Essays

The Effectiveness of the Law and Consistent Interpretation

Gennaro Santorelli*

Abstract

The subject of the value of judicial precedent appears to have assumed a central role in current scholarly debate. Although the principle of binding precedent is not applied in the Italian legal system, the gradual strengthening of the Court of Cassation's function as guarantor of the uniform interpretation of the law raises important questions regarding the current basis of legal effectiveness.

Through a critical re-reading of the traditional doctrine of the so-called 'living law', it may come to take on a meaning that falls in line with the duty of ordinary judges to interpret it in a way that is compatible with the Constitution, a duty long upheld in constitutional case law. Once the ontological basis for the effectiveness of the law has been discerned, the so-called 'living law' is no longer a restriction on the interpretative freedom of the Constitutional Court but rather a hermeneutical/argumentative standard, serving to suggest the meaning of the provision whose constitutionality is at issue.

I. The Value of Judicial Precedent in the Constitutional Order. The Current Dimension of the So-Called 'Living Law'

The *creative* role of judicial interpretation has once more become very topical of late.[1]

Contemporary scholarship speaks of an Age of the Judiciary, where the conceptual boundary between the function of the courts and that of the legislator appears less clear cut than in the past.

At times, the Court of Cassation (Corte di Cassazione) itself defines its decisively describes its decisions as being 'normative case law'. Scholars are focusing once again on the creation of law through consolidated models of decision making and therefore on the question of the binding force of applying the rules of precedent, for which the expression 'living law' was coined.[2] This issue is

* Assistant Professor of Private Law, Parthenope University of Naples.

[1] Most recently on the subject, S. Patti, 'L'interpretazione, la giurisprudenza e le fonti del diritto privato' *Il Foro Italiano*, 114 (2014); N. Lipari, 'L'uso alternativo del diritto, oggi' *Rivista di diritto civile*, 144 (2018); Id, *Il diritto civile tra legge e giudizio* (Milano: Giuffrè, 2017); G. Zagrebelsky, *Diritto allo specchio* (Torino: Einaudi, 2018); P. Grossi, *L'invenzione del diritto*, (Roma-Bari: Laterza, 2017).

[2] N. Lipari, *Il diritto civile tra legge e giudizio* (Milano: Giuffrè, 2017), 20. Observing that the expression 'living law' has recently come back into vogue, and questions surrounding the

particularly important at a time when written law originates from sources coming from a plurality of legal orders, and case law stems from the concrete applications of different courts at domestic and supranational level.

For several reasons, the topic is linked to that of what is now a strongly felt need for legal certainty:[3] the inclusion of safeguards in a multi-level system of sources of law, the multiplicity of supreme courts, the fragmentary nature of legislation, and rapid social change. Today, the interpreter of the law is called upon to provide solutions to emerging concrete problems but also to ensure the certainty and stability of the legal system. The changing stance of case law is, in reality, a physiological fact,[4] and it leaves ample room for judicial discretion, making the judge's decisions less predictable.

The regulatory indications of the Italian legal system do not envisage the binding value of precedents. Nevertheless, the gradual acceptance and recognition of the Court of Cassation's function as guarantor of the uniform interpretation of the law implies the need to take previous decisions into account and to state the reasons for any differing interpretation.

The principles of legal certainty and the fair trial – Art 6 of the European Convention on Human Rights (ECHR) – require the adoption of appropriate measures to avoid conflicting case law, as far as this is possible. In this respect, Italian procedural law appears to comply with the indications of the Strasbourg Court: it provides, in fact, for certain instruments whose purpose is to avoid conflicts between laws. This objective has been achieved, for example, by putting procedures in place to ensure the stability of the case law by encouraging courts to abide by precedents or advising against deviation from them without directly affecting the value of the precedent.[5]

Of importance in this regard is the introduction of a horizontal restriction relating to the precedent of the Joint Sections or the Plenary Session: in order to disregard a position held by these bodies, the Single Section is now obliged to refer the matter once again to the Supreme Court[6] or, if it considers their position

notion and its current scope are being raised again, S. Sica, 'Il valore del precedente: attuale dimensione del "diritto vivente"' *federalismi.it*, 3 (2018).

