Legislative Omission in the Constitutional Jurisprudence

Italian Report

1. Introductory considerations

In the Italian system of constitutional justice there is no specifically stated remedy to contrast legislative omission.

This deficiency has as its origin the concept of the constitutional court clearly prevalent among the constituent Fathers. Before the coming into force of the Republican Constitution, Italian history was characterized, with very few exceptions, by closely following the postulates of the unquestionable nature of the legislative act. The idea of introducing a body deputed to examine the work of the legislator was therefore in itself an innovation so radical (not by chance opposed by various parties) to impose a certain cautiousness in its setting up. The risk feared by many was indeed the one of creating a "government of judges": the return to democracy, after twenty years of fascist dictatorship, in its turn preceded by a slow, inconclusive realization of a State which was the expression of popular sovereignty, could not do without the attribution of power to parliament, direct representative of the electoral body, and the acts carried out by the latter (firstly the law), a prominence with regard to other expressions of public powers. Certainly, the previous years of authoritarian rule put people on guard towards a dogmatic adhesion to parliamentary paradigm, which existed in this way because people were very aware that, in an era of the prevalence of the doctrine of positive law and rigid deference to the principle of law, the dictatorship had had the possibility of affirming itself under the protection of the (at least formal) respect for the law, and that this (formal) respect had marked the rhythm of a large part of the changes which took place after Mussolini's coming to power until the totalitarian veering away, symbolically represented by the so-called "racial laws" which legalized discrimination against Jewish citizens in 1938.

This experience then imposed the creation of a system in which Parliament could not be silenced as easily as it had been during the fascist period. But the experience more generally made inevitable the construction of a system in which the separation of powers was guaranteed,

together with the protection of fundamental rights: in a word, a system characterized by the principles of constitutionalism.

If the Constitution had effectively to be the "fundamental law" and at the same time, the "supreme law", antibodies able to react against the breaches to which it had been subjected had to be created. Both the role of the President of the Republic was conceived in this context as a *super partes* body and the Constitutional Court was set up.

The Constitutional Court came into being as an instrument of reaction against breaches of the law (*ergo*, actions put into place by public powers) and principally as the "judge of the laws", as the body deputed to examine correspondence between the law (the product of the action of the legislator) and the Constitution, because the recent past had taught that the former, where no limitations existed, could depart from the Rousseau ideal of the general will of the people to the point in which it itself became the vehicle through which (not just to recognize, but also) to limit and to annihilate rights and freedoms.

The form of the Constitutional Court has had profound repercussions on its way of working which have been elaborated in a concrete manner. What is considered the insufficient adaptability of the blue print of constitutional justice of the United States and the connected option in favour of a centralized examination of Kelsen stamp have certainly supported the idea of constitutional jurisdiction as the jurisdiction of "annulment" (according to the outline drawn by Kelsen in his essay on the *La garantie juridictionnelle de la Constitution (La justice consitutionnelle)* in 1928). The Constitutional Court, called as it was (and as it had to be) to guarantee respect for the Constitution, could not superimpose itself over the legislator in such a way as to substitute the latter, but should limit its work to the elimination of those provisions (of legal rank) from the legal system which were incompatible with the Constitution. If the product of its work were then on a par, from the point of view of effect, with the legislative one, the direction of its work was absolutely opposite: where the legislator acted (by law making), the Court would have to react (by annulling).

Regarding the (sole) annulling function originally cut out for the Constitutional Court, we have eloquent evidence in the setting out of its functions; according to Art. 136 of the Constitution, first paragraph, concerning the effectiveness of its decisions, "when the Court declares a legal norm or act in force constitutionally illegitimate, the norm *is no longer in effect* from the day after the publication of the sentence". For the same purposes, other provisions can also be quoted, this time from the law of March 11 1953, no. 87 (Norms on the constitution and

on the workings of the Constitutional Court), first of all the one stated in Art. 23, first paragraph, which makes the judge who raises the question of constitutional legitimacy to indicate "the provisions of the law or act in force of the State or of a Region, claimed to be deprived of constitutional legitimacy". In the same way the first paragraph of Art. 27 states that "the Constitutional Court, when it declares an instance or appeal concerning a question of constitutional legitimacy of a law or of an act in force, declares within the limits of the contestation, *what the illegitimate legislative provisions are"*. Again, Art. 30, third paragraph, again regarding the effectiveness of sentences, underlines that "the provisions declared unconstitutional cannot be applied from the day after the publication of the sentence".

Certainly, the anchoring of the examination of constitutional legitimacy to the power of annulling legislative provisions is not in itself an impediment to recognizing that on a logical level the Court is on a par with the legislator, since both reform the legal system in acts which have equal effectiveness. However, on a systematic level this can only lead to the Court taking on the role of the legislator, since it is the latter who "innovates" whereas the former limits itself to expunging the innovations (or the parts of the innovations) which are in contradiction with the Constitution: if this is to be called, in the broad sense, legislation, it is really a question of "negative legislation" which lacks, by definition, one of the basic attributes of the power of law-making, that is of adopting a functional determination to reach a specific goal which could be politically appreciated. On this point, Art. 28 of the law quoted above, no. 87 of 1953, could not have been more specific: "the examination of the legitimacy by the Constitutional Court regarding a law or an act with legal force excludes any evaluation of a political nature and any examination of the use of discretional power of Parliament." The Court is legitimated to examine the laws and at the same time bound, insofar as it is the interpreter of the Constitution, free from any political conditioning or militancy: if any contrast between sources arises from the examination, it proceeds to annul the subordinated source; if there is no contrast, (or where there are no margins to determine it), the Court can only respect the decisions of the legislator.

From what has so far been stated, it would seem to be possible to conclude *in limine* this analysis, stating the absence within the Italian legal system of material to be treated in connection with "legislative gap".

What is more, it would seem not at random that the concept in question is generally evoked in the documentation regarding constitutional justice more than in a technical sense, with principal reference to the role that the Constitutional Court cut out for itself, (correction, had to exercise), from the very first years of its work. In fact, shortly after the Constitution came into

force, the Italian Republic passed through a period in which the new principles had difficulty in radiating themselves into the system, as the consequence of a kind of "constitutional freezing" (as it was happily defined), due on the one hand to the missing realization through states of many of the innovations contained in the Constitution and on the other to the little inclination shown by a large part of the magistracy to look for, among the different possible interpretations of legislative rules, those most consonant with the changed constitutional framework.[1]

In this context, marked (also) by a gap of the legislator which can be put down to the way of the "missing coming into force" of the Constitution, the Court found itself in the position of exercising a "temporary" function, transmitted by a series of declarations of constitutional illegitimacy and of pronouncements of interpretations to be followed in order to make legislative law conform to constitutional law. This temporary work produced, in large measure, a substantial body of case law, the substantial character of which is due in particular measure to the direction of the Court adopted from its first sentence (sentence no. 1 of 1956), on the basis of which constitutional case law also had to check the constitutionality of the provisions of legislative rank which came into force previous to the Constitution[2].

A vast line of case law sprang from this theoretical premise in which the subject of the questions were provisions produced during the 20 years of fascism (and also previously), frequently inspired by principles and ideologies absolutely irreconcilable with the ones on which the Republic had been built.

It is undeniably a question of an examination which has nothing technically to do with a gap, since the subject of the judgment of constitutionality still remains legislative norms (therefore, "actions"). One can just about concede that it is a control of constitutionality resulting from a gap, insofar as had the legislator acted promptly to remove the (absolutely not limited) leftovers from preceding times from the system, the Court would not have been called to intervene.

Leaving aside these issues, and more specifically dwelling on the gap on the part of the legislator in the technical sense, the affirmation of the absence of control on the same must be

[1] One notes, moreover, that the Constitutional Court itself was the victim of "constitutional freezing", since it only began to work in 1956, that is to say eight years after the Constitution came into force. In the period 1948-1956, jurisdictional protection of the Constitution had to be guaranteed, according to the terms of Section VII of its transitory final provisions, through the work of ordinary judges who in observance to the traditional respect for the principle of law, demonstrated a certain reluctance to start a *judicial review of legislation.*

[2] In other words, the Court believes that the pre-republican norms were potentially breached by a constitutional illegitimacy which supervened, and were not therefore to be considered abrogated by constitutional norms incompatible with them (this latter solution was adopted by other systems, for example the German and Spanish ones.

more carefully submitted to critical scrutiny, bearing in mind that the concept of "gap" is susceptible to different variations in meaning.

In the light of the reflections which Italian scholarship has led us to, two different meanings of the term "gap" can be proposed: to omit is not necessarily synonymous with not being carried out, but can easily be the result of a not completely realized action. In other words, the gap is not only the result of inactivity but is also the product of a partial action, which is a gap regarding the part in which a non completed action comes about compared to what should have been brought about by the action.

In the wake of this consideration, it might be a good idea to distinguish at this point between the gap as "inactivity" and the gap as "uncompleted action" a vast line of case law sprang. Significantly different consequences arise in the context of constitutional justice according to which of the two meanings one is referring to.

2.The gap as "uncompleted action": additive sentences.

By regarding the gap as an incomplete action, this opens up large avenues regarding control on the part of the Constitutional Court.

The latter depend essentially on two factors. In the first place, the existence of an action, i.e. of a legislative product, (even if incomplete) on which it is possible to base constitutional examination, according to what we have discovered above.

This element, on the other hand, would be without actual results if the Court had not freed itself as early as during the sixties from rigid adherence to the blue print of the "negative legislator", considering inherent within its powers the one of "manipulating" normative texts as the subject of its control. On this point it is necessary to clarify that this liberation did not move into the area of lack of application of the provisions of positive law - above passed over briefly – which leads to the examination of constitutionality as based on legislative data. Urged for by more and more pressing systematic needs (the natural call is in the function of "temporary position" exercised in regard to the delayed execution of constitutional precepts on the part of the Republican legislator), the Court based its judgment, not just on the provisions (i.e. on the linguistic propositions contained in the normative texts), but instead on the norms (in other words on the meanings of the propositions extracted in an interpretative way). By pointing out the subject of constitutional control in the norms, the Court has taken on the double role of a body conveying the interpretations of the

provisions and at the same time (and in the case), of a body which has the power to expunge those provisions which cannot be matched with the Constitution. In this way the situation has been created in which the Court, carrying out control on the norms, can come to terms with the annulment of provisions, but also with their modification, and therefore to revive a situation of correspondence between meanings deducible from the text of the law and constitutionally compatible ones.

