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Italy

Constitutionally Conforming Interpretation and Judicial Dialogue

CHIARA VALENTINI*

I. INTRODUCTION

CONFORMING INTERPRETATION, IN broad terms, demands that the interpretation of a legal norm is compatible with a provision that has a different origin and basis of legitimation than those of said norm.¹ Accordingly, *constitutionally* conforming interpretation (hereinafter CCI) requires that the interpretation of ordinary laws conforms to the Constitution and, if their wording allows for more than one interpretation, it requires that the interpreter favours the interpretation that is most in line with the Constitution. As such, CCI functions to unify² two normative levels: the level of ordinary laws and the level of the Constitution. Thus, it boils down to a two-tiered interpretation, the interpretation of the ordinary law to be applied to a certain case *and* the interpretation of the Constitution to which such law should conform.

In the Italian constitutional system, courts do not have a legal obligation to engage in CCI. However, the Italian Constitutional Court has progressively established a duty for ordinary judges to perform CCI as a condition for admitting the

*I wish to thank José Juan Moreso, Corrado Caruso and Matthias Klatt for helpful discussions and suggestions on the topics addressed in this chapter.

¹Elisabetta Lamarque, 'The Italian Courts and Interpretation in Conformity with the Constitution, EU Law and the ECHR' (2012) 4 *Associazione Italiana dei Costituzionalisti* 1, 1, drawing on Massimo Luciani, 'Le funzioni sistemiche della Corte costituzionale, oggi, e l'interpretazione conforme a' (2007) *Foro amministrativo TAR* 7, 7–8.

²Lamarque (n 1) 1, defines conforming interpretation as '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'.

questions of constitutional legitimacy that those judges raise before the Court. As the Court stated in a landmark decision: ‘in principle, laws are not declared constitutionally illegitimate because it is possible to give them unconstitutional interpretations, but rather because it is impossible to give them an interpretation in conformity with the Constitution’.³ This position is the result of an evolution in the approach of the Italian Constitutional Court to CCI. In a first phase, the Court did not delegate CCI to ordinary judges but kept for itself the role of main interpreter of the Constitution.⁴ In a second phase, the Court started to set a requirement of CCI for ordinary judges and, at the same time, to abide by the limits posed by the living law to its own interpretation, that is, the limits set by the interpretation of ordinary laws given by ordinary judges and by the Supreme Court (Corte di Cassazione). Then, in a third phase, the Constitutional Court has strongly favoured, if not imposed, the use of CCI by ordinary judges. The result is that the practice of CCI has been firmly established among ordinary judges, along with an intense interaction among those judges and the Constitutional Court in the interpretation of the Constitution. Currently, the Court has begun pursuing a central role, again, in the exercise of CCI, changing the approach established so far.

Be that as it may, CCI has been highly controversial and widely debated in Italy. First, it is controversial whether CCI is legitimate and, if so, whether it should be obligatory for ordinary judges. Second, there is no agreement as to what form CCI should take in practice, that is, the instruments that the Court and ordinary judges should adopt so as to interact in the performance of CCI. Third, and relatedly, it is widely discussed whether CCI has a legitimate impact on the system of concentrated constitutional review and, more specifically, on the interaction between the Constitutional Court and ordinary judges.

The present chapter addresses these key issues, providing an overview of the evolution and key features of CCI in the Italian system. The analysis is divided into six further sections that follow this introduction. Section II introduces the topic and sections III and IV outline the main features of CCI in the Italian legal system, with a focus on the system of constitutional justice. Section V illustrates the main phases in the evolution of CCI in the Italian system. Section VI addresses the most controversial aspects of CCI, concerning the terms in which the Constitutional Court should interact with ordinary judges, through CCI and the impact of CCI on the concentrated system of judicial review adopted in Italy. Section VII concludes.

II. CCI AS A CANON OF INTERPRETATION IN THE ITALIAN LEGAL SYSTEM

CCI is an interpretative canon requiring to give ordinary laws a meaning that conforms to the Constitution. Therefore, according to this canon, ‘when two interpretations are possible, one that conforms to the constitution, the other that doesn’t, the judge must follow the first interpretation’.⁵

³ Corte Cost. n. 356/1996.

⁴ Corte Cost. 3/1956 and 8/1956 clearly establish this central role of the Court.

⁵ Giusi Sorrenti, *L’interpretazione conforme a Costituzione* (Milano, Giuffrè, 2006) 5.

According to some readings, conforming interpretation is, more precisely, an interpretative meta-canon,⁶ while for others it is an interpretative canon that, based on the supremacy of constitutional norms, directly determines the meaning of lower-level norms, prevailing over other canons (and differing from them, even from the canon of systematic interpretation).⁷ Ultimately, the former view seems to be dominant,⁸ framing CCI as a meta-criterion requiring to choose among different possible readings – produced according to different interpretative canons – the one that conforms to the Constitution. In these terms, CCI guides the interpreter by indicating the meaning that should prevail over others in negative terms. It allows for various unconstitutional interpretations to be sifted out, but it does not allow to identify, in positive terms, a single right answer among different possible answers.⁹ As pointed out by Klatt, the use of CCI requires that ‘at least one interpretation variant must violate the constitution’ and ‘at least one interpretation variant must conform to the constitution’.¹⁰

As such, CCI is a ‘duplex interpretatio’,¹¹ having a comparative nature insofar as it is focused on the connection – and relation of correspondence – between ordinary laws and constitutional norms in a legal system. In CCI, this connection is hierarchical, that is, linking the meaning of ordinary, lower-level, norms to the meaning of the constitutional, higher-level, norms.

CCI allows to adapt the meaning of the former to the meaning of the latter, being a form of systematic interpretation, understood as a framework that brings together different interpretative techniques aimed at preserving the unity of the *system* of norms in which the norm subject to interpretation is embedded. As such, systematic interpretation is not a unitary technique, but rather a *family* of different techniques, which all rely on the systematic structure of the law in ascribing a meaning to legal norms.¹²

Traditionally, in fact, CCI relies on a view of the law as a system of norms¹³ in which antinomies must be handled according to criteria aimed at preserving the

⁶This view points to the distinction between two levels of interpretative argumentation. A first level on which interpretative arguments are provided in order to justify the ascription of a certain meaning to a legal norm, and a second level on which interpretative arguments are provided in order to justify the use of certain arguments on the first level, rather than others. CCI, according to this distinction, would operate on the second level. For this distinction, see Jerzy Wróblewski, *The Judicial Application of Law* (Dordrecht, Kluwer, 1992) 61ff.; Riccardo Guastini, *Nuovi studi sull’interpretazione* (Roma, Aracne, 2008) 35ff; Pierluigi Chiassoni, *Tecnica dell’interpretazione giuridica* (Bologna, Il Mulino, 2007); Damiano Canale and Giovanni Tuzet, *La giustificazione della decisione giudiziale* (Torino, Giappichelli, 2019) 70–72; Giorgio Pino, *L’interpretazione nel diritto* (Torino, Giappichelli, 2021).

⁷An overview of the different arguments is provided by Giuseppe Laneve, ‘L’interpretazione conforme a Costituzione: problemi e prospettive di un sistema diffuso di applicazione costituzionale all’interno di un sindacato (che resta) accentrato’ (2011) 17 *federalismi.it* 1, 1–37.

⁸Laneve (n 7) 10; Andrea Pugiotto, ‘La metamorfosi delle sentenze interpretative di rigetto’ (2005) 65 *Il Corriere Giuridico* 501.

⁹Matthias Klatt, ‘The Legitimacy of Constitutionally Conforming Interpretation’ in this volume.

¹⁰Klatt (n 9) 11–12. Besides these conditions, Klatt notes two other conditions, the ambiguity of the norm to be interpreted and the condition according to which the conforming interpretation must not ‘rewrite’ the whole content of the norm.

¹¹Franco Modugno, ‘Sul problema dell’interpretazione conforme a Costituzione: un breve excursus’ (2010) 8 *Giurisprudenza italiana* 1961, 1963.

¹²Pino (n 6) 295–96.