[3] P. Grossi, 'Sull'odierna incertezza del diritto' *Giustizia civile*, 935 (2014).

[4] M.R. Morelli, 'L'overruling giurisprudenziale in materia di processo civile', Report no 31 of 2011, Ufficio del Massimario e del Ruolo della Corte Suprema di Cassazione, 21, available at www.cortedicassazione.it.

[5] F. Patroni Griffi, 'Valore del precedente e nomofilachia', 16 October 2017, available at tinyurl.com/y7glt6nq (last visited 7 July 2020); G. Severini, 'La sicurezza giuridica e le nuove implicazioni della nomofilachia' *federalismi.it*, 2018, 9; S. Sica, n 2 above, 3.

[6] R. Rordorf, '*Stare decisis. Osservazioni sul valore del precedente giudiziario nell'ordinamento italiano*' *Il Foro Italiano*, 284 (2006). In case law, Corte di Cassazione 18 May 2011 no 10864, available at www.cortedicassazione.it (2011), affirms the need for courts to be cautious in changing a consolidated position in order not to compromise a party's legitimate expectations; Corte di Cassazione-Sezione lavoro 15 October 2007 no 21553, *Giustizia civile - massimario*, 10 (2007), states that even if there is no rule in the Italian procedural system imposing *stare decisis*, one

to be in conflict with European Union law, to the Court of Justice of the European Union (Art 374 of the Code of Civil Procedure, introduced by legge 2 February 2006 no 40).

The growing value of precedents in our system can also be seen in Art 118 of the implementing provisions of the Code of Civil Procedure, as reformed by legge 18 June 2009 no 69, which expressly authorises courts to refer to analogous precedents to justify the legal reasons for a judgment.

In addition to these are the provisions of the Code of Civil Procedure that allow the reasoning section of judgments to be simplified by referring directly to analogous precedents or, conversely, those that permit an appeal, including before the Court of Cassation, to be declared inadmissible if the impugned decisions are in accordance with established case law, and no element pointing to a need to change it emerges.

In the light of the question of the value to be attributed to precedent in today's legal system, the second section examines the issue of the sudden change in direction in the consolidated case law of the Court of Cassation. Considering the differing opinions on the binding nature of precedent, the third section attempts to identify the basis for the effectiveness of the law.

We propose a critical analysis of the traditional doctrine of the 'living law', particularly in relation to the duty – now affirmed in constitutional case law – of the ordinary judge to interpret in a way that is compliant with the Constitution provisions whose lawfulness may be in doubt. The fourth paragraph shows the incompatibility between the official doctrine of 'living law' and the so-called consistent interpretation.

Having highlighted the problems in the original formulation of 'living law', the fifth section gives it a different meaning: seen from an ontological standpoint – in the light of recent rulings of the Court of Cassation and the Constitutional Court – we conclude (Section VI) that, today, the 'living law' can be seen not as an historical given that cannot be changed – binding, as such, the Constitutional Court to a specific interpretation – but as a hermeneutical criterion.

II. The Predictability of Decisions, Overruling, Prospective Overruling

The growing importance given to 'living law' has led to an interest in the phenomenon of overruling in both scholarship and case law.[7]

cannot deviate from the consolidated interpretation of the Court of Cassation, which plays a nomophylactic role.

[7] R. Rolli, '*Overruling* del diritto vivente vs *ius superveniens*' *Contratto e impresa*, 591 (2013); M. Gaboardi, 'Mutamento del precedente giudiziario e tutela dell'affidamento della parte' *Rivista di diritto processuale*, 435 (2017); A. Proto Pisani, 'Un nuovo principio generale del processo' *Il Foro Italiano,* 117 (2011); R. Caponi, 'Il mutamento di giurisprudenza costante in materia di interpretazione di norme processuali come ius superveniens irretroattivo' *Il Foro Italiano*, 311 (2010); S. Turatto, '*Overruling* in materia processuale e principio del giusto processo' *Le nuove leggi civili commentate*,

The changing interpretation of a legal provision in case law is a natural phenomenon. However, if it is sudden and innovative, it may run counter to the protection of legitimate expectations, especially with regard to any legal relationships that arose before the new interpretation.

