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THE ITALIAN COURTS AND INTERPRETATION IN CONFORMITY WITH THE CONSTITUTION, EU LAW AND THE ECHR*

1. Introduction. 2. Between the past and the present. The 'prototypes' of the current forms of conforming interpretation within the Italian legal system. 3. The first 'prototype'. The interpretation in conformity with the Constitution in the first forty years of the Italian incidental constitutional review. 4. The second 'prototype'. The presumption of conformity of law with the international treaties. 5. The present day. The 'procedural' nature of all obligations of conforming interpretation. 6. Who imposes the duty of conforming interpretation on the Italian courts? 7. The logical limit of conforming interpretation. 8. Breaches of the limit by the very courts imposing the duty of conforming interpretation on the other courts. 9. The Italian courts and interpretation in conformity with... 10. The crux of the matter. What is the 'European law' which the courts must comply with?

1. Introduction.

'Conforming interpretation' is the interpretative technique which recommends – in a more or less binding way, as we shall see below – that a judicial body interpret a legislative text which it considers should apply to the case before it in a compatible manner… let us, say for the moment, generically with 'something different', that is in conformity with a provision which "does not have the same origin and legitimation"[1] as that contained in the former text.
This is a multi-use and fluid instrument which may be used by interpreting bodies in the most varied contexts. Conforming interpretation could be compared with a *zip* capable of holding together two levels of legislation – or even two logics or two worlds – which are distant from each other, no matter which levels are actually involved, but which nonetheless must necessarily both be taken into account by a court when ruling on a specific dispute.
On a global scale, where a range of legal orders which are not systemically structured coexist alongside a considerable variety of global, international, supranational and national rules which are not hierarchically arranged and differ in origin and nature, conforming interpretation performs an essential function. In fact, it offers one of the most effective instruments for use by any of the courts operating in that global space (that is, not only national ordinary and constitutional courts, but also supranational courts, international courts and even arbitral tribunals operating on a global scale) in order to comply with the two constitutional tasks with which they are vested: the task of guaranteeing internal legal unity for their legal system of origin, and the task of ensuring linkage between the legal system of origin and external systems, by adjusting the relations between the different systems.[2]

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[1] M. Luciani, *Le funzioni sistemiche della Corte costituzionale, oggi, e l'interpretazione "conforme a"*, in *Studi in memoria di Giuseppe G. Floridia*, Napoli, 2009, 425. There are many authors within Italian legal theory, such as Luciani, who consider the conforming interpretation to be a unitary legal concept or tool, even if stated in different ways according to the parameter of reference (particularly: the Constitution, EU law and the ECHR). T. Epidendio, *Riflessioni teorico-pratiche sull'interpretazione conforme*, in *Diritto penale contemporaneo*, October 17th, 2012, for example, notes that the concept, in all its forms, is always characterized by two "unvarying elements" (a structural one and a functional one).

[2] S. Cassese, *Il diritto globale. Giustizia e democrazia oltre lo Stato*, Torino, 2009, 139; Id., *I tribunali di Babele. I giudici alla ricerca di un nuovo ordine globale*, Roma, 2009, 90.

But even if we narrow our focus, as this paper intends to do, from the global scale to the Italian legal system, it can easily be observed that the complexity of sources of law,[3] accompanied by the resulting need for conforming interpretation, has gradually increased since the aftermath of the end of the Second World War, growing through to its current scale, which is almost dramatic for legal practitioners.

The entry into force of the Republican Constitution on 1 January 1948 established the dimension of constitutional legality above that of statutory legality, without negating either one or the other,[4] thus requiring the courts to … constantly have a foot in both camps, that is to rule on the cases brought before them for examination without even breaching either the law of the Constitution.

Moreover, in parallel with the adoption of the Republican Constitution, relying on the broad formula laid down in its Article 11,[5] the Italian legal system was opened up to and subsequently embraced the international and supranational legal orders, thereby giving rise once again to an overlap of sources of differing origin and legitimation, all of which equally aspire – and legitimately so – to influence the solution to individual disputes.

The consequence is that the Italian courts are now required to engage constantly with various international and supranational legal systems, alongside naturally the two internal dimensions of legality. Indeed, for one reason or another, which it is not necessary to consider further at this stage, both the Constitution and the 'external' sources are presented to the courts as sources which are normative, binding or – to put it in even more generic terms – *effective*:[6] therefore, these sources do not accept that the court may set them aside, ignore them or decide not to take account of them, even though it is applying the statute law.

In other words, the Italian courts, as modern-day Harlequins servant of two – or more – masters, are 'subject' to all these sources, even though they at all times remain 'subject' to statute law, in accordance with Article 101(2) Const.[7]

Accordingly, even within the Italian legal system, the interpretative technique which allows the courts to reach a decision which does not contrast with any of the normative frameworks on play, and which in fact reconciles and harmonises them within the solution to each single case, is currently enjoying extraordinary success and takes on different forms, even operating within highly diverse contexts. If we consider the current complexity of systemic intertwinement and the increasing overlap between the different normative dimensions, indeed, we understand that the Italian courts need such *zips* today much more than in the past in order to join in a fluid and smooth manner the heterogeneous and originally separate elements, progressively embracing them with a simple single gesture, and eventually fusing them together or mixing them upon application.[8]

In this paper I intend to illustrate how the technique of conforming interpretation operates today in the Italian judicial system, both in theory and in practice and in all of its embodiments.

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[3] With regard to the fact that the current crisis in law is nothing more than a "severe and stringent questioning of the forms – i.e. the sources – within which modernity has claimed to restrain the law" refer in particular to Grossi, *Introduzione al Novecento giuridico*, Roma-Bari, 2012, 76-77.

[4] Again M. Luciani, *Su legalità costituzionale, legalità legale e unità dell'ordinamento*, in *Studi in onore di Gianni Ferrara*, II, Torino, 2005, 504 ss.

[5] "Italy rejects war as an instrument of aggression against the freedom of other peoples and as a means for the settlement of international disputes. Italy agrees, on conditions of equality with other States, to the limitations of sovereignty that may be necessary to a world order ensuring peace and justice among the Nations. Italy promotes and encourages international organisations having such ends".

[6] With regard to the central nature played today by the concept and term of effectiveness in legal discourse refer to M.R. Ferrarese, *Prima lezione di diritto globale*, Roma-Bari, 2012, 92 and *passim*.

[7] "Judges are subject only to the law".

[8] If one utilizes an even more extreme metaphor, on the other hand, it is possible to note that legal systems currently tend in any case - and it does not matter if initially classified in terms of separation or integration - to contaminate one another during their daily operations, or rather tend to mix according to a principle of entropy, and it is the use of a conforming interpretation that most clearly highlights this trend: by means of a conforming interpretation, in fact, two norms that apparently belong to different sources or systems "will fuse together and lose the information of their origin", even to the point that "it is difficult to tell what the source of the rule of the case in question is" (R. Bin, *Gli effetti del diritto dell'Unione nell'ordinamento italiano e il principio di entropia*, in *Studi in onore di Franco Modugno*, III, Napoli, 2011, 374 ss. and in particular 380, where reference is also made to O. Chessa, Drittwirkung *e interpretazione: brevi osservazioni su un caso emblematico*, in *Il giudizio sulle leggi e la sua "diffusione"*, edited by E. Malfatti, R. Romboli, E. Rossi, Torino, 2002, 420 ss.).

I will consider the issue first from a historical perspective, along with a description of two 'prototypes' of the forms which our technique currently takes on in Italy (paragraphs 2-4).
I will then identify the common framework to the three present forms, consisting in interpretation in conformity with the Constitution, with EU law and with the ECHR, also specifying their features and pointing out the subjects that mostly push toward their expansion (paragraphs 5-8).
Finally, I will provide a brief illustration as to how our technique actually works within the Italian courts (paragraphs 9-10).

2. Between the past and the present. The 'prototypes' of the current forms of conforming interpretation within the Italian legal system.

The current manifestations of the conforming interpretation known by the Italian judicial system certainly have two 'prototypes': the interpretation in conformity with the Constitution as suggested by the Constitutional Court to the regular courts over the first
forty years of its existence (1956-1996), and the presumption that internal laws are compatible with international obligations.[9]
However, compared to both of these 'prototypes', the current forms are not just displaying the aforesaid quantitative difference, but also a *qualitative difference*.
Make no mistake. Also the two 'prototypes' acted as *zips*, matching the same, unchanged, need to bring together in a harmonious manner different levels of legislation when ruling on disputes. However, the way they worked is light years distant from the current model. Indeed, their underlying logic was, so to speak, one of *good practice*, in the sense that they presented themselves to the interpreting body as excellent instruments for resolving an apparent conflict between normative requirements with different origin and legitimation, but did not stake a claim to predominance. The interpreters thus remained free to adopt a different course immediately, or to follow another path in order to exit from the *impasse* in which they were mired. Today, on the contrary, the idea behind all instances of conforming interpretation without distinction is that the courts are under an *obligation* to engage in such activity at any cost, or almost at any cost.
In other words, from the perspective of the Italian courts, conforming interpretation has passed over time from a useful and recommended option (under the 'prototypes') to a mandatory imperative (under the current model).
Before describing the current model, in the two following paragraphs I will briefly recall the way the 'prototypes' worked.

3. The first 'prototype'. The interpretation in conformity with the Constitution in the first forty years of the Italian incidental constitutional review.

As concerns the interpretation in conformity with the Constitution on the part of the judicial autority between 1956, birth year of the Constitutional Court, and 1996, the pivotal year when that interpretation forwent its voluntariness and shifted toward today's imperativeness, its history is well known[10], but it is worth briefly summarizing it.

[9] The fact that these two serve as 'prototypes' for the obligation of the interpretation in conformity with the Eu law also appears to be recognized in the foreign literature: refer in particular to G. Betlem, *The Doctrine of Consistent Interpretation – Managing Legal Uncertainty*, in *Oxford Journal of Legal Studies*, Vol. 22, No. 3 (2002), 398.

[10] Refer at least to E. Lamarque, *Interpreting Statutes In Conformity With The Constitution: The Role Of The Constitutional Court And Ordinary Judges*, in *Italian Journal of Public Law*, October 2010, Volume 2, No. 1, at http://www.ijpl.eu/; Ead., *La fabbrica delle interpretazioni conformi a Costituzione tra Corte costituzionale e giudici comuni*, in *La fabbrica delle interpretazioni. Atti del VII convegno della Facoltà di Giurisprudenza. Università degli studi di Milano-Bicocca 19-20 novembre 2009*, edited by B. Biscotti, Borsellino, V. Pocar and D. Pulitanò, 2012, 43 ss.; R. Pinardi, *L'interpretazione adeguatrice tra Corte e giudici comuni: le stagioni di un rapporto complesso e assai problematico*, in *Il diritto costituzionale come regola e limite al potere*, IV, edited by G. Brunelli, A. Pugiotto and Veronesi, Napoli, 2009, 1527 ss.; R. Romboli, *Qualcosa di nuovo… anzi d'antico: la contesa sull'interpretazione conforme della legge*, in *Studi in memoria di Giuseppe G. Floridia*, Napoli, 2009, 677 ss.; Id., *L'applicazione della Costituzione da parte del giudice comune*, in *Ordinamento giudiziario e forense*, I, edited by S. Panizza, A. Pizzorusso and R. Romboli, Pisa, 2002; Id., *L'interpretazione della legge alla luce della Costituzione tra Corte costituzionale e giudice comune*, in *Il dialogo tra le Corti*, edited by E. Navarretta and A. Pertici, Pisa, 2004; G. Sorrenti, *L'interpretazione conforme a Costituzione*, Milano, 2006, 177 ss. and *passim*; Ead., *Corte costituzionale,*

Firstly, we shall recall that, in the first few month of its existence, the new Italian organ of constitutional justice shook the scholars and surprised the judicial authority by introducing an adjudication instrument that no constitutional or legislative provision had encompassed: the 'interpretative decision of dismissal' by which it rejected the reading of the legislative provision upheld by the referring court, and declared unfounded the doubt of its constitutionality, on the basis of a new interpretation of the law that was, in fact, in conformity with the constitutional provisions[11]. By introducing such instrument, the Constitutional Court achieved two goals: on the one hand, it extended its jurisdiction to the interpretation of the law, and on the other, and this is what mostly matters to us, it advised regular courts to "not stop, in the interpretation process, at the barrier of the law, but to go beyond it, and to proceed into the realm of constitutional values"[12].
The interpretation in conformity with the Constitution stems, therefore, from a kind and gentle suggestion to the judicial authority to *also* avail itself of the Constitution, not just the law, to resolve the concrete legal disputes, by simply interpreting the latter in the light or the former.
History tells us, however, that for many years the only response received by the Constitutional Court was a slammed door. The suggestion to use the Constitution as a legal provision mostly went unheeded, especially on the part of the higher courts, whose judges received their training in a pre-Republic era and therefore were less sensitive to the constitutional novelty; and maybe were also 'jealous' of their 'nomofilachia' prerogatives, which they saw threatened by what was often perceived as an intrusion of the Constitutional Court in their traditional field of jurisdiction. But even among the lower courts such suggestion did not find fertile ground during the difficult start of the relationship between the Constitutional Court and the judicial authority. In many cases they did not dare to follow the suggestion contained in an interpretative decision of dismissal because they feared, and for good reason, that the higher courts would overrule their innovative case law; therefore they preferred resorting to the constitutional objection, thereby hoping to obtain a declaration of unconstitutionality of the law by the Constitutional Court[13]. The Constitutional Court, however, never stopped for even an instant to adopt interpretative decisions of dismissal, sometimes by even recycling disputable laws that belonged to the fascist era; and continued, in spite of its failures, with its work which we might call of 'constitutional pedagogy' aimed at the judiciary.
It was only starting with 1965 that said pedagogical commitment began bearing fruit. Indeed in that year, at the end of a stormy meeting of the National Association of Magistrates, whose members at that time were only lower court judges[14], a well-known motion was approved
which *clearly affirmed for the first time* that henceforth, alongside the power to raise incidental questions of constitutionality, every regular court has to exercise also the power to use the Constitution as a normative source, both to directly apply it where technically possible and – and this is what matters here – to interpret legislation in conformity with it[15]. This could naturally also occur upon their own initiative, even in the absence of an explicit request from the Constitutional Court.
After that symbolic date the ordinary lower court judges gradually started adopting a more flexible strategy to achieve harmonizing the statute law with the Constitution. They no longer resorted to merely referring the matter to the Constitutional Court; instead, they felt more and more convinced about adopting interpretations

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*giudici e interpretazione ovvero… l'*insostenibile leggerezza *della legge*, in *La ridefinizione della forma di governo attraverso la giurisprudenza costituzionale*, edited by A. Ruggeri, Napoli, 2006, 465 ss.; Ead., *La Costituzione "sottintesa"*, in *Corte costituzionale, giudici comuni e interpretazioni adeguatrici. Atti del seminario svoltosi in Roma, Palazzo della Consulta, 6 novembre 2009*, Milano, 2010, 15 ss.

