respected, that begins with notice to the accused, rather than to the defence lawyer, of the act from which said options derive. This principle was applied in Judgment no. 120 of 2002, which declared Article 458(1) of the Code of Criminal Procedure unconstitutional in the part in which it prescribed that the time period in which the accused may ask for summary judgment (*giudizio abbreviato*) starts from notification of the decree of immediate

judgment [which allows the pre-trial phase to be skipped under certain conditions, moving directly to trial], rather than from the final notification, to either the accused or the defence lawyer, of, respectively, the decree or the notice of the date fixed for the immediate judgment. In Judgment no. 162 of 1975, with reference to the time period for raising objections of nullity, as well as Judgment no. 80 of 1984, regarding the time period for filing requests for retrial, the time periods were triggered by the awareness of the measure on the part of the accused, rather than from notice to the defence lawyer.

The principle of public defence also imposes the rule against confiscating papers and documents used for defence purposes from defence lawyers or consultants (because they are not part of the body of evidence). This rule also applies to notes taken by the accused and kept in the cell where he or she is detained, for the purpose of responding more easily to the interrogation already administered, in the declared intent to "verify whether these notes reveal circumstances that differ from the ones in the oral statement" (Judgment no. 229 of 1998).

The right to confer with one's defence lawyer cannot be compressed or conditioned by his or her state of incarceration, except within the limits that may be prescribed by the law to protect other constitutionally guaranteed interests (for example through temporary, limited suspensions of the exercise of the right, like the one considered in Judgment no. 216 of 1996), and except in order to regulate the way the right is exercised as a function of the other requirements connected with the state of incarceration. The right may never be made subject to the appreciation-free evaluation of the administrative authorities, which would make it truly subject to discretional authorization. On the basis of this principle, Judgment no. 212 of 1997 declared a rule that did not allow convicted prisoners serving finalized sentences to confer with their defence lawyers from the start of their sentence to be unconstitutional as a violation of Article 24(2) of the Constitution. More recently, Judgment no. 143 of 2013 declared that a rule limiting the right to speak with a defence lawyer for prisoners subject to the suspension of the rules of treatment under Article 41-*bis*, second paragraph, of the Code of Criminal Procedure, where it said that such prisoners could have "a phone call or personal conversation of the same duration of those provided for family members [that is, ten minutes or an hour, respectively] up to three times per week" with their defence lawyers. The Court said that the rule "by introducing limits on the duration and frequency of direct and telephone conversations with their lawyers – limits which operate independently not only from the nature and complexity of the judicial proceedings in which the detainee is involved and from the degree of urgency of the requested consultation, but also from their number and, therefore, from the number of legal representatives with which the detainee must have contact – the application of the special detention regime automatically and unavoidably effects a compression of the right to a consultation. Nor are the limitations in question justified by the balancing of the right of defence and the interests of equal constitutional relevance like the protection of public order and safety of citizens. Indeed – and this follows the case law of the European Court of Human Rights, according to which a limitation of the privileged contacts between a detainee and his or her lawyers may only occur when strictly necessary – in effecting a balancing, one may not decrease the protection of a fundamental right if there is not a corresponding increase of protection of another interest of equal rank, an eventuality that does not appear to be the case in the matter under examination."

Judgment no. 63 of 1972 declared unconstitutional certain rules of the Code of Criminal Procedure (Article 309), which did not allow for the assistance of a defence lawyer during a personal search [looking for something specific] and inspections of people, places, and things [general inspections] following a judicial order.

The essential role of public defence again comes to the fore when lawyers and attorneys collectively abstain from providing services [strike]. Judgment no. 171 of 1996 struck down a rule that failed to institute an obligation to give fair notice and a reasonable time limit on striking, did not establish other tools suitable for granting the essential legal services, and did not establish measures or

sanctions in case of violation. The Court said: "given that the objective of Law no. 146 is to safeguard essential public services, and that, in reality, by aiming exclusively to protect people from abuses of the right to strike, the law does not foresee any rational and coherent regulation, which includes other possible, collective expressions of this right that are able to compress the primary values of the person, the absence of regulation of lawyers and attorneys' right to strike from court appearances among the law's provisions compromises its purposes and reduces its effectiveness, given that its silence on the matter impacts, no less than a worker strike of registries and judicial clerks, the administration of justice, which is an essential public service."