According to the principle of the declarative nature of judicial decisions, the new interpretation should normally have retroactive effect. The question concerns the limits that distinguish, in the building of 'living law', the function of those who make the laws from that of those who are called to apply them, namely, how to do define the role of the judge in the constitutional system of the separation of powers.

Constitutional and Convention rules, such as the ECHR and the Nice-Strasbourg Charter (Art 6 of the Treaty on the Functioning of the European Union - TFEU), place limits on the legislator's power of authentic interpretation. These limits must also be considered to operate in relation to judicial interpretation: the normal retroactivity of the rule created by the new legal position is restricted by the protection of the legitimate expectations built up on the basis of the original judicial precedent, if retroactive application of the new position leads to the forfeiture or preclusion of proceedings that could not have been envisaged previously.

In the Italian legal order, the question concerns the role attributed to case law in the hierarchy of sources. The principle of *stare decisis* has no relevance in the Italian legal system: under Art 101 of the Constitution, judges are subject only to the law. Nor does the provision of Art 374, para 3, of the Code of Civil Procedure, mentioned above, appear to introduce the principle of binding precedent. Case law has a merely declaratory function, serving to identify the scope of the law and with no creative function within it.

The declaratory function of case law does not, however, rule out the need to identify suitable remedies to protect the legitimate expectations that have been created with regard to the interpretation that is later overruled. The question relates to the effectiveness in time (operating only in the future or even retroactively) of an innovative ruling with regard to previously settled case law in the field of procedural law, leading to forfeiture or preclusion to the detriment of a party to the proceedings.

In the Italian legal system, although prospective overruling is known in civil law and recent judgments of the Constitutional Court, it had never been adopted

1151 (2015); G. Ruffini, 'Mutamenti di giurisprudenza nell'interpretazione delle norme processuali e «giusto processo»' *Rivista di diritto processuale*, 1390 (2011). In case law, Corte di Cassazione-Sezioni unite 11 April 2011 no 8127, *Il Foro Italiano*, 1386 (2011), with a commentary by G. Costantino; Corte di Cassazione-Sezione lavoro 25 February 2011 no 4687, *Il Foro Italiano,* 1074 (2011); Corte di Cassazione 7 February 2011 no 3030, *Il Foro Italiano*, 1075 (2011); Corte di Cassazione 2 July 2010 no 15809, *Il Foro Italiano,* 144 (2010); Corte di Cassazione 2 July 2010 no 14627, *Il Foro Italiano*, 3050 (2010); Corte di Cassazione 17 June 2010 no 15811, *Il Foro Italiano,* 3050 (2010).

by the Civil Division of the Court of Cassation. This decision-making power, in fact, brings the judiciary closer to the power traditionally attributed to the legislature alone. The question, therefore, concerns the value of the precedent and whether the function attributed to case law is merely declaratory or creative, as well as the possibility of including it among the sources of the Italian legal order.

The case law of the Court of Cassation answers the question of the effectiveness of changes in case law regarding consistent rules of a procedural nature[8] by specifying the limits within which the 'living law' can become a source of law, and therefore the question of the relationship between the function of the judge and that of the legislator.

In the event of an *unforeseeable* ruling – based on a principle of law different from the consolidated one on which the party had relied – the alternative is whether to treat as standard (ie, valid) the act carried out in connection with and compliant with the previous case law, or to consider it invalid, as it does not comply with the provision of reference as subsequently reinterpreted. In this case, mechanisms would be put in place to protect the party who had trusted in a previous 'living law'.

The Court of Cassation reiterates that the judiciary cannot make provision for the temporal effects of the decision since this power belongs to the legislature alone.

The Court also states that case law retains its retroactive effect as it does not *create* but *interprets* the law. The judgment therefore normally has retroactive effect. The fundamental precept that the judge is subject only to the law (Art 101 of the Constitution) prevents the interpretation of case law from being equated to a source of law.[9]

The change to the previous interpretation of procedural law on the part of the Court of Cassation constitutes a corrective interpretation that retroactively affects the provision of procedural law. The act performed or the conduct of the party on the basis of the previous position is not therefore in accordance with the provision. The new construal applies to the cases covered by the rule to be

[8] In the same vein, Corte di Cassazione 27 December 2011 no 28967; Corte di Cassazione 4 May 2012 no 6801; Corte di Cassazione 17 May 2012 no 7755; Corte di Cassazione 1 March 2013 no 5962; Corte di Cassazione 19 January 2016 no 819; Corte di Cassazione 15 February 2018 no 3782, all available at www.cortedicassazione.it.