¹³Sorrenti (n 5) 8–9. For the view of CCI as a form of systematic interpretation – which is dominant in the Italian legal doctrine – see Roberto Bin, ‘L’interpretazione conforme, due o tre cose che so di lei’ (2015) 1

structure of that system, based on the hierarchical order of the sources from which the norms that belong to such a system derive. This view, more precisely, requires preserving the unity of the system by avoiding internal conflicts among the components of the system, namely, antinomies understood as conflicts among norms that boil down to relations of ‘non-conformity’ – in terms of ‘opposition’ and in terms of ‘contradiction’ – between them.¹⁴

In this respect, however, a question arises as to the terms in which the quest for the unity of the legal system – and the avoidance of antinomies – legitimately impacts on the interpretation of legal norms. More specifically, there is the question of whether the quest for unity of the legal system requires legal interpreters to engage in CCI, and adapt the meaning of lower-level norms to that of higher-level norms so that the meaning of the former is not in conflict with the meaning of the latter.¹⁵

In the Italian legal system, there is no explicit statement concerning the primacy of this type of interpretative instrument over other instruments that can be used to solve antinomies.¹⁶ The Constitutional Court has introduced CCI in the interpretative practice through – and along with – the interpretative judgments of rejection (*sentenze interpretative di rigetto*) – and, then, it has gradually established a strong favour for this canon of interpretation. As we shall see, CCI has become increasingly widespread and relevant in the interpretative practice, with the Constitutional Court requiring ordinary judges to conform their reading of ordinary laws to the Constitution.¹⁷

As such, CCI has been guiding legal interpretation on two levels. On a first level, it guides the interpretation of ordinary laws, requiring the interpreter to adapt their meaning to the meaning of constitutional norms; on a second level, then, CCI bears on the interpretation of the Constitution. In fact, conforming interpretation requires to shed light on the meaning of constitutional norms and to conform to such meaning the interpretation of ordinary laws. By way of this process, the Constitution feeds into the reading of ordinary laws while, at the same time, ordinary laws feed into the reading of constitutional norms.¹⁸

On both levels, CCI raises controversial questions. First, it raises the question of whether, and to what extent, ordinary judges should engage in CCI. Especially in constitutional systems with concentrated judicial review, like the Italian system, one of the most controversial issues concerns the legitimacy of CCI performed by ordinary judges and its impact on the interpretative activity undertaken by the Constitutional Court in the exercise of judicial review. In this regard, a crucial turning point in the evolution of CCI, in the Italian system, is marked by the decision no. 356 of 1996

Rivista Associazione Italiana Costituzionalisti 1, 1–13; Antonio Ruggeri, ‘L’interpretazione conforme e la ricerca del “sistema di sistemi” come problema’ (2014) 2 *Rivista Associazione Italiana Costituzionalisti* 1, 1–18.

¹⁴ See, for all, Norberto Bobbio, *Teoria generale del diritto* (Torino, Giuffrè, 1993) and Norberto Bobbio, ‘Antinomia’, in Antonio Azara and Ernesto Eula (eds), *Novissimo digesto italiano* (vol I, Torino, UTET, 1957) 667ff.

¹⁵ Sorrenti (n 5) 10–11.

¹⁶ Sorrenti (n 5).

¹⁷ See Corte Cost. n. 8/1956.

¹⁸ Giuseppe U Rescigno, ‘Interpretazione costituzionale e positivismo giuridico’ (2005) 11 *Diritto pubblico* 19, 19–48; Laneve (n 7) 7–8.

of the Italian Constitutional Court. With this decision, the Court established that it does not ‘declare a law constitutionally illegitimate if it is possible to give an unconstitutional interpretation of it’, but rather ‘if it is impossible to give a constitutional interpretation of it’. In these terms, the Court introduced a requirement for ordinary judges to seek the constitutional interpretation of the norms to be applied to concrete cases, that is, to interpret such norms in accordance with the Constitution. The establishment of this requirement results from a long judicial path in which, as we will see, the favour of the Constitutional Court for CCI has gradually emerged.

Second, CCI raises the question of the terms in which the Constitutional Court, engaging in CCI, should impact on – and borrow from – the interpretative activity of ordinary judges. In this regard, the Italian Court has progressively established a doctrine of living law according to which the Court should take into account the interpretation of ordinary judges in its own interpretative activity and CCI. Furthermore, as we will see, the Court has used the interpretive judgments of rejection to establish a dialogue with ordinary judges, with regard to conforming interpretation, fostering interpretative pluralism in the system.

Ultimately, CCI raises the difficulty of combining different, and potentially conflicting, levels of interpretation, namely, the level of the interpretation performed by ordinary judges and the level of the interpretation performed by the Constitutional Court. Nonetheless, CCI has become a central component of the interpretative practice of both the Constitutional Court and ordinary courts, serving as the main instrument to address conflicts among norms and thereby preserve the unity of the system,¹⁹ as part of a broader practice of conforming interpretation that also concerns other normative levels. Let me briefly outline how this practice connects the level of ordinary laws with the level of administrative acts, as well as the level of ordinary laws with the level of EU law.

In the first respect, a strong preference for conforming interpretation is emerging from the jurisprudence of administrative courts in the Italian legal system, according to which

regulatory norms of execution must be interpreted in close connection with the legislative provisions to whose execution they are preordained; therefore, where the possibility of a non-univocal interpretation of the regulatory provision arises, we must necessarily ascribe to it the meaning that does not conflict with the legislative provision on which it is based.²⁰

The Constitutional Court has endorsed this approach, stressing that ‘legal acts, subordinate to ordinary laws, must be interpreted so as to adapt, as far as possible, their meaning to the laws in force’, based on the idea that the legal system must be a unitary totality and in light of the principle of preservation of legal acts.²¹ In this interpretative domain, however, the problem of shifting competences with respect to resolving conflicts between ordinary laws and the Constitution – which arises in the case of CCI – does not arise.

¹⁹ Sorrenti (n 5).

²⁰ Cons. Stato n. 207/1968, in Cons.Stato, 1968, I, 416, as discussed by Sorrenti (n 5) 29.

²¹ sent. 599/1988.

In the second respect, conforming interpretation is also extremely relevant, playing a central role in the interaction between national law and EU law.²² Article 117 of the Italian Constitution establishes 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’. The norms of EU law, thus, prevail over national ordinary laws and, therefore, the interpretation of the latter must conform to the former. This type of conforming interpretation can combine, and/or overlap, with CCI. According to the Italian Constitutional Court, in case of conflict between the readings resulting from these two types of conforming interpretation, the reading based on CCI should prevail over the reading based on the interpretation conforming to EU law.²³

With two decisions in 2007,²⁴ the Constitutional Court established that the interpretation of ordinary laws should also conform to the European Convention, given its place in the hierarchy of legal sources.²⁵ Indeed, according to Article 117 of the Italian Constitution, the European Convention is a legal source interposed between the Constitution and ordinary law. On this basis, the Constitution is a hierarchically superior legal source with respect to the Convention and ordinary laws are hierarchically inferior sources with respect to the Convention. These hierarchical relations impact on legal interpretation, requiring that the interpretation of ordinary laws conforms to the Convention as well as to the Constitution. In case of doubts about the compatibility of a norm with ‘the norms of the ECHR, as interpreted by the European Court and serving as legal sources that integrate the standard of constitutionality established by art. 117, paragraph 1 of the Constitution’, a question of constitutional legitimacy can be raised before the Constitutional Court; more precisely, a question concerning the conformity of the norm at stake with the Convention and – at a higher level in the hierarchy of legal sources – with Article 117 of the Constitution through which the Convention enters the Italian legal system. Accordingly, when interpreting the domestic norm, the ordinary judge should do so in way that adheres to the international provision, within the bounds set out in the text. If this is not feasible, or the domestic norm is deemed to be incompatible with the Convention, the judge will refer the question of constitutional legitimacy to the Court, in accordance with Article 117 of the Constitution.²⁶

Along these lines, the Constitutional Court’s decisions have been downplaying the relevance of the interpretation in conformity with the ECHR that has become a type of conforming interpretation that is residual with respect to CCI. Indeed, ordinary judges cannot apply the European Convention directly and, furthermore, such law – and the principles elaborated by the European Court of Human Rights – cannot find application if not compatible with the Constitution.²⁷ Ordinary judges, indeed, enjoy

²² See, among others, Corrado Caruso, ‘Il “posto” dell’interpretazione conforme alla Cedu’ (2018) 63/4 *Giurisprudenza costituzionale* 1985, 1985–2000; and Lamarque (n 1).

²³ See Gaetano Silvestri, ‘La Corte costituzionale nella svolta di fine secolo’ in Luciano Violante and Livia Minervini (eds), *Storia d’Italia. Annali. 14, Legge, diritto, giustizia* (Torino, Einaudi, 1998) 948ff, on the applicability of Community law rules, and Bin (n 13).

²⁴ Corte Cost. n. 348/2007, n. 349/2007.

²⁵ Caruso (n 22).

²⁶ As established by the Constitutional Court with decision n. 349/2007.

²⁷ *ibid.*

a wider margin of manoeuvre with regard to conforming interpretation in the case of norms of EU law, directly applicable in the domestic system.

III. CCI IN THE ITALIAN SYSTEM OF CONSTITUTIONAL JUSTICE

In the Italian system, the Constitutional Court is the only institution entrusted with the task of reviewing the constitutional legitimacy of laws and, thereby, plays a central role in the domain of legal interpretation. Nonetheless, in this domain the action of the Court combines with the action of ordinary judges, through mechanisms that entrust the latter with the task of raising questions of constitutional legitimacy before the Court. These mechanisms generate an interaction among the Court and ordinary judges that fosters interpretative pluralism. This pluralism, on the one hand, contributes to make the legal system ‘dynamic and open’ to different interpretations, but, on the other, it must be somehow ‘governed by constraining the relation between ordinary judges and the Court’ so as to ensure that the latter and judicial review exert their authority and provide ‘closure to the legal order’ and ensure legal certainty.²⁸ With this in mind, let me outline the main features of the Italian system of constitutional justice before analysing the foundations and role of CCI within such system.

The Italian system of constitutional justice is a hybrid of two models, namely, the concentrated model and the diffuse model of judicial review. In the former, only one judicial institution – a Constitutional Court – has the authority to review the constitutional legitimacy of legal norms and declare their unconstitutionality. In the latter, such authority is shared by many and different judicial institutions reviewing the constitutionality of the norms that they apply in the exercise of their functions at the various levels of the system.