Still on the topic of the legal profession, Judgment no. 87 of 1997 highlighted that regulation of lawyer confidentiality and the power to refuse to be interrogated as a witness during a trial about what a lawyer may have learned in the exercise of his or her profession, responds to the need for an assured defence, based on a real knowledge of facts and circumstances, and not conditioned upon a mandatory transfer of such knowledge to the trial, through the testimony of those working as professional defence lawyers. On the contrary, it is intended to guarantee the full specification of the right of defence, allowing a defendant to share with their defender, without hesitation, facts and circumstances the knowledge of which is necessary or useful for the effective exercise of legal defence work. The legislator, in regulating the power of lawyers to strike, effected a balancing between the duty to testify and the duty to keep secret what has been learned in carrying out the activities of the legal profession.

The right to a defence attorney

The Italian system fully assures that those without means will have access to legal aid programs for the poor and State-provided legal aid, the latter being granted in criminal proceedings and in civil proceedings only for the exercise of actions for compensation for damages and reparations for a criminal act. The legislator, after the ratification of the republican Constitution, reformed with Law no. 217 of 1990 the general regulations governing legal representation of those without means in all jurisdictions. In addition to providing for tax deductions and similar forms of aid (fee waivers, or waivers of other expenses relating to judicial or administrative acts; postponed payment of the fee to enroll in the registry [registrar fee-stamp duty]) the law also includes two distinct effects of the access to free legal aid: some services are provided free of charge (defence by an attorney or lawyer; the activities of the judicial officials, notaries, and experts; and publishing in judicial publications) and public funds are advanced to cover certain expenses (travel expenses for public officials; expert expenses; expenses for deposing witnesses and to publish certain required information as well as the decision on the merits in newspapers). The Constitutional Court, which has been called upon many times to pronounce on the steps necessary to guarantee the effective right of defence, has stated: "The grant of legal assistance for those without means, although articulated with varying nuances and degrees of strength depending upon the discretional choices of the legislator, has to embrace every form of protection of rights and legitimate interests. This is even clearer in the third paragraph of Article 24 of the Constitution, read in strict connection with the first paragraph, according to which the right of defense must be "guaranteed to everyone equally and according to appropriate forms" (Judgment no. 149 of 1983, 188 of 1980, and 125 of 1979). The broad acknowledgment that everybody has the right to access to justice for the protection of his or her own rights and legitimate interests also represents the scope in which the safeguard granted to indigents in order to bring claims or defend against them "in every jurisdiction" is realized so that,

where the system recognizes a situation giving rise to a legal action or a procedural tool of protection, the individual may not be excluded for lack of the means to bring an action or defend his or herself. The connection between the first and third paragraphs of Article 24 is consistent with the principle of equality found in Article 3, first paragraph of the Constitution, and with the task – assigned to the Republic by the subsequent, second paragraph – to remove obstacles (financial in nature in this case) which otherwise would limit this equality in the realization of rights and legitimate interests (Judgment no. 194 of 1992).

Considering only some of the aspects to which the Court has spoken, it is useful to look at Judgment no. 144 of 1992, which observed how the simple procedure for being admitted to the benefits provided for under Article 6 of Law no. 217 of 1990, although it did not provide for any verification or check on behalf of the competent judge, fully implemented the constitutional requirements, because the grant of legal aid for indigents must be assured on a short timeframe incompatible with time-consuming checks and investigations on the income of the applicant. Subsequent Order no. 386 of 1998 then clarified that the risk that, because of the limited nature of the requirements, incomes coming from illegal activities may go unnoticed, is overcome by the fact that the applicant's request and the decree of admissibility must be transmitted to the competent finance and tax authorities (*Intendente di finanza*) so that they may verify the correctness of the amount of income claimed by the accused and, if necessary, carry out checks through the finance and tax police (*Guardia di finanza*).
As far as aid by experts is concerned, Judgment no. 149 of 1983 declared unconstitutional – as violatory of Article 24 of the Constitution – Article 11 of Royal Decree no. 3282 of 1923 in the part in which it failed to provide that free legal aid also included the power on the part of the indigent individual to have recourse to help from experts. The Court stated that the constitutionally protected right of defence is, in the first place, a guarantee of a fair adversarial process and of technical-professional aid, and, therefore, the principle that applied first to defence lawyers was also extended to experts who advise the parties, who play a role similar to that of the lawyer, albeit limited to the technical plane, the selection of an advisor to the party being provided for in order to more fully guarantee the evenness of litigation. Judgment no. 33 of 1999 declared Article 4(2)(1) of Law no. 217 of 1990 unconstitutional in the part in which, concerning experts, it limited the effects of qualification for State-funded legal aid to only those cases in which the judge requested an expert opinion. The Court held that this limitation violated the right of defence, because where the judge did not consider it necessary to nominate an expert, the indigent accused was denied access to the assistance of an advisor, not even in extreme circumstances in which such assistance was essential and no less important than the professional assistance of an attorney for effectively carrying out his or her defence. As far as executive procedures under Article 612 of the Code of Civil Procedure are concerned, Judgment no. 194 of 1992 declared Article 11 of Royal Decree no. 3282 of 1923 unconstitutional in the part in which it failed to provide, among the effects of qualification for free legal aid, the advancement of funds by the State for expenses for carrying out an order of specific performance to complete an unfinished work or destroy a finished one. The Court acknowledged that the right of defence was violated because the claimant, by having to anticipate expenses despite being admitted to free legal aid, was not in a condition to carry out the effective protection of his or her rights.
Concerning income-related requirements, Judgment no. 165 of 1993 held that the legislator was reasonable when it chose to include the evaluation of the incomes of family members in the same household for admission to the benefit in the case of becoming a civil party in a criminal proceeding. While Judgment no. 219 of 1995 declared Article 5(3) of Law no. 217 of 1990 unconstitutional where foreigners were permitted to qualify for free legal aid through a mere auto-