[9] This position has recently been restated by the Joint Sections of the Court of Cassation, called upon to rule again on the issue, in particular with regard to the effectiveness of prospective overruling of substantive rules. The Court reiterated that prospective overruling exists when there is a change in the Court of Cassation's case law with regard to provisions regulating trial procedure but not to provisions of a substantive nature and when the change was unforeseeable due to the consolidation over time of the previous policy, which has become 'living law' and thus likely to induce a party to reasonably rely on it. According to the Court, the interpretation of a procedural rule that is stated at a later stage does not represent a necessarily non-retroactive jus superveniens, since it simply reinterprets the wording and is, as such, meant to apply from the outset. However, the original misreading of the case law created (or may have created) 'the appearance of a rule' on which the party relied.

interpreted, even if it arose at a time before the *revirement* of the case law.

However, given the need to protect legitimate expectations, by virtue of the higher value of due process, the Court of Cassation introduces an institution to protect the legitimate expectations of a party who has carried out specific acts relying on future alignment with previously made decisions.[10]

The retroactivity of sudden and unforeseeable changes in case law, which have the effect of precluding the right of action and defence of the party who innocently relied on the consolidated position, is therefore ruled out. Uncertainty regarding the value of case law raises the need to identify systems to prevent values such as legal certainty and the predictability of outcome from being undermined. Nevertheless, it is clear that 'judge-made law' is increasingly relevant to our legal system.

On the one hand, there are those who strongly affirm the value of the precedent as a remedy to the increasing unpredictability of judicial decisions and the consequent crisis of legal certainty, warning, among other things, of the risk of breaching the principle of equality. In scholarship it has been observed that although precedent has no binding value in our legal system, the strengthening of the unifying function may not be impeded. It is therefore necessary to give courts strict criteria for deviating from precedent, notwithstanding their subjection to the law alone. This would safeguard important values such as equality before the law and the predictability of decisions.[11]

Others claim that the basis of positive law is not effectiveness alone: the 'living law' cannot be synonymous with mere judicial practice.[12] The proliferation of rules alone cannot be the answer to the diminishing mandatory and effective nature of the order: what is needed are fewer rules and a return to *law*, understood as a synthesis of interests analysed in the light of choices inspired by values.[13]

III. The Effectiveness of Law. Fundamentals and Limits. The Traditional Doctrine of 'Living Law'

In light of the above considerations, it is clear why scholarship[14] again poses the question of what the object of the study of law is: the provisions of the law or what can be identified with the reality of the application of the law, the regulation of relationships, ie, the law as it is accepted in its application by society.

Case law acts in reaction to needs as they emerge in society. The court

[10] On this subject, F. Santangeli, 'La tutela del legittimo affidamento', available at www.diritto.it (2017).

[11] F. Patroni Griffi, n 5 above.

[12] C.M. Bianca, *Realtà sociale ed effettività della norma. Scritti giuridici* (Milano: Giuffrè, 2002), I, 35.

[13] S. Sica, n 2 above, 4.

[14] C.M. Bianca, 'Diritto vivente, coscienza sociale e principio di effettività' Relazione al Convegno 'Il Diritto Vivente', Roma, 12 April 2018, available at www.magistraturaindipendente.it.

becomes the interpreter of the social conscience, proposing new interpretations and new content when the written law is no longer adequate.

The court thus proposes a new reading of the provision on the basis of the needs and ethical values perceived by society. The legal principles set out in case law become 'living' because they are applied and shared in society. How is this effectiveness justified? Where does effective law come from? What is – if any – the basis for the effectiveness of the law, of the gradual transition from written law to applied law?