[11] The time of creation of this instrument can be traced back to the Constitutional sentences no. 3 and no. 8 of 1956.

[12] C. Mezzanotte, *La Corte costituzionale: esperienze e prospettive*, in *Attualità e attuazione della Costituzione*, Roma-Bari, 1979, 161.

[13] M. Capurso, *I giudici della Repubblica*, Milano, 1977, 1211; V. Onida, *L'attuazione della Costituzione fra magistratura e Corte costituzionale*, in *Scritti in onore di Costantino Mortati*, IV, Milano, 1977, 541 ss.

[14] This is noted by A. Simoncini, *L'avvio della Corte costituzionale e gli strumenti per la definizione del suo ruolo: un problema storico aperto*, in *Giur. cost*., 2004, 3099

[15] The motion in this sense can be read in Associazione Nazionale Magistrati, *Atti e commenti*, XII Congresso nazionale, Brescia – Gardone, 25-28 settembre 1965, Roma, 1966, 309.

of statute law in conformity with the constitutional provisions[16]. In those same years, however, the appeal by the Constitutional Court to read the statute law in the light of the Constitution started being less pressing and even more subdued, because of the need to avoid as much as possible any conflict with the supreme courts, which, in some well-known cases, had refused to adopt its advice and had continued applying the law in the way that had already been ruled unconstitutional. For an extended period of time, and at least until the early 1990s, the Constitutional Court adopted a 'conciliatory' approach[17]: it offered new interpretations in conformity with the Constitution, with interpretative decisions of dismissal, only when an unconstitutional 'living law' had not yet been formed[18] (assuming that in Italy we call 'diritto vivente', 'living law', every uniform and settled interpretation of a statute law given by the courts, and particularly by the ordinary and administrative supreme courts). When, instead, an unconstitutional 'living law' already existed, the Constitutional Court proceeded decidedly with upholding the judgement.
Over the long period of time that the organ of constitutional justice has exercised a cautious approach so as not to vex the judiciary with its advice, however, judges have been replaced by new judges, and the constitutional culture of the judiciary at all levels has been consolidated. So, gradually, not only lower court judges, but also higher court judges started taking the constitutional provisions into account when shaping their own interpretative guidelines that aim at becoming 'living law'.
At the beginning of the 1990s the criterion of adhesion to the 'living law', even though it continued to be embraced by the Constitutional Court, started receding, as opposed to the criterion, which later became omnivorous, of the interpretation in conformity with the Constitution. It was actually back then that the Constitutional Court was already using, albeit rarely, the interpretative decision of dismissal to ask the judges to retrace their steps and leave behind an interpretative mindset that, although consistent, was not aligned with the constitutional provisions. We cannot thoroughly analyse herein the reasons why the Constitutional Court changed its approach. Suffice to mention that now, as said, the regular judges speak the same language of the constitutional judges, and they make use of the constitutional provisions with *nonchalance*. On the other hand, the Constitutional Court can certainly rejoice that the judges do the 'dirty work' of harmonizing the statute law with the Constitution, because starting from 1990 it cleans up the entire backlog of work that had been piling up during the Lockheed trial; and therefore finds itself in the uncomfortable position of having to rule on laws freshly passed by the government and the majority in Parliament (we can recall, for example, the flood of questions of constitutionality aimed at the code of criminal procedure of 1988), with the risk, very likely, of violent clashes with politics. By delegating to the regular courts part of the job of verifying constitutionality of the laws, which up to then it had taken upon itself, the Constitutional Court therefore adopted a less visible position, a *low profile*, thereby attempting to avoid or at least delay, but not always succeeding, the confrontation and frontal fight with the political majority[19]. The Constitutional Court, in other words, retreated from the front line to settle behind the lines, reserving the right to attack with heavy artillery only where absolutely necessary.
The new approach of the organ of constitutional justice was formally established through the well-known decision no. 356 of 1996, which marked the start of the current era. For the first time, in that circumstance, the only possibility of giving "constitutional interpretations" of statutory law inspired the Constitutional Court to adopt – rather than a decision of dismissal, which encourages the other courts to proceed with the

[16] Again V. Onida, *L'attuazione*, cit., 555 ss.

[17] As noted by R. Granata, *Corte di Cassazione e Corte costituzionale nella dialettica tra controllo ermeneutica e controllo di legittimità – Linee evolutive della giurisprudenza costituzionale*, in *Foro it*., 1998, I, 17.

[18] In this period, as a result, interpretative decisions of dismissal tend to only occur in two cases: if the interpretation accepted by the referring judge is in conflict with uniform and consolidated case law in conformity with the Constitution or if no uniform and consolidated case law exists in relation to the law that is subject to the constitutionality judgement: refer in particular to L. Elia, *La giustizia costituzionale nel 1984*, in *Giur. cost*., 1985, 393-394.

[19] T. Groppi, *Verso una giustizia costituzionale "mite"? Recenti tendenze dei rapporti tra Corte costituzionale e giudici comuni*, in *Pol. dir*., 2002, 230; Ead., *Corte costituzionale e principio di effettività*, in *Rass. parl*., 2004, 215 ss.; Ead., *The Constitutional Court of Italy: Towards a Multilevel System of Constitutional Review?*, in *Journal of Comparative Law,* 2008, 3:2, 115 ss. and – although with less emphasis on this theme – Ead., *Cinquanta (e più) anni di giustizia costituzionale in Italia*, in Ead., *Le grandi decisioni della Corte costituzionale italiana*, Napoli, 2010, XXXII ss.

conforming interpretation alongside the Constitutional Court – a pronouncement of *inadmissibility*, that is to say a decision that asks the other courts to proceed with the conforming interpretation *before*, or preferably *instead of*, the Constitutional Court[20].
The new rule which the Constitutional Court laid down in 1996, and never revoked, required that the Constitutional Court and the judges always act based on a precise sequence: now, reconciling law with the Constitution is always at first a burden that falls on the judges, and only after, and not necessarily, on the Constitutional Court. Moreover, at least from 1998 onwards, the previous quest on the part of a regular court for an interpretation of law in conformity with the Constitution has become, as someone says[21], a new condition for incidental constitutional review, alongside the other two conditions established by constitutional and ordinary law for the Constitutional Court's functioning (relevance and non-manifest groundlessness of the doubt of constitutionality)[22]. Now, indeed, if a court do not prove, in its order of remittal to the Constitutional Court, that an adaptive interpretation was duly attempted before raising the question of constitutionality, the question is rejected and sent back to the... remitter without undue ceremony, by means of a peremptory constitutional order of manifest inadmissibility[23].
The invitation aimed at the courts to formulate interpretations in conformity with the Constitution has thus become *increasingly insistent* over the years, indeed turning utterly *unavoidable*; to the extent of having actually become *an obligation* for all courts in the Italian legal system[24]. Compared to the first forty years of the Italian incidental constitutional review, the past fifteen/twenty years have seen a downright qualitative transformation and genetic mutation of the statute of the interpretation in conformity with the Constitution. Current reality is way different from its 'prototype'.

4. The second 'prototype'. The presumption of conformity of law with the international treaties.

I am now going to examine, even more summarily, the other 'prototype' of this phenomenon, that is the presumption of conformity of law with the international obligations that the Italian Government previously committed to, and the Italian Parliament accepted and turned into law.
In this case the distance from the current requirement of interpretation of the national statute law in conformity with the EU law and the ECHR and, in general, with the international treaties binding the country appears, if possible, even more striking.
To begin with, the traditional presumption of conformity of national law with international law steaming from an international treaty is a 'relative' one, given that judges can draw from it only where no obvious intention

[20] A new category of constitutional sentences thereby emerges: the "interpretative decisions of inadmissability" (E. Lamarque, *Una sentenza interpretativa di inammissibilità?*, in *Giur. cost*., 1996, 3107).

[21] E. Malfatti – S. Panizza – R. Romboli, *Giustizia costituzionale*, 3rd edition, Torino, 2011, 107-110. Others instead believe that, in legal reasoning, a search for a solution that complies with the Constitution does not support, but rather logically precedes, an assessment relative to a non-manifest groundlessness, and therefore does not result in a third prerequisite for raising questions of constitutional legitimacy nor does it transform the doubt of unconstitutionality of the law into a certainty (as stated by M. Ruotolo, *Interpretazione conforme a Costituzione e tecniche decisorie della Corte costituzionale*, in *Il Gruppo di Pisa*, 8.1.2011, at www.gruppodipisa.it, 6-7, which in turn refers, in relation to this point, to F. Modugno, *Scritti sull'interpretazione costituzionale*, Napoli, 2008, 258).

[22] Article 1 Const. Law February 9th 1948, no. 1 and Article 23 (2), Law March 11, no. 87.

[23] The utilization of this decision-making technique in place of the interpretative decision of dismissal has been subject to much criticism. Refer, in particular, to M. Bignami, *Il doppio volto dell'interpretazione adeguatrice*, in *Forum di Quaderni Costituzionali*, at the website www.forumcostituzionale.it; G. Sorrenti, *La Costituzione "sottintesa"*, cit., 35 ss.; G.U. Rescigno, *Una ordinanza di inammissibilità che è in realtà una decisione interpretativa di rigetto*, in *Giur. cost*., 2008, 2335-2336; M. Ruotolo, *Alcuni eccessi nell'uso della "interpretazione conforme a…"*, in *Giur. cost*., 2007, 1214 ss.; M Raveraira, *Le critiche all'interpretazione conforme: dalla teoria alla prassi un'incidentalità "accidentata"?*, in *Giur. it*., 2010, 1972; G. Serges, *Interpretazioni conformi e tecniche processuali*, *ibidem*, 1973 ss. and, willing, E. Lamarque, *Il seguito delle decisioni interpretative e additive di principio della Corte costituzionale presso le autorità giurisdizionali (anni 2000-2005)*, in *Riv. trim. dir. pubbl*., 2008, 757 ss.

[24] For this evaluation refer, in particular, to R. Romboli, *Il ruolo del giudice in rapporto all'evoluzione del sistema delle fonti ed alla disciplina dell'ordinamento giudiziario*, in *Ass. per gli studi e le ricerche parlamentari*, *Quad. n. 16*, 2006, 73; Id., *L'attività creativa di diritto da parte del giudice*, in *Quest. giust.*, 2008, 203.

emerged on the part of the legislator to violate the international requirement previously accepted[25]. It is therefore just one of the possible ways available to the interpreter to solve a seeming antinomy between two equal sources, but it has not to be adopted at all cost.
Secondly, before the constitutional reform of Article 117(1) Const., in 2001[26], the failed attempt to interpret a treaty provision as being the overriding provision did not result in the unconstitutionality of the ensuing national law. By letting this latter provision be the overriding provision in the concrete case, it appeared that Italian Republic had simply agreed to incur such liability on the international level. Thirdly – although almost superfluous recalling it – the operating scope of the presumption of conformity was much narrower than the current requirement of interpretation in conformity with international and supranational law. The old presumption could only operate where the international commitment had been entered into *prior* to the approval of the national law, under the assumption, that is, that the legislator did not intend to deny the will, already made explicit through the implementation order, to agree to a particular international convention. After the constitutional reform of 2001, instead, whether the law at issue was passed prior to or after the international or supranational law becomes irrelevant, as concerns the requirement of conforming interpretation, because it is always the latter that ought to be considered overriding in the concrete case.

5. The present day. The 'procedural' nature of all obligations of conforming interpretation.

The feature common to all presently recognised forms of conforming interpretation under Italian law which sets them apart from the two 'prototypes' is therefore *their mandatory nature for the courts*, which are therefore subject to a genuine duty to elaborate the rule in each case, by taking into account all the different effective, relevant and non-invalid sources[27], rather than picking just one and neglecting the rest.
It is now time to consider the precise essence of this obligation or mandatory requirement.
First and foremost, it has been correctly argued that the courts are under an obligation with regard to the means used, and not to the result achieved.[28] In particular, the courts are required not simply to try to read the legislation applicable to the cases before them in a manner which does not conflict with constitutional law, EU law or the ECHR, but must rather take all possible action, exhaust all interpretative powers available to them, or indeed avoid leaving anything unaddressed in this regard. However, the courts may and indeed must desist when confronted with an evident solution, that is when it is certain – notwithstanding their best efforts – that conforming interpretation is not practicable in the particular case.
The duty of conforming interpretation is therefore a *procedural duty*: the attempt on the part of the judges to apply it, which must be done, as mentioned above, in a very serious way, is an 'obligatory step',[29] which must be taken, though it is not necessarily the destination to be reached. Actually, when they initiate the attempt of conforming interpretation, judges are not yet supposed to know if that will be their point of arrival or just a stage of their reasoning.
The fact that the obligation is only procedural is proven, *a contrario*, by the circumstance that once this mandatory step has been taken and in case of failure of the attempt of conforming interpretation, *there will*

[25] For a similar assessment, refer also to F. Viganò, *Il giudice penale e l'interpretazione conforme alle norme sovranazionali*, in *Studi in onore di Mario Pisani*, II, edited by Corso and E. Zanetti, Piacenza, 2010, 643. The presumption of conformity of internal law with international law can always be overcome not only in the Italian legal system but also in those legal systems in which it assumes a particularly "strong" connotation: refer to A. Tzanakopoulos, *Domestic Courts as the 'Natural Judge' of International Law: A Change in Physiognomy'*, in *Select Proceedings of the European Society of International Law*, edited by J. Crawford and S. Nouwen, Vol. 3, Hart Publishing, Oxford, 2011, 162-163.

[26] Article 117(1) Const. provides, after 2001, that: "Legislative powers shall be vested in the State and the Regions in compliance with the Constitution and with the constraints deriving from EU-legislation and international obligations".