The possibility of "manipulating" legislative provisions then mutated into the (self) attribution of being able to render so-called manipulative judgments, judgments that is to say which, regarding a purview of unconstitutionality, do not make a simple annulment of the provisions, but a modification of them, transmitted by (i) ablations, (ii) substitutions or (iii) additions.

(i) More specifically, the judgments of constitutional illegitimacy of the "ablative" kind are those in which the Court declares the unconstitutionality of a provision "in the part in which" it provides for something which it should not provide for (and so through the sentence a fragment is eliminated).

One of the first cases in which the Court used this type of decision is represented by sentence no. 63 of 1966, which states the constitutional illegitimacy of some provisions of the civil code concerning the discipline of prescription of the right to pay for work paid in wages. There was not a statement of unconstitutionality for the whole discipline but it was instead "limited to the part in which" prescription of the law should start from when the work began: the Court in case of need stated that "in a relation where there is no resistance, such as characterizes relations of state employment, the fear of withdrawal, in other words of being dismissed, drives or can drive the worker to take the road of giving up a part of his own rights; in this way this renunciation, in the course of this type of work relations, cannot be considered an expression of free will concerning a legal transaction".

A similar provision was adopted in sentence no. 11 of 1979, in which the constitutional illegitimacy of Art. 18, paragraph three, of the royal decree of the 18 June 1931, no. 773 (Single text of the laws on public safety) was declared in the part in which there was a provision for conviction entailing a fine for anyone who took the floor in a meeting in a public place for which necessary notice had not been given to the authorities. The effect of this decision was that the organizers could be convicted, but not the other participants (even active ones) in the meeting.

(ii) In the "substitutive" sentence the provision is declared unconstitutional "in the part in which" a certain thing "instead" of another is provided for (the ruling has the effect of substituting the sentence with another).

A classic example is in sentence no 15 of 1969, in which the Court declared the provision of the criminal code which provides for the power of the minister of justice to give authorization to proceed in cases of public defamation of the Constitutional Court to be constitutionally illegitimate. Such a provision, damaging to the institutional position of the Court, was declared unconstitutional, not just in its entirety but "within the limits in which it attributed the power of authorization to proceed for the crime of contempt of the Constitutional Court to the Minister (….) instead of to the Court itself.

A similar purview is contained in sentence no. 409 of 1989, in which, in order to proceed to an equalizing to another crime considered of equal weight, the Court declared Art. 8, second paragraph, of the law of 15 December 1972, no. 772, illegitimate, in the part in which it determined the edictal conviction, for the crimes of refusing to do military service on grounds of conscience, for a minimum of two years instead of six months and for a maximum of four years instead of two.

(iii) Through the "additive" sentences, the declaration of unconstitutionality strikes at the provision "in the part in which it does not" foresee something (with which the decision adds a fragment to the norm which is the subject of the judgment).

Among the first examples of additive rulings sentence no. 190 of 1970 can be cited. This declared the provision allowing for the presence of the public prosecutor during questioning of the defendant to be constitutionally illegitimate. The reason for unconstitutionality obviously did not lie in what it stated but in what it did not state, in particular the (necessary) presence of the defendant's lawyer during the same interrogation, which is where the declaration on the part of the Court introduced this normative fragment.

Another particularly important additive judgment – among many others – is sentence no. 68 of 1978, the subject of which was Art. 39 of law 25 May 1970, no. 352, regarding referendum. The contested provision established that, in the case of abrogation of normative provisions destined to be the subject of an abrogative referendum, the procedure of the latter was stopped. The Court decided on the unconstitutionality of the above article limiting itself to the part in which, where the abrogation of the acts or of the single provisions to which the referendum referred to were accompanied by another discipline of the same subject, without changing either the inspiring

principles of the whole preexisting discipline or the essential normative contents of the single rules, the referendum should take effect regarding the new legislative provisions.

As we can clearly see, this type of decree departs quite noticeably from the blue print of constitutional judge drawn up as a simply annulling function, which is to be, as feared, as the superimposing of the Court over the legislator, translated as interference on the part of the Court in a field which should be closed to it, in other words, to actively bring about innovations of the legal system.

In reality, the manipulative decisions are subject to the same logic of the other ones of constitutional illegitimacy, insofar as both the former and the latter are *only* started by comparison between the legal provision and the Constitution. Nor does it follow that even when the Court proceeds to the manipulation of a provision, it does so exclusively because it is forced to in order to make the provision conform to the Constitution. It is the necessary respect for the Constitution which leads the Court on the *an* of the manipulation and on the *quid* which results from the manipulation. There is then no "free" creation of a new law but the deduction of normative contents of principles present in the legal system and particularly of the Constitution: the manipulation comes about (and can only do so if) in "set rhymes".

It is by bearing in mind the limits which are imposed on manipulative decisions that the way to shape the additive judgments can be drawn, that is to say where the Court adds a normative fragment as the reaction to gaps by the legislator, gaps not appreciable on the level of the *an* of the intervention but on the level of the contents of the product of the intervention placed within it. The gap in this case is indeed the result of an incomplete intervention, since in rewriting a certain part of the legal system the legislator has been wanting in the insertion of a certain normative content.

Speaking generally, one cannot but emphasize that in a good part of theoretical reconstructions the additive types of judgment which actually do add normative content can (and must in the light of the idea of the judge of constitutionality as the annulling judge) be read as annulments, insofar as by means of these one eliminates from the system the possibility of obtaining a rule exactly opposite to the one which the Court has pointed out: in substance, if the Court has declared that a provision is unconstitutional in the part in which a certain thing is not provided for, it has done this because from the provision, as it was before the intervention of the Court, one obtained the provision which excluded that same certain thing.

Such observations lead us to conceive, from the theoretical point of view, the additive judgments as different compared to the declaration of the existence of a gap (as a "partial activity"), insofar as

their practical effect does not depart from (but on the contrary ends up by being) the declaration of an omitted forecast by the legislator.

3.The distinctive characteristics of the additive judgments

By invariably linking the addition of normative contents to the need for making the legislative provision conform (better expressed, the norms deriving from the provision conform) to the Constitution, the characteristics of the additive judgments are drastically reduced compared to the other sentences of constitutional illegitimacy. The greatest discrepancy is to be found, not by chance, in the declaration, in relation to the precise wording in the additive of the new normative fragment which the Court deduces from the Constitution.

The distinctive characteristics of the declaration, which has no significant repercussions on the motivation of the judgment, has besides some inevitable reflections on the *ratio decidendi*. In this concern, three profiles to be taken into consideration can be summarized.

a)First of all, from the motivation must (and cannot not) come the logical-deductive procedure which leads to the pinpointing of the normative fragment which is missing within the provision that is the subject of the judgment. This fragment must be compared to the contents already present in the provision, with the aim of finding common elements and/or elements of differentiation which justify or not the enlargement of the scope of a rule through an addition to the text. It is, in other words, a question of the application of the principle of equality, such as the one for which the Court is called to make a comparison between the cases in point provided for in the censured provision and those which from the latter do not appear: the addition is indeed only conceivable where this comparison gives positive results regarding the assimilability of the case.

In the light of the experiment of judgment regarding the existence of the breach of the principle of equality, and also for the purposes of eventually pronouncing an additive judgment, the Court must likewise evaluate what is the relation that exists between the norm present in the legal system and the one which the Court is requested to add (better expressed, to explain). In this sense, the piece contained in sentence no. 383 of 1992, also taken from preceding judgments (and subsequently repeated in absolutely similar forms) is particularly eloquent: “the piece which states the principle of equality cannot be invoked when the provision of law from which the *tertium comparationis* is of the kind of norm derogatory to a general rule. In this case the function of the judgment of constitutional legitimacy according to Art. 3 of the Constitution can only be the restoration of the general discipline, unjustifiably derogated from the particular one, not the

extension to other cases of this latter, which would worsen instead of eliminating the lack of coherence of the system of rules".

Two examples, among the many which could be cited, illustrate the argumentative, decisive dynamics used by the Court.

In sentence no. 295 of 1995, the question of constitutional legitimacy of Art. 186-*ter*, first paragraph, of the code of civil procedure was rejected, in the part in which there is no provision for the State and the bodies and institutes subject to protection and vigilance of the State to have the possibility to ask the judge to pronounce, by ordinance, an injunction to pay at every stage of the trial, even when the premises occur as stated in Art. 635 of the same code. According to the remitting judge, the disputed rule (the *ratio* of which is held to be recognizable to the protection conceded to the creditor against the dilatory manoeuvres made by the debtor through the preventive setting up of a judgment of negative investigation of the credit) was in contrast with Art. 3, first paragraph, of the Constitution, for unreasonable discrimination towards provident institutions compared to common creditors.

Contrary to this prospect, the Court noted that "even if it was not called on as the only choice of constitutionally legitimate legislative politics, the exclusion of the granting of the ordinance *de qua* regarding the credits of the State and of public bodies, whenever these used specific probatory material as stated in Art. 635 of the code of civil procedure, it could not just for this be considered irrational and damaging to the principle of equality. In fact "the substantial difference between the cases in which the subject furnished written proof of the credit coming from the debtor or from third parties and the case characterized by the particular value attributed to the documentation formed and coming from the same creditor, because of its particular subjective qualification, related to the public and institutional goals followed" were evident: nor, in the opposite sense, the inclusion already in place, in the context of the operativeness of temporary protection, could be called upon, of the hypotheses stated in the second paragraph of Art. 634 of the code of civil procedure, in which the proof appears structurally similar to the one described in the first paragraph of the following Art. 635, And this, especially, because it is a question of a special rule, derogatory to the general principles regarding the theme of proof in civil procedure, as such not suitable to act as *tertium comparationis*. And then because in any case the derogation (in the broad sense) coming from it according to the disposition of Art. 2710 of the civil code is directed to facilitate, not the creditor because of his standing, but rather the proof of the credits of the entrepreneur considering the particular trust which is required in commercial dealings, also in order to circulate the same credits.

In the same perspective, sentence no. 97 of 1996 declared the question of constitutional legitimacy unfounded, the subject of which was Art. 2 letter *c*) of the law 13 May 1961, no. 469 (Rules regarding Fire fighting and the National Body of Firemen and the legal status and economic treatment of the staff of the non-commissioned officers, chosen guards and guards of the National Body of firemen), in the part in which there is no provision for owners of places where public performances are held to set up their own service for the prevention and extinguishing of fires, by means of private firefighting teams, with the limitations and on the basis set out by the competent Ministry of Home Affairs.