In the Italian system, the judicial review is concentrated,²⁹ but in weak terms. Only the Constitutional Court can scrutinise the constitutional legitimacy of ordinary laws, in both direct and incidental terms. On the one hand, public bodies, such as Regions, can challenge the constitutionality of ordinary laws before the Court. On the other hand, ordinary judges can challenge the legitimacy of ordinary laws when they have doubts about the legitimacy of a norm that they should apply to a case. Individuals, by contrast, cannot directly bring constitutional complaints before the Court. In this respect, the Italian system differs from the Spanish and the German systems in which individuals can raise before Constitutional Courts complaints concerning the infringement of their rights, with the instruments of ‘amparo’ and ‘Verfassungsbeschwerde’.

²⁸Ines Ciolli, ‘Brevi note in tema di interpretazione conforme a Costituzione’ (2012) 1 *Rivista Associazione Italiana Costituzionalisti* 1, 1–2 (my translation).

²⁹Art 134 of the Italian Constitution of 1948 establishes a Constitutional Court ‘which shall pass judgement [on] ... controversies on the constitutional legitimacy of laws and enactments having force of law issued by the State and Regions’ and ‘over disputes arising over the allocation of powers between branches of State, between the State and the Regions and between Regions’; ‘accusations raised against the President of the Republic, in accordance with the Constitution’ and ‘admissibility of requests for repealing referenda’ submitted according to art 75 of the Constitution (art 1 of the Constitutional Law No. 1, 11 March 1953). For a description of the functions of the Italian Constitutional Court see www.cortecostituzionale.it/documenti/download/pdf/The_Italian_Constitutional_Court.pdf (2009) and Vittoria Barsotti et al, *Italian Constitutional Justice in Global Context* (Oxford, Oxford University Press, 2015).

Furthermore, the Italian system does not allow Parliamentary minorities to challenge the constitutionality of ordinary laws, as happens in other European systems.³⁰

Even though the Constitutional Court is the only institution with the power of reviewing the constitutional legitimacy of laws, ordinary judges play a relevant role in constitutional adjudication. In fact, they can raise questions of constitutionality before the Court. The different judicial authorities that operate on the various levels of the system have the power, and the duty, to raise such questions if they are relevant – that is, they concern norms that must be applied to the case at hand – and not manifestly groundless.³¹

In this sense, the judicial review is concentrated in weak terms. Only the Court can perform the review, but such review is not totally disconnected from the application of the law by ordinary judges.³² Indeed, ordinary judges introduce judgments before the Court, incidentally, based on their doubts concerning the constitutional legitimacy of a norm that they should apply to a case. The exercise of judicial review in the Italian system is, thus, ‘a posteriori and concrete’ with respect to the enactment of the norms that undergo the review.³³

The preference for such a system is due to several factors, the first of which concerns the judicial culture in place at the time when the new constitutional system was designed and established in Italy. In fact, there was a body of judges still permeated by the legal culture of the previous regime, which diverged from the values enforced by the new Constitution. Furthermore, that body of judges was accustomed to interpret and apply ordinary laws and not yet acquainted with the application of the new Constitution. For these reasons, there was the risk that ordinary judges would be reluctant to focus on, and enforce, the Constitution in their interpretative activity. Finally, there was a relevant difference with respect to the Anglo-american legal systems adopting the diffuse model of judicial review. In those systems, the doctrine of precedent has traditionally provided stability and temporal continuity to judicial decisions on the constitutionality of legal norms. By contrast, in the Italian system, judicial precedents set weak constraints and, therefore, do not ensure the same degree of stability and continuity. More generally, the Italian system is traditionally characterised by a different political and institutional culture, assigning a central role to the Parliament and a more marginal role to judicial institutions.³⁴

All these factors explain the role and place of ordinary judges in the Italian system of constitutional justice. They are not directly involved in the exercise of judicial review, except for the possibility of raising questions of constitutionality before the

³⁰ This is the case with the French, Spanish, Austrian, German, and Portuguese systems. For an overview of these aspects concerning the judicial review in the Italian system, see Barsotti et al (n 29) 52ff.

³¹ As provided by art 1 l. cost. 1/1948: ‘The question of the constitutional legitimacy of a law or an act having the force of law of the Republic, detected ex officio or raised by one of the parties in the course of a judgment and not considered by the judge manifestly groundless, is remitted to the Constitutional Court for its decision’.

³² Sorrenti (n 5) 132 and Silvestri (n 23).

³³ On this aspect, see Alessandro Pizzorusso, ‘I sistemi di giustizia costituzionale dalla teoria alla prassi’ (1982) 3 *Quaderni Costituzionali* 521, 521ff.

³⁴ Following the reconstruction provided by Sorrenti (n 5) 133ff; Giustino D’Orazio, *La Genesi della Corte Costituzionale* (Milano, Edizioni di Comunità, 1981) and Carlo Mezzanotte, *Il giudizio sulle leggi: le ideologie del Costituente* (Napoli, Editoriale Scientifica, 1979).

Constitutional Court. In this respect, the requirement of not being manifestly groundless restricts the range of questions that can be raised. This requirement, in fact, allows for a filtering of questions that can be submitted to the Court, but the Court ultimately stands as the only institution competent to adjudicate those questions and review the constitutional legitimacy of laws. Indeed, ordinary judges are restricted from making any decision that pertains to such legitimacy, the latter being reserved solely for the Constitutional Court.³⁵ Under this aspect, there are relevant differences between the Italian system and the German system. In the latter, ordinary judges raise a question of constitutionality before the Constitutional Court only if they are ‘convinced’ and provide arguments in favour of the unconstitutionality of the norm that they should apply and, thereby, significantly contribute to the review of the legitimacy of laws.³⁶ In fact, they have been gradually developing the approach according to which ‘before presenting a question of constitutional legitimacy before the Federal Constitutional Court, they engage in the “verfassungskonforme Auslegung”’.³⁷

In the Italian system, the engagement of ordinary judges with constitutional justice is weaker, since they do not perform an autonomous inquiry into the constitutional legitimacy of legal norms. Nonetheless, they have been increasingly involved in such inquiry, indirectly. Especially through CCI, ordinary judges have acquired an important role in the interpretative adaptation of ordinary laws to the Constitution and, in parallel, in the interpretation of the constitutional norms providing the standards of legitimacy for conforming interpretation.

In these terms, CCI has allowed ordinary judges to play a part in the adjudication of questions of constitutional legitimacy. To the extent that such questions depend on interpretative doubts, they require ordinary judges – raising those questions – to engage in CCI and address, alongside the Constitutional Court, the relation between the meaning of ordinary laws and the meaning of constitutional norms. Before raising questions of legitimacy, in fact, ordinary judges must assess those doubts, which requires them to engage in a preliminary evaluation about whether the legal norm at stake can be interpreted so as to conform to the Constitution.³⁸

Still, the concentrated model of judicial review gives pre-eminence to the CCI performed by the Court over the CCI of ordinary judges. Ultimately, only the Court can determine whether ordinary laws are constitutionally legitimate and only after the Court has ruled in this respect, can the ordinary judge apply the norm on the basis of the Court’s interpretation and, therefore, in accordance with the Constitution.

Such interaction between ordinary judges and the Court, as mentioned above, needs to be ‘governed’ in order to ensure uniformity in the interpretation of ordinary

³⁵ On this aspect see among many Riccardo Guastini, *Teoria e dogmatica delle fonti* (Milano, Giuffrè, 1998) 477.

³⁶ Sorrenti (n 5) 137 (my translation).

³⁷ Sorrenti (n 5) 138 (my translation).

³⁸ See Elisabetta Lamarque, ‘Interpreting Statutes in Conformity with the Constitution: The Role of the Italian Constitutional Court and Ordinary Judges’ (2010) 2 *Italian Journal of Public Law* 87, 93, pointing out that the Italian system of constitutional justice calls for ‘the existence of a single body empowered to strike down laws as unconstitutional with erga omnes effect (arts 134 and 136 Const.) and also prohibits ordinary, or regular, courts from directly setting aside a law that violates the Constitution, but at the same time entrusts them to carry out a preliminary evaluation of the constitutionality of the substantive or procedural laws that they must apply to concrete cases’.

laws and the Constitution. In fact, the hybrid model of judicial review adopted in the Italian system works well insofar as ‘dialogue and the centrality of the Court ... remain in balance’.³⁹

Through them – at least in a first phase – a virtuous circle was established whereby the interpretative role of the judges had the effect of conveying the constitutional values in the legal system. The function of the court, on the other hand, was to guide and direct the dissemination of those values, when ordinary judges had not yet had the time to know and introject them.⁴⁰

The interpretative exchanges between the Court and ordinary judges, occurring through CCI, have favoured this process and the interpretative pluralism that it fosters. By this, the constitutional system has become highly dynamic, insofar as all judges are potential interpreters of the system, and yet it is the Court that brings the closure needed to preserve legal certainty. In fact, the order and guidance provided by the Court serves as a catalyst for the legislator, prompting her to partake in the evolution of law and to identify and rectify any lacunae therein.⁴¹

From this perspective, part of the Italian doctrine suggests that CCI should be constrained, at the top, by the Court’s interpretation of constitutional principles and, at the bottom, by the living law produced by ordinary judges, based on the judicial application of ordinary laws and the underlying interpretations.⁴²

As we will see, these constraints have been emerging over time throughout the evolution of CCI in the Italian system. Especially since the 1970s, the idea that constitutional principles impact on the interpretation of ordinary laws has progressively consolidated and the Court’s reading of constitutional norms has become increasingly relevant for the interpretative activity of ordinary judges. Alongside this development, the idea that the interpretation of ordinary laws can be sharply separated from the interpretation of the Constitution – so that the former is of competence of ordinary judges and the latter is of exclusive competence of the Constitutional Court – has lost its force. As a result, a common interpretative ground has gradually emerged between ordinary judges and the Constitutional Court, raising the challenge of bringing together – and harmonising – the readings provided on both fronts. The terms in which this challenge can be met depend on the foundations of CCI in the system. Ultimately, the role and forms that CCI should take in the interpretative practice depend on the reasons and the terms in which we can justify that both the Court and ordinary judges seek to interpret ordinary laws in accordance with the Constitution.