It is generally acknowledged that the first elaboration of the doctrine of 'living law' – as the theory of the object of constitutional judicial review – is attributed to Tullio Ascarelli.[15] The reflections of this illustrious scholar rest on the conception of hermeneutical activity as creative: interpretation is not a mathematical and mechanical operation. The interpreter of the law does not merely reveal the meaning of a provision: he creates it. The law lives, therefore, in its concrete application: the text becomes *law* subsequent to its interpretation.

The interpretative process is circular in nature:[16] a law lives only at the moment of its application[17] and then becomes text once again,[18] becoming, therefore, the starting point for the declaration of a new law.[19] If the law[20] exists only when it is applied, when deciding on its lawfulness, the Court has to consider the applications of the text in practice[21] and, therefore, its prevalent interpretation in case law.[22]

According to the official theory of 'living law', therefore, while the interpretation of the ordinary court has an applicative purpose and is not subject to any constraint,[23] the object of the interpretation of the Constitutional Court is the disputed provision as a historical fact. Consequently, the ambiguity of the wording of the law must be overcome by referring to the applications that have actually be made.[24]

For constitutional judges, therefore, there is no question of choosing between the various possible interpretations of the text, because 'living law' is binding and cannot be amended.[25] In this respect, the theory shows its logical limitations: the

[15] T. Ascarelli, 'Giurisprudenza costituzionale e teoria dell'interpretazione giuridica' *Rivista di diritto processuale*, 351 (1957), and also in Id, *Problemi giuridici* (Milano: Giuffrè, 1959), I, 139.

[16] A. Pugiotto, *Sindacato di costituzionalità e «Diritto vivente». Genesi, uso, implicazioni* (Milano: Giuffrè, 1994), 36.

[17] T. Ascarelli, 'Giurisprudenza costituzionale' n 15 above, 140.

[18] ibid 145.

[19] T. Ascarelli, 'In tema di interpretazione ed applicazione della legge' ('Lettera al Prof. Carnelutti') *Rivista di diritto processuale* (1958), also in Id, *Problemi giuridici* n 15 above, 154.

[20] T. Ascarelli, 'Giurisprudenza costituzionale' n 15 above, 145.

[21] ibid 151.

[22] ibid 151.

[23] ibid 151.

[24] ibid 152.

[25] See A. Pugiotto, n 16 above, 77; V. Accattatis, 'Conflitti interpretativi' *Rivista penale*, 510 (1966).

central problem consists, in fact, precisely in the assumption that the Constitutional Court carries out a purely historiographical investigation, which is not creative but declarative and therefore not an interpretation of law.[26]

From a logical perspective, it is possible to raise two objections against the theory: on the one hand, if the 'living law' is 'living' solely at the moment of application[27] – only to revert to being a mere text destined to become the expression of new laws[28] – one cannot logically claim that the Constitutional Court is bound to a previous and concluded judicial interpretation. Consequently, the Constitutional Court too, like the ordinary court, will be able to deduce new principles from that text, and these will be different from those established in previous interpretations that have identified provisions that no longer exist. The Constitutional Court cannot grasp the 'living' provision, which is such only at the moment of judicial application to the concrete case.[29] The very circularity[30] of the process described by Tullio Ascarelli is incompatible with the survival of the provision beyond its life cycle.[31]

The second logical contradiction in this theory consists in the fact that if the power of the Constitutional Court to interpret the disputed provision is denied, it becomes impossible to explain from what sources the Court itself derives its interpretative power in the absence of a dominant judicial interpretation. The Constitutional Court's review would have no object[32] in the absence of an established interpretation in case law to which it could refer (eg in the case of a

[26] A. Pugiotto, n 16 above, 68.

[27] T. Ascarelli, 'Giurisprudenza costituzionale' n 15 above, 140.

[28] T. Ascarelli, 'In tema di interpretazione' n 19 above, 145-154.

[29] G. Maranini, 'La posizione della Corte e dell'autorità giudiziaria in confronto all'indirizzo politico di regime (o costituzionale) e all'indirizzo politico di maggioranza', in G. Manarini ed, *La giustizia costituzionale* (Firenze: Vallecchi, 1966), 140. An opposing opinion A. Pugiotto, n 16 above, 95.

[30] A. Pugiotto, n 16 above, 36.