In order to support the request for an additive judgment, the remitting judge pointed out that the denounced provision was in contrast, among other things, with Art. 3 of the Constitution, because of the illogical discrimination carried out by the aforesaid entrepreneurs towards the owners of industrial factories, deposits etc. (only relatively to those provided for by the setting up of a private service), as well as for the consequent compression of the right to private economic initiative of the owners of places where public performances are held.

The Court replied by emphasizing how the difference of the rules regarding industrial factories and places where public performances are held, concerning the possibility of making use of a private service instead of a public one, could be justified because it concerns specific, distinct realities, between which there is no correspondence with reference to the subject of the protection prepared for by the rules on this subject. A subject which has in the first place to be singled out, respectively regarding the safety of workers in the workplace and of the public during performances.

The evident lack of homogeneity of the situations compared led to the excluding radically that one could believe irrational the disparity of treatment as described, " even leaving aside any possibility that in the case the principle of equality could be usefully evoked, considering that the provision assumed as *tertium comparationis* (had) the nature of a special provision, derogatory with regard to the general rule deducible from the whole system of laws".

b) Once the normative fragment hypothetically to be added is singled out, the motivation must take account of the indefectibility of the addition. In other words, the Constitutional Court must verify in advance that the relative judgment is legitimate by the impossibility of exercising choices regarding the *an* and the *quid* to be added, in other words, in order to pronounce the additive. Where there are no "set rhymes" in which the works of the Court can be written, the latter can only withdraw, unless it puts into being a creative activity institutionally precluded to it,

because of its role and the monopoly given to the political bodies (Parliament in the first place) to transfuse into positive law choices which can be freely carried out (within the limitations respected by the Constitution).

The motivation contained in sentence no. 109 of 1986 is particularly incisive. In this case the remitting judge expressed his doubt regarding the constitutional legitimacy of Art. 1, seventh paragraph, decree law of 7th February 1985 no. 12, made law on the 5th April 1985, no. 118 which foresaw the expiry of the benefit of the suspension of the execution of the provisions for leaving residential housing for people who are given subsidized or reduced cost residential housing (as well as for people buying houses of this second category), in the case of arrearage lasting for more than 3 months concerning payment of the rental fee or of incidental costs.

The judge *a quo* maintained that the abovementioned provision, expressly referring to the subjects mentioned before, excluded all other tenants from suspension: this would be in contrast with Art. 3, first paragraph of the Constitution, regarding the principle of equality, as there was no plausible reason not to extend the loss of the benefit of suspension of execution for tenants in arrears.

In reality, the remittal ordinance was then aimed at a judgment with which the Court, in suppressing the subjective limit cited above would extend the contrasted provision to all the tenants of housing destined to be residential.

In this regard, in order to motivate the adopted decision of inadmissibility, the Court underlined that "an additive decision is allowed, as is *ius receptum*, only when the adjusting solution must not be the result of discretional evaluation but necessarily follows on from the judgment of legitimacy, so that the Court in reality proceeds to a logically necessitated extension which is often implicit in the interpretative potentialities of the normative context in which the contrasted provision is placed". On the contrary, "when (…) a number of different solutions, coming from various possible evaluations, are outlined, the intervention of the Court is inadmissible, since the relative choice depends solely on the legislator". The extension of the content of the contrasted norm in the case implied the necessity to evaluate if opportunely or not the suspension provided for had been limited to those who in enjoying the particular advantages of subsidized or reduced cost housing had in connection obligations more rigorously sanctioned. The Court, therefore, would have had to carry out a task of legislative function, which clearly was not permitted to it.

What is more, judgments in which respect for the discretional judgment of the legislator presents itself as an insurmountable barrier in the workings of the Court are quite frequent.

For example, sentence no. 71 of 1983 stated the inadmissibility of the question of articles 1 and 14 of the law of the 24th of December 1975, no. 706, "in the part in which they do not exclude from decriminalization the offence as described in the single Article of the law of the 10th of April 1962, no.165, (on the "ban on advertising regarding products for smoking"). The inadmissibility was motivated precisely by the type of judgment required. The same judge *a quo* in fact considered unquestionable that "the choice between the norms to be decriminalized and those which should maintain the character of a crime was up to the ordinary legislator"; he nevertheless stated the hypothesis that the Court should substitute the legislator in declaring the offence referred to in the single article of law no. 165 of 1962 excluded from criminalization. In this regard, the Court underlined that "judgments of the kind exceed the powers of the judge of the constitutional legitimacy of the laws, who cannot subtract determined cases in point from the common system of rules, adding new cases of exclusion to a series absolutely fixed by the law".

Again, in the judgment concluded by sentence no. 8 of 1987, the judge *a quo* – in outlining the profile of the condition of disadvantage of the parent who in intending to proceed to a delayed recognition of his son of sixteen, already recognized by the other parent, can be stopped by the lack of consent by the latter, only surmountable by a sentence by the Court which takes the place of the missing consent – proposes a different treatment which re-establishes equality between both parents, making them subject to a judicial authorization which served to control the suitability of the former and also the successive recognition in order to realize the minor's interest. The request formulated tended to obtain a reply which was part of the sphere of what is really legislative power, since a radical restructuring of the norm which called on the discretionary power of the legislator and not the judge of constitutional legitimacy was prospected .

From the nineties on, in some judgments the Court expressly referred to the necessity, in order to proceed to additives, which underlie the "set rhymes".

In this regard, sentence no. 70 of 1994 can be pointed out, which decided the questions of constitutional legitimacy raised against Art. 146, first paragraph, no. 3, of the criminal code, added to Art. 2 of the decree law of 14th May 1993, no. 139, made law on the 14th of July 1993, no. 222.

The norm subjected to censure foresaw the obligatory postponement of the execution of the penalty if the latter was to take place with regard to a person infected with HIV in cases of incompatibility with the state of detention.

As a first step, the Court pointed out that the question touched the very centre of the delicate problem relating to the establishing of the borders within which the legislator is allowed to exercise his own discretional choices, in the framework of the not always smooth balancing of values to which the Constitution assigns a specific importance. All of this is not unconnected to the high drama which the sad phenomenon of AIDS presents, both on the level of the opposite, serious needs which arise from this and which inevitably have reverberations on the whole community and also on the difficulties of finding adequate means to allow for a prognosis of facilitated remission of the same phenomenon.

There was an examination, in particular, of the insistent, documented reference to frequent cases of convicted people who have obtained their freedom by means of the norm contrasted, who return to committing crime with terrifying frequency, in this way exposing to danger the system, public safety and the fundamental rights of the people who are attacked.

The large number of cases was "serious and greatly worrying, especially considering the quite extensive numbers presented by the phenomenon, according to the estimated statistics set out in the report which accompanied the draft law of conversion of the decree law no. 139 of 1993". All the same, it was pressing, for the decision, to "verify if the normative option admitted possible censure only on the level of mere opportunity, or rather if the same (had) in some way gone beyond the basis of a correct use of discretionary power, offending constitutional parameters". In a similar perspective, it could not but state that ″at the root of the normative choice (there was) recoverable an important need for the effects of balancing the values which this choice implied, since the legislator had intended to remedy "extremely dramatic situations" , such as those stemming from the particular importance which the problem of HIV infection carries within the context of the prison population, "since prison is the place where one finds a high concentration of people at risk"″.

The protection of a primary good, such as that represented by health, therefore constitutes the first term of reference under the auspices of which to appreciate the conformity to the constitution of the legislative choice, not leaving aside the importance which the very particular conditions assume for that end – such as are those which are characteristic of prison status – in which this good must find adequate guarantee. From this point of view it seems evident that the alternative to immediate execution of the prison sentence or its temporary "irrecoverableness" because of conditions of health, that the legislator himself had held proper to qualify as incompatible with imprisonment, "did not involve solutions with "set rhymes" on the constitutional

level, since it was necessary to admit areas for normative evaluation which could easily make the obligatory nature of the punishment fit the specific situations of the person who had to undergo it".

Besides sentence no. 70 of 1994, the reference to the absence of "set rhymes", in order to exclude the possibility for the Court to pronounce an additive sentence, was mentioned in sentences 298 of 1993, 258 and 308 of 1994. More recently, the reference set out in ordinances nos. 380 and 432 of 2006 have had equal effect.

With reference to these latter, the first one declared manifestly inadmissible the question of constitutional legitimacy of Art. 18, second paragraph, of law 27th July 1978, no. 392 (Rules regarding the leasing of urban dwellings, in the part in which it is excluded that the territory of the communes with a population of not more than 20,000 inhabitants can be divided with regard to the more detailed listing of areas as referred to in the first paragraph of the same article, and so as in the case in which the territory of such communes borders on that of communes with a population of more than 20,000 inhabitants. The absence of "set rhymes" was in this case extracted from the circumstance that, "concerning the division of the territory of communes with a population of not more than 20,000 inhabitants in order to determine the rental fee of the buildings for residential use, it is impossible to extract a single, constitutional compelling solution from the legal set of rules which could substitute the one denounced illegitimate by the remitting judge, since it would be necessary to use choices (regarding categories of areas to be introduced in addition to the three already mentioned in the contrasted norm and on the same level of calculation to be attributed to each of these) which imply evaluations of multiple circumstances susceptible to lead to various different solutions.

The second ordinance declared manifestly inadmissible the question through which the Court was requested to introduce, by an additive judgment, a new norm into the system which would allow the administrative judge to officially transfer the extraordinary appeal to the jurisdictional office, in the case in which the disputed act was consequential to the one that was the subject of the extraordinary appeal to the Head of State.

The sollicited intervention tended to introduce into the system of administrative justice forms of coordination between the two remedies cited, without however taking into consideration that "the concrete ways of coordinating between the two remedies could be multiple and answer to diverging aims, (….) without any one of them able to be considered constitutionally mandatory". The decision of the merit of the question finally came from the need to recognize "the existence of areas of normative evaluation characterized by a high level of legislative discretionary power", with

which “the question raised was (solved) in the request of an adjustment to the Constitution which presented itself not in set rhymes”.

In just one case, as far as is known, the explicit reference to “set rhymes” is connected to the existence of conditions to proceed to a declaration of unconstitutionality of the additive kind.

This occurred in sentence no. 218 of 1995, which regarded the (supposed) illegitimacy of the system of incompatibility between the check (or pension) for disability and the mobility allowance.