IV. THE FOUNDATIONS OF CCI

The Italian doctrine provides different justifications for CCI, mostly drawing on the systematic nature of the legal order – and the hierarchical relations between ordinary

³⁹ Ciolli (n 28) 2.

⁴⁰ *ibid* (my translation).

⁴¹ *ibid*.

⁴² Sorrenti (n 5) 143.

law and the Constitution.⁴³ The supremacy of the Constitution;⁴⁴ the principle of preservation of legal acts.⁴⁵

A. The Unity of the System

The dominant view accounts for CCI as a form of interpretation required by the structure of constitutionalised legal orders, as systems of norms connecting constitutional norms to other legal norms through hierarchical relations. Such relations among legal sources (between the Constitution and ordinary law, and between ordinary law and administrative acts, and so on) constrain legal interpretation,⁴⁶ insofar as they require that the superior source prevails over the inferior source. The norms deriving from the latter must be interpreted so as to conform to the norms deriving from the former. Otherwise, the legal norm deriving from the inferior source, and conflicting with the norm deriving from the superior source, is invalid.

This point raises the question of the relation between CCI and the criteria that should be applied to solve antinomies. As pointed out by Luciani, with regard to the hierarchical criterion, it requires the interpreter to give lower-level norms a meaning that harmonises with higher-level norms.⁴⁷ In this case, as well as in the case of the criterion of competence, the solution of the antinomy goes in the same direction of conforming interpretation, namely, from the source conditioning the validity to the source whose validity is conditioned.⁴⁸ With regard to the chronological criterion, by contrast, there is no pre-determined direction in which conforming interpretation should proceed ‘in the absence of a source conditioning the validity of the other’.⁴⁹ In this respect, legal interpretation is guided by a combination of the general principle of preservation of legal acts (and laws) with a principle of innovation of the legal order. To that end, the anterior source is to be interpreted in such a way that is in harmony with the posterior source, with recourse to abrogation only in the event of an intractable conflict, in which case the anterior source must yield to the latter.⁵⁰

CCI, in these terms, has a relational function insofar as it allows to establish and maintain a connection among various legal acts and systems, each pursuing and responding to different rationales and logics, though all being equally relevant in

⁴³ See (n 13) and also Valerio Onida, ‘L’attuazione della Costituzione fra Magistratura e Corte costituzionale’ in *Aspetti e tendenze del diritto costituzionale: Scritti in onore di Costantino Mortati* (Milano, Giuffrè, 1977) 532ff.

⁴⁴ Franco Modugno, ‘Interpretazione costituzionale’ (2019) *Annali della Facoltà Giuridica dell’Università di Camerino* 8, 55, 69–70.

⁴⁵ Massimo Luciani, ‘Interpretazione conforme a Costituzione’ in *Enciclopedia del diritto* (Milano, Giuffrè, 2016) 391–476; Giuliano Vassalli, ‘Interpretazione giudiziale e Corte costituzionale’ (1966, 1968) in Pulgiatti Slavatore (ed), *Scritti giuridici I* (Milano, Giuffrè, 1997) 130; Giuseppe Branca, ‘L’illegittimità parziale delle sentenze della Corte costituzionale’ in Giuseppe Marinini, *La Giustizia costituzionale* (Firenze, Vallecchi Editore, 1966) 71ff.

⁴⁶ Bin (n 13) 3–4.

⁴⁷ Luciani (n 45) 445.

⁴⁸ Luciani (n 45) 449 (my translation).

⁴⁹ Luciani (n 45) 450.

⁵⁰ Luciani (n 45) 451.

terms of applying a particular legal norm to a case.⁵¹ As such, CCI works as a ‘zip’ connecting normative acts, and levels, that are different but equally relevant for the solution of a legal case.⁵² Given the hierarchical connections among such levels, interpreters can no longer simply deploy the hermeneutic canon that they deem most apt. Rather, they are obliged to apply the canon of CCI based on a general requirement of unity of the legal system, which the interpreter should meet in reading the norms of that system.⁵³

With regard to such unity, the idea is that ‘all legal norms of a legal order form a unified entity that is controlled by the constitution, which is the highest law’. This assumption builds on the two key elements of consistency and coherence.⁵⁴

On the one hand, consistency concerns the absence of logical contradictions among the norms that form part of a legal system,⁵⁵ which is required by the rule of law to ensure legal certainty. The requirement of unity of the legal system finds its basis in the theory of the formal hierarchy of legal sources, understood as a hierarchy of conditions and a hierarchy of derogation.⁵⁶ The former connects legal acts in such a way that one act is a condition for another act, in the sense that it is the source of that act and precedes it in logical terms.⁵⁷ The latter establishes mechanisms of derogation among higher-level and lower-level norms, such that when they conflict, the higher-level norm derogates the lower-level norm.⁵⁸ Indeed, on both fronts – the hierarchy of conditions and the hierarchy of derogation – CCI allows the preservation of both consistency and coherence – the unity – of the legal system, among two normative levels, that is, the level of ordinary law and the level of the Constitution.

As pointed out above, this approach emphasises the idea of a hierarchical order as the basis of CCI. CCI would be ultimately justified by the need for an interpretation of ordinary laws that conforms to the Constitution as the superior source of law and, more precisely, as the ‘source of all sources’ so as to avoid the annulment of the norm.⁵⁹

In these terms, however, the unity of the legal system is not sufficient to justify the resort to CCI and its pre-eminence over other canons of interpretation. The argument justifying CCI based on the unity of the legal system is ‘insufficient to legitimize the canon of constitutionally conforming interpretation’. Rather, the combined force of different arguments can provide the basis for the legitimacy of this form of

⁵¹ Caruso (n 22) 1986.

⁵² Lamarque (n 1) 1.

⁵³ Bin (n 13) 4.

⁵⁴ Klatt (n 9) 24.

⁵⁵ *ibid.*; on this aspect see Robert Alexy and Aleksander Peczenik, ‘The Concept of Coherence and its Significance for Discursive Rationality’ (1990) 3 *Ratio Juris* 130, 130–47.

⁵⁶ *ibid.*, analysing the theory of legal sources put forward by Adolf J Merkl and Hans Kelsen and its impact on interpretation with regard to CCI; see Adolf J Merkl, ‘Prolegomena einer Theorie des rechtlichen Stufenbaues’ in Alfred Verdross (ed), *Gesellschaft, Staat und Recht. Untersuchungen zur Reinen Rechtslehre* (Vienna, Springer, 1931); Hans Kelsen, *Introduction to the Problems of Legal Theory* (Oxford, Clarendon Press, 1992); Hans Kelsen, ‘On the Theory of Interpretation [1934]’ (1990) 10 *Legal Studies* 127, 128.

⁵⁷ Klatt (n 9) 26–30.

⁵⁸ *ibid.*, building on Merkl (n 56).

⁵⁹ Ruggieri (n 13) 1–18. In this respect, the Italian doctrine often refers to art 117 of the Constitution, according to which ‘the principle of legality ... means that any limit directly imposed on the law becomes a limit for the executors of the law itself’. In this sense, the theory of legal sources provides a framework for the theory of legal interpretation.

interpretation.⁶⁰ From this perspective, alongside the argument based on: (a) the unity of the legal system, the Italian legal doctrine relies on arguments built around (b) the pre-eminence of constitutional values (linked to the argument based on the unity of the system in terms of coherence), (c) the principle of preservation of legal acts.

B. Constitutional Values

Focusing on substantive relations among ordinary laws and the Constitution, part of the Italian doctrine justifies CCI in axiological terms, as an instrument that allows to preserve the coherence among legal norms in light of the principles that serve as the basis of the whole legal system. More precisely, the ultimate foundation of CCI would be a meta-principle, a ‘Grundnorm’, requiring that the law to be sought and applied is that which can best protect fundamental rights.⁶¹ The value of dignity, in particular, would stand above all the principles that lie at the basis of the legal system, being the ultimate foundation of the system. As such, this value would guide legal interpretation through the canon of CCI and provide a key to its results. From this perspective, CCI is an interpretative technique at the service of values and, more precisely, of the supreme value of dignity governing all other values. In the background lies the idea of a mutual integration among values, understood as the standard guiding inter-systemic relations. Such standard, however, is not understood as merely procedural, but rather comes with ‘an axiological’ load that crucially bears on the application of the law.⁶²

According to another version of this approach, the basis of CCI is twofold. On the one hand, CCI responds to the need to ensure the coherence and consistency of the legal system, through the primacy of the Constitution in both formal and substantive terms. On the other hand, it also responds to the need for a frictionless transition from the rule of law to a *constitutional* rule of law. As pointed out by Luciani, the doctrinal debate on CCI has focused mostly on the first need, given the structural features of the Italian system of constitutional justice and, in particular, concentrated judicial review.⁶³

Nonetheless, CCI also finds its basis in the transition from the rule of law to a *constitutional* rule of law and, therefore, in the need for harmony between the dimension of legal legality, which comes with the former, and the dimension of constitutional legality, which comes with the latter, as dimensions of legality that should overlap, rather than diverge or conflict.