certification, confirmed by the competent consular authorities as not being false "to the knowledge of that authority."
The impossibility to verify the contents of the autocertification on the merits was held to violate the principle of reasonableness, when compared with the rigorous procedure put in place for Italian citizens to qualify.

Question No. 17

Has your Court developed case law on other individual rights related to rule of law?

The State is the supreme guarantor of individual rights and freedoms, and the tool through which its citizens enjoy a peaceful coexistence. The way in which the rule of law is manifested concretely, through the enumeration of public powers, defines the form and effective enjoyment of individual rights withinin the system. This nexus is perhaps most evident in the area of individual freedoms.
The First Part of the Italian Constitution, dedicated to the "Rights and Duties of Citizens," deals with personal freedoms and the safeguards intended to protect them found at Articles 13 to 28 (Title I, labeled "Civil Relations"). That section contains the principles relating to the inviolability of personal liberty (Article 13), the inviolability of the domicile (Article 14), the freedom and confidentiality of correspondence and every other form of communication (Article 15), freedom of travel and residency (Article 16), freedom of assembly (Article 17), freedom of association (Article 18), freedom to profess one's belief in any form, individually or with others (Articles 19 and 20), freedom of expression of thought (Article 21), the prohibition of discrimination on political grounds (Article 22), the reservation of personal or financial obligations to legislative regulation (Article 23), judicial protection and the inviolability of the right of defence (Articles 24 and 25), personal criminal responsibility (Article 27), and the direct liability of public officials (Article 28).
In its more than sixty years of existence, the Italian Constitutional Court has produced a rich body of case law interpreting and developing these provisions. A number of examples follow.
As a preliminary matter, in order to better understand the topic, it is useful to recall what has already been said in the asnwers to questions 4 and 12 above, about the protection of legitimate expectations.

Judicial Practice
With limited space to provide examples, this response will focus on judicial practice concerning which the Constitutional Court has consistently reiterated that no punishments may be carried out outside of due process and unless they conform to the procedural safeguards to which the accused is entitled. There are many principles that apply to this area of law, notably including the *ne bis in idem* principle, "a principle of legal civilization with extremely broad application." According to the principle, after a judgment is handed down an accused person is removed from the potentially ongoing spiral of repeated criminal actions for the same facts. Otherwise, contact with the potentially incessant, repressive apparatus of the State would cast a shade of uncertainty on the enjoyment of the freedoms associated with the development of the individual personality, which lies at the heart of the constitutional system (Judgments no. 1 of 1969 and 219 of 2008). The many other principles include the independence and impartiality of the judge (supported by the institutions of abstention and recusal); the reasonable duration of trials, according to which every extension of the length of proceedings must correspond to a logical need reviewable by the Constitutional Court

(Judgments no. 148 0f 2005 and 63 of 2009); and the publicity of judicial proceedings, a principle internal to any democratic legal system, although not explicitly affirmed by the Constitution (Judgment no. 97 of 2015). Finally, and most importantly, they include the right to bring a claim and the right of defence, rights described in many forms by a very rich body of case law.

Personal Freedom

With particular regard for issues involving personal freedom, the Constitutional Court has issued numerous decisions which express *favor libertatis* [favouring freedom, according to which, in cases of doubt, the interpretation maximizing personal freedom is to be preferred], in reference to judicial activities and especially to public safety authorities.