The Court was careful to precisely define that it is up to the discretion of the legislator to establish eventual relations of non accruement or rather of different incompatibilities between different services of social security or of charitable nature. It is therefore possible that in an overall balancing of the interests and of the values at play which sees the opposition of solidarity and of the liberation from need (Art. 38 of the Constitution) with the limitations consequent to the need to preserve the balance of public finance (Art. 81 of the Constitution) the legislator – in a situation in which there are multiple events which are the subject of social security – may evaluate as sufficient the attribution of a single treatment of benefit in order to guarantee to the insured worker adequate means for the necessities of his life and also of his family. But this concentration of the intervention of the system of social security in a single benefit must satisfy the principle of equality and of reasonableness (Art. 3 of the Constitution), since it cannot pass over the fact that in general the person who is submitted to multiple detrimental events finds himself in a position of greater need than the person who is submitted to only one and therefore the former cannot, compared to the latter, have an inferior treatment, even if for this end it had to ponder globally and in a complex way (not limited to specific aspects or periods) of the multiplicity of treatments which from the abstract point of view arise regarding different events.

In this case the system of rigid incompatibility, not tempered by the faculty of option, was evaluated with reference to the particular hypothesis in which the multiple events which took place were those of application in mobility and disability and the treatment which from an abstract point of view were concurrent were those of a subsidy for mobility and of a check (or pension) for disability. The comparison between the two treatments revealed the “intrinsic unreasonableness” of the rigid criteria of incompatibility which produced a disparity in treatment. Even though both the disability check and the disability pension were suitable *singulatim* to realize the aims of social security (Art. 38 of the Constitution), on the other hand the worker who was partially disabled, in the case in which he was in a position of mobility, would find himself in a situation of more urgent

need than a healthy worker likewise in a position of mobility since it was predictable that the former compared to the latter would have a greater need for maintaining himself. On the contrary - since the sum of the allowance for mobility both of the pension and for the disability check was greater – a situation was verified in which in the same community of workers placed in mobility, the disabled workers received an allowance inferior in quantity to the one of healthy workers.

The legislator himself, who had corrected the system of incompatibility by introducing the indicated faculty of option, had realized that there existed this clear incongruence – unjustified in the case even if one globally considers the possibly extended length of the treatment of disability compared to the one of mobility because the state of disability increases the risk of involuntary unemployment inherent in the being placed in mobility; but also in the preceding period, to emend the above mentioned *vulnus*, the foreseen incompatibility, with reference to the abovementioned concurrent treatments, should in any case have saved the faculty of option.

The *reductio ad legimitatem* was possible all the same with an additive judgment, "since it was to be inferred "by set rhymes" from the setting out of the rules of the option successively introduced"; an option which can therefore be carried out now as at that time.

*c)*At the same time as the verification regarding the existence of necessary additions, the Court must also verify – this can however only emerge implicitly from the statement of motives – the sector of the system in which the normative fragment should be placed. This is because there are contexts in which the additive sentences suffer from particular limitations: these refer to the services paid for by public powers, regarding which we will have the opportunity to dwell on *infra* in the following paragraph, and especially to criminal matters.

In application of a principle of strict legality, enounced by article 25, second paragraph of the Constitution, "No one may be punished except on the basis of a law in force prior to the time when the offence was committed", the Court cannot pronounce additives in criminal matters which act *in malam partem*, extending the range of an incriminating norm.

The application of the principle of strict legality in criminal matters has been constantly repeated by the Constitutional Court. Particularly explicit (so much so as to constitute the leading case in the matter) in this concern is sentence no. 42 of 1977, which produced a judgment regarding the question of constitutionality of Art. 1 of the law 8th February 1948, no. 47 (the law regarding the press), in the part in which it refers exclusively to printed texts and publications, in other words to the reproduction of various examples of the same piece of writing, since there is no reference to

the broadcasting of news by other means than the press in the traditional sense (in this case, the application of the criminal set of rules to the authors of television news was questioned).

From the above-mentioned omission the judge *a quo* drew the statement of a disparity in treatment – unreasonable and damaging to the principle of equality – consequent to the indicated legislative situation foreseen for the authors of libel committed through a radio broadcast, subjected instead to the common set of regulations.

The predicted solution, consisting of the extension to crimes committed through radio broadcasting of the most serious set or rules provided for crimes committed through the press, was declared inadmissible for this reason: even if it is held that the Constitutional Court can eliminate from the system norms favorable to the criminal with the aim of restoring the general strength of the derogated incriminatory norms, leaving up to the judges of the case to evaluate the efficacy of a similar judgment in the criminal judgments in course, it is certain that remaining within the context of criminal affairs, it is impossible to extract some cases from the common set of rules to lead them back into a special set of rules which is believed to more adequately protect the interests involved and even less when this involves an increase in the sentence. A similar choice which must be defined eminently political, is indeed reserved by Art. 25 of the Constitution to the legislator alone, any other possibility of intervention through additive sentences remaining excluded.

Nor did it follow that, in this case, even though it hoped that the legislator would promptly provide for the gaps which might exist by means of its discretionary power, the Court could not substitute the legislator and even less could it extend legislative norms provided for an activity established for another activity objectively different.

A definition of this type, absolutely consolidated in constitutional case law, finds confirmation in many decisions. Among the most recent we can point out ordinances nos. 187 of 2005 and 437 of 2006, both of manifest inadmissibility.

The former resolved the pending judgment on the constitutional legitimacy of articles 52, 63 and 64 of the legislative decree of 28th August 2000, no. 274 (Provisions regarding the criminal competence of the justice of the peace, according to article 14 of the law 24th November 1999, no. 468), censured insofar as the sanctions provided for by Art. 52 for crimes attributed to the competence of the justice of the peace are applicable to the crime of culpable injuries committed in violating the norms regarding circulation of traffic, whereas the sanctions provided for by the criminal code, applicable to the crimes of injuries concerning professional negligence or committed in violating the norms for the prevention of accidents in the workplace or which have brought about

an illness connected to the person's profession, continue to be attributed to the competence of the ordinary judge. In the opinion of the remitting judge, this distribution of competence between the justice of the peace and ordinary judge determined an unreasonable diversification of the sanction for behavior which offended the same good and could have brought about damages of equal seriousness. The Court pointed out that the judge, insofar as he requested for the crime under examination a decision which would allow for the mechanism of sanctions to be revived which was applicable before the coming into force of the legislative decree no. 274 of 2000, was invoking in substance an additive intervention *in malam partem.*

The second ordinance defined the judgment in which Art. 2634 of the civil code was censured, in the part in which it unreasonably excludes from the list of the active subjects of the crime of hereditary unfaithfulness the partners who in conflict of interest with the company, concur in a determining way to deliberate acts regarding the disposal of the company property. According to the remitting judge, the censured norm – by subjecting to criminal sanction only "the administrators, the directors general and the liquidators having an interest in conflict with the company one, in order to procure for themselves or for others an unjust profit or other advantage, carry out or concur in deliberating acts disposing of company goods, in so doing intentionally causing patrimonial damage - limits in an unreasonable way the active subjects of the crime, because it excludes the liability to punishment of the partner wherever the latter, on a par with the administrator, contributes to decide an act of disposal of the company goods in conflict with the interests of the company. In the ordinance of manifest inadmissibility, it was pointed out in this regard that the second paragraph of Art. 25 of the Constitution hindered the examination of the merits of the question, "which – in the constant case law (of the) Court – in affirming the principle according to which nobody can be punished if not as a law which had come into force before the fact committed, excludes that the Constitutional Court may introduce in addition new crimes or that the effect of one of its sentences may be one of enlarging or aggravating the forms of already existing crimes, since it is a question of interventions reserved exclusively to the discretional power of the legislator".

All the same, the principle of strict legality in criminal affairs does not operate in an absolute sense, since it is quite possible for the Court to introduce manipulations of the norm which can bring about reductive effects of the range of the criminal precept.

In this sense, the declaration of constitutional illegitimacy contained in sentence no. 108 of 1974 is paradigmatic. The subject of the judgment was Art. 415 of the criminal code, insofar as according to the judge *a quo*, the contrasted norm provided for and made punishable the fact of the

instigation of hate between social classes, intending as such every form of demonstration of thought which supports the principles of doctrines which affirm the need for contrast and for struggle between people of contrasting interests, and insofar as such forms of demonstration of thought had to be considered constitutionally legitimate since they constitute the exercise of the right provided for in Art. 21 of the Constitution, nor do they necessarily involve instigation to disobey the laws of public order.

The Court recognized that the norm in the denounced wording, since it did not indicate instigation of a specific criminal action or activity directed against public order or towards disobedience of the laws, but indicated the giving rise to a feeling, without in the meantime requesting that the modalities with which it was put into force were such as to constitute a danger to public order and to public tranquility, did not exclude the possibility that it could damage the simple demonstration and incitement to the persuasion of the truth of a political, philosophical doctrine and ideology of the necessity of contrast and of the struggle between people of opposing economic and social interests.

The theories of the necessity of the contrast and of the struggle between the social classes are doctrines which, arising and developing in the heart of conscience and of political, social and philosophic concepts and convictions of the individual, belong to the world of thought and ideology. The activity of externalizing and spreading of these doctrines, insofar as it does not give rise to violent reactions against public order or are realized so as to represent a danger to the peace of the general public, does not have aims in contrast with the primary interests constitutionally guaranteed and therefore any repression or limitation of the latter violates freedom as consecrated in Art. 21 of the Constitution.

Consequently the contrasted norm, insofar as it is indeterminate, was considered to be in contrast with Art. 21 of the Constitution, since it did not specify the ways in which its instigation should be put into practice provided for by the latter since this could be considered different from the manifestation and spreading of the persuasion of political, social and philosophical or economic doctrines, and therefore criminally actionable without violating the constitutional precept of Art. 21.

The necessary conclusion was of the constitutional illegitimacy of Art. 415 of the criminal code in the part in which it punishes anyone who publicly incites hatred between the social classes, insofar as the same article did not specify that this instigation had to be put into practice in a manner dangerous for public peace. The declaration was clearly of the additive type (unconstitutionality of

the article "in the part in which it did not specify"): the reductive effect of the precept made the action of the Court fully justified in the criminal context.

An additive action in the criminal field is contained, among others, in sentence no. 139 of 1989, pertaining to Art. 266 of the criminal code, regarding the crime of inciting the armed forces to disobey the laws.