C. Preservation of Legal Acts

The arguments that refer to the unity of the system – in formal and substantive terms – and the axiological arguments are not sufficient, per se, to ground CCI. Alongside these arguments, the Italian doctrine relies on arguments built around the

⁶⁰ Klatt (n 9) 18.

⁶¹ Ruggeri (n 13) 4–5.

⁶² Ruggeri (n 13).

⁶³ Luciani (n 45) 461ff.

principle of the preservation of legal acts. According to this principle, CCI allows not only the maintenance of the unity of the system, but also keeping together the quest for innovation within the system – through the production of ordinary laws and the quest for the preservation of the norms produced by the legislature that form part of the system – through the adaptation of laws to the Constitution.

As argued by the Italian Constitutional Court, the very requirement of unity of the legal system ultimately results from a convergence of the principle of framing a normative order as a unitary totality, in terms of both interpretation and application, and the principle of preservation of legal acts, ‘which serves as the basis of the assumption that a legal norm is not to be declared illegitimate as long as it is possible to ascribe to it at least one meaning conforming to the law’.⁶⁴

This approach grounds the performance of CCI in the unity of the law as a system of norms and, furthermore, in the principle that requires us to preserve those norms as much as possible, and therefore to avoid undermining the living law that is compatible with the Constitution only for the sake of potential unconstitutionality.⁶⁵

The principle of preservation of legal acts, or the principle of *favor legis*, requires that interpreters retain the norm as far as possible and that a norm can only be said to violate the Constitution to the extent that this is needed in order to enforce the Constitution.⁶⁶ Therefore, the judge must only exclude any unconstitutional interpretation variants and opt for variants that preserve the validity of the norm at stake. By this, it is possible to achieve an equilibrium among potentially conflicting requirements. On the one hand, the requirement that judges apply the Constitution according to its primacy; on the other, the requirement, posed by the rule of law, that judges apply ordinary laws and that such laws bind them. According to the principle of preservation of legal acts, judges apply ordinary laws enacted by the Parliament and, at the same time, avoid the violation of constitutional norms. Furthermore, such principle allows the avoidance, to the greatest possible extent, of a legal vacuum being created that ‘would occur if the norm were declared void and thus spares the legislature the burden of a new enactment’.⁶⁷

Conforming interpretation is a fundamental instrument for applying this principle, since it saves legal norms from declarations of constitutional illegitimacy, permitting to choose, among the various interpretative alternatives opened by the text, the one that retains the validity of the rule.⁶⁸

The combination of the different arguments outlined so far – the argument of unity; the axiological argument; and the preservation of legal acts argument – has provided the basis for the pre-eminence of the canon of CCI in the interpretive practice both for the Constitutional Court and ordinary judges. As such, the judicial resort to CCI has gradually led to a dynamic more akin to a diffuse rather than a concentrated model of constitutional adjudication.⁶⁹ Let me turn now to the historical development of CCI in the Italian system that has established this dynamic.

⁶⁴ Sent. 559/1988, discussed by Bin (n 13) 4.

⁶⁵ Sorrenti (n 5) 123.

⁶⁶ Klatt (n 9) 38.

⁶⁷ Klatt (n 9) 39.

⁶⁸ Luciani (n 45) 451.

⁶⁹ Sorrenti (n 5) 123.

V. THE EVOLUTION OF CCI

Since the establishment of the Constitutional Court, CCI has characterised the practice of legal interpretation. Over time, CCI has evolved to become an instrument of dialogue and cooperation among the different judicial authorities that operate in the Italian system and, more precisely, among the Constitutional Court, the Supreme Court (Corte di Cassazione), and ordinary judges. Gradually, the resort to CCI has become widespread, favouring the rapprochement between the legal order and the constitutional order that the Founding Fathers originally thought of as separate.⁷⁰ The process that led CCI to play this important role can be divided into three main phases,⁷¹ with important turning points especially in the interaction between the Constitutional Court and the Supreme Court. This interaction, in fact, instantiates the combination, in the Italian system, of two levels of legality, the level of ‘constitutional legality’ – based on the Constitution and guaranteed by the Constitutional Court – and the level of ‘legal legality’ – based on the laws produced by the Parliament and guaranteed by ordinary judges and the Supreme Court.⁷² Especially in the 1950s and 1960s, the interaction between these levels – and the judicial authorities that operate on them – led to conflicts between the Constitutional Court and the Supreme Court. These conflicts eventually came to an end and were followed by a peaceful coexistence gradually achieved through the use of two main instruments of coordination. On the one hand, the doctrine of living law developed by the Constitutional Court, according to which the Court decides in accordance with the decisions and interpretations of ordinary judges. On the other hand, the duty to engage in CCI imposed by the Court on ordinary judges and the Supreme Court. With the first instrument, the sphere of legal legality has progressively penetrated the sphere of constitutional legality. With the second instrument, the sphere of constitutional legality has progressively penetrated the sphere of legal legality, reducing the gap between them.⁷³

The relations between these spheres – and between the Constitutional Court, the Supreme Court and ordinary judges – provide the key to the history of CCI in the Italian system. Let me turn now to the three main phases of the evolution of CCI.

A. First Phase

In a first phase (1956–1965), the Constitutional Court established the centrality of its own role with respect to CCI, avoiding as much as possible having to delegate conforming interpretation to ordinary judges. The Court stated that ‘even in the presence of a single unconstitutional meaning, which could be given to the contested

⁷⁰ Carlo Mezzanotte, ‘La Corte costituzionale: esperienze e prospettive’ in Giuliano Amato et al, *Attualità e attuazione della Costituzione* (Roma, Bari, 1979).

⁷¹ Following the reconstruction of Sorrenti (n 5) in line with the reconstruction provided by Lamarque (n 1).

⁷² Luciani (n 45) 463.

⁷³ *ibid.*

provision, this provision should be annulled'.⁷⁴ In such terms, the Court established the idea that CCI was exclusively its own competence. The reasons in support of this monopoly are the same as those in favour of the concentrated system of judicial review. On the one hand, there is the idea that a 'specialised' body has greater political sensitivity and, therefore, can better protect the Parliament from arbitrary judicial decisions on the constitutionality of ordinary laws. On the other hand, there is the idea that legal certainty can be better guaranteed by a centralised exercise of judicial review, which avoids conflicting judicial rulings on the constitutional legitimacy of the laws.⁷⁵

With decision 3/1956, the Constitutional Court, in the first few months of its existence, introduced an adjudication instrument that no constitutional or legislative provision explicitly encompassed, that is, the interpretative judgment of rejection (*sentenza interpretativa di rigetto*).⁷⁶ This is the instrument with which the Court rejects a question of constitutional legitimacy on the basis of the reading of the contested norm upheld by the referring judge and, therefore, declares unfounded the doubt of its constitutionality providing a different reading of that norm, that is, a reading in conformity with the Constitution. By introducing such instrument – and CCI along with it – the Constitutional Court extended its own jurisdiction to the interpretation of ordinary laws in light of the Constitution, and at the same time advised regular courts to broaden their interpretation and enter the realm of constitutional values.⁷⁷

This dual move had a crucial relevance for the development of the Italian system of constitutional justice. First, it opened a new path for the exercise of judicial review. Besides the options of declaring the questions raised before the Court as founded or unfounded, the decision disclosed a third, interpretative, option, that is, the option of making those declarations dependent, even if only in part, on a certain reading of the norm at stake. Second, the Court established its own interpretative authority with regard to ordinary laws and, at the same time, attracted the action of ordinary judges within the realm of constitutional interpretation. By this, the Court reduced the distance between the sphere of legal legality and the sphere of constitutional legality, which were separated in the original view of the Founding Fathers.⁷⁸

In both respects, decision 3/1956 marked the beginning of a process that has progressively led from conflict to dialogue between the Court and ordinary judges.⁷⁹ In fact, the decision made it clear that the Court can give an interpretation of the law that differs from the interpretation given by ordinary judges, if required to ensure that the law is compatible with the Constitution. Likewise, the Court established that it could declare groundless – and reject – a question of constitutional legitimacy if it is

⁷⁴ As pointed out by Roberto Pinardi, 'L'interpretazione conforme a Costituzione e la sua «radicalizzazione» quale tema (e problema) di natura istituzionale' in Marillisa D'Amico and Barbara Randazzo (eds), *Interpretazione conforme e tecniche argomentative* (Torino, Giappichelli, 2009) 373–87.