[31] V. Crisafulli, 'Ancora delle sentenze interpretative di rigetto della Corte costituzionale', commentary on the Constitutional Court 19 February 1965 no 11, *Giurisprudenza costituzionale*, 99 (1965); M. Mazziotti, 'Osservazioni all'ordinanza n. 128 del 1957 of 1957' *Giurisprudenza costituzionale*, 1227 (1957); N. Assini, *L'oggetto del giudizio di costituzionalità e la 'guerra delle due corti'* (Milano: Giuffrè, 1973), 36; A. Spadaro, *Limiti del giudizio costituzionale in via incidentale e ruolo dei giudici* (Napoli: Edizioni Scientifiche Italiane, 1990), 262. Again, an opposing opinion A. Pugiotto, n 16 above, 158. On this subject, please refer to G. Santorelli, 'Il c.d. diritto vivente tra giudizio di costituzionalità e nomofilachia', in P. Femia ed, *Interpretazione a fini fini applicativi e legittimità costituzionale* (Napoli: Edizioni Scientifiche Italiane, 2006), 545-546.

[32] F. Carnelutti, 'Poteri della Corte costituzionale in tema di interpretazione della legge' *Rivista di diritto processuale*, 349 (1962); G. Marzano, 'La Corte costituzionale e l'interpretazione delle leggi ordinarie' *Foro padano* (1963); M.S. Bigi, 'Natura dei poteri e limiti del sindacato della Corte costituzionale nel giudizio incidentale di legittimità delle leggi' *Rassegna di diritto pubblico*, 904 (1965); G. Conso and E. Fazzalari, 'Appunti per una discussione sui problemi attuali della Cassazione' *Rivista di diritto processuale*, 77 (1965); G.U. Rescigno, 'Per la distinzione tra questione di costituzionalità e argomentazioni del giudice *a quo*. Sul potere del prefetto di respingere la domanda di oblazione' *Giurisprudenza costituzionale*, 1063 (1967); N. Assini, n 31 above, 28, 69 and 73. For further bibliographical reference, see A. Pugiotto, n 16 above, fn 15.

recently issued provision, or which has not often been applied in the courts, or else a provision subject to unresolved conflicts of interpretation).[33] The theory therefore leads to a logical paradox. The Court must therefore be considered to be endowed with autonomous power of interpretation: the 'living law' cannot cancel out or even limit the exercise of this power.

Notwithstanding the efforts of theorists of the 'living law' to reduce the importance of these objections,[34] the theory is obviously inadequate to govern and regulate the interpretative activity of the Constitutional Court. The official doctrine of 'living law' is based, as mentioned above, on the assumption that the interpretation of a provision falls to ordinary courts, while the Constitutional Court is entrusted with comparing it, as interpreted by the referring court, with the provisions of the Constitution.[35] The Court expressly states, in its rulings, that it refers to 'living law' (meaning the law as applied by the ordinary courts) in its deliberations.

The constraint of the Constitutional Court with regard to the settled interpretation of case law is thus affirmed, regardless of the correctness of the interpretative proceeding.[36] In compliance with the 'living law', the Court could declare a provision unlawful even though it is possible to read it in conformity with the Constitution.[37] Moreover, in the absence of an unambiguous or settled judicial interpretation of the provision enshrined in the disputed law, the Constitutional Court enjoys total freedom of interpretation; in such cases, it may attribute new or different legal significance to the legislative provision with respect to the order for reference presented by the referring court and the positions that have emerged in case law.[38]

Where there is settled 'living law', the task of the Constitutional Court comes down to the alternative between ('mere', ie non-interpretative) rejection of the question or the conclusion that the question is well founded. The additional model of the so-called 'interpretative judgement of rejection' could be adopted only where the referring court has suggested a different interpretation of the provision with respect to the Court of Cassation's settled interpretation: in this

[33] M. Mazziotti, n 31 above, 1226; G. Marzano, 'La Corte costituzionale e l'interpretazione delle leggi ordinarie' *Foro padano* (1963); V. Crisafulli, n 31 above, 99; N. Assini, n 31 above, 37. Cf, also, F. Modugno and A.S. Agrò, *Il principio di unità del controllo sulle leggi nella giurisprudenza della Corte costituzionale* (Torino: Giappichelli, 1991), 207; A. Spadaro, n 31 above, 263.