[27] This is the appropriate definition of judicial duty formulated in O. Chessa, *Non manifesta infondatezza* versus *interpretazione adeguatrice?*, in *Interpretazione conforme e tecniche argomentative*, edited by M. D'Amico and B. Randazzo, Torino, 2009, 273.

[28] A. Celotto – G. Pistorio, *Interpretazioni comunitariamente e convenzionalmente conformi*, in *Giur. it*., 2010, 1980.

[29] The expression is that of A. Colella, *Interpretazione conforme al diritto comunitario ed efficienza economica: il principio di concorrenza*, in *Interpretazione conforme e tecniche argomentative*, cit., 103.

always be another instrument or a different measure for remedying the overlap between the two heterogeneous normative levels which have now been demonstrated to be irreconcilable.
It is worth recalling which measures are adopted by the Italian courts following an attempt at conforming interpretation.
If a court is unable to give the law a meaning compatible with the Constitution, it will be required to refer the question to the Constitutional Court, which may potentially lead to the possible lapse of law with general effects.
On the other hand, if a court do not achieve a reading of the law in conformity with the EU law, irrespective of whether this occurs before or after a preliminary ruling to the ECJ, it will have two options.[30] If the EU law is directly applicable or has direct effect, and if in this latter instance the case involves a relationship between an individual and a public authority, the court will without doubt be required to set aside the national law. Where instead the EU law does not have direct effect, the court will be required to raise a question concerning the constitutionality of the national law before the Constitutional Court due to violation of Articles 11 and 117(1) Const.,[31] which here too may result in the removal of the legislation from the legal order.
Finally, if a court deems impossible to interpret the law in conformity with the ECHR, it will once again be required to raise a question concerning the constitutionality of the legislation due to violation of Article 117(1) Const.[32] When the Constitutional Court finally adopted a stance regarding the new mode of operation of international law obligations, including the ECHR, within the Italian legal system – many years after the entry into force of the relevant constitutional law (November 2001 – November 2007) – it forcefully asserted its centralised power of review, and expressly held that the courts could not resolve themselves any contrasts with international law, including in particular the ECHR, by setting aside national law.[33]
Ultimately, whilst the sequence does involve variants for each of the three forms of conforming interpretation, it does at all times comply with the same logic, that of *gradualness*: from the 'mildest' and most malleable measure, which reconciles the various normative levels, to the most 'severe' and definitive measures[34] acknowledging that such reconciliation is impossible and drawing all necessary consequences.
A ruling of incompatibility between normative spheres is thus always the *last resort*.[35] More precisely, it is always an ancillary measure[36] which must admittedly be adopted, but only when the principal measure, i.e. conforming interpretation, is not practicable (and in that case it will be adopted either by the regular courts,

[30] Constitutional Court, sentence no. 170 of 1984, *Granital*. On this regard see M. Cartabia e J.H.H. Weiler, *L'Italia in Europa*, Bologna, 2000, 191 ss.

[31] See notes 5 and 26.

[32] See, again, note 26.

[33] Refer to the "twin" constitutional sentences which initiate this interpretation of Article 117 (1) Const. (Constitutional Court, sentences no. 348 and 349 of 2007) as well as – from amongst the numerous other decisions - the "grown twin sentences" (Constitutional Court, sentences no. 311 and 317 of 2009), in addition to Constitutional Court, sentence no. 80 of 2011, which confirms the maintenance of the system initiated by the "twin" sentences even after the entry into force of the Treaty of Lisbon, and in particular strongly reiterates the centralized nature of the 'conventionality review' (on the same issue in the same way see, afterwards, ECJ, April 24th 2012, Servet Kamberaj, C-571/10, which states that "The reference made by Article 6(3) TEU to the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950, does not require the national court, in case of conflict between a provision of national law and that convention, to apply the provisions of that convention directly, disapplying the provision of domestic law incompatible with the convention").

[34] With regard to the interpretation conforming with the Constitution, this observation was extensively discussed in the contributions of T. Groppi, referred to above in note 19. With regard to the interpretation in conformity with EU law, on the other hand, A. Dashwood, M. Dougan, B. Rodger, E. Spaventa, D. Wyatt, *Wyatt and Dashwood's European Union Law*, VI ed., Hart Publishing, Oxford, 2011, 244 consider it "the first port of call for resolving apparent inconsistencies between national law and Union law", while the principles of direct effect and supremacy are the "harder tools" to use when the conforming interpretation is not possible.

[35] This is noted, amongst others, by F. Modugno, *Scritti sull'interpretazione costituzionale*, cit., 222; Id., *Sul problema dell'interpretazione conforme a Costituzione: un breve* excursus, in *Giur. it*., 2010, 1964.

[36] S. Rodin, *Back to the Square One – the Past, the Present and the Future of the Simmenthal Mandate*, in *Europe's Constitutional Challenges in the Light of the Recent Case Law of National Constitutional Courts*, edited by J.M. Benyeto and I. Pernice, Nomos, Berlin,

when setting aside national legislation on the grounds of incompatibility with EU law, or by the Constitutional Court, when striking down legislation as unconstitutional on the grounds that it breaches the Constitution or breaches the interposed rule under EU law or the ECHR).
To return to our metaphor, when it is necessary to hold together two fabrics of different quality and consistency, it is first necessary to try using a *zip* which leaves the fabrics intact and can be opened or closed at any time. Thereafter, it is only if the zip does not hold or becomes blocked that one will *cut* one of the two fabrics and then sew it to the other.

6. Who imposes the duty of conforming interpretation on the Italian courts?

As demonstration that the duty of conforming interpretation incumbent upon every judge is a procedural duty, it is sufficient to consider that it has been asserted only by the two courts – the ECJ and the Constitutional Court – which have a direct relationship on an institutional level with the regular courts hearing specific cases, and are therefore capable of influencing the order of their activities, reviewing their proper implementation and as appropriate correcting the route followed, reining it in with regard to one issue or another. On the other hand, this is not asserted or required by the other court, the Strasbourg Court, which does not have the tools to direct the work of the regular courts whilst proceedings are still in progress, but may rather only verify the results after such proceedings have been concluded.
In relation to interpretation in conformity with the Constitution, the Constitutional Court is in a position to require that the regular courts make a serious attempt to this effect. It may request – and indeed constantly requests – the regular courts to demonstrate in their referral order that they engaged in an attempt at conforming interpretation. If this is not demonstrated, the Constitutional Court has the upper hand, because at least from 1998 onwards it began sanctioning the improper conduct by ruling the manifest inadmissibility of the question raised.
As regards the duty of interpretation in conformity with EU law, this emerged during the 1980s in parallel within the case law of the ECJ and that of the Constitutional Court, which gave rise to a progressive joint action of encirclement of the Italian courts.
The first formulation of this obligation dates back to the *Von Colson* judgment from 1984, in which the ECJ held for the first time that: "the Member States' obligation arising from a directive to achieve the result envisaged by the directive and their duty … to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation, is binding on all the authorities of Member States including, for matters within their jurisdiction , the courts. It follows that … the national court is required to interpret its national law in the light of the wording and the purpose of the directive".[37]
On the internal front on the other hand, the leading case is the *Granital* judgment, symbolically also from 1984, having been adopted only two months after *Von Colson*, in which the Constitutional Court asserted that, "in hermeneutic terms, there is a presumption that national legislation is compatible with Community law: out of the possible interpretations of the legislative text adopted by the national organs it is necessary to select that which is compatible with the requirements of Community law, and thereby also with the Constitution, which guarantees compliance with the Treaty of Rome and the law derived from it".[38]
Today the Constitutional Court checks that the regular courts did make their due attempt before raising the question of constitutionality of a national law they deem in conflict with a EU law not vested with direct effect, and here too may apply the penalty of ruling the question inadmissible if the courts have not adequately demonstrated compliance with this requirement – which is hence the same requirement as that stipulated under the case law of the Constitutional Court since 1998 in relation to any doubt regarding constitutionality.[39] However, above all, it is the ECJ which imposes the requirement of conforming interpretation for national law in that, in cases involving European law which is directly applicable or has direct effect, it is branded as a measure which must under all circumstances be preferred to the setting aside

2011, 300.
[37] ECJ, April 10th 1984, Von Colson, C-14/83.

[38] Constitutional Court, sentence no. 170 of 1984, cit. (registered June 8th). The statement is repeated in subsequent constitutional case law (see G. Pistorio, *La prevalenza* ermeneutica *del diritto comunitario*, in *Studi in onore di Franco Modugno*, III, Napoli, 2011, 2623).

[39] Constitutional Court, sentence no. 227 of 2010.

of the national law;[40] moreover, in cases involving EU law without direct effect, conforming interpretation is classified as the 'indirect effect' of such legislation,[41] having been imposed in the name of the efficacy of EU law,[42] and which is to be preferred *inter alia* to damages claims by individuals,[43] which are premised on a finding that the State has broken the EU law, a situation which is undesirable in all cases.
Regarding this, I would like to stress that the ECJ is institutionally capable of imposing the attempt of conforming interpretation at the very least on the referring court, thanks to the efficacy of its interpretative judgments, which are without doubt binding upon that court.[44]
Furthermore, if the methodological requirement to attempt to identify a conforming interpretation of the national law is also binding upon all of the courts throughout the twenty-seven Member States, this will naturally depend upon which answer is given to the long-standing question regarding the general effects of judgments of the ECJ.[45] Whichever answer is provided – and this is not the appropriate forum in which to consider these answers – it is nonetheless clear that, if such an interpretative judgment is issued by the ECJ, no court will be able to avoid the requirement to give reasons, even if only in summary form, as to how it is impossible to read its own national law in such a manner as to ensure the *effet utile* of EU law in relation to which the ECJ has already adopted a position. A national court of last instance is no less able to avoid the requirement to give reasons on this point – and, it could be specified, no less is an *Italian* court of last instance able to do so – given the stringent approach followed by the ECJ in recent years precisely in relation to Italian cases which has held, as is known, that the Member State is liable "for damage caused to individuals by an infringement of Community law attributable to a court adjudicating at last instance by reason of the fact that the infringement in question results" – insofar as is of interest for our present purposes – "from an interpretation of provisions of law".[46]

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[40] For example ECJ, January 7th 2004, X, C-60/02, but also the same ECJ, January 19th 2010, Kücükdeveci, C-555/07. With regard to more recent sentences, refer to the ECJ, January 24th 2012, Dominguez, C-282/10, which strongly insists on stating that – among the obligations of a national judge, when acting as a judge of the European Union – the one relative to an interpretation that conforms with internal law retains precedence with respect to the same obligation for its disapplication.

[41] In Italian legal theory the expression "indirect effect" is not frequently used to specify the result of an interpretation of the national law in conformity with EU law. Explicit use of the term is, however, found in M. Cartabia and M. Gennusa, *Le fonti europee e il diritto italiano*, Torino, 2009, 48 ss. and G. Tesauro, *Diritto dell'Unione europea*, 6th edition, Padova, 2010, 196. The case law of the Court of Justice in relation to the obligation of interpretation of national law in conformity with EU law without direct effects is extensive: in addiction to the above cited Von Colson of 1984 and the other sentences cited in the previous note, reference can also be made, amongst others, to the ECJ, November 13th, 1990, Marleasing SA, C-106/89 and the ECJ, October 5th 2004, Pfeiffer, C-397/01.

[42] The fact that this is a fundamental element of the doctrine of indirect effect - despite certain ambiguities in the case law of the Court of Justice - is almost universally recognized. Refer, in particular, to S. Drake, *Twenty tears after* Von Colson*: the impact of "indirect effect" on the protection of the individual's Community rights*, in (2005) 30 *E.L.Rev.*, 329 ss.

[43] ECJ, April 23rd, 2009, Angelidaki, from C-378/07 to C-380/07, but see also ECJ, January 24th 2012, Dominguez, cit.

[44] And, in fact, when the decision of the Court of Justice directly specifies the interpretation of national law in the light of EU law – which however rarely occurs given that typically the Court of Justice prefers to entrust the national courts with the task of interpreting their law – it is capable of imposing on the referring court not only a required passage but also the destination that must be reached.

[45] With regard to this point refer at least to R. Caponi, *Corti europee e giudicati nazionali*, in *Corti europee e corti nazionali*, Bologna, 2011, 290 ss.; E. D'Alessandro, *Il procedimento pregiudiziale interpretativo dinanzi alla Corte di Giustizia. Oggetto ed efficacia della pronuncia*, Torino, 2012, 245 ss.; G. Gaja and A. Adinolfi, *Introduzione al diritto dell'Unione europea*, Roma-Bari, 2012, 116; F. Ghera, *Pregiudiziale comunitaria, pregiudiziale costituzionale e valore di precedente delle sentenze interpretative della Corte di Giustizia*, in *Giur. cost*., 2000, 1204 ss.; G. Martinico, *Le sentenze interpretative della Corte di giustizia come forme di produzione normativa*, in *Riv. dir. cost.*, 2004, 249 ss.; Id., *L'integrazione silente. La funzione interpretativa della Corte di Giustizia e il diritto costituzionale europeo*, Napoli, 2009, 91 ss.

[46] ECJ, November 24th 2011, European Commission vs. Italian Republic, C-379/10; ECJ, June 13th 2006, Traghetti del Mediterraneo, C-173/03 and ECJ, September 30th 2003, Köbler, C-224/01 (where it is specified that the liability of the State raises only in the exceptional case that the judge has manifestly violated EU law). With regard to this issue, refer in particular to M. Luciani, *Funzioni e responsabilità della giurisdizione. Una vicenda italiana (e non solo)*, in *Rivista AIC*, no. 3/2012; R. Bifulco, *La responsabilità del giudice tra principi dell'unione europea e applicazioni nazionali*, at www.astrid-online.it, and M.A. Sandulli, *Riflessioni sulla responsabilità civile degli organi giurisdizionali*, in *federalismi.it*, no. 10/2012, at www.federalismi.it. The debate that took place in the daily newspaper *La*

Finally, as regards the duty to interpret in conformity with the ECHR, the only judicial organ which has asserted that this applies to the national courts is – pay attention! – the Italian Constitutional Court. Indeed, the Constitutional Court prevents regular courts from adopting tough measures immediately – by referring the conflict between national law and conventional law to the Constitutional Court itself – and asks them instead to first attempt to harmonise the different normative frameworks. Thus, an attempt at interpretation in conformity with the ECHR thereby also becomes a necessary precondition, along with relevance and non-manifest groundlessness, for the valid initiation of proceedings before the Constitutional Court. Again, if the lower court is unable to demonstrate that it made such an attempt, the question raised will be ruled manifestly inadmissible.[47]

On the other hand, as mentioned above, the duty to interpret in conformity with the ECHR has not been asserted even once by the European Court charged with guaranteeing compliance with it.