Art. 266 was considered to be in contrast with Art. 3 of the Constitution, in the light of a comparison with Art. 212 of the military criminal code of the peace, regarding incitement – put into practice by the armed forces – to commit military crimes. The correspondence between the cases provided for in the two articles clarified the disparity in treatment, insofar as Art. 212 stated that the punishment was always applicable in a lower degree than half the punishment established for the crime to which the incitement referred, whereas this limit was not stated in Art. 266 of the criminal code. Apart from the difference in rank of the perpetrator (military in one case, non military in the other), the existing reasons for the two norms being compared in substance coincided, so that the extension of the limit of the punishment to Art. 266 was made necessary, and consequently declared constitutionally illegitimate in the part in which it did not foresee that for the incitement of the armed forces to commit a military crime the punishment was "always applied in a lower degree than half the punishment established for the crime to which the incitement referred".

4. Additive sentences of services

Additive judgments present some peculiarities which cannot be neglected when the normative fragment which the Court adds takes shape in the addition of a service to be performed by public authorities.

This type of judgment, closely connected to the carrying out of the postulates of the Welfare State, is not characterized so much for the declaration of unconstitutionality (since it is a question of an additive not dissimilar to those already examined) as for the motivation which underlies it. In fact, the circumstance in which the Court introduces into its rules a "new" service (or more frequently a "new" category of people who will benefit from a particular service) has inevitable financial consequences. On this point the problem pertaining to the applicability of Art. 81, paragraph four, of the Constitution is raised, according to which every "law which involves new or greater expenses must indicate the means to meet the latter": the so-called "financial cover", necessary for the sources of law produced by political bodies, is not applicable, *a rigori*, to the judgments of the Constitutional Court. Notwithstanding this, when the Court introduces new or greater expenses, it cannot maintain the constitutional provision cited *tamquam non esset*, taking on

the burden of a balancing between the rights guaranteed by the services added and respect for the cardinal principle of the correct management of public spending. This balancing had important consequences, for example when the provision being examined results as unconstitutional since it violates the principle of equality: the missing consideration regarding public expenditure would lead to an equalization "upwards", in the sense of extending the number of people to benefit from it, but this addition would be against the rules of the Constitution; the balancing which took place between opposing needs led the Court to equalize even "downwards", in the light of which respect for the principle of equality was restored, limiting the list of people benefiting from the service to a specified service, excluding anyone who found themselves in a situation comparable to the one of others not taken into consideration by the legislative set of rules. This decision-making technique finds its source in the impossibility not to take into account "that there is a limit to the resources available and in the context of expenditure, it is up to the Government and to the Parliament to introduce changes to the legislation of expenditure, where this is necessary to safeguard the balance between the State budget and the following of aims of financial programming"; besides, it is indisputable that "it is up to the legislator, in the exercising of his discretionary power and bearing in mind the fundamental needs of political economy, to balance all the legally relevant factors" (sentence no. 99 of 1995).

Moreover "the operativeness of the principle of equality is one way directed at extending the reach of a discipline better evoked as *tertium comparationis*, but can also spread towards the removing of the unjustified privilege of a set of rules more favorable compared to the one indicated "(see sentence no. 421 of 1995) The "possible leveling downwards of the categories compared" was imposed, for example, in sentence 421 of 1995, by the "evolution of the social conscience" as well as by the "grave crisis of public financing", and (even if operating retroactively), did not have a negative influence on the principle of the citizen's confidence. In any case, "the annulment of the favorable norm does not interfere with the discretionary power of the legislator, who remains free to act as he thinks best in order to reorganize the set of rules by leading the discipline back to rationality".

Obviously these considerations cannot prevent the Court from acting consequently when it notes a defect of constitutionality. In the context of the sentences "which cost", the constitutional sentences pertaining principally to areas such as public sector employment, social security, public welfare (for example on minimum wages, social and health security and welfare, wage earning capacity, additions to the minimum social security payments,) assume a particular importance; these are sentences which involve financial increases not only for the State but also as the burden of the

bodies which belong to the so-called "widened public financing". They constitute the answer of the Constitutional Court to the missing action of the legislator, in other words, a positive reply, compared to the one that the legislator has omitted to dictate, in order to remedy the breach of the Constitution; and from where precisely arise very important implications regarding the relationship between the judgment of constitutionality of the laws and the sphere of action of Parliament.

From the point of view outlined above, sentence no. 455 of 1990 assumes a particular importance; the Court pointed out that the same fundamental rights, when they require positive services at the expense of public structures, are subject to very precise conditions, particularly regarding the necessary expenditure involved. In this concern, it has been established, in the context of the law on health contributions, the right to healthcare is subject to "the calculation of the instruments, of timescales and of the means of carrying out" of the relative protection by the ordinary legislator. This latter dimension of the right to healthcare implies that, on a par with each right to positive services, the right to benefit from the health system, since it is based on constitutional norms that impose a certain specific goal to be reached, is guaranteed to everybody as a constitutional right conditioned by the implementation given by the ordinary legislator through the balancing of the interest protected by that right with the other constitutionally protected interests, bearing in mind the objective limits which the same legislator meets in his work of implementation in relation to the organizational and financial resources available to him at that moment. This principle, common to every other constitutional right to positive services, certainly does not imply a demotion of the primary protection guaranteed by the Constitution to a purely legislative level, but implies that the implementation of the constitutionally mandatory protection of a determined good (health) happens gradually following a reasonable balancing with other interests or goods which enjoy equal constitutional protection and taking into account the real, objective possibility of using the necessary resources.

In applying this argumentative logic, the constitutional guarantees set up in defense of working mothers have justified the declaration of unconstitutionality contained in sentence no. 310 of 1999, of article 18 of the law of the Region of Sicily of the 1° September 1993, no. 25, in the part in which, excluding the existence of the subordination of the work relations of young workers carrying out work of collective utility, did not state the applicability to working mothers engaged in this work, of article 15 of the law of the 30 December 1971, no. 1204, which ordered the allocation in their favor of an allowance equal to 80% of their wage.

In the case, the Court maintained that the indisputable discretionary power of the legislator regarding the discipline of social security and welfare meets limits, especially in regard to benefits

not only of a patrimonial nature but which first and foremost represent forms of protection of a personal condition (such as motherhood) which enjoys particular constitutional consideration.

The Court has also frequently stated that motherhood must not find obstacles where the mother is a worker. To guarantee this aim it is necessary to remove those economic obstacles which would render it more practically difficult to carry out the mother's irreplaceable role: those norms which imply a substantial loss of money because the worker is a mother cannot therefore be considered legitimate.

In conclusion the Court stated that even if the legislator can exclude specified social security and welfare bodies for some work activities, it cannot on the other hand deprive the latter of the fundamental constitutional guarantees set down, even if it continues to have the possibility to alter the set of rules of the various bodies according to the characteristics and the requirements of each activity.

In another regard, in sentence no. 467 of 2002, the Constitutional Court issued a judgment regarding economic contributions for the disabled, because of missing legislation for the concession for disabled minors attending nurseries of the monthly attendance payment. In underlining the "formative goals" of the service offered by the nurseries, the Court noted that the missing provision for the payment of the concession with regard to children under three years of age did not find "any justification in the legal system". With the prospect of the "protection of weak subjects", and faced with the same formative integrative goals recognized to nurseries and to school bodies by ordinary legislation, the Court, by means of an action of the additive type, worded a norm in which a payment for attending nursery school was imposed for disabled children, filling a real "unconstitutional gap" which could not be overcome on the mere interpretative level. The normative reference framework rendered practicable a solution of truly "set rhymes", as shown by the Court where it stated that the exclusion of the payment in the hypothesis indicated "found no justification in the legal system".

A well-known omission on the part of the legislator was filled in by the Court with sentence no. 476 of 2002, also in article 1, paragraph 3, of the law of the 25 of February 1992, no. 210, in the part in which it does not provide for an allowance by the State for health workers who have been subject to permanent psychological and physical damage following an infection contracted after contact with blood and derivates of the same coming from subjects infected with hepatitis during their work.

No benefits were available for health workers who had contracted hepatitis following contact with infected blood or derivates of the same, in contrast with the set of rules regarding subjects affected with HIV infection.

The compensatory reason which justified the measures in favor of the categories provided for and which the legislator had explicitly founded on the insufficiency of health controls predisposed till that moment could not but be also valid for the category of subjects not provided for and therefore excluded. In particular, it was incomprehensible that health workers, in the cases indicated above, were given an allowance when it was a question of HIV infections but not in the case of hepatitis, once the same legislator in evaluating the two types of pathology had judged them equivalent with regard to the allowance, when the latter resulted as having contracted the disease following the administration or transfusion of blood.

What is more, it is certain that the imperative of the rationality of the law imposes that the *ratio* of the legislative actions of the kind in question be pursued as a whole. If this does not happen, the legislative provision which is unjustifiably missing determines a discrimination forbidden by article 3 of the Constitution.

Along with this type of additive of service, in constitutional case law there are also to be found types of sentences which are only the indirect cause of new contributions, where there seem to be no problems of covering deriving from article 81, fourth paragraph, of the Constitution: in fact, it can happen that the source of the new or increased expenditure it not in itself the normative situation which has been created following the issuing of the judgment, but the need to renew acts carried out on the basis of the norm declared unconstitutional. Cases of this kind are to be found in sentences no. 284 of 1987 (which allows the participation of lecturers who have not done a certain number of years service in the processes concerning the inclusion in the list of researchers who have not done a certain number of years service), no. 399 of 1988 (which allows “temporary workers” to benefit from the positions left over on the reserve list of teachers) and no. 39 of 1989 (which allows lecturers to take part in examinations to be put on the official list of confirmed university researchers, whose discipline is set out in art. 24 of the law of 24 February 1967, no. 62). The effect of these judgments can be the need to carry out the examinations again, from which certain subjects who according to the Court had the right to participate had been excluded.

Similar situations in which the public administration has had to meet the expense of new, unexpected demands of payment, without article 81 of the Constitution immediately being brought to bear, have appeared in the light of annulments which eliminated a short expiry term for the

exercise of the right to be paid by the public administration, so that new appeals initially declared inadmissible, were able to be presented: in this regard see sentence no. 8 of 1976 (which annulled the provision prescribing the final term of 90 days for the presentation to the Court of Auditors of appeals regarding civil pensions) and sentence no. 97 of 1980 (which annulled a similar norm concerning war pensions).