[34] A. Pugiotto, n 16 above, 197.

[35] Corte costituzionale 17 June 1992 no 280, *Giurisprudenza costituzionale*, 2139 (1992); Corte costituzionale 30 November 1982 no 204, *Giurisprudenza costituzionale*, 2157 (1982); Corte costituzionale 10 October 1990 no 435, *Giurisprudenza costituzionale*, 2597 (1990); Corte costituzionale 30 December 1985 no 369, *Giurisprudenza costituzionale*, 2570 (1985).

[36] G. Zagrebelsky, 'La dottrina del diritto vivente' *Giurisprudenza costituzionale*, 1149 (1986); E. Cheli, 'La Corte costituzionale nella forma di governo italiano' *Quaderni dell'Associazione per gli studi e le ricerche parlamentari*, Seminari 1989-90, 1, 132 (Milano: Giuffrè, 1991).

[37] L. Elia, 'La giustizia costituzionale nel 1984' *Giurisprudenza costituzionale*, 394 (1985).

[38] See, for example, Corte costituzionale 20 March 1985 no 73, *Giurisprudenza costituzionale*, 539 (1985); A. Pugiotto, n 16 above, 360.

case, the Constitutional Court finds the question unfounded, referring to the prevalent interpretation itself.[39]

If, on the other hand, the disputed provision has not been ascribed a stable position in case law, the Constitutional Court acts autonomously and is not prevented from reaching new hermeneutical conclusions. Consequently, the Constitutional Court hands down its decision on the basis of its own independent interpretation. In this case, the function and role of interpretative rejection is different: it is not used to challenge interpretations of the disputed provision that differ from those imposed by the highest courts but to introduce new legal meanings into the circuit of judicial interpretation – as a 'living law' in the process of becoming – capable of removing the contested provision from the alleged claims of illegality (the so-called adjustment interpretation).[40]

The establishment of a constraint of the Constitutional Court with respect to the dominant positions held by the Court of Cassation look, therefore, like an attempt to reinforce the doctrine of judicial precedent in the relations between the two Courts.[41] A precedent, as a rule for a specific and concrete case, consumed and impossible to reproduce due its uniqueness, cannot have a binding force autonomous and superior to that of the rules and principles of which it constitutes the application.[42]

IV. 'Living Law' and Interpretation Compliant with the Constitution

The traditional doctrine of 'living law', which affirms the submission of the Constitutional Court to the settled interpretation of the Court of Cassation, has

[39] See, for example, Corte costituzionale 11 April 1984 no 104, *Giurisprudenza costituzionale*, 576 (1984), where it is stated that a question of constitutionality raised on the basis of an interpretation contrary to the 'living law' must be rejected even where that 'living law' was consolidated after the referral order, taken up by G. Zagrebelsky, 'La dottrina' n 36 above, 1151. On the subject, moreover, see A. Pugiotto, n 16 above, 40.

[40] On this, see L. Elia, 'La giustizia costituzionale nel 1985' *Giurisprudenza costituzionale*, 295 (1986).

[41] On judicial precedent, see G. Gorla, 'Precedente giudiziale' *Enciclopedia giuridica* (Roma: Treccani, 1990), XXIII, 1. On the role of precedent in decisions of the Constitutional Court, see A. Anzon, *Il valore del precedente nel giudizio sulle leggi* (Milano: Giuffrè, 1985), 65; G. Treves, 'Il valore del precedente nella giustizia costituzionale italiana', in G. Treves ed, *La dottrina del precedente nella giurisprudenza della Corte Costituzionale* (Torino: UTET, 1971), 3; A. Pizzorusso, 'Effetto di 'giudicato' e effetto di 'precedente' nella sentenza della Corte Costituzionale' *Giurisprudenza costituzionale*, 1976 (1966); Id, 'La Corte Costituzionale', in G. Piva ed, *Potere, poteri, poteri emergenti e loro vicissitudini nell'esperienza giuridica italiana* (Padova: CEDAM, 1986), 370; A. Gardino Carli, 'Il principio del precedente e la sua applicazione nella giurisprudenza della Corte costituzionale sulle Regioni a statuto ordinario' *Quaderni regionali*, 602 (1985).