⁷⁵ Roberto Romboli, 'Qualcosa di nuovo ... anzi d'antico: la contesa sull'interpretazione conforme della legge' in Peter Carnevale and Carlo Colapietro (eds), *La giustizia costituzionale tra memoria e prospettive* (Torino, AIC, 2008).

⁷⁶ Lamarque (n 1) 4.

⁷⁷ *ibid.*, drawing on Mezzanotte (n 70) 161.

⁷⁸ Laneve (n 7) 14–15 and Luciani (n 45).

⁷⁹ Laneve (n 7) 14–15.

raised with regard to a norm that can be interpreted in constitutionally conforming terms.

An important aspect of interpretative judgments of rejection, however, is that they do not have *erga omnes* effects and do not bind ordinary judges, who can still give a different interpretation of that norm and challenge its constitutionality. In fact, the extent to which ordinary judges follow them, and the underlying Court's interpretations, depends on their willingness to cooperate with the Court.

In this first phase, ordinary judges did not interact with the Court in the domain of constitutional interpretation, since they had not yet developed a sufficient degree of constitutional sensitivity. The Court, thus, played a central role in CCI.⁸⁰ Yet, gradually, the Court began to consider the living law based on the interpretations given by ordinary judges as a limit to its own interpretative activity and began to involve ordinary judges in constitutional interpretation. As a consequence, the pre-eminence of the Constitutional Court has gradually diminished and, in parallel, the Court and ordinary judges have started to interact and engage in dialogue.

B. Second Phase

The interaction between the Court and ordinary judges, oscillating between conflict and dialogue, marks the second phase (1965–96) in the evolution of CCI in the Italian system. In fact, the interaction began as one of conflict, but gradually a balance was struck between the Court and ordinary judges with respect to the performance of CCI. The balance has been achieved, on the one hand, by virtue of the increasing relevance given by the Court to the 'living law' and to the interpretation of ordinary laws given by ordinary judges, and, on the other hand, by virtue of the obligation, gradually imposed by the Court on ordinary judges, to conform their interpretation of ordinary laws to the Constitution and take into due account the interpretation of the Constitution given by the Constitutional Court.

The beginning of this new phase has been marked by the 'entrance' of ordinary judges into the realm of CCI. In 1965, a meeting of the Italian National Association of Magistrates ended with a motion inviting ordinary judges, before raising questions of constitutional legitimacy, to utilise the Constitution as a normative resource, understood as the power to directly apply the Constitution as well as to interpret ordinary laws according to it.⁸¹ In the same year, one of the most significant episodes in the conflict between the Constitutional Court and ordinary judges took place. The Supreme Court (Corte di Cassazione) did not adhere to an interpretation given by the Constitutional Court in an interpretative judgment of rejection. The Constitutional Court, for its part, imposed its own interpretation with a manipulative decision of acceptance (*sentenza manipolativa di accoglimento*), which sparked a conflict between the two Courts. On the one hand, ordinary judges and the Supreme Court could resist the readings offered by the Constitutional Court in interpretative judgments of rejection, given the lack of *erga omnes* effects; on the other hand, the

⁸⁰ Laneve (n 7).

⁸¹ Lamarque (n 1) 4.

Constitutional Court reacted by imposing its own interpretations, claiming a central role in CCI. This conflict started to subside when the Constitutional Court introduced the doctrine of living law and, in parallel, ordinary judges started to engage in CCI and to infuse constitutional norms – and the Constitutional reading of those norms – into the application of ordinary law.⁸²

As noted by Romboli,⁸³ two decisions – interpretative judgments of rejection – taken by the Constitutional Court in 1998⁸⁴ have been especially relevant for the evolution of the relations between the Court, the Supreme Court, and ordinary judges. In fact, the reaction of the Supreme Court to these decisions arrived with the *Anagni* decision (1998)⁸⁵ and, much later, with the *Pezzella* decision (2004),⁸⁶ putting forward a different attitude of the Supreme Court towards the Constitutional Court.

With both decisions, the Supreme Court took a position on three relevant aspects. The constraints for the referring judge deriving from interpretative rejection judgments (sentenze interpretative di rigetto) issued by the Constitutional Court; the constraints deriving from such decisions for all other judges; and the role of the Constitutional Court and of the Supreme Court (Corte di Cassazione) in the interpretation of the law. On these aspects, the Supreme Court ruled in different terms in the two decisions, shifting from the acknowledgement of the centrality of the role played by the Court to the view that ordinary judges should have a margin of interpretative manoeuvre, especially with regard to CCI.⁸⁷

The Supreme Court took different positions because of various factors. The first factor is the evolution of the Constitutional Court's doctrine of the living law. This doctrine has favoured, throughout the second phase, the end of conflicts between the two courts and their rapprochement. Afterwards, however, the Court's reliance on this

⁸² Laneve (n 7) and Luciani (n 45) emphasises this aspect.

⁸³ Romboli (n 75), available at www.associazionedeicostituzionalisti.it/old_sites/sito_AIC_2003-2010/dottrina/fontidiritto/romboli/interpretazionelegge.html para 5. On the 'war' between the two Courts see Nicola Assini, *L'oggetto del giudizio di costituzionalità e la "guerra delle due Corti"* (Milano, Giuffrè, 1969).

⁸⁴ Corte cost. 22 giugno 1998, n. 232, and 18 luglio 1998, n. 292.

⁸⁵ Corte Cass. n. 1492/1998.

⁸⁶ Corte Cass. n. 23016/2004.

⁸⁷ With the *Anagni* decision (1998), the Court ruled, on the first aspect, that the constraints on the referring judge operate in 'negative' terms. Interpretative rejection judgments exclude for the ordinary judge the possibility of engaging in CCI if the Constitutional Court has already intervened on the question at stake, providing a particular interpretation as the only one compatible with the Constitution. In this case, the referring judge cannot depart from the Constitutional Court's interpretation without giving reasons and without raising a new question of constitutionality. With regard to the second aspect, the Court established that the decisions of the Constitutional Court set precedents that guide all other judges who find themselves deciding on similar cases. Finally, concerning the third aspect, the Supreme Court pointed out that the Constitutional Court is the 'most qualified body in terms of interpretation of the constitution'. Over time, the Supreme Court changed this approach as the *Pezzella* decision shows (2004). Concerning the first aspect, the Supreme Court confirmed that for the referring judge there is a negative constraint. Nonetheless, concerning the second aspect, the Court stated that there are no constraints for other judges who maintain 'the power-duty to autonomously interpret the law' pursuing a constitutionally oriented reading, 'even if different from that of the constitutional judge'. Finally, with regard to the third aspect, the Supreme Court stated that the interpretations of the Constitutional Court are not binding, but rather have 'persuasive' authority. The Constitutional Court and the Supreme Court, thus, may legitimately disagree on the interpretation of a legal norm, given that it is possible to give divergent, and legitimate, readings of the same norm.

doctrine diminished,⁸⁸ a result also of the criticisms it raised for the risks that could come from the Court's excessive reliance on the interpretations provided by ordinary judges and the possible loss of centrality for the Court.⁸⁹ Indeed, the doctrine was criticised for the vagueness of the concept of 'living law' and, consequently, for the wide margin of discretion enjoyed by the Constitutional Court in identifying and interpreting such law.⁹⁰ Progressively, thus, the Constitutional Court has been distancing itself from the living law, to the point of explicitly inviting ordinary judges to work toward a conforming interpretation, even if a living law or a univocal judicial approach is present. In this regard, the judge has the means to comply with the dominant jurisprudential approach, but is not obliged to do so.⁹¹ From this perspective, the Constitutional Court has started giving priority to its own conforming interpretation over adherence to the living law, when they are not compatible.

A second, significant factor has been the doctrine that the Constitutional Court started to establish during the 1990s, between the second and the third phase, requiring ordinary judges to perform CCI. More precisely, this doctrine says that ordinary judges must prove, in respect of their motivation, that they sought, and privileged, the interpretative solutions that allow to conform the meaning given to a legal norm to the constitutional standards that ground the doubt of constitutionality concerning that norm.⁹²

Ultimately, the Court has given special emphasis to the canon of CCI in two directions. On the one hand, the Court has weakened its ties to the living law, widening the scope of its own action with regard to conforming interpretation; on the other hand, the Court has 'insistently'⁹³ affirmed the existence of a duty of conforming interpretation for ordinary judges. These two movements have reinforced one another, establishing a coordination between the Court and the other judicial authorities.⁹⁴

Along these lines, between the second and the third phase of the evolution of CCI, the Constitutional Court placed greater emphasis on judges making use of their interpretative remit to pursue those readings of a norm that best comply with constitutional principles, and in the process avoid triggering any questions of constitutionality that CCI could settle.⁹⁵

C. Third Phase

The third phase (from 1996 to today) has been characterised, on the one hand, by the increasing emphasis of the Constitutional Court on the duty of ordinary judges to

⁸⁸Tania Groppi, "Verso una giustizia costituzionale' mite"? Recenti tendenze dei rapporti tra Corte costituzionale e giudici comuni' (2002) 33/2 *Politica del diritto* 217, 217–36.

⁸⁹Romboli (n 75) para 3.