However, the Strasbourg Court has asserted on several occasions that it has been called upon to verify whether the manner in which national law is interpreted and applied (above all by the administrative and judicial authorities) results in (or fails to result in) consequences compatible with the Convention.[48] Moreover, in certain judgments it has even acknowledged that a national legal system which had previously been in breach of the minimum standards required under Strasbourg case law had subsequently fallen into line with the Convention, thanks not only to legislative amendments, but also to the subsequent jurisprudence of its highest courts (in particular: of the constitutional tribunal and of the supreme court in the Spanish case regarding wire-tapping[49]). However, similar assertions only relate to the type of review to be conducted by that Court: a case-by-case review of actual respect for the Convention rights of the applicant by the contracting State, and hence also by its courts. However, the Strasbourg Court has never asserted that the best possible or principal way of ensuring the State's compliance with its Convention obligations was through a change in case law, and has rather always been indifferent to the means chosen by the State organs for achieving this goal.

None of this, as mentioned above, should come as any surprise as it in fact furnished proof of the procedural – rather than substantive or absolute – nature of any judicial duty of conforming interpretation.

Indeed, due to the lack of any mechanism operating in an analogous manner to the preliminary reference, there are no direct relations between the Strasbourg Court and the national courts, and therefore the former is not in a position to impinge upon the activities of the latter whilst these are ongoing, nor to correlate them with its own. On the contrary, it by definition intervenes only after their work has been concluded in order to approve or object to the actual results obtained. Therefore, it cannot have any interest in discussing any judicial obligation to interpret national legislation in conforming with the Convention; thus, whether the result is achieved through the courts or through the administrative or legislative activity of the State, which the Strasbourg Court may influence only indirectly, all that counts in its eyes is that *in the end* the Convention has actually been complied with.

7. The logical limit of conforming interpretation.

Repubblica between the constitutionalist Alessandro Pace (*La responsabilità dello Stato-Giudice*, June 10th, 2012; *La responsabilità dei giudici*, June 19th, 2012) and the First President of the Court of Cassation Ernesto Lupo (*Un pericolo per la giustizia*, June 12th, 2012) was also interesting.

[47] Starting with Constitutional Court. sentence no. 239 of 2009.

[48] Refer in particular to: ECHR, II Division, May 30th 2000, Carbonara e Ventura vs. Italia, no. 24638/94, par. 68 ("In any event, the Court is required to verify whether the way in which the domestic law is interpreted and applied produces consequences that are consistent with the principles of the Convention"); ECHR, Grand Chamber, March 29th 2006, Scordino (1) vs. Italia, no. 36813/97, par. 191 ("The Court is therefore required to verify whether the way in which the domestic law is interpreted and applied produces consequences that are consistent with the principles of the Convention"); ECHR, I Division, May 20th 2010, Lelas vs. Croatia, no. 55555/08, par. 76 ("The principle of lawfulness also requires the Court to verify whether the way in which the domestic law is interpreted and applied by the domestic courts produces consequences that are consistent with the principles of the Convention").

[49] ECHR, September 25th 2006, Coban (Asim Babuscum) vs. Spain, no. 17060/02 (decision of inadmissability).

One further element, alongside its mandatory nature, which is common to all the current forms of conforming interpretation is the requirement that it involves genuine interpretation – either of an individual provision or of the entire system of primary legislation – and cannot be transformed through distortion into the correction/manipulation of the actual legislation. Indeed, when imposing this procedural obligation, both the Constitutional Court and the ECJ assert *in unison* that not only its mandatory nature but also the very possibility for the courts to engage in conforming interpretation will cease if the literal meaning of the law is not amenable to be stretched to achieve the result sought by the reference norm.
This has been significantly identified as the logical limit of our technique:[50] conforming interpretation *contra legem* is as a matter of principle not permitted because it would logically speaking no longer amount to interpretation but would rather, under the guise of interpretation, in reality conceal an operation – *the setting aside of the clear textual provision of the law* – which, depending upon the circumstances, is prohibited for the courts or, if it is a permitted action such as in cases involving directly applicable EU law, must be conducted in the full light of day, and called with its true name.
Is all well therefore? Not entirely. The unstoppable tendency, which once again brings together the three current forms of conforming interpretation within the same destiny, is to be stretched *beyond* the logical and structural limit mentioned above.
In other words, the extraordinary qualities of malleability and flexibility with regard to the harmonisation of the various normative levels offered by the technique of conforming interpretation, which are so precious within a framework of sources of law which is as complex as the current framework, result in an inexorable tendency to degenerate into different characteristics.
Indeed, in the experience of all legal practitioners – or at the very least those working in Italy – the technique lends itself to be used in an non-rigorous, elusive and intangible manner, as a pretext for achieving the result sought, without getting to the more drastic measures mentioned above. In this way however, conforming interpretation stops being an element of "pacification" between sources and legal systems and by contrast turns into a cause of "upheaval in the operational mechanisms of one source or the other source, of one legal system or the other legal system". [51]
However, it is important to point out that such a tendency to reach beyond the limit may be encountered within the case law of all judicial authorities, but it does appear to be more evident with the courts which speak in favour of conforming interpretation than it is with the courts on the receiving end of this invitation.

8. Breaches of the limit by the very courts imposing the duty of conforming interpretation on the other courts.

It must be said that the very two court which assert the mandatory status of and the logical limit on conforming interpretation – that is the Constitutional Court and the ECJ – are often the first to suggest interpretations of the statute law in the individual cases brought before them for examination which are *impossible* or at the very least *acrobatic*,[52] i.e. difficult to reconcile with the literal wording.
In other words, both those courts do not practice what they preach (that is to say, they specify the logical limit, but breach it in concrete cases), thereby setting a bad example for other courts, which will in turn feel that they are authorised to proceed in the same brazen manner.
It is necessary to consider why this occurs. The answer is complex.

[50] F. Viganò, *Il giudice penale e l'interpretazione conforme alle norme sovranazionali*, cit., 649 ss. and V. Manes, *Metodo e limiti dell'interpretazione conforme alle fonti sovranazionali in materia penale*, in *Arch. pen*., 2012, 17 ss. distinguish between the 'logical' limit of any type of conforming interpretation from the 'axiological' limits, that are present only in the interpretations in conformity with EU law in criminal matters.

[51] The mandatory reference is again M. Luciani, *Le funzioni sistemiche della Corte costituzionale, oggi, e l'interpretazione "conforme a"*, cit., *passim*.

[52] The adjective has been used by G. Gaja, *Il processo di armonizzazione e la sua incidenza sull'ordinamento italiano*, in *L'ordinamento italiano dopo 50 anni di integrazione europea*, Torino, 2004, 44. However, the awareness that both the Constitutional Court as well as the ECJ do not hesitate to propose actual hermeneutical excesses is widespread in legal theory. In particular, refer - with regard to the first court - to the contributes cited above in note 10; with regard to the second court see G. Pistorio, *Interpretazione e giudici. Il caso dell'interpretazione conforme al diritto dell'Unione europea*, Napoli, 2012 (chapter II, part II, paragraphs 2.2 e 2.3.).

There is naturally a tendency within the higher courts to avoid as far as possible arriving at a head-on clash with the political authorities, which often leaves the field littered with dead and injured.
A better approach is to suggest a gentler path, involving mutual adaptation and peaceful harmonisation, than brashly and definitively asserting the irreconcilable nature of the legislature's choices with a parameter with which it should have complied.
Again, it is better to pretend that the legislature acted properly, rather than ask it to take action to remedy its errors. In fact, given the predictable absence of a ready answer from the legislature, in some cases the efficacy of the reference norm (the Constitution, the ECHR or EU law) could suffer. And yet – and this is an important point – it is always the legitimation of the court which (without success) asked the legislature to take action which suffers from this.
Moreover, in some cases the advice to engage in conforming interpretation transfers on other subjects – the regular courts – part of the pressure that weighs on the higher court: the latter do not wish to be accused by the political authorities of not following with sufficient rigour the 'passive virtues' so dear to that power; on the contrary, the regular courts will be accused of encroaching upon the prerogatives of the legislature, by amending legislation rather than interpreting it.
In other cases, where it be for the regular courts to proceed by themselves – for instance in cases involving an alternative between conforming interpretation and the setting aside the EU law with direct effect –, there are at least two reasons why the ECJ always prefers to advise the regular courts to attempt the first measure, before turning to the second.
First and foremost, conforming interpretation assures flexibility in relations between the different normative levels and neutralises or takes the sting out of the ever possible conflicts between national law and European law, whilst the more rigid measure of setting aside legislation exacerbates these conflicts, always portraying a winner – Europe – and a loser – the Member State.[53] In order to ensure peace of mind for all, including the ECJ, it is therefore better to rely on indirect effect rather than on direct effect.
Secondly, if the national legislation develops jurisprudential guidelines requiring the interpretation of existing national laws in conformity with a directive that has direct effects, the legislative or administrative implementation of that directive becomes unnecessary, because the state's obligation can be deemed to have been fulfilled. On the other hand, if the national judges choose to set aside the national law, action by the political bodies will remain essential. Here again, the result achieved according to a 'softly-softly approach' is more worthwhile than that achieved through the more drastic measures.
Lastly, there is one more possible reason which might induce the Constitutional Court and the ECJ to suggest a conforming interpretation that is risky and of dubious compatibility with the statute's wording: the awareness that in some cases conforming interpretation can 'bring home' a practical result which even the more invasive judicial instruments are not able to achieve.
In fact, he Constitutional Court sometimes chooses to issue an interpretative decision of dismissal because it is aware that 'manipulative' ruling – i.e. a ruling striking down a particular provision as unconstitutional and rebuilding it in a different manner – is untenable due to the requirement to respect 'legislative discretion'.[54]
The consequence of this is naturally that in such cases the interpretation recommended to the regular court will inevitably be highly creative, in that it is required to achieve in a non-standard manner a result analogous to the amendment of the statute law, or the manipulation of its literal provision.
On the other hand, the ECJ is often led to suggest an interpretation in conformity with national law without paying heed to its practicability when a case pending before the courts involves a relationship between private parties. Given that it is impossible to ensure direct effect, the only way of guaranteeing that EU law prevails in such cases is to require indirect horizontal effect. Compared to the former, in fact, payment of

[53] G. Martinico, *The Importance of Consistent Interpretation in Subnational Constitutional Contexts: Old Wine in New Bottles?*, in *Perspectives on Federalism*, Vol. 4, issue 2, 2012, 283; Id., *Is the European Convention Going to Be 'Supreme'? A Comparative-Constitutional Overview of ECHR and EU Law before National Courts*, in *EJIL* (2012), Vol. 23 No. 2, 409.

[54] This has been noted by A. Ruggeri, *Esperienze di giustizia costituzionale, dinamiche istituzionali, teoria della Costituzione*, in *Giur. cost*., 2008, 3612; Id., *La Corte costituzionale davanti alla politica (nota minima su una questione controversa, rivista attraverso taluni frammenti della giurisprudenza in tema di fonti)*, in *Percorsi cost*., 2010, no. 2-3, 45. With regard to the 'legislative discretion' as a limit to the possibility that the Constitutional Court can declare a law unconstitutional by manipulating its meaning refer to G. Zagrebelsky e V. Marcenò, *Giustizia costituzionale*, Bologna, 2012, 399-400.

damages is nothing other than a pale surrogate available to the few, which is incapable of guaranteeing the effectiveness and superiority of EU law.
Therefore, in both of the cases illustrated above, conforming interpretation is embraced not so much as the best and more desirable measure, i.e. as a mandatory step in order to avoid a declaration of incompatibility between two normative systems, but rather as the *only way available to the courts of achieving a result which could not otherwise be achieved without legislative action*. It can therefore be understood why the Constitutional Court and the ECJ dare to propose it even in the context of a legislative framework which could only be lent with difficulty to interpretation in conformity with constitutional or EU law.
However, the breach by the ECJ of the textual limit of the law is supported by a justification which would not apply to similar action by the Italian Constitutional Court. It may in fact be reasonably supposed that out of the twenty-seven legal systems at which the judgments of the ECJ are directed there will always be at least one – although perhaps not that of the referring court! – in which the framework of internal sources lends itself to interpretation in conformity with EU law. Moreover, the institutional task of the ECJ is to interpret EU law, and not the individual national laws into which it often strays in order to ensure the efficacy of EU law, even though it does not bear any responsibility for their correct operation, the national courts being the only bodies responsible for the interpretation of national law.
In any case, the disadvantages which such a *modus operandi* of the Constitutional Court or the ECJ entails are well known and often discussed in the literature, which is highly critical of any recommendation that the two courts may engage in conforming interpretation when the operation does not appear to be adequately supported by the wording of the law.
Direct harm is caused to the supreme interest of legal certainty, because naturally not all Italian courts will be happy to accept such invitations without reservation.
On the other hand, adopting a more long-term perspective, the stance would risk bouncing back like a boomerang against the very same courts which propose eccentric interpretations, because it is likely that future courts will feel authorised no longer to trust their judgments and to act on their own initiative when, strictly speaking, they should address a doubt (as to interpretation or constitutionality) to the appropriate court. The risk of being sidelined is one which applies above all to the Constitutional Court because, as noted above, it still has the power – at least on paper – to pass judgment on laws which are argued to be unconstitutional, to breach EU law not endowed with direct effect or to violate the ECHR. An excessively careless use of all three forms of conforming interpretation by the regular courts could indeed cause the incidental channel of access to Constitutional Court to seize up, thus depriving it of its role on all three fronts simultaneously.
However, we are reminded by Italian and foreign scholars that there is still a need for a constitutional court in a country like Italy.[55] There are still many benefits of centralised constitutional review which cannot be given up, as Victor Ferreres Comella has recently argued.[56] An efficient centralised system of constitutional review can first and foremost ensure a more effective implementation of the value of legal certainty and the related principle of equality of the individuals before the law, because within a legal system lacking a system of precedent it is better for there to be a constitutional court which can strike down laws once and for all, rather than a widespread power of judicial review, which could result in contradictory results from court to court. Moreover, centralised review satisfies the claim by the political majority, in accordance with the democratic principle, that its actions only be judged by a highly specialised court, which is the most appropriate to comply with this task given its peculiar composition and specialisation in the resolution of questions of constitutional law. There is once again a guarantee that the entire community may participate in public debate which only a ruling by a constitutional court can provide. Moreover, a robust system of centralised constitutional review will facilitate effective intervention by the political sphere in relation to the controversial issues which society brings before the courts, because the legislature's capacity to give a coherent answer

[55] M. Luciani, *Le funzioni sistemiche della Corte costituzionale, oggi, e l'interpretazione "conforme a"*, cit., 425; T. Groppi, *Riformare la giustizia costituzionale: dal caso francese indicazioni per l'Italia?*, in *Rass. parl*., 2010, 54 ss.