Since its inception, the Court has taken the approach of limiting sacrifices of personal freedom to the minimum dictated by necessity, for example in the areas of precautionary measures and preventive detention (remand). The Court, while acknowledging that the Constitution recognizes the need to sometimes restrict freedom-related rights, has held that it provides that such restrictions may only be established by law or with an act coming from judicial authorities. Moreover, the allocation of power to the legislator does not confer unlimited power, but remains subject to oversight by the Court, according to a rigorously applied criterion of necessity. And, furthermore, the criminal judge and public safety authorities, in the cases and within the limits in which they are authorized to act, have the duty to act with an awareness of the exceptional character of restrictions on freedom.

The Court has consistently held that restrictions of personal freedom cannot be separated from a consideration of other values underlying the Italian legal system. It has noted in particular that coercion, be it physical or emotional, may never offend a person's dignity.

With explicit reference to punishment, Article 27(3) provides that "Punishments may not be inhuman and shall aim at re-educating the convicted." This provision gave the Constitutional Court oversight over criminal policy choices made by the legislator, allowing it to strike down laws containing sanctions that defy the limit of "humanity," as well as those not geared toward re-education, within a necessary balancing with other ends typical of punishment (such as retribution and public safety).

These principles have been applied to every kind of restriction. For example, with regard to safety measures, which correspond to the danger to society posed by the individual they apply to, Judgment no. 167 of 1972 held that, "[Safety measures] are not punitive in nature, but work preventatively and in the defence of society. This distinction is not diminished when they […] effect a restriction on personal freedom. This does not eliminate the fact that the constitutional guarantees concerning the reduction of personal freedom extend to said measures […] even if the constitutional provisions do not explicitly refer to them." The Court also held: "In essence, any coercive measures regarding personal freedom that can be linked to the crime, including for the purpose of effecting a specific prevention (as in the case of safety measures) cannot be exempted from important social goods, these being humane treatment and the possibility for the affected individual to move towards his or her social rehabilitation."

Exercise of public powers

Administrative law is another sector that is particularly delicate from the rule of law perspective. In this area too, the Court has consistently intervened in order to safeguard citizens against potential abuses by those charged with public power.

Among its many decisions, Judgment no. 115 of 2011 is particularly important. It declared Article 54(4) of the Unified Text of the Laws Regulating Local Bodies (*Testo unico delle leggi sull'ordinamento degli enti locali*) to be unconstitutional in the part in which it gave mayors the power to issue ordinances of an administrative order. Although the law did not permit mayors to deviate from legislative or regulatory rules in force, it nevertheless granted a practically limitless exercise of discretion. The provision violated, in the first place, the reservation to legislation under Article 23 of the Constitution, in that it placed no limits on administrative discretion in the area of requiring certain actions, which comes under the general area of the freedom of citizens. In the second place, it violated the other reservation to legislation found under Article 97 of the Constitution, since the public administration may only enact, including in the form of additional rules, what is generally provided by the law. Finally, it also violated Article 3(1) of the Constitution, since, in the absence of a valid legislative basis, the same actions could have been considered to be legal or illegal, varying from community to community among the many communities making up the national territory, represented by the spheres of power of their mayors.

In terms of the imposition of new mandatory taxes, the Court explained that the principle of the reservation to legislation established by Article 23 of the Constitution is fulfilled, even in the absence of an express legislative indication of the criteria sufficient to limit administrative discretion, provided that the concrete required payment can clearly be deduced from the legislative interventions concerning administrative activities. The Court has expounded on this principle on numerous occasions, limiting administrative discretion for the protection of individual freedom. One of the many decisions on this topic is Judgment no. 190 of 2007, which declared unconstitutional a legal provision that delegated power to administrative authorities to establish a mandatory tax imposed on all health workers enrolled in professional associations. The provision only contained the obligatory nature of the contribution, without offering any direction, direct or indirect, suitable for discerning proper criteria for the concrete quantification and distribution of the duties.

Question No. 18

Is the rule of law used as a general concept in the absence or specific fundamental rights or guarantees in the text of the Constitution in your country?

As mentioned above, there is no succinct formula such as "rule of law" in Italian; however, the same concept is articulated by several constitutional principles.
Since its inception, the Constitutional Court has often referred to the concept of "rule of law" as a way of expressing the common ground underlying all the principles granting the important freedoms of citizens, which are considered fundamental and essential in contemporary democratic legal systems.
It bears noting that the Constitution of the Republic is an advanced, democratic iteration of the European model of the rule of law as it historically emerged in Europe. It would not be accurate, therefore, to say that the decisions of the Court have had to fill the gaps in the constitutional order. Rather, they have developed and made explicit the constitutional rules that refer to the concept of the rule of law.

For more on this, see the answers to questions 4 and 12, which lay out an analysis of the case law expounding on the various facets articulating the “rule of law.”