⁹⁰On this aspect see Sorrenti, 'Corte costituzionale, giudici e interpretazione, ovvero ... l'insostenibile leggerezza della legge' in Antonio Ruggeri (ed), *La ridefinizione della forma di governo attraverso la giurisprudenza costituzionale* (Napoli, Edizioni scientifiche italiane, 2006) 491–92. On the 'crisis' of the doctrine of living law see Groppi (n 88) 228ff.

⁹¹Corte cost, ord. 1 luglio 2005, n. 252, as discussed by Romboli (n 75) para 6.

⁹²Romboli (n 75) para 8.

⁹³Sorrenti (n 5) *conforme*, 212.

⁹⁴Sorrenti (n 5) *conforme*, 213.

⁹⁵Romboli (n 75) para 4.

perform CCI, and, on the other hand, by the awareness of ordinary judges about the contribution that they can give to conforming interpretation and the instruments that they can use to this end, relying on constitutional norms with all their ‘semantic and normative potential’.⁹⁶ It is precisely in this phase that the Court has been identifying the canon of CCI as ‘pre-eminent’ with respect to other interpretative canons, based on the arguments illustrated above and built around the quest for unity of the legal system and the principle of preservation of legal acts.

This phase started with the famous decision of the Constitutional Court n. 356/1996, according to which, as cited earlier, ‘we do not declare a law constitutionally illegitimate if it is possible to give an unconstitutional interpretation of it ... but rather if it is impossible to give a constitutional interpretation of it’.

This new approach marked the start of a new era in which the Constitutional Court, given the possibility of giving a constitutional interpretation of an ordinary law, rejects the question of constitutionality concerning that norm, requiring ordinary judges to proceed with the conforming interpretation prior to, if not instead of, the Constitutional Court.⁹⁷ According to this approach, thus, the attempt to interpret ordinary laws in conformity with the Constitution must be made, first, by ordinary judges and only after, if necessary, by the Court. In these terms, the attempt of the ordinary judge to provide a constitutionally conforming interpretation of the norm must precede the review of that norm by the Constitutional Court. If the referring judge does not prove, in its order of remittal to the Court, the attempt to interpret the contested norm conforming to the Constitution, the question is not admissible before the Court.

This favouring of the Constitutional Court for the performance of CCI by ordinary judges has become more and more intense, with the Court explicitly requiring them to proceed with the conforming interpretation of the law before raising a question of constitutionality⁹⁸ and gradually establishing a burden of engaging in CCI for ordinary judges.

More precisely, ordinary judges, in order to avoid the Court rejecting a question of constitutionality, must: (a) account for judicial interpretations that differ from the one they propose and demonstrate that those alternative interpretations do not allow for a reading of the law conforming to the Constitution;⁹⁹ (b) avoid proposing alternative interpretative solutions;¹⁰⁰ and (c) produce ‘an exhaustive and not implausible motivation’ regarding the reasons that led them to choose a certain interpretation as the only feasible one.¹⁰¹ On this basis, according to part of the Italian doctrine, CCI has become a third requirement to access the Court, alongside the requirements of relevance and of not manifest groundlessness.¹⁰² A different reading, however,

⁹⁶ Laneve (n 7) 6.

⁹⁷ Lamarque (n 1) 5.

⁹⁸ Marco Ruotolo, ‘L’interpretazione conforme torna a casa?’ (2020) 2 *Rivista del Gruppo di Pisa* 37.

⁹⁹ Orders 4 and 57 of 2008.

¹⁰⁰ Orders 21 and 208 of 2008.

¹⁰¹ Ruotolo (n 98) 3, decision n. 231/2008.

¹⁰² Ruotolo (n 98) with reference to the position of Elena Malfatti, Saule Panizza and Roberto Romboli, *Giustizia costituzionale*, 2nd edn (Torino, Giappichelli, 2007) 99 and Giovanni Amoroso, ‘L’interpretazione «adeguatrice» nella giurisprudenza costituzionale tra canone ermeneutico e tecnica di sindacato di costituzionalità’ (1998) 121/2 *Foro italiano* 89.

points out that CCI is not a third requirement, but rather a step that necessarily introduces – and is part of – the inquiry into the requisites of relevance and not manifest groundlessness.

Along these lines, the Constitutional Court has established the centrality and pre-eminence of the interpretative canon of CCI also for ordinary judges who became part of the CCI endeavour, with a twofold effect. On the one hand, the scope of the Court's interpretative action has become narrower, and, on the other, the scope of the action undertaken by ordinary judges has become broader almost to the point of approximating a system of diffuse judicial review. In this regard, part of the doctrine highlights how the Italian system has come to gradually resemble the German system, albeit without the same guarantees against a possible glut in the diffusion of judicial review (in Germany there is, in fact, the possibility for citizens to appeal directly to the Court, which is not possible in the Italian system).¹⁰³

VI. THE IMPACT OF CCI ON THE ITALIAN SYSTEM OF CONSTITUTIONAL JUSTICE AND THE BEGINNING OF A NEW PHASE

The history of CCI in the Italian system has been characterised by a major problem, namely delimiting the interpretative spaces of the Constitutional Court and ordinary judges within the framework provided by a centralised system of constitutional review. In this respect, the evolution of CCI has led to an overlapping between the Constitutional Court's interpretative activity and the activity of ordinary judges, as the result of efforts that went in two directions, that is, 'from judges to the court' and 'from the court to judges'.¹⁰⁴

In the first direction, a crucial step was the Court's application of the doctrine of living law and the imposition of the burden of CCI on ordinary judges. In the second direction, a crucial, and related, step was the performance of CCI by ordinary judges. The combination of these moves allowed for a gradual convergence between the interpretative options endorsed by the Court and the readings offered by ordinary judges.

On this basis, CCI has become the core of the relations between ordinary judges and the Constitutional Court, which, from the 1990s to the present day, have been progressively reinforcing their coordination. As discussed above, the Court left ordinary judges with a very wide margin of manoeuvre, through the invitation – and, then, the duty – to engage in CCI.¹⁰⁵

In more recent years, however, the Constitutional Court has changed this approach and its relations with ordinary judges. As Lamarque observes, the Court has gradually developed the awareness that the burden of CCI on ordinary judges and their involvement in constitutional interpretation, if excessive, may undermine the Court's central role in the system of judicial review.¹⁰⁶ This awareness has been confirmed

¹⁰³ Ciolli (n 28) 3.

¹⁰⁴ Sorrenti (n 5) *conforme*.

¹⁰⁵ Elisabetta Lamarque, *Corte costituzionale e giudici nell'Italia repubblicana. Nuova stagione altri episodi* (Napoli, Editoriale Scientifica, 2021).

¹⁰⁶ *ibid* 201.

by a decrease in the number of referral orders, which points to the ordinary judges' attitude of being autonomous with regard to interpretation.¹⁰⁷

As a consequence of this fear of losing ground and centrality, the Court has started modifying its attitude towards CCI and the terms in which ordinary judges should take part in it, in three directions.¹⁰⁸

First, an increase in the Court's resort to decisions of rejection or inadmissibility, as well as a reduction in the use of orders. The order, in fact, is a decisional instrument that might harm the centrality of the Court because the invitation addressed to ordinary judges – if not accompanied by a sufficient justification – is not followed in a fairly high percentage of cases.¹⁰⁹ In sum, the order would have an inhibiting impact on the dialogue between the Court and ordinary judges.

Second, the weakening of the burden for ordinary judges. The Court no longer asks ordinary judges to 'prove that a conforming interpretation is impossible' – as stated in the famous 1996 decision – but rather asks to prove that such interpretation is 'unlikely or difficult'.¹¹⁰ This 'erosion'¹¹¹ of the CCI canon previously established began with the Court's decision of 2015 and then was confirmed by the Court in 2017.

Third, besides this change of approach with respect to the duties of ordinary judges, the Court changed its approach also in respect of the forms of CCI suggested to ordinary judges. In fact, the Court has begun to express its own preference for judicial interpretive arguments that follow the higher courts' guidelines.¹¹²

For this change of approach, the Court's decision 221/2015 marks an important turning point. With this decision, the Court has stated that the failure of the referring judge to attempt to give interpretations conforming to the Constitution is not a condition of admissibility of the question of constitutionality:

The possibility of a different, alternative, interpretation, which the referring judge did not deem to adopt, has no relevance for the purposes of compliance with the procedural rules of constitutional adjudication, since verifying the existence and legitimacy of this further interpretation is a matter that concerns the merits, rather than the admissibility, of the question of constitutionality.

Two years later, with the decision 42/2017, the Court refined this new approach, stating that 'if the interpretation chosen by the referring judge is to be considered the only persuasive one, it is a point that goes beyond admissibility and relates, on the other hand, to the merits of the question';¹¹³ therefore, if 'we do not declare a law constitutionally illegitimate if it is possible to give an unconstitutional interpretation of it ... but

¹⁰⁷ In this sense, work carried out by the court's studies service points out a percentage of 70% for the reception of interpretative rulings by ordinary judges, which is a high percentage although 'not entirely satisfactory'. Due to all these factors, the Court has been gradually adjusting the scope of its own action. See *ibid* 201ff.

¹⁰⁸ Lamarque (n 105) 202ff.

¹⁰⁹ Lamarque (n 105) 202.

¹¹⁰ Lamarque (n 105) 203.

¹¹¹ Sandro Staiano, 'Corte costituzionale e giudici comuni. La congettura del riaccentramento' (2021) 3 *Federalismi.it* 105.