[56] V. Ferreres Comella, *Constitutional Courts and Democratic Values. A European Perspective*, Yale University Press, New Haven&London, 2009, 114-115 and *passim*.

to problems of constitutional law is greater when confronted with the unitary stance of a constitutional court, rather than numerous and potentially diverging judgments of the regular courts.[57]

9. The Italian courts and interpretation in conformity with...

In the previous paragraphs we have discussed the two courts which provide wide-scale recommendations to the regular courts to engage in conforming interpretation before and instead of other measures, even if this runs contrary to the letter of the law. But how do the Italian regular courts act? Do they also make excessive use of this technique? And consequently, can the fear that the Italian Constitutional Court may be sidelined due to the uncontrolled increase in decentralised forms of review of laws which are 'palmed off' as conforming interpretation be said to be justified?
These are very weighty questions. Before trying to formulate any answer, it must be pointed out that the vast case law of the regular Italian courts dealing with the EU law (again, the EU Charter of Rights), the ECHR and the Constitution itself in support of interpretative choices which have already been made independently naturally falls outwith the scope of the enquiry.
The style of argumentation which refers to fundamental rights asserted in those national and supranational bill of rights, or in the case law of the Constitutional Court or the two European courts, is very widespread throughout the Italian courts, although this is by no means an indicator of the application of the technique of conforming interpretation within specific individual cases. Indeed it only arise when a court declares that the choice between more than one interpretation, which were initially all considered to be viable, was resolved or significantly affected by a consideration of the reference parameter, in the absence of which the choice would have been different.
I will now try to answer those demanding questions, step by step.
First, there is no doubt that the Italian courts – including both the higher courts as well as the lower courts – know well and apply without any difficulty all of the possible rules and facets of the technique of conforming interpretation[58] and are perfectly aware of its mandatory status,[59] in the wake of the strong insistence of the Constitutional Court and the ECJ.

[57] Without taking into account that, as noted by T. Groppi, *La legittimazione della giustizia costituzionale: una prospettiva comparata*, in *Magistratura, giurisdizione ed equilibri istituzionali. Dinamiche e confronti europei e comparati*, edited by R. Toniatti and M. Magrassi, Padova, 2011, 311-312, a declaration of constitutional illegitimacy of a law always offers the affected subjective positions a guarantee of stability that is greater than even constant case law in conformity with the Constitution: if the political majority intends to act against this result, in fact, it would be required to proceed – if acting against a declaration of unconstitutionality – with a constitutional law, with all the costs that the aggravated proceedings would require, while in order to act against an undesirable interpretation in conformity with the Constitution an ordinary law would be enough.

[58] Italian judges, for example, have learned perfectly from the Court of Justice that it does exist an obligation of conforming interpretation even with old framework decisions on police and judicial cooperation in criminal matters (for an important application of this principle see Court of Cassation, III Criminal Division, March 4th 2010, no. 10981, pertaining to juvenile pornography; refer also to, amongst others, Court of Cassation, IV Criminal Division, September 23rd 2011, no. 39240); that disapplication is a secondary measure, since a conforming interpretation must always be preferred if possible (this is the reasoning, for example, of the Council of State, Division V, December 14th 2011, no. 6543, about public works contracts); that, in the criminal sector, the interpretation in conformity with EU law can not have effects in *malam partem* (refer within the text and below in notes 84 and 85); that, in the case of horizontal relationships, the directives can not produce direct effects, but an interpretation of internal law in conformity with the directive is required, if compatible with the textual meaning of the internal law (in this sense, amongst others, the learned sentence of the Court of Palermo no. 42 of March 26th, 2010, pertaining to bank account contracts); that the "principle of conforming interpretation of national law - despite essentially referring to internal norms that are introduced in order to incorporate EU directives – places overall internal law, however, within a hermeneutical circuit which aims to generate an application that is not in conflict with the result that the directive itself is aiming at" (as stated by the First President of the Court of Cassation E. Lupo, *Pluralità delle fonti ed unitarietà dell'ordinamento*, in *Il nodo gordiano tra diritto nazionale e diritto europeo*, edited by E. Falletti and V. Piccone, Bari, 2012, 13, while referencing Court of Cassation, Joint Civil Division, January 13th 2010, no. 355).

[59] Among the countless decisions that recall the duty of each judge to choose an interpretation in conformity with the ECHR – which is both impossible but also unnecessary to reference here – see, for example, to the well known sentence which, following the jurisprudential turnaround which had introduced the possibility for a person convicted abroad to request the application of a pardon, allows for – in conformity with Article 7 of the ECHR – a new request on the part of the person who had previously formulated the same request but with a negative outcome (Court of Cassation, Joint Criminal Division., January 21st 2010, no. 18288, commented, but from a different perspective, by F. Biondi, *La decisione delle Sezioni Unite della Cassazione ha lo stesso "valore" della fonte di diritto scritto? Quando l'interpretazione conforme alla Cedu pone dei dubbi di costituzionalità*, in *Osservatoriosullefonti.it*, Vol. 3/2010). Finally, amongst the multiple and very significant decisions of the Court of Cassation pertaining on seizure which declare that they must conform with the case law of the Court of Strasbourg, refer also to Court of Cassation, Joint Criminal Division, January 19th 2012, no. 14484.

Moreover, there is no doubt that they grasp at this technique with both hands not only in ordinary cases, but also where the intersection between sources and legal systems is more intricate. Indeed, when pursuing this path they are able to resolve very 'hard cases' wisely and in a balanced manner, avoiding choices which would be needlessly more expensive or painful both for the national and for external legal systems. A very important example of this is the decision by the Joint Criminal Divisions of the Court of Cassation regarding the probative value of pre-trial statements made without respecting the principle of adversary hearings. In that judgment in fact, the Court of Cassation *inter alia* interpreted the constitutional right to a fair trial itself (Article 111 Const.) in conformity with the ECHR and the case law of the Strasbourg Court, in such a way as to avoid – very wisely – an incompatibility between the constitutional law and the supranational law, and in turn subsequently interpreted the relevant provision from the Code of Criminal Procedure (Article 526) in conformity with the Constitution, and hence with the ECHR.[60]
Again, there is no doubt that each time the Constitutional Court or the ECJ suggest an interpretation which departs from the literal wording of the law, the regular courts feel authorised to ignore the law, with which they would have most likely complied in the absebce of a judgment by the Constitutional Court or the ECJ.
On this point however, it is necessary to draw a distinction.
As regards the reactions of the regular courts to the 'bold' interpretations of the law proposed by the Constitutional Court, a fairly recent study has demonstrated that almost every judicial authority complies with the Constitutional Court's indications, although subject to a condition: that these indications be specified in Constitutional Court judgments which are well documented and duly supported by reasons, and not in summary constitutional orders supported by sparse argumentation.[61] Therefore, the regular courts will also follow the interpretations conforming with the Constitution suggested by the Constitutional Court even when the interpretation suggested is difficult to reconcile with the letter of the law, although such adherence is never a-critical and only occurs if the Constitutional Court has used convincing interpretative arguments.
By contrast, adherence by the Italian courts to the 'acrobatic' interpretations of Italian law which emerge from between the lines of the judgments of the Luxembourg Court is automatic and practically independent of the reasons given.
A significant example of this is provided by the aftermath of the renowned *Pupino* judgment,[62] in which the Italian referring court followed without a comment[63] a judgment in which the ECJ requested the Italian courts to order the taking of evidence according to special pre-trial procedures (*incidente probatorio*) in a case not included within the closed list laid down in the Code of Criminal Procedure by virtue of a provision of EU law contained in a framework decision, which certainly lacked direct effect[64].

[60] Court of Cassation, Joint Criminal Division, July 14th 2011, no. 27918. The sentence, which was then followed by analogous ones (for example, Court of Cassation, I Criminal Division, March 7th 2012, no. 12735), is referred to by the First President of the Court of Cassation, Ernesto Lupo - in his report on the administration of justice in the year 2011 (which was read during the course of an inauguration of the new judicial year, Roma, January 26th, 2012, at www.cortedicassazione.it) – as an "exemplary case of conforming interpretation" (24 of the report). Gaeta, *Dell'interpretazione conforme alla Cedu: ovvero, la ricombinazione genica del processo penale*, in *Arch. pen*., 2012, 105 ss., comments also discusses it, calling it a "paradigmatic example of an interpretation conforming to the ECHR, and in which the great variegation of its tones resound": however, despite emphasizing the noble nature of its aims and the opportunity for its realization, he also notes certain excesses, and concludes that it shifts the traditional limit of the conforming interpretation – the letter of the law – forward, and replaces it "with a different criterion, of systemic-axiological nature, whose criterion of legitimacy lies in the values of the system". See also, among others, Court of Cassation, III Criminal Division, June 15th 2010, no. 27582 and Court of Cassation, VI Criminal Division, June 15th 2011, no. 35515.

[61] E. Lamarque, *Il seguito delle decisioni interpretative e additive di principio della Corte costituzionale presso le autorità giurisdizionali (anni 2000-2005)*, cit., 758 ss.

[62] ECJ, June 16th 2005, Pupino, C-105/03.

[63] The follow-up of the Pupino decision of the ECJ given by the Tribunal of Florence is referred to in F. Viganò, *Il giudice penale e l'interpretazione conforme alle norme sovranazionali*, cit., 621.

[64] R. Calvano, *Il Caso* Pupino*: ovvero dell'alterazione per via giudiziaria dei rapporti tra diritto interno (processuale penale), diritto UE e diritto comunitario*, in *Giur. cost.*, 2005, 4030. On the Pupino see also Craig e G. De Bùrca, *EU law: text, cases and materials*, V ed., Oxford University Press, 2011, 204.

Moreover, a Constitutional Court judgment from the summer of 2011[65] also provides an important example – out of the many available – of this way of thinking. This case drew a line under the long-standing issue of study grants for trainee specialist doctors between the years 1983 and 1991 during which, in breach of the European directive governing such matter, no national legislation was enacted to recognise their economic rights. Indeed, arguing in a manner which was far from convincing, a judgment of the Court of Cassation ended up recognising the *effet utile* of the directive through a mix of conforming interpretation of national legislation and the direct application of European law as suggested by two judgments of the ECJ.[66]
In this sense, those who criticise the excessive *nonchalance* with which the ECJ invites the national courts to accept conforming interpretations of national laws which are not adequately supported by the literal wording of such legislation are right. In fact, such invitations induce the national courts to cast aside cognitive style in justifying their decisions because they appear to authorise them – although inadmissibly – to refrain from providing adequate reasons in support of the real possibility offered by the national legislation to follow the interpretation of the law suggested by the ECJ.[67]
Finally, there is no doubt that the regular courts frequently adopt, albeit without an explicit invitation from the Constitutional Court or the ECJ, 'suspect' instances of conforming interpretation – once again, with the Constitution, EU law or the ECHR –, i.e. readings of the statute law which appear to ignore its literal wording.
The reasons why the judicial authorities may prefer a conforming interpretation to a different measure, even when the wording of the law would appear to oppose such an interpretation, are entirely comprehensible. This kind of approach is favoured first and foremost by the desire to make a 'fair' decision in the individual case. In this regard, some commentators have asserted in relation to interpretation in conformity with the Constitution, though with perhaps excessive rigidity, that "within this perspective the Constitution does not count for what it actually states in the text of its articles considered overall: it is only a pretext for legitimising actions carried out for the purposes of material justice".[68] Moreover, the tendency to go to extremes during conforming interpretations is also fuelled by the growing anti-formalism which inspires judicial activity and the now open recognition that a dose of creativity is inevitably contained in all judicial choices. It is also assisted by the legitimate desire to do justice and to protect the rights of the parties to the trial quickly, without waiting for example for the conclusion of constitutionality proceedings the outcome of which is considered to be a foregone conclusion. And this is without considering, naturally, that the repeated encouragement from the Constitutional Court and the ECJ has the more general effect of enticing otherwise reticent courts to proceed more boldly along the road of conforming interpretation whenever they see the possibility.
However, an examination of the case law, above all from the Court of Cassation, over recent years suggests that a *distinction* should be drawn, this time, between various forms of conforming interpretation.
Indeed, *interpreting in conformity with the Constitution* is that which the regular courts engage in with the least (formal) scruples, and are happy to bend the law in the service of the Constitution for which they now consider themselves *custodians*, along with the Constitutional Court, albeit naturally using different instruments.
However, on this point it is necessary to draw an important distinction.[69]
There are instances in which the regular courts do in fact substantively set aside the law *but* the Constitutional Court nonetheless remains firmly within a leadership role, as it ploughs the furrow along which the regular courts' case law expands. For example, it may be the case that the constitutional principle asserted in a Constitutional Court judgment finding existing legislation to be unconstitutional and remedying the situation by amending that legislation is used by the regular courts for the conforming interpretation of provisions analogous to those already ruled unconstitutional, *without* any court considering that it is necessary to refer the question once again to the Constitutional Court. Consider, for example, the case of

[65] Court of Cassation, III Civil Division, August 29th 2011, no. 17682.

[66] ECJ, February 25th 1999, Carbonari and others, C-131/97, and ECJ, October 3rd 2000, Gozza, C-371/97.

[67] M. Caianello, *Il caso "Pupino": riflessioni sul nuovo ruolo riconosciuto al giudice alla luce del metodo adottato dalla Corte di Giustizia*, in *L'interpretazione conforme al diritto comunitario in materia penale*, edited by F. Sgubbi e V. Manes, Bologna, 2007, 97 ss.