5. Additive of principle judgments

The peculiar characteristics of the additive judgments make evident the delicacy of the role which the Court assumes in filling the gap of normative contents which afflicts the provision that is the subject of its examination. The delicacy, as we have noted, is to be appreciated especially in relation to the necessity not to go beyond the limits which have been imposed on the Court by its own role. However it is certain that there are frequently cases in which the Court finds the existence of a gap to be filled, at the same time having to note that in the case in which it is the same Court which had to fill this gap, the function of the judge of the laws would end up by becoming something different, superimposing over the judgments which institutionally are the competence of political bodies.

One of the limits which are imposed on additive sentences, to be summarized in the proper respect of legislative discretionary power, produces the double effect of not precluding the declaration of the existence of unconstitutionality, and on the other hand, of making the Court stop in its work of re-stitching the consistency of the legal system: when faced with many possible (and constitutionally allowed) additions, the Court is not legitimized to choose.

In order to overcome a situation in which the ascertained unconstitutionality cannot be declared, one could hypothesize a declaration of constitutional illegitimacy which would strike the whole provision, that would not give rise to problems regarding respect of legislative discretionary power. Drawbacks would appear though, easily noticeable, for example with regard to a provision which might offer a guarantee concerning certain determined situations without extending them to others: the annulment *tout court* of the provision would have the result in not creating the remedy with regard to a non conformity with the Constitution , but the worsening of the defect, coming from the (further) shrinking of the protected situations.

Precisely from the point of view of one of the most complete assertions of the principle of constitutionality which saves the prerogatives of political bodies, starting from the second half of the eighties, judgments in constitutional case law of the new type have emerged, mainly defined as “additives of principle”.

With these sentences, after declaring the constitutional illegitimacy of the provision which was the object of the judgment "in the part in which it did not" (as in the "classic" additives), the Court does not go on to point out the normative fragment which is missing, but indicates the general principle which has to be re-written in filling the gap with contents.

From a rapid (and merely indicative) collection of additive judgments characterized by the general nature of the provision (in the sense above described) we can draw the meaning of this technique for deciding used in areas which are particularly "sensitive", in order to balance the different concrete requirements underlying the judgment of the Court .

One of the first examples is represented by sentence no. 560 of 1987, which defined the judgment which had as its subject article 21, first paragraph, of the law of 24 December 1969, no. 990 (Mandatory insurance of tort liability deriving from traffic of motor vehicles and boats), modified by the law of 26 February 1977, no. 39, which converted the decree law of the 23 of December 1976, no. 857, in the part in which it limited the action of the Guarantee Fund for the Victims of Road Accidents, for a maximum amount of 15 million lire for each person injured and for 25 million lire for each accident, without establishing neither at the start nor subsequently, any form of adjustment of such limits.

Once it had pointed out the incongruity of an action of compensatory nature which, for the lack of possibility to modify the financial terms in which it was expressed, was subject in the course of time to the progressive reduction and the making void of its market value, the Court deduced the irrationality of the legislative provision which did not fit the evaluation of the monetary values of the compensatory service into the flux of time.

Notwithstanding this, the choice of the ways to clear up the *par condicio* among the victims of road accidents caused by non-identified vehicles and the generalities of those who had the right to be compensated for damage covered by insurance policies had to remain within the discretionary power of the legislator, leading to the declaration of unconstitutionality of the provision "for the part in which it does (did) not provide for the adjustment of the financial values stated in it".

In the wake of similar considerations, sentence no. 497 of 1988 censured the legislative provision which fixed at a rate of 800 lire per day the ordinary allowance for unemployment benefit (article 13 of the decree law of the 2 March 1974, no. 30, made law, with modifications, on the 16 April 1974, no. 114), declaring the unconstitutionality of the latter "for the part in which it did not provide for a mechanism of adjustment of the financial value stated in it".

The *ratio decidendi* of sentence no. 420 of 1991 is to be ascribed to the same logic; the Court declared the constitutional illegitimacy of article 1, paragraph 1, of the law of the 22 August 1985, no. 450, regarding the carrier's liability for damage deriving from the loss or damage to things being transported, "in the part in which it did not provide for a mechanism of up-dating the maximum limit prescribed for the amount of the liability".

More recently, sentence no. 270 of 1999 concerns article 4, first paragraph, letter c), of the law of 30 December 1971, no. 1204, (Protection of working mothers), censured insofar as in expressly forbidding the giving of work to women for three months after they have given birth, it was held to be violating the principle of equality of treatment of the cases regarding birth at full term and premature birth, insofar as only the former would be considered protected and not the latter. The constitutional values of the protection of the family and the protection of the minor would also be prejudiced, considering that the denounced provision did not, in the case of premature birth, allow for the "breaking up" of the mandatory period of leave from work and its start from the entry of the child into the family or at least from the predicted date of the birth instead of the actual date so as to allow for an adequate protection of the woman giving birth.

The Court recognized the incongruence of the contrasted norm, underlining that different solutions could be proposed with specific regard to the start date of the period of leave from work, moving its beginning to the time when the child took its place in the family or rather the presumed date of the physiological moment of a normal pregnancy. If the choice between the one and the other was certainly up to the legislator, it was pointed out that once the constitutional illegitimacy of the norm was declared, in the absence of a legislative action it would be up to the judge to (have) to find the suitable rule within the whole system to discipline the case, in conformity with constitutional principles. From this point of view, the declaration of constitutional illegitimacy struck the contrasted provision "in the part in which it did not provide for a start date of the period of mandatory leave from work in order to guarantee an adequate protection of the mother and the child in the hypothesis of premature birth".

Again, sentence no. 158 of 2001 should be noted, declaring the constitutional illegitimacy of article 20, sixteenth paragraph, of the law of 26 July 1975, no. 354 (Rules regarding the prison system and the carrying out of the measures for the privation and limitation of freedom), "in the part in which it did not recognize the right to paid annual leave for the prisoner who carried out his work for the prison authorities". The Court arrived at this, underlining how the right to annual leave integrates one of those "subjective positions" which cannot in any way be denied to those people who carry out work during their time in prison, without neglecting the particularities of the work

relations of prisoners, which " imply that the concrete ways (of form and time) of realizing annual paid leave (and suspending their work), dedicated to rest or to alternative activities existing within the prisons, must be compatible with the state of detention". These ways "may then diversify according to whether the work is internal (for the prison administration or for third parties), or if it is carried out externally or in a situation of semi-liberty; variations which are up to the legislator, to the judge or the administration to set out".

Through the additive of principle judgment, the Court starts a dialogue, not only with the legislator, called to fill the gap in the regulation, but also with the judges on whom falls, in the default of legislation action, the task of following up the principle enounced in the decision of constitutional illegitimacy, in the concrete form of legal relations.

Sentence no. 295 of 1991 is especially explicit, with regard to the effects of the judgments under examination, in which was pointed out that "the declaration of constitutional illegitimacy of a legislative gap – as the one recognized in the hypothesis of the missing provision, from the legal ruling norm of a constitutionally guaranteed right, of a mechanism suitable to guarantee the effectiveness of the latter – whereas it leaves it up to the legislator, in recognizing his undeniable competence, to introduce and to set the rules even retroactively of this mechanism by way of abstract law making, administers by itself a principle which the common judge is able to refer to in order to remedy in the meantime for the gap while finding the rule of the concrete case".

As is clear, the trilateral dialogue assumes different forms according to the type of principle deduced by the Court. In particular, the variable which has to be borne in mind is the degree of precision which makes the activity of the legislator indispensable whereas this activity can be substituted when the Court offers the ordinary judges a sufficient basis on which to insert their hermeneutic activity.

Especially during the first half of the nineties, the case law of the Court does not lack examples of additive of principle judgments whose characteristic is that of primarily turning to the legislator, the only person institutionally capable of meeting the requirements of the indications contained in the sentence.

The judgment which is probably best known is the one contained in sentence no. 243 of 1993 concerning the set of rules regarding the end of the work relation of civil servants, defined by some – for reasons which will shortly be described – as a sentence of unconstitutionality "with delegation to the legislator". The censured discipline appeared on this occasion to be in contrast with the principle of equality and of rationality, both with the principles of sufficiency and the

proportionality of the payment, where it omitted to include on the basis of calculation in the end of relation payment of civil servants the special complementary allowance.

The provisions which are the subject of judgment (the combined provisions of article 1, third paragraph, letters *b*) and *c*), of the law of the 27 May 1959, no. 324, with articles 3 and 38 of the decree of the decree of the President of the Republic of the 29 December 1973, no. 1032, with articles 13 and 26 of the law of the 20 March 1975, no. 70, and with articles 14 of the law of the 14 December 1973, no. 829, and 21 of the law of the 17 May 1985, no. 210) were declared unconstitutional "in the part in which they did not provide, regarding the treatment of the end of work relations, for legislative mechanisms of calculation of the special complementary allowance according to the principles and to the times indicated in the statement of motives".

The reference to the statement of motives is connected to the affirmation it contains, according to which the declaration of unconstitutionality "involved the recognition of the holding, for the interested subjects, of the right to an adequate calculation of the special complementary allowance for the purposes of the treatment of the end of work relations".

In practice it was up to the legislator "determining the quantity, the ways and the times of this calculation, concretely rendering the same right realizable". From this if "the action of the legislator – regarding the declaration of constitutional illegitimacy – (was) necessary to reintegrate the infringed constitutional order, it (had) to happen with adequate speed". And considering that the same legislator should provide "for the retrieval and for the destination of the necessary resources to meet the financial burden followed on from this, the arrangements for the above-mentioned mechanisms of homogenization (should have) been started on the occasion of the (successive) budget, or in any case on the first available occasion for the setting up and the formulating of global choices of budget policy".

In order to reinforce these directions of content and time, the Court stated in more detail, with an admonitory aim, (on the theme, see below) that "naturally", if the legislator had not conformed, "or if the times of the gradual adjustment to constitutional legality (were prolonged) beyond any reasonable limit, or if the principles enounced in the (…) judgment (were to seem) unexpected, in the case in which (the) Court were again asked to examine the problem, it (would have to) adopt the appropriate judgments for that situation".

Previously the Court had adopted judgments which lead back to the same type of sentence no. 243 of 1993. In this context, sentences nos. 204 and 232 of 1992 can be mentioned.