¹¹² Lamarque (n 105) 203–204, with reference to sentence 347 of 1998.

¹¹³ Here, the Court cites the doctrine established with the decisions n. 95 and 45/2016, n. 262/2015 and 204/2016.

rather if it is impossible to give a constitutional interpretation of it',¹¹⁴ this does not mean that when a constitutionally conforming interpretation cannot be (easily) given, the question should not be considered and scrutinised on its merits. Such consideration and scrutiny is crucial, even if only in terms of establishing 'whether the interpretative solution conforming to the Constitution rejected by the referring court is possible instead'.

In such terms, the burden of CCI has started being an obligation of means or, more precisely, one of diligence. To incidentally introduce a judgment of constitutionality, the ordinary judge should argue that, by ordinary hermeneutical means, it is not possible to conform the meaning of the legal norm at stake to the Constitution.¹¹⁵ When this is the case, the Court cannot issue a decision of inadmissibility of the question, but at most an interpretative judgment of rejection, if it considers that a conforming interpretation is possible.¹¹⁶

With this decision, the Court has started 'deconstructing' the canon established with the 1996 decision,¹¹⁷ pointing to a new era in the interaction between the Constitutional Court and other judicial authorities. An interaction that, again, finds its core in the practice of CCI. As always, CCI is used by the Court to calibrate its own interpretative power vis-à-vis the power of ordinary judges and the Supreme Court, so as to keep them in the equilibrium required by the hybrid system of constitutional justice adopted in Italy.

In this respect, the most controversial question still concerns the terms under which the Constitutional Court should interact with ordinary judges and, thereby, handle the dialogue with them, without compromising its own role in the system of constitutional adjudication and, at the same time, the equilibrium with ordinary judges that is required in order to avoid new conflicts among them. The answer to this question crucially depends on the instruments used by the Court to address the questions of constitutionality raised by ordinary judges and the interpretation of the contested provision adopted by the ordinary judge.

In this sense, since their introduction in the Italian system, interpretative decisions (*sentenze interpretative*) have played a central role. In fact, the performance of CCI – by the Court and by ordinary judges – has been strongly linked to the Court's resorting to this type of decision.

With interpretative judgments of rejection, as mentioned before, the Constitutional Court rejects a question of constitutionality raised in respect of a legal norm and, furthermore, provides an interpretation of that norm that differs from the interpretation provided by the referring judge. To provide this interpretation, the Court resorts to CCI and thereby invites the referring judge, and other judges, to follow its own, conforming, reading. As we saw, this type of decision is not envisioned by any legal provision, but the Court started issuing interpretative judgments very early, the first being n. 8/1956. By introducing and using this instrument, the Court has pursued and achieved two ends. First, extending its competence to the interpretation of the

¹¹⁴ Corte Cost. 356/1996.

¹¹⁵ Modugno (n 44) 70–71.

¹¹⁶ Corte Cost. 42/2017.

¹¹⁷ Staiano (n 111) 103.

law; and second, advising ordinary judges to expand their interpretation process beyond the bounds of ordinary law and into the sphere of constitutional values.¹¹⁸

Still, it is controversial whether, and how, the Court should use this type of decision. In very general terms, there are two approaches to this issue. According to a first approach,¹¹⁹ the Court should accept, and scrutinise the merits of, questions of constitutional legitimacy whenever there is a possible interpretation of the contested provision that does not conform to the Constitution. According to another approach,¹²⁰ the Court should reject questions of legitimacy if there is the possibility of a conforming interpretation and it should suggest such interpretation in an interpretative judgment of rejection.

These approaches point in different directions, especially with regard to the upshots of the position taken by the Court. In the first case, the decision of the Court, in case of annulment of the contested provision, has *erga omnes* effects. In the second case, the interpretative decision of rejection has effects only in terms of the referring judge, although it has persuasive authority with regard to all other ordinary judges.

However, the approach that is currently dominant, in the legal doctrine as well as in the jurisprudence, is the approach according to which the Court must resort to interpretative judgments of rejection when there is the possibility of a constitutionally conforming interpretation of the contested provision. Be that as it may, the way in which the Court should reject the question, and signal to ordinary judges the interpretative path to take, remains controversial.

The interpretative judgment – of rejection or acceptance – seems to be the most suitable instrument to orientate ordinary judges. In fact, although judgments of rejection do not have *erga omnes* effects, they nevertheless exert persuasive authority. Being motivated, such judgments provide arguments that influence the reasoning of ordinary judges and provide a basis for their decisions. Nonetheless, the Court often resorts to interpretative *orders* of rejection, which are succinctly motivated and therefore seem to be a less suitable instrument to impact on the decision-making of ordinary courts. Through the motivation, in fact, interpretative judgments expound and set out the reasons that led to the rejection/acceptance of a question raised before the Court. By this, such judgments offer the necessary elements to ordinary judges to know and appreciate the conforming interpretation of the norm at stake and, therefore, to consider whether to adopt the same interpretation. In such terms, interpretative judgments can favour the establishment of a dialogue – and coordination – between the Court and ordinary judges more than ordinances can.

In this respect, it is necessary to highlight an important distinction between interpretative judgments of rejection and acceptance.¹²¹ The former propose an interpretation conforming to the Constitution, while the latter exclude one of the possible meanings of the contested provision by accepting the doubt that it does not conform to the Constitution. The Court's choice of the decision-making technique fluctuates between these two fronts. On the one hand, the judgments of acceptance, acting in

¹¹⁸ Lamarque (n 1) 4.

¹¹⁹ Alessandro Pace, 'Identità o differenza tra la questione di costituzionalità della norma e la questione di costituzionalità dell'interpretazione?' (1965) 91 *Giurisprudenza costituzionale* 1650, 1656.

¹²⁰ Ruotolo (n 98).

¹²¹ Ruotolo (n 98) 9.

the negative, guarantee certainty with respect to an interpretative option to exclude. On the other hand, judgments of rejection guarantee clarity and encourage collaboration with ordinary judges, offering a positive interpretation in accordance with the Constitution that those judges can follow.¹²² These are the different needs justifying the different interpretative options that guide the choices of the Court in this sense. An equilibrium among them can be achieved as long as the interaction among the Court and ordinary judges unfolds through the use of decisional techniques that motivate the interpretations adopted by the Court.

VII. CONCLUSION

Ultimately, in a concentrated system of judicial review, the Court has, and should retain, the power of determining whether a legal norm violates the Constitution – and whether it is not possible to give a constitutionally conforming interpretation of that norm. At the same time, however, this power comes with the burden for the Court of guiding the practice of CCI so as to ensure that its own interpretations reach ordinary judges through adequately motivated decisions. Only in these terms does the Court put ordinary judges in the condition of appreciating the interpretative reasons that support its decisions, and to assess whether those reasons fit their own reading and application of ordinary law. Such exchange of reasons allows for a dialogue among different judicial institutions, operating at different levels of the system, which ensures uniformity in the interpretation and application of the law and, therefore, legal certainty, as required by the rule of law.

Furthermore, such dialogue favours a cross-fertilisation of interpretative options – throughout the system – and, by this, leads to the establishment of a reflective equilibrium¹²³ that ultimately improves and strengthens the judicial doctrines emerging from the (joint) practice of CCI.¹²⁴ Indeed, reflective equilibrium can be narrow or wide.¹²⁵ In the first case, it is the result of a deliberative process that goes back and forth between a particular judgment and the principles or reasons that – from the perspective adopted by the deliberative agent – are relevant in order to ground that judgment. In the second case, the reflective equilibrium results from a deliberative exercise testing a judgment on a particular case against a wider spectrum of principles or reasons that pertain not only to the perspective of the deliberative agent, but also to other perspectives. By this, the deliberation proceeds towards the establishment of a *wide* reflective equilibrium, based on the mutual adjustment between a particular judgment and a varied – broader – spectrum of arguments and reasons that are relevant for the justification of that judgment. The interaction between the Constitutional Court and ordinary judges in the practice of CCI – and other forms

¹²² *ibid.*

¹²³ John Rawls, 'The Independence of Moral Theory' (1974) 47 *Proceedings and Addresses of the American Philosophical Association* 5, 5–22.

¹²⁴ For this understanding of judicial dialogue, see José J Moreso and Chiara Valentini, 'In the Region of Middle Axioms: Judicial Dialogue as Wide Reflective Equilibrium and Mid-level Principles' (2021) 40 *Law and Philosophy* 545, 545–83.

¹²⁵ Rawls (n 124).

of judicial dialogue¹²⁶ – points to this second form of reflective equilibrium. Indeed, the practice of CCI allows both the Constitutional Court and ordinary judges to test their interpretative solutions against the reasons and principles of their own interpretative doctrines and, also, against the reasons and principles of other doctrines, adopted by other judicial actors. Ultimately, the different deliberative agents – ie the courts involved – refine their own arguments, and the principles that ground those arguments, by comparing them with alternative arguments and principles, being prompted to clarify the terms in which they differ and/or converge. Along these lines, the practice of CCI gradually leads to the progressive elucidation and refinement of conforming interpretative arguments, enhancing the justification offered on the basis of such arguments at the different levels – and by the different actors – of the judicial system.

¹²⁶ See Moreso and Valentini (n 126).