[68] M. Manetti, *La delega al giudice dell'applicazione della Costituzione come sistema di* governance, in *Dem. e dir.*, 2011, 135.

[69] E. Lamarque, *Corte costituzionale e giudici nell'Italia repubblicana*, Roma-Bari, 2012, in particular 127-132.

blood and genetic evidence with the purpose of excluding paternity, in which the declaration of unconstitutionality relating solely to cases involving adultery by the wife was unproblematically extended by the regular courts to different situations such as impotency and hidden pregnancies.[70] A similar situation arose in the case involving pre-trial custody, which the Code of Criminal Procedure imposed for a list of particular serious offences, but which the Constitutional Court had ruled to be unconstitutional in relation to certain offences within the list, including sexual violence.[71] In relation to the offence of group sexual violence, which had not already been declared unconstitutional, the Court of Cassation subsequently arrived at the same practical result – of not imposing pre-trial custody – through interpretation, that is *without* first requesting and obtaining from the Constitutional Court an analogous judgment amending the Code for that offence.[72]

On the other hand, the situation is entirely different for certain other issues within the case law, where the Constitutional Court's voice is entirely absent. Consider the following two cases.

For some years now, there have been isolated episodes, which have duly been reported in the academic literature,[73] in which individual courts base their argument on the principle of interpretation in conformity with the Constitution with the goal of arriving at a 'fairer' solution to that offered by the legislature *in an expedited manner*, that is by substantively setting aside the law in the individual case *without* referring a question to the Constitutional Court and – it is important to note – *without* any previous intervention by the Constitutional Court having in any way suggested or authorised such a stance in that specific situation. The episodes which have signalled the alarm bells for the academic literature have been above all those in which the regular courts rely on arguments based on reasonableness/rationality inferred from the principle of equality laid down in Article 3 Const. either on its own or in conjunction with other rights of constitutional standing.[74] Here, the room for manoeuvre for interpretation in conformity with the Constitution is very broad, and the regular courts' discretion and creativity genuinely risks degenerating into arbitrariness.

Secondly, it may be the case that an interpretation conforming with the Constitution which is very far-removed from the literal wording of the law – and which may hence once again be considered equivalent to the setting aside of the law – not only appears but also *establishes itself*, becoming 'living law', *without* any court even trying to refer a question concerning the constitutionality of the law in its literal meaning. Judicial practice offers at least one glaring example in an approach recently adopted by the Court of Cassation, which immediately became established, relating to Article 37 of the Code of Civil Procedure. This article provides that "the lack of jurisdiction of the ordinary courts over the public administration or of the special courts may be raised, including *ex officio*, at any instance or stage of the trial". However, in 2008 the Joint Divisions of the Court of Cassation stated their intention to subject it to an "interpretation with amending effects", in order to contain its substantive scope "within closer limits than those authorised by the letter of the law", in such a manner as to prevent the lack of jurisdiction from being raised once an implicit ruling had been reached on that point, that is whenever the case has been decided on the merits, except in some limited exceptional cases. According to the Joint Divisions, in fact, the "core axis" of the new interpretation of the Code's provision must become the constitutional principle of the reasonable length of trials, given that "the traditional interpretation, based solely on the letter of the law, does not strike a correct balance between the constitutional values at stake and leads to an unjustified violation of the principles of the reasonable length of trials and the efficacy of relief (Articles 24 and 111 Const.), since it entails the regression of the trial to its original stage, the overturning of two judgments on the merits and the deferral *sine die* of a valid ruling

[70] Constitutional Court, sentence no. 266 of 2006, followed by Court of Cassation, I Civil Division, June 6th 2008, no. 15089 and no. 15088.

[71] In particular Constitutional Court, sentence no. 265 of 2010.

[72] Court of Cassation, III Criminal Division, January 20th 2012, no. 4377. See M. Dogliani, *Le norme prodotte dalle sentenze-legge possono essere applicate per analogia dal giudice ordinario?*, in *Rivista AIC*, n. 1/2012 e M. Ruotolo, *Oltre i confini dell'interpretazione costituzionalmente conforme? A proposito della pronuncia della Cassazione sulla presunzione di adeguatezza della custodia cautelare in carcere per il delitto di violenza sessuale di gruppo*, in *Rivista AIC*, n. 2/2012.

[73] For example G. Sorrenti, *La Costituzione "sottintesa"*, cit., 85-86 e C. Pagotto, *La disapplicazione della legge*, Milano, 2008, 110 ss.

[74] G. Scaccia, *Valori e diritto giurisprudenziale*, in *Dir. soc*., 2011, 153 and M. Ruotolo, *Per una gerarchia degli argomenti dell'interpretazione*, in *Giur. cost*., 2006, 3424.

on the merits".[75] The Court of Cassation, thus, completed this operation in the full light of day without feigning: it struck an autonomous balance of the constitutional values at stake, and gave them precedence over the literal meaning of the Code.[76] However, more importantly, between 2008 and the present time no other court has considered it possible to achieve the same result by following the different path – which moreover is unanimously viewed as the correct one within the literature[77] – of referring the question to the Constitutional Court. Therefore, it is only in this latter case that the risk of a systematic and intentional avoidance of the Constitutional Court's centralized power of review will tangibly arise, because this situation no longer involves structurally isolated cases of interpretative errors committed due to an excessive use of the principle of conforming interpretation, as in the previous case, but rather an attempt to establish *de facto* a diffused, or decentralized, system of constitutional review.

As regards *interpretation in conformity with EU law and the ECHR* on the other hand, at least for the time being, the courts adopt a more prudent approach,[78] and it is therefore a *fairly rare* occurrence that, in the name of those external norms, they *spontaneously* accept interpretations of national law which are so 'stretched' as to be essentially equivalent to a correction/amendment of the law itself. The courts thus demonstrate their awareness of the mandatory status of conforming interpretation, whilst also having perfectly understood its procedural nature and 'logical' limit, because when accepting it they very often specify that, had national law not permitted an interpretation in accordance with the supra-national law, it would have been necessary to follow the subsidiary alternatives of, depending upon the circumstances, setting aside the national law[79] or referring a question of constitutionality to the Constitutional Court.[80]

Analogously, the Italian courts have no difficulty in following the ECJ when it imposes a further limit on them – although this time of an 'axiological' nature[81] – in relation to criminal law with regard to the use of the technique of conforming interpretation for EU law.[82] Examples of this are provided by the judgments, once again of the Joint Divisions of the Court of Cassation, relating to confiscation of equivalent assets[83] and the acquisition of items of suspect origin,[84] in which it is asserted and repeated that the use of supra-national

[75] Court of Cassation, Joint Civil Division, October 9th 2008, no. 24883, followed by a lot of analogous sentences, such as Court of Cassation, Joint Civil Division, October 12nd 2011, no. 20932; Court of Cassation, Tax Division, December 30th 2011, no. 30408.

[76] Other examples in M. Bove, *Il principio della ragionevole durata del processo nella giurisprudenza della Corte di Cassazione*, Napoli 2010, 17 ss. and, above all, in G. Sorrenti, *La tutela dell'affidamento leso da un* overruling *processuale corre sul filo della distinzione tra natura creativa e natura dichiarativa della giurisprudenza*, in *Rivista Aic*, n. 1/2012.

[77] R. Caponi, *"Ciò che non fa la legge, lo fa il giudice, se capace": l'impatto costituzionale della giurisprudenza della Corte di Cassazione italiana*, in *Annuario di diritto comparato e di studi legislativi*, Napoli 2011, 246; A. Oddi, *La Corte di Cassazione l'utilizzo spinto, in chiave ermeneutica, del principio costituzionale della "ragionevole durata" del processo (ovvero: di due casi emblematici di "eccesso" di… interpretazione costituzionalmente conforme)*, in *Costituzionalismo.it*, 12 gennaio 2011; G.G. Poli, *Le sezioni unite e l'art. 37 c.c.,* in *Foro it.*, 2009, I, c. 814; R. Vaccarella, *Rilevabilità del difetto di giurisdizione e* translatio iudicii, in *Giust. civ*., 2009, 413

[78] F. Mannella, *Giudici comuni e applicazione della Costituzione*, Napoli, 2011, 175

[79] For example Council of State, Division V, December 14th 2011, no. 6543.

[80] Of the numerous examples, consider Council of State, Division IV, September 2nd 2011, no. 4960 and Court of Cassation, Labour Division, February 22nd 2012, no. 2632.

[81] The distinction between 'logical' and 'axiological' limits for the interpretation in conformity with EU law is proposed by the authors referred to above in note 50.

[82] A recent sentence which repeats the consolidated case law on this point and adopted by the Court of Luxemburg in relation to the reference for a preliminary ruling of an Italian judge is ECJ, June 28th 2012, C-7/11.

[83] Court of Cassation, Joint Criminal Division, June 25th, 2009, no. 38691. With regard to this point, and on this sentence, refer to V. Manes, *Metodo e limiti dell'interpretazione conforme alle fonti sovranazionali in materia penale*, cit., 19 ss.; Id., *Nessuna interpretazione conforme al diritto comunitario con effetti in* malam partem, in *Cass. pen*., 2010, 101 ss. and A.M. Maugeri, *La confisca per equivalente* – ex *art. 322*-ter – *tra obblighi di interpretazione conforme ed esigenze di razionalizzazione*, in *Riv. it. dir. e proc. pen.*, 2011, 791 ss.

[84] Court of Cassation, Joint Criminal Division, January 19 2012, no. 22225.

legislation is precluded when "the result of such an interpretation translates into an interpretation *contra reum* of the criminal national law".
It is important to consider expressions of the same spirit of prudence from the judgments of the Criminal Divisions of the Court of Cassation which, following the indications of the ECJ as to the time when the obligation of conforming interpretation arises,[85] notwithstanding that the latter are not entirely clear in this regard,[86] do not endorse interpretations in accordance with the EU directive on linguistic assistance in trials (not yet transposed into Italian law) on the grounds that the national courts are not required to do so until the time limit for implementation has expired[87]. Even though it must be noted that various judgments of the Civil Divisions of the Court of Cassation – amongst which the important judgment on the burden of proof for the purposes of recognition of the status of political refugee is prominent – assert that the duty of conforming interpretation limits the national courts even when the deadline for implementation of the directive has not yet expired.[88]
Before examining the reasons for such a lack of excesses by the Italian courts within interpretation in accordance with EU law, it must be pointed out that a prudent approach is not always adopted and that there are exceptions. The cases in which judges act on their own bat even when perhaps they should not are however rare, and moreover feature a common characteristic: in support of their bold interpretation of the legislation, the reasons given by the courts refer jointly to at least two, if not all three, reference parameters (constitutional law, EU law and the ECHR).[89]
In other words, it is only the sum total of various converging indications which forms an *explosive mixture*. In cases involving such a convergence of parameters, no form of literal wording will hold good, and the courts will end up construing their duty of conforming interpretation not so much as a procedural obligation but rather as an obligation as to the result.
Emblematic of this issue is the case involving the European arrest warrant which culminated in the 2007 judgment of the Joint Criminal Divisions of the Court of Cassation regarding the rule precluding surrender in cases in which, according to the Italian law implementing the framework decision, no provision was made in the legislation of the issuing State for maximum limits to pre-trial custody.[90] In that judgment, rather than referring a question to the Constitutional Court, as would perhaps have been necessary given the literal wording of the law which appeared to introduce a preclusionary condition not stipulated and hence prohibited under the European legislation,[91] the Joint Divisions interpreted the legislation in conformity with EU law *and at the same time* with Article 5 of the ECHR, as interpreted in the case law of the Strasbourg Court, thereby successfully executing the acrobatic operation of reconciling three different and apparently irreconcilable indications of differing origin and provenance upon application.[92] Moreover, it must be stressed that at the

[85] ECJ, July 4 2006, Adeneler, C-212/04; ECJ, April 23 2009, Angelidaki, cit.

[86] D. Chalmers, G. Davies and G. Monti, *European Union Law*, II ed., Cambridge University Press, 2010, 297-300.

[87] Court of Cassation, III Criminal Division, July 7 2011, no. 26703 and Court of Cassation, I Criminal Division, February 16 2012, no. 10296, both relative to the translation of the sentence.

[88] Court of Cassation, Joint Civil Division, November 17th, 2008, no. 27310. With regard to the latter guidelines, also in reference to other decisions, refer to R. Conti, *La Convenzione europea dei diritti dell'uomo. Il ruolo del giudice*, Roma, 2011, 307 ss.

[89] In this sense S. Cassese, *La giustizia costituzionale in Italia: lo stato presente*, in *Riv. trim. dir. pubbl.*, 2012, 610, which also reports the two examples that I mention in the text.

[90] Court of Cassation, Joint Criminal Division, January 30th, 2007, no. 4614.

[91] This is argued, for axample, by F. Viganò, *Il giudice penale e l'interpretazione conforme alle norme sovranazionali*, cit., 622 and 654.

[92] The decision of the Joint Divisions is very appreciated by R. Mastroianni, *Il dialogo tra la Corte costituzionale e le corti europee: dal conflitto alla contaminazione*, in *Corti europee e corti nazionali*, cit., 414-420, who considers it a sign of "the capacity of our legal system, beyond formalisms, to be open to a common constitutional scope" as well as a demonstration of the fact that, in practice, the case law of Strasbourg plays, in any case, a decisive role.

first opportunity the Constitutional Court approved without hesitation the operation carried out by the Court of Cassation.[93]

However, it is not only the regular courts which consider themselves authorised to carry out death-defying leaps in interpreting the law when more than one reference parameter requires this. One may recall for instance the settled approach within the administrative courts of first instance which – acting in the name of the "principle of effective judicial relief which may be inferred from Article 24 Const. and, more recently, from the case law of the Strasbourg Court in relation to Articles 6 and 13 of the ECHR" – asserts that the court-appointed administrative official must be deemed to be vested with the power to adopt the necessary measures, notwithstanding that the provisions governing competence to issue such measures (such as the power to make changes to the balance sheet entries of the Ministry of Justice in order to comply with the court of appeal's decision ordering the Ministry to pay compensation for the unreasonable length of trials).[94]

Sabino Cassese, a member of the Italian Constitutional Court, has reported other instances of interpretation which simultaneously complies with multiple parameters (including the Constitution, EU law and the ECHR) and comes very close to the correction or setting aside of legislation.[95] He refers in particular to certain judgments – all of the administrative courts – which re-read the provisions on the renewal of residence permits provided for under the consolidated text of the law on immigration, arguing that the failure to comply with the mandatory prerequisites provided for under the law does not automatically justify the refusal to renew, as it is necessary also to assess additional circumstances, including in particular the presence in Italy of underage children,[96] along with the judgment by the ordinary merits courts annulling a decision by the police headquarters to deny a residence card to a non-Community citizen who had married an Italian citizen of the same sex in Spain.[97]

However, we shall endeavour to examine the deep-seated reasons behind the general prudence, or self restraint, displayed by the Italian courts in relation to the interpretation of national law in conformity with EU law or with the ECHR.