In the first sentence, articles 17, first paragraph, of the law of 21 December 1978, no. 843, and 15 of the decree law of the 30 December 1979, no. 663, made law on the 29 February 1980, no. 33 were declared unconstitutional. The first provision forbade the combined sum of the special complementary allowance and the payment to pensioners whose work depended on third parties started subsequently to 31 December 1978; the second established the freezing of the increases of the special complementary allowance, assessed from the 1 January 1979, to pensioners whose work depended on third parties in course on the 31 December 1978. These provisions were considered by the remitting judge to be in contrast with article 36, first paragraph, of the Constitution, insofar as they implied a substantial reduction of the whole pension without the minimum limit of payment being established in relation to which this reduction became operative. The unconstitutionality – turned down in the form of the additive of principle: "in the part in which they did not determine the amount of the payment, beyond which the exclusion and freezing of the special complementary allowance became operative – was furnished with the more precise description according to which the decision regarding the minimum payment and of the relative start date depended on the legislator, whose discretionary power had to be clearly explained so as to safeguard constitutional precepts.

In the second sentence, in applying the same *ratio decidendi*, the Court declared the constitutional illegitimacy of article 97, first paragraph, of the decree of the President of the Republic of 29 December 1973, no. 1092, concerning the treatment of the holder of a pension or of a renewable cheque whose work was paid by the State, of public administration or of public bodies, for whom a thirteenth month salary was not payable for the period in which he had worked and been paid for this work. The provision was annulled by the Court "in the part in it did not determine the amount of payment beyond which the thirteenth salary was not payable".

More recently, sentence no. 171 of 1996 must be mentioned, regarding the declaration of constitutional illegitimacy of article 2, paragraphs 1 and 5, of the law of the 12 June 1990, no. 146 (Rules regarding the exercising of the right to strike in essential public services and on the safeguarding of the constitutionally guaranteed rights of the person. The setting up of a committee for the guarantee of the implementation of law), "in the part in which it did not provide for, in the case of collective abstention from the judicial activity of lawyers and of attorneys-at-law, the obligation of a timely warning and of a reasonable time limit of the abstention and it did not provide for the suitable instruments to find and guarantee essential services, together with the procedures and measures consequent to the case of non-observance".

The detailed declaration is to be read in connection with the final part of the statement of motives, with which the Court, once it had recognized the impossibility of extending for the abstention of lawyers and of attorneys-at-law, the disciplines set out for other categories, pointed out that it could only "leave up to the legislator to define in an organic way the measures to realize a balanced protection of the rights involved, since (the Court itself) cannot establish solutions in detail".

6. Procedure additives

Among the additive judgments, a type recently elaborated by constitutional case law can be indicated as the one of "procedure additives". These are additive judgments completely comparable, on the structural level, to classical additives, or sometimes, to additives of principle. The change is in the content of the addition which has principally as its subject the procedure of the formation of the law which is the subject of the judgment or – more frequently - of other acts the rules of which are set out in the same law. The Court in other terms adds normative contents to provisions of a procedural type, in order to insert moments or phases on the path towards their approval.

This decisive typology, valid from the abstract point of view for any procedure, acquires a particular importance in the relations between the State and the Regions, in as much as the actions put into being by the Court in the recent past have spread a pervading application of the principle of loyal cooperation between territorial bodies, suggesting a distancing from the "dual" regionalism (originally precisely an Italian experience) in favor of a greater permeation of competences and of actions among the institutional actors of the different levels of government.

In this perspective, it is to be noted that the procedure additives have assumed a particular importance in the last few years following a new division of legislative and administrative competences between the State and territorial autonomies (constitutional law of the 18 October 2001, no. 3). There are many subjects and competences which intersect, without certain, unequivocal criterion to ascribe the contrasted discipline to precisely defined constitutional parameters, and which therefore render indispensable cooperative modules to obviate a legal gap; nevertheless the legislator has not taken into account the need to involve mixed bodies institutionally deputed to the composition of opposing interests between State and territorial autonomies.

In this context, among many which could be mentioned, sentence no. 219 of 2005 is significant, which declared the unconstitutionality of article 3, paragraphs 3, 76 and 82, of the law of the 24 December 2003, no. 350, in the part in which, in authorizing the Ministry of Labour to prorogate for 2004 the conventions with the communes for the carrying out of socially useful work and in authorizing the Ministry to stipulate in 2004 new conventions directly with the communes, it did not provide for any suitable instrument to guarantee loyal cooperation between the State and the Regions.

In similar fashion, in sentence no. 231 of 2005, by operating the control of constitutionality of article 4, paragraphs 112, 113, 114 and 115 of the law no. 350 of 2003, regarding the norms for the setting up of a special fund for stimulating the participation of workers in enterprises, to support programmes aimed at the participation of the workers in the management results or choices of these same enterprises, the Court underlined that "the whole set of rules which is the subject of the contrast is placed at the cross-roads of subject matter in relation to which legislative competence is differently attributed to the Constitution: exclusive of the State in relation to the civil system, competing with it regarding the protection of labor"; precisely from this statement was deduced the constitutional illegitimacy of the exclusion of the Regions from any involvement, breaching the principle of loyal cooperation, in the management of the fund.

Sentence no. 133 of 2006 is to be noted insofar as the addition of the Court completed the implementation of the procedure of the contrasted law by adding a constitutionally forced procedural phase. In providing for the setting up of a fund destined for scientific research, the contrasted provision of the law of 30 December 2004, no. 311, concerned a number of subjects which did not only fit into a limited material context (environment, scientific research, energy), and did not lend itself to a prevailing judgment according to the competence. As a consequence, in order to steer the norm back to constitutional legitimacy, it was necessary to apply the principle of loyal cooperation in the phase of applying the provision and allocating resources, in the form of an agreement with the Conference of State and Regions.

Sentence no. 213 of 2006, regarding actions in favor of the fishing industry, also declared the unconstitutionality of article 4, paragraphs 29 and 30 of the law no. 350 of 2003, in the part in which it did not establish that the division of the financial resources provided for took place in agreement with the Conference of the State and Regions. For the Court, the refinancing of the expenditure, since in had a weight both on circles of state competence and also on circles of regional competence justified, according to article 118, first paragraph, of the Constitution, the attraction to subsidiarity through allocation of the relative functions to a single level which could

only be of the State. Nevertheless, it would be necessary, according to the principle of loyal cooperation, to have the Regions involved in the phase of the division of the financial resources among the various types of work, by agreement: therefore the above-mentioned declaration of constitutional illegitimacy.

Again, last of all, one may consider sentence no. 165 of 2007, where the provisions of law no. 266 of 2005 are examined regarding productive districts. For the Court, in consideration of the goal which it fixed itself (development of the economy and of the Italian system of production) the discipline made legitimate the attraction to the centre of administrative and normative functions. What is more, the "call to subsidiarity" of the State, even if justified, still required that the legislative action provided for forms of loyal cooperation with the Regions. Since this last condition did not result as being observed by the contrasted norms, the Court recuperated the role of the Regions in terms of the involvement of the latter, through the application of the setting up of necessary, equal orchestration between state bodies and the Conference of the State and the Regions of the powers of normative and programming type reserved exclusively by the contrasted provisions to state bodies.

7. The gap as "lack of action" and admonitions towards the legislator.

As we have previously pointed out, apart from what we will describe in the following paragraph, there is no specific remedy for the legislative gap understood as "lack of action" in the Italian system of justice.

Notwithstanding this lack, there are certainly cases in which the control of constitutionality is resolved, in the facts (even if not obviously on the theoretical level), in an evaluation concerning the inertia shown by the legislator in putting into being norms to be held constitutionally necessary.

In this concern, great importance have the cases in which the Court, without reaching censures of unconstitutionality, pronounces an "admonition" to the legislator, inviting him to discipline a determined subject or case, in order to remove situations of problematic compatibility (if not of radical incompatibility) of the legislation with constitutional dictat.

These statements, inserted into judgments of rejection in the merits or also of the procedural type (but sometimes also in sentences which carry a declaration of unconstitutionality), bear witness to the difficulties for the Court of proceeding through the annulment of provisions, once the possibility is established that from the annulment derive prejudicial consequences for the

consistency of the system and/or for the protection of individual rights, together with gaps in the normative content.

The admonitory declarations can in their variety assume different forms: from the simple invitation to the legislator to make a provision to the "threat" of future annulling actions on the part of the judge, in the case in which he has to deal with a similar question.

The degree of "inconvenience" felt by the Court is certainly what determines the form of the admonition: the admonition indeed can strike a norm on which exist doubts regarding its constitutionality, and in this case the "tone" of the Court can only be less peremptory compared to the hypotheses where there exists a clear contrast with the Constitution (one speaks, in this regard, of judgments of unconstitutionality "ascertained, but not declared" or of judgments of "provisional constitutionality", to point out the absence of conditions which allow to arrive at the judgment of annulment, for example because this would bring about the superimposing the judgment of the Court to the discretionary power of the legislator).

All the same, it is not just the extent of the defect which shapes the admonition, but also the prognosis concerning what the Court can concretely "threaten". In other words, the admonition can be the premonitory sign of a future declaration of unconstitutionality, but it can also be a way of prompting the legislator to find a remedy for a situation for which the Court, because of the powers which are given to it, cannot respond in an adequate manner.

In limiting oneself here to only mention some of the many cases in which the Court carried out the task of promoting the initiatives of the legislator, one can distinguish the admonitions contained in the (*i*) judgments of rejection (in the merits), (*ii)* those which reinforce judgments of unconstitutionality, and finally, (*iii*) those connected to judgments of the procedural type.

(*i)*Among the admonitions to be found in judgments of rejection in the merits, particularly strong in tone, so much as to be numbered among the cases of ascertained but not declared unconstitutionality, is the admonition contained in sentence no. 212 of 1986, regarding the public nature of the hearings in the tax commissions. The Court has noted that "since the doctrinal opinion and the direction of the case law of jurisdictional nature of the above mentioned commissions have been finally consolidated, a further protraction of the present discipline could not be allowed: on the contrary, it is absolutely indispensable in order to avoid serious consequences for the legislator to intervene quickly in order to adjust the tax process to article 101 of the Constitution, correctly interpreted.

Sentence no. 826 of 1988, regarding radio and television, is also to be indicated, in which the Court criticized the circumstance in which directions on private broadcasting expressed seven years before (in sentence no. 148 of 1981) remained for a long time without any legislative follow up. In particular, as far as concerned the broadcasts by air waves in a local environment, the legislator had still not given any reply to the repeated reminders by the Court concerning the necessity of adopting a suitable set of rules which – in defining the local environment and fixing the criteria for the attribution of frequencies and for the granting of the indispensable authorizations - would match the exercise of private initiative with the needs of the national public service. The legislative gap, prolonged for a notable length of time, had objectively favored the uncontrolled proliferation of private broadcasting which – without asking for the "anticipatory" authorization considered necessary by the Court – proceeded to an invasion of frequencies, even spilling over into bands assigned to other users.