In the first place, a cultural factor is certainly significant. In contrast to the position for constitutional law, the courts are not yet perceived as being vested with the front-line task of ensuring at all costs the efficacy of those external provisions, and therefore will not be readily willing to sacrifice their continuing subjection to national law on that particular altar.

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[93] Constitutional Court, order no. 109 of 2008.

[94] The Regional Administrative Court of Campobasso - Molise, Division I, December 2nd, 2011, no. 807, and the case law of the administrative courts of first instance cited therein. The sentence also refers to an infamous, and highly criticized, decision of the Council of State in which the principle of effectiveness of jurisdictional protection was derived from the same conventional norms which in that case, however, the Council of State had declared to be, at that point, "directly applicable within the national system" following the entry into force of the Treaty of Lisbon (Council of State, Division IV, March 2 2010, no. 1220). Similar incorrect statements, however, seem to not have been repeated by the administrative courts, except in another highly criticized decision of the Regional Administrative Court of Lazio and in a few other sporadic occasions. Moreover, and as also recently noted, both the Council of State and the Regional Administrative Court of Lazio – despite their declarations of principle – had not failed to apply specific provisions of internal law on those two occasions but had limited themselves to "supplying an interpretation of national law that is in conformity with ECHR law" (as stated precisely by M. Ramajoli, *Il giudice nazionale e la Cedu: disapplicazione diffusa o dichiarazione d'illegittimità costituzionale della norma interna contrastante con la Convenzione?*, in *Dir. proc. amm*., 2012).

[95] Again S. Cassese, *La giustizia costituzionale in Italia: lo stato presente*, cit., 608-610.

[96] Council of State, Division VI, September 29 2010, no. 7200. Refer also to the less explicit Council of State, Division VI, June 15 2010, no. 3760; Council of State, Division VI, February 26th, 2010, no. 1133; Council of State, Division VI, February 10th, 2010, no. 683; Regional Administrative Court of Tuscany – Florence, division II, March 16th, 2011, no. 462, and see, again, Court of Cassation, III Criminal Division, February 3rd 2010, no. 18527, followed by Court of Cassation, II Criminal Division, January 18th 2011, no. 3607. Within the relevant case law, the convergence of all parameters of reference is often noted, always for the purposes of preventing expulsion, even in different and entirely peculiar circumstances (for example, Court of Novara, March 1st 2010, states that a non-EU female citizen that is married to an Italian but which no longer lives with the latter as a result of abuse on his part retains the right to the issue of a residency permit for an indefinite time period).

[97] Court of Reggio Emilia, I Civil Division, February 13th 2012.

Secondly, with specific reference to EU law, the courts probably consider that the game is not worth the candle, or in other words, that it is not worth engaging in a bold interpretation of national law, up to the limit of setting it aside, in order to ensure that the provisions contained in directives – which in the majority of cases predominantly enhance individual guarantees only in relation to economic rights, and not in relation to fundamental rights – prevail in the specific case.
Thirdly, when on the contrary the external provisions relate to fundamental rights – i.e. the provisions of the European Charter of Fundamental Rights from 1st December 2009 and the ECHR –, the technique of conforming interpretation takes on considerable value for the courts, although continues to be used with prudence. Indeed, if upon a careful assessment of the practicability of conforming interpretation the Italian law appears to remain in breach of the external provision, the principal solution still appears to be a reference to the Constitutional Court, which the regular courts are still more than willing to invoke in order to resolve cases involving fundamental rights in which a margin of uncertainty remains once and for all and with general effects.

10. The crux of the matter. What is the 'European law' which the courts must comply with?

However, in my view there is a fourth and last interesting explanation for the greater prudence, or measured approach, of the regular courts when engaging in conforming interpretation with EU law and ECHR compared to their approach when interpreting in the light of the Italian Constitution. This is a highly significant element, to which however the academic literature has not yet dedicated the necessary attention, and which may be summarised as follows: with regard to interpretation in conformity with EU law and the ECHR, the discretion available to the courts is invariably presented as being significantly more limited compared to the broader discretion which they enjoy when the reference parameter is the Italian Constitution, up to the point of rendering the application of that technique not only less useful, but also less desirable.
It must be recalled that when a regular court engages in a conforming interpretation it always has to face a *duplex interpretation*:[98] that is, the interpretation *both* of the law *and* of the other normative provision to which the court is nonetheless 'subject', and which may from time to time be the Constitution, EU law or the ECHR.
However, it is only in relation to interpretation in conformity with the Constitution that the regular courts are fully entitled to carry out both operations, in the sense that they may actively consider both texts side by side at the same time, up to the point of causing their meaning to converge upon application. In relation to interpretation in accordance with EU law or the ECHR on the other hand, even a single intervention by the Luxembourg Court or the Strasbourg Court prevent the Italian courts from freely carrying out such a comparison, because the meaning of EU law or of the ECHR is already presented as pre-set or is in any case partly determined in advance by the case law of those European courts.
Therefore, it is only with regard to interpretation in conformity with the Constitution that the regular courts may exercise this technique with full flexibility having regard to the requirements of the specific case.[99] On the contrary, as regards interpretation in conformity with EU law or the ECHR, when the competent European court has already passed judgment on the meaning of the reference provision, the task of the regular courts would appear to apply only to the text of the national law, which must therefore be stretched to the extreme limit of its logical and lexical possibilities in such a way as to achieve a result which has already been determined in advance, or regarding the determination of which the courts may exercise only minimal influence. In other words, the attempt at interpretation in conformity with EU law or the ECHR is often a 'one way' operation because it is national law which must be brought into line with European law, and not vice versa. The adaptation which it tends to achieve is unilateral and not reciprocal, because it is the law alone which must be forced to comply with European law, and not the opposite.

[98] This effective expression is by F. Modugno, *Scritti sull'interpretazione costituzionale*, cit., 222.

[99] The fact that the conforming interpretation is the best way to achieve the integration of norms of different origin and their flexibile use is noted by A. Ruggeri, *Interpretazione conforme e tutela dei diritti fondamentali, tra internazionalizzazione (ed "europeizzazione") della Costituzione e costituzionalizzazione del diritto internazionale e del diritto eurounitario*, in *"Itinerari" di una ricerca sul sistema delle fonti. XIV. Studi dell'anno 2010*, Torino, 2011, 298 ss.

Therefore, when applied to EU law and the ECHR, the technique of conforming interpretation ends up losing a significant amount of its flexibility, and also loses its entire appeal for the Italian regular courts: in some cases, the duty of conforming interpretation ceases to be an extraordinary resource and risks turning into a 'vice-like' grip which reins in the court up to the point of almost throttling it.[100]
Such arrangements would appear to be entirely reasonable from the external perspective of the EU or the Council of Europe, because European law ends up being the same for all, as is required by those two European courts. And yet its foundations are however undermined by a concealed *paradox*.
Indeed, the assertion within Italian legal system of a more engrained and insistent version than those commonly accepted under other European legal systems both of the *monopoly on interpretation* of the Luxembourg Court with regard to EU law as well as the *monopoly on interpretation* of the Strasbourg Court with regard to the provisions of the ECHR is due solely to the case law of the Constitutional Court. By contrast – and this is the nub of the paradox[101] – the Italian Constitutional Court does not have a monopoly on the interpretation of constitutional law, first because, contrary to the position of other constitutional courts, no such monopoly is granted under positive law, and secondly because it has never made a serious attempt to impose it on the Italian courts.
If the Italian Constitution is fully open to be shaped by the regular courts upon application, this is due to the structure of relations between the Constitutional Court and the judicial authorities which dates back to the very first interpretative decision of dismissal from 1956 (see above par. 3), in which the Constitutional Court, acting in the face of all of the academic literature at that time, clearly waived its monopoly over the interpretation of the Constitution[102] which had been granted to it alone, rather preferring to share the power to interpret constitutional law for the purposes of its application with the other courts. However, it is also due to the result of the two renowned 'wars' between the Criminal Divisions of the Court of Cassation and the Constitutional Court, occurring at a distance of forty years (the first in 1965, regarding the rights to a defence during the pre-trial summary procedures, and the second, which occurred between 1998 and 2005, regarding the calculation of the maximum time limits for pre-trial custody), that the argument developed within the literature – according to which the Constitutional Court is a 'court of interpretation' on the grounds that it is vested with the power to impose its own interpretations of constitutional law on the other courts within the legal order, with the consequence that once an interpretative decision of dismissal has been adopted, all courts would be under an obligation either to comply with the Constitutional Court's judgment or to propose the question a second time – has been refused twice, and hence now rejected without any possibility of appeal.[103] Therefore, in Italy, an interpretative decision of dismissal by the Constitutional Court does not result in any obligation, not even of the alternative nature referred to above: even after an interpretative decision of dismissal has been adopted, all courts may continue to interpret both the law and the Constitution in an autonomous manner, which accordingly need not coincide with the nonetheless authoritative view proposed by the Constitutional Court.[104]
On the other hand, as regards the strengthening of the interpretative monopoly of the ECJ over EU law, it is sufficient to note that for almost thirty years the Constitutional Court has recognised its judgments as 'sources' of EU law vested with direct effect, which are accordingly binding upon all Italian courts,[105] even

[100] M. Bignami, *L'interpretazione del giudice comune nella "morsa" delle corti sovranazionali*, in *Giur. cost*., 2008, 594 ss.

[101] The cue in this sense is derived from V. Valentini, *Legalità penale convenzionale e obbligo d'interpretazione conforme alla luce del nuovo art. 6 Tue*, in *Dir. pen. contem*, no. 2/2012, 18. A similar mindset is found in M. Bignami, *L'interpretazione del giudice comune nella "morsa" delle corti sovranazionali*, cit., 605 and 612.

[102] F. Bonifacio, *Corte costituzionale e autorità giudiziaria*, in *Riv. dir. proc*., 1967, 246.
[103] L. Elia, *Sentenze «interpretative» di norme costituzionali e vincolo dei giudici*, in *Giur. cost.,* 1966, 1718 ss.; Id., *Gli inganni dell'ambivalenza sintattica*, in *Giur. cost*., 2002, 1051; but refer also to A. Pizzorusso, *La motivazione delle decisioni della Corte costituzionale: comandi o consigli?*, in *Riv. trim. dir. pubbl*., 1963, 406.
[104] This is what occurred - during the course of the war between the two courts – with the two decisions of the Criminal Division of the Court of Cassation which, by contesting the possibility to utilize the conforming interpretation, forced the Constitutional Court to 'surrender', i.e. to adopt a declaration of constitutional illegitimacy of the law instead of an interpretative decision of dismissal (Court of Cassation, I Criminal Division, April 28 1965, Garbuglia, followed by Constitutional Court, sentence no. 52 of 1965; and Court of Cassation, Joint Criminal Division, May 17th, 2004, Pezzella, followed by Constitutional Court, sentence no. 299 of 2005).
[105] Constitutional Court, sentence no. 113 of 1985; sentence no. 389 of 1989; order no. 132 of 1990; sentence no. 168 of 1991; no. 285 of 1993; order no. 255 of 1999; order no. 62 of 2003; sentence no. 227 of 2010.

though their legal effect outwith the proceedings in relation to which the case was referred is still undoubtedly disputed within the Italian and European literature.[106]

As regards the interpretative monopoly of the European Court of Human Rights over the ECHR, here too, against the backdrop of European literature which is extremely divided and given the silence of ECHR case law on this matter, the Constitutional Court initially endorsed this monopoly – and subsequently reiterated, starting from the 'twin judgments' from the end of 2007 – in its most blind form,[107] inferring an absolute interpretative obligation from the case law of the Strasbourg Court, which applies to all national judicial bodies, including the Constitutional Court.[108]

However, the adoption of this stance, which should be defined as a genuine choice over judicial policy, was recommended – or almost imposed – on the Italian Constitutional Court by significant opportunity considerations. In fact, the 'twin judgments' from the end of 2007 represented the first genuine occasion on which the Italian Constitutional Court had the opportunity to lay the basis for its relations with the European Court of Human Rights and its case law. But the other stances adopted in the Constitutional Court's judgments certainly did not help in the construction of a sound relationship for the future, and in fact amounted to a terrible start. Indeed, in those two judgments the Constitutional Court on the one hand asserted the prohibition to apply the ECHR provisions instead of the internal provision which conflict with them; and, in doing so it ignored the hopes expressed by the Strasbourg Court itself and the other bodies of the Council of Europe, which consider that the best way to implement Convention rights – although it is certainly not the only way available to the contracting States – is to incorporate the ECHR into the internal legal order, favouring its direct application by the national courts. On the other hand, again in those two inaugural judgments, the Constitutional Court chose to relegate the ECHR to a subordinate position compared to the Constitution and to subject it to full constitutional review before it, thereby following a head-on collision course with the other powerful aspiration of the organs of the Council of Europe to construct a European public order of fundamental rights overarching national constitutions, and presided over by the Strasbourg Court.

Therefore, in order to offset at least partially the other two choices which would certainly not be approved by the European Court, at their first encounter the Italian Constitutional Court could not have done anything

[106] For references see note 45 above.