Sentence no. 155 of 2004 is important, particularly with regard to the theme tackled, in which the Court, returning to examine the norms which provide for the suspension – and the extension of the suspension - of the executive procedure for the consignment of buildings, at the same time as expressing groundlessness, repeated the admonition already expressed in sentence no. 310 of 2003, pointing out in particular that where the legislative choices "should continue to follow the logic so far adopted, they could not be exempt from the proposed censures of constitutional illegitimacy (….), considering the *vulnus* that the protraction of the extension would cause to the principle of reasonable length of trials and for the consistency of the system".

In the context of personal liberty, we should mention sentence no. 526 of 2000 in which the Court stated that the power enjoyed by the prison police to search prisoners cannot be exercised arbitrarily but only in the cases provided for by the norms which set out the prison rules, always with a motivated provision, subject to protest. It is to be noted that with the same judgment the Court issued an invitation both to the legislator and to the judges: to the former, to make the system fit in with the principles established by the same Court, expressly providing for the forms and ways of contesting the acts of the prison administration; to the latter, to make them take on the task, where there are no normative actions, of guaranteeing the possibility of judicial execution of the above mentioned acts in an interpretive way.

(*ii*) In relation to the admonitions inscribed in the judgments of unconstitutionality, the admonition concerning some important points of the legislative discipline regarding the Tax on the income of physical persons (Irpef) derives directly from constitutional principles: in sentence no. 179 of 1976, in order to declare the unconstitutionality of the combined income of the couple, the

requirement that the principles of the personality and of the progressive nature of the tax were exactly applied was stressed in general terms, as well as the principle that the passive subjectivity of the tax was recognized to each physical person with regard to his or her capacity to contribute, and that attention should be paid to the concrete behavior of the latter while assessing and according to the debt and responsibility of the tax, and finally, that the subject should find an adequate set of rules in the norms for which the possession of incomes were substantiated in the free availability of the latter.

Sentence no. 436 of 1999 should be remembered, concerning the applicability of the law on the prison system to minors. It was a question of a situation in theory transitory, with the prospect of an organic law of reform explicitly announced but the absence of which had been prolonged for twenty years. In its judgment the Court underlined the fact that it had on many occasions denounced the discordance with regard to constitutional principles of this omission and lacking as it does the power to carry out the necessary choices to create an organic minors prison system of rules, was forced to intervene on the single provisions incompatible with the constitutional requirements of the criminal law for minors: a declaration of unconstitutionality derived from this which excluded the applicability to minors of the set of rules of alternative measures, while the more general problem of compatibility with the Constitution of the extension to minors of the norms on the prison system remained (since it could not be remedied through an annulment).

An admonition which was followed by an immediate action by the legislator is to be found in sentence no. 32 of 1999, with an additive of principle in the wake of which the Court had extended the obligation of proceeding to the questioning of the person who is in prison awaiting the opening of the trial. The absence of a constitutional obliged solution to the judge who has been given the task of proceeding with the questioning, to the acts to be used for this purpose and to the expiry date by which the questioning must be completed, as well as the consequences deriving from the non-observance of this date, made the Court decide to reserve for the legislator the task of filling the gaps consequent to its judgment. A task fulfilled with the issuing of the decree law of 22 February 1999, no. 20 (four days after the judgment of the Court), made law on the 21 April 1999, no. 109 (in the merits, the option adopted was the one according to which, up to the declaration of the opening of the trial, the judge who decided the application of the imprisonment is the one who should hold the questioning).

Regarding the denial of the applicability of the substitutive sanctions of short-period detentions for military crimes, sentence no. 284 of 1995, once the permanent impossibility of arriving at a classic action of the additive type was arrived at when faced with persisting legislative

silence, prepared an additive solution to the principle of guarantee. At the same time the Court remarked that the legislator, with respect for the principle of reasonableness and of other constitutional principles, continued to have the task of preparing the set of rules to adapt the discipline of substitutive sanctions both for the particular aims of re-education of military sanctions and also for the particular status of the defendant: an action which had at this time become really impossible to postpone in order to avoid a new disparity in treatment, this type for the armed forces and certainly not chargeable to the *decisum* of the Court.

(*iii*) In the list of the declarations of inadmissibility with admonitions and/or invitations to the legislator, a relatively recent judgment regarding the civil status of the legitimate child is particularly interesting. Sentence no. 61 of 2006 examined the norm which states that the legitimate child automatically acquires the surname of the father, even when the parents wish otherwise and this is legitimately manifested. On this occasion, the Court took pains to point out, in a position of a line of continuity with other decisions in this regard (ordinances 176 and 585 of 1988), how the present system of attribution of the surname represents the heritage of an obsolete patriarchal conception of the family and of the declining power of the husband, no longer in line with the principles of the system and with the constitutional value of equality between man and woman, and also emphasizing the limitations in this regard of international sources, in particular of the Convention on the elimination of every form of discrimination towards women, adopted in New York on the 18 December 1979, made enforceable in Italy with the law of 14 March 1985, no. 132, and also the recommendations of the Council of Europe no. 1271 of 1995 and no. 1362 of 1998 of the resolution no. 37 of 1978. Notwithstanding this, the sentence arrived at a declaration of inadmissibility, insofar as the action requested by the remitting judge would have involved a manipulative operation exceeding the powers of the judges of the Constitutional Court. Finally, taking into account the lack of rules which the annulment of the discipline would have determined, according to the Court not even a judgment could be hypothesized which, in accepting the question for examination, would require the regulation of the matter with a future action on the part of the legislator.

Sentence no . 202 of 1991 is to be noted, in which the Court, at the same time as recognizing the damage caused by so-called “passive smoking” arrived at a judgment of inadmissibility, motivated not by problems regarding possible unconstitutionality, but simply on procedural grounds. All the same, in the sentence there is the confirmation of the legitimacy (according to article 32 of the Constitution and article 2043 of the civil code) of a direct request for compensation of damages for the said legal case. At the same time it invited the legislator to act for the “necessity

of preparing a more incisive, complete protection of the health of citizens from the damage caused by smoking, also of the so-called passive kind, since it is a question of a fundamental and constitutionally guaranteed primary right".

From the collection of cases which we have examined, it emerges that, through admonitions, the Court establishes the existence of a gap, understood as lack of action, on the part of the legislator. When the instruments to fill this gap are missing, the admonition cannot be other than the declaration of the same, reinforced by the eventuality that the Court in the future should substitute the legislator (within the limits of its own powers) and take the road of repairing the situation of unconstitutionality which has been created.

What is more, the admonition is of its own nature, nothing more than an invitation or, according to the case, a threat without the binding efficacy towards the receiver. The admonition is in fact contained within the statement of motives (the element of the judgment which is not in itself binding), of judgments (of inadmissibility or of groundlessness) without a general mandatory efficacy. In the light of this it is not surprising that, as emerges in more than one case among those we have mentioned, the same Court has often had to assert the admonition by repeating it in successive judgments.

8. Judgment for the "missing adaptation" of the regional and provincial laws in Trentino-Alto Adige

A "completely round" analysis of the Italian justice system allows us to find a procedure specifically dedicated to the examination by the Constitutional Court of the legislator's gap to be properly intended as a gap deriving from lack of action. This is a question of gaps arising as such not from the national legislator but necessarily from the legislator of the Region of Trentino-Alto Adige or from the provincial legislators of Trento and of Bolzano.

Article 2 of the legislative decree of the 16 March 1992, no. 266, with the norms regarding the realization of the special Statute for the Trentino-Alto Adige, introduced a new judgment of competence of the Court, usually defined as judgment of "missing adaptation".

In particular, it establishes that regional and provincial legislation must be adapted to the principles and to the norms constituting limits indicated by articles 4 and 5 of the special statute (general principles of the legal system and fundamental principles established by the laws of the State), principles and norms introduced through a legislative act of the State. The obligation of adaptation, which is in force, obviously, for all the Regions (as logical corollary of the pluralist

structure of the Republic), is reinforced, in article 2 quoted, through the provision of a term set: the adaptation must in fact take place within the six months successive to the publication of the state legislative act in the *Gazzetta Ufficiale* (Official Gazzette) or in the wider term established by it.

In order to further reinforce the obligation imposed, it was established that, whenever the term had passed fruitlessly without the Region or the Provinces having provided for the adaptation of their own legislation, the "not adapted" regional and provincial legislative provisions can be contested before the Constitutional Court for infringement of the special Statute. This contestation is put forward by appeal, with a time limit of 90 days, by the Government, and particularly by the Prime Minister, after a resolution by the Council of Ministers, and must be deposited in the chancery of the Court within 20 days of the notification to the President of the Region or of the Province.

Without prejudice of the control ordinarily to be activated (in the incidental way and/or in the principal way) on the regional norms which are considered to be in contrast with state normative acts which have supervened (and which therefore postulate an adaptation by regional or provincial legislators), another system of contestation was introduced in 1992; it concerns regional and provincial laws whose constitutionality as declared by the Constitutional Court has the double effect of annulling the "not adapted" legislative provisions and of "forcing" the regional or provincial legislator to act or rather, as an alternative, of establishing the applicability, in a substitutive way, of the state provisions immediately applicable and towards which the incompatibility of the regional or provincial provisions has been found.

This type of judgment has had a number of fairly limited applications: till today the Court has in fact issued five sentences nos. 496 of 1993; 172, 256 and 292 of 1994; 477 of 2000) and six ordinances (nos. 195 and 254 of 1996; 279 of 1997; 141, 142 and 382 of 2002). Furthermore it is to be noted that in the last few years there are no appeals for missing adaptation. The changed attitude of the government does not obviously affect the lasting validity of the provisions relative to the obligation for the regional and provincial legislators to adapt, eventually to be censured according to the different procedures. In this context sentence no. 50 of 2007 is particularly significant, in which the Court, in judging on the discrepancy between a law of the autonomous Province of Bolzano and the state norm containing a fundamental principle, was able, in the wake of consolidated case law, to underline how "the eventual supervening unconstitutionality can be raised in an incidental way, despite the missing appeal by the Government after six months had passed from the publication in the *Gazzetta Ufficiale* (Official Gazzette) of the state legislative norms, according to what is provided for in article 2 of the legislative decree no. 266 of 1992 ".