[107] Many authors had expressed perplexities regarding the absolute nature of this interpretative obligation proclaimed by the Constitutional Court between 2007 and 2011 or, in any case, had noted that the Constitutional Court should have at least distinguished - with regard to their effects - between the decisions made by the European Court with respect to Italy and those made with respect to other member State of the Council of Europe, or between those which were non-definitive and those made definitive by the Grand Chamber, or even between the consolidated guidelines of the case law of Strasbourg and those being formed or critiqued through dissenting opinions of the same judges of Strasbourg. This mindset is applied at least by M. Bignami, *L'interpretazione del giudice comune nella "morsa" delle corti sovranazionali*, cit., in particular 616 ss.; Id., *Costituzione, carta di Nizza, Cedu e legge nazionale: una metodologia operativa per il giudice comune impegnato nella tutela dei diritti fondamentali*, in *Rivista AIC*, no. 1/2011, 12-13; R. Calvano, *Dopo Lisbona, il dialogo tra le Corti e l'attesa di un recupero del ruolo della politica*, in *Studi in onore di Franco Modugno*, cit., III, 451; S. Campailla, *L'obbligo di interpretazione conforme tra diritto dell'Unione europea, Convenzione europea dei diritti dell'uomo e ruolo della Corte di Strasburgo*, in *Proc. pen e Giust.*, 2012, 104 ss.; E. Cannizzaro, *Il bilanciamento fra diritti fondamentali e l'art. 117, 1° comma, Cost.*, in *Riv. dir. internaz.*, 2010, 128 ss.; Id., *Diritti "diretti" e diritti "indiretti": i diritti fondamentali tra Unione, Cedu e Costituzione italiana*, in *Dir. Un. Eur.*, 2012, 28; A. Cardone, *Diritti fondamentali (tutela multilivello dei)*, in *Enc. dir.*, IV Annali, Milano, 2011, 389; M. Cartabia, *Le sentenze "gemelle": diritti fondamentali, fonti, giudici*, in *Giur. cost.*, 2007, 3573; F. Donati, *La Cedu nel sistema italiano delle fonti del diritto alla luce delle sentenze della Corte costituzionale del 24 ottobre 2007*, in *I diritti dell'uomo: cronache e battaglie*, 2007, 3 and 17; R. Conti, *La Convenzione europea dei diritti dell'uomo. Il ruolo del giudice*, cit., 236 ss.; Ferrua, *L'interpretazione della Convenzione europea dei diritti dell'uomo e il preteso monopolio della Corte di Strasburgo*, in *Proc. pen e giust.*, 2011, in particular 120 ss.; Gaeta, *Dell'interpretazione conforme alla Cedu: ovvero, la ricombinazione genica del processo penale*, cit., 83 ss.; A. Guazzarotti, *Precedente Cedu e mutamenti culturali nella prassi giurisprudenziale italiana*, in *Giur. cost.*, 2011, 3790-3793; E. Lamarque, *Il vincolo alle leggi statali e regionali derivante dagli obblighi internazionali nella giurisprudenza comune*, in *Corte costituzionale, giudici comuni e interpretazioni adeguatrici*, cit., in particular 177 ss.; M. Luciani, *Alcuni interrogativi sul nuovo corso della giurisprudenza costituzionale in ordine ai rapporti fra diritto italiano e diritto internazionale*, in *Corr. giur.*, 2008, 204; L. Montanari, *Interpretazione conforme e Convenzione europea dei diritti dell'uomo e canoni di proporzionalità e adeguatezza*, in *Interpretazione conforme e tecniche argomentative*, cit., 491; M. D'Amico, *Interpretazione conforme e tecniche argomentative*, *ivi*, 522; F. Sorrentino, *Apologia delle "sentenze gemelle" (brevi note a margine delle sentenze nn. 348 e 349/2007 della Corte costituzionale)*, in *Dir. soc.*, 2009, 219.

[108] Constitutional Court, sentences no. 348 and no. 349 of 2007, cit. See G. Martinico and O. Pollicino, *Report on Italy*, in *The National Judicial Treatment of the ECHR and the EU Laws. A Comparative Constitutional Perspective*, edited by G. Martinico e O. Pollicino, Groningen, Europa Law Publishing, 2010, 281 ss.; G. Martinico e O. Pollicino, *The Interaction between Europe's Legal Systems*, Edward Elgar Publishing, Cheltenham, 2012, 19 ss. and *passim*.

other than what it did:[109] offer them in exchange for an absolute monopoly of interpretation over the ECHR on a silver platter, renouncing in its own right and on behalf of all Italian courts any fanciful claim to be able to interpret the provisions of the ECHR on national level.[110]
It was clear that such a rigidly servile position to the case law of another court could not stand up for long on the facts, or in concrete application. However, even its very formulation was destined to be reviewed and tempered. Indeed, after only two years, in view of the continuing growth in requests from the regular courts to rule Italian legislation unconstitutional due to the failure to comply with various judgments or various approaches adopted by the European Court of Human Rights, the Constitutional Court found itself forced first to correct its aim somewhat, referring in its 'grown-up twin judgments' from the end of 2009 to a margin of discretion vested in the Constitutional Court when assessing the impact of ECHR provisions on the Italian legal system (according to which the provisions of the ECHR were to be weighed up against the provisions of the Constitution, in order to ensure that the entry into national law of ECHR provisions would not result in a overall regression, rather than an overall increase, in the level of protection of rights already available under Italian constitutional law).[111] However – it is important to note – at the end of 2009 the Constitutional Court was still repeating that it did not have any say in the matter with regard to the determination of the contents of the ECHR provisions.
It has only been since the middle of 2011 that the Constitutional Court has appreciated that the course of events has required it to backtrack. This occurred for various reasons, although the decisive feature was probably the awareness that a particular category of laws which is frequently used in Italy – in order to remedy chaotic legislation, to put a brake on contradictory litigation on a significant scale, and to contain the chasms which have opened up in the public finances due precisely to the chaotic state of legislation and the related litigation – namely laws of 'authentic interpretation', would have to be ruled unconstitutional on a systematic scale if the interpretation of Article 6 of the ECHR as provided by the Strasbourg Court was to be followed to the letter.
Thus, at a distance of around four years from its first encounter with the Strasbourg Court, the Italian Constitutional Court has in part taken back its romantic promise of absolute loyalty to European Case law, and has finally asserted its power to exercise that famous "margin of appreciation and of adaptation which enables it to take account of the specific characteristics of the legal order into which the Convention provision is destined to be incorporated" when assessing the Strasbourg case law which is relevant for any given Convention provision.[112] It therefore expressly stated that, whilst it was unable to "disregard the interpretation provided by the Strasbourg Court to a provision of the ECHR", it can "nonetheless *in turn interpret it*, although naturally in substantive accord with the European case law on that matter"[113] (italics added).
There are at least two positive consequences of the new more uninhibited approach in the case law of the Constitutional Court which enables the Italian courts to adopt a position on the very scope and content of the ECHR provisions.

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[109] Constitutional Court, sentences no. 348 and no. 349 of 2007, cit. With regard to the reasons which led the Constitutional Court to formulate a similar constraint: Ferrua, *L'interpretazione della Convenzione europea dei diritti dell'uomo e il preteso monopolio della Corte di Strasburgo*, cit. 122, A. Ruggeri, *Interpretazione conforme e tutela dei diritti fondamentali, tra internazionalizzazione (ed "europeizzazione") della Costituzione e costituzionalizzazione del diritto internazionale e del diritto eurounitario*, cit., 308 and E. Lamarque, *Il vincolo alle leggi statali e regionali derivante dagli obblighi internazionali nella giurisprudenza comune*, cit., 183 ss.

[110] And hence giving up a genuine share of its sovereignty to ECHR and to the Court of Strasbourg, given that – as has been correctly pointed out by M. Luciani, *Alcuni interrogativi sul nuovo corso della giurisprudenza costituzionale in ordine ai rapporti fra diritto italiano e diritto internazionale*, in *Corr. giur.*, 2008, 203; Id., *Costituzione, integrazione europea, globalizzazione*, in *Quest. giust.*, 2008, 77 – one of the typical prerogatives of sovereignty is that every national State vests the power of interpretation over its own laws in its own courts.
[111] Constitutional Court, sentences no. 311 and no. 317 of 2009, cit.

[112] Constitutional Court, sentence no. 236 of 2011, par. 9.

[113] Constitutional Court, sentence no. 303 of 2011, par. 4.2. (about it A. Bonomi, *Brevi note sul rapporto fra l'obbligo di conformarsi alla giurisprudenza della Corte di Strasburgo e l'art. 101, c. 2 Cost. (… prendendo spunto da un certo mutamento di orientamento che sembra manifestarsi nella sentenza n. 303 del 2011 Corte cost.)*, in *Consulta online*, April 5 2012). Refer also to Constitutional Court, sentence no. 15 of 2012 and decree no. 150 of 2012.

On the external level, the Italian legal system is finally in a position to be able to participate, above all through the contribution of its higher courts, including first and foremost the Constitutional Court, in the fundamental project pursued by the Strasbourg Court of ensuring that the text of the ECHR may keep pace with current circumstances, and providing to that effect the full precious heritage of the Italian tradition. This is a fundamental operation, which the 'twin judgments' from 2007 would have prevented, but which notwithstanding the prohibition the regular courts, and in particular the Court of Cassation, had continued to pursue by devising a kind of 'adherence subject to reservation' to the interpretative monopoly of the Strasbourg Court, with the goal of attempting to reshape the international law obligation taking account of the particular characteristics of the national legal system which may have been ignored or disregarded by the European Court. The most important example of this mode of operation was the 'negotiation' successfully conducted with the European Court by the Court of Cassation regarding the contents of the ECHR provision on the reasonable length of trials, which had as its final result the imposition of the Italian solution contained in the "Pinto Law", which provides that compensation is due not in respect of the full duration of any trial which has been excessively long, as desired by Strasbourg, but rather only the years in excess of the reasonable length.[114]

The hope that the national supreme courts will play an active role in the development of the ECHR by proposing innovative readings, rather than at all times passively submitting to the leadership of the Strasbourg Court, has moreover recently been asserted not only by scholars,[115] but also by the President of the European Court himself, Jean-Paul Costa, who has recalled on various official occasions during the last years of his mandate that the European Court has often been inspired or influenced by high-profile national judgments,[116] and has often reached further by asserting that, as a matter of principle, *it is for the national courts to interpret the ECHR*, albeit under the ultimate supervision of the European Court.[117]

It is not about, as some may fear, pushing national judges to castle themselves on the constitutional chessboard,[118] but rather about asking them to be courageous in bringing to the attention of the Strasbourg Court not only the point of view of the Italian legal tradition but also the extraordinary wealth of its balancing operations, since otherwise – as we well know –that tradition will not have 'advocates' at Strasbourg who are equally capable of supporting and defending it as the national supreme courts are.

On the internal level, on the other hand, the recovering of a margin of discretion in reading the ECHR provisions certainly legitimises a better, albeit more frequent, use of the technique of conforming interpretation by the judicial authorities: a contrast between the provisions of a national law and of the ECHR, indeed, may be excluded or remedied by the Italian courts through interpretation by working simultaneously on two normative fronts, as currently occurs with regard to interpretation in conformity with the Constitution, that is not only by bringing the meaning of the statute law close to that of the ECHR, but also vice versa, by granting the ECHR a meaning which takes account *both* of the case law of the Strasbourg Court *as well as*

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[114] The event is described in E. Lamarque, *Il vincolo alle leggi statali e regionali derivante dagli obblighi internazionali nella giurisprudenza comune*, cit., 141 and 170 ss.; refer to this text for all references. Here it is sufficient to note that the sentence which marks the 'surrender' of Strasbourg before the Italian Court of Cassation is the ECHR, March 31st 2009, Simaldone vs. Italy, no. 22644/03 (in particular par. 30). As of this date, there are dozens of decisions of legitimacy by the Italian courts which confirm their previously victorious case law. Some of these numerous decisions tend to specify that, if a court deems the Pinto law to be in conflict with the ECHR, it should not however follow the path of disapplication, but rather that of raising the question of constitutional legitimacy (for example Court of Cassation, I Civil Division, February 1st2011, no. 2388); others, on the other hand, explicitly note that the Court of Strasbourg, by means of the Simaldone case, had agreed with the Court of Cassation by recognizing that the differing position of the Italian judge on the extent of the conventional obligation "is correlated to a margin of appreciation that each nation adhering to the ECHR has at its disposal; each of these nations can create legal protection that is consistent with its own legal system and its traditions, in compliance with the quality of life of the country" (Court of Cassation, I Civil Division, May 17th 2012, no. 7767).

[115] E. Bjorge, *National Supreme Courts and the Development of ECHR Rights*, in *ICON* (2011), Vol. 9 No. 1, 5 ss. and in particular 30.

[116] J. Costa, *Concluding Remarks on the Future of the Strasbourg Court*, in *The Italian Yearbook of International Law*, Vol. XX (2010), 196.

[117] J. Costa, *On the Legitimacy of the European Court of Human Rights' Judgments*, in *European Constitutional Law Review,* 7, 2011, 179.

[118] The fear of a similar "defensive act of protection" on the part of Italian case law - despite positively evaluating the more cooperative, rather than conflicting, approach of the Constitutional Court – can be found in V. Manes, *I principi penalistici nel* network *multilivello:* judicial transplant*, palingenesi,* cross-fertilization, in *Riv. it. dir. proc. pen*, 2012 (at the end of paragraph 4).

requirements internal to the legal system. This has the result of enabling the "natural vocation of normative materials relating to individual rights … to incorporate into and support one another reciprocally in interpretation" to be implemented to the full.[119]
Moreover, it was genuinely appropriate for the Constitutional Court to end up, as it did so, granting the judgments of the Strasbourg Court a lower 'weight' vis-à-vis the Italian courts than the judgments of the Luxembourg Court. Leaving aside all theoretical and systematic considerations relating to the different role which each of the two European courts plays within its own system, which it is not appropriate to discuss here, it is sufficient to recall that the ECHR constitutes a loose-fitting legal system, whilst EU law – including both treaty law and secondary law – is always structured according to a more dense and stringent plan. Therefore, much more space may be filled by the discretionary acts of the Strasbourg Court, whilst on the other hand the space available to the Luxembourg Court is much more limited.
Consequently, it is entirely reasonable to prevent the Italian courts from remaining under the sway of a highly discretionary case law which essentially lacks textual references (i.e. the Strasbourg case law on the ECHR); and to accept, by contrast, that it is dependent on a case law which intervenes 'surgically' on the meaning of the provisions of supranational law, moreover only when the national courts themselves consider this necessary (i.e. the case law of the Luxembourg Court on EU law).

[119] A. Ruggeri, *Alla ricerca del fondamento dell'interpretazione conforme*, in *Interpretazione conforme e tecniche argomentative*, cit., 398 and *passim*.