[42] P. Perlingieri, *Diritto comunitario e legalità costituzionale. Per un sistema italo-comunitario delle fonti* (Napoli: Edizioni Scientifiche Italiane, 1992), 28. See also A. Pizzorusso, 'Delle fonti del diritto', in A. Scialoja and G. Branca eds, *Commentario al Codice Civile* (Bologna-Roma: Zanichelli, 1977), 525, and B.N. Cardozo, 'La natura dell'attività giudiziale', in Id ed, *Il giudice e il diritto*, Italian translation of V. Gueli (Firenze: La Nuova Italia, 1961), 71.

no basis in positive law, still less at the constitutional level.[43] The Constitution actually hints at quite the opposite. Art 101(2) of the Constitution establishes that all judges, and therefore also constitutional ones, are subject only to the law.[44]

Nor can a different conclusion be reached even by referring to the constitutional relevance (under Art 111, para 7 Constitution) of the Court of Cassation's function as guarantor of the uniform interpretation of the law.[45] It is a known fact that the principle of law expressed by the Court of Cassation entails a duty of uniformity exclusively with respect to the referring court (pursuant to Art 384, para 1 of the Italian Criminal Code).

The distinction between an individual decision and a legal provision must therefore be stressed once again. Over and beyond the case for which it is handed down, the value of a judgment lies purely in what it may suggest from the point of view of interpretation, which may be subject to critical review and academic debate:[46] the interpretation of case law is not, in the Italian legal system, a source of law.[47] As precedents have no law-making value,[48] a judicial decision, even if handed down by the Court of Cassation, is only persuasive and, therefore, non-binding.[49]

The ordinary court, therefore, is not obliged to abide by the position of the Court of Cassation[50] but must become aware of its role of responsibility in the implementation of constitutional lawfulness and not give way to judicial

[43] This basis is rejected by G.A. Micheli, 'Osservazioni sulla natura giuridica delle Commissioni tributarie (dopo le sentenze nn. 6 e 10 della Corte costituzionale)' *Giurisprudenza costituzionale*, 314 (1969); G. Vassalli, 'Interpretazione giudiziale e Corte costituzionale (a proposito di un recente progetto legislativo)' *Giustizia penale*, 130 (1966); G. Laserra, 'La Corte costituzionale e l'interpretazione della legge' *Giurisprudenza italiana*, 192 (1961).

[44] Cf A.M. Sandulli, 'Atto legislativo, statuizione legislativa e giudizio di legittimità costituzionale' *Rivista trimestrale di diritto e procedura civile*, 162 (1961).

[45] See Art 65, decreto reale 30 January 1941 no 12, for which the Court of Cassation ensures the precise observance and uniform interpretation of the law. This is also recognised in constitutional case law: see, for example, Corte costituzionale 4 February 1982 no 21, *Giurisprudenza costituzionale*, 206 (1982); Corte costituzionale 5 July 1995 no 294, *Giurisprudenza costituzionale*, 2293 (1995).

[46] E. Betti, *Interpretazione della legge e degli atti giuridici (teoria generale e dogmatica)* (Milano: Giuffrè, 2nd ed, 1971), 228 and 327; see, on this point, also P. Perlingieri, *Il diritto civile nella legalalità costituzionale* (Naples: Edizioni Scientifiche Italiane, 2nd ed, 1991), 92.

[47] E. Betti, n 46 above, 228.; P. Perlingieri, 'Prassi, principio di legalità e scuole civilistiche' *Rassegna di diritto civile*, 956 (1984), now in Id ed, *Scuole tendenze e metodi. Problemi del diritto civile* (Napoli: Edizioni Scientifiche Italiane, 1989), 217; P. Perlingieri and P. Femia, *Nozioni introduttive e principi fondamentali del diritto civile* (Napoli: Edizioni Scientifiche Italiane, 2nd ed, 2004), 66. In this regard, see also S. Bartholini, 'Di un caso di rilevanza dinanzi alla Corte costituzionale dell'esecuzione della disposizione impugnata', in Id, *Spunti di diritto costituzionale* (Padova: CEDAM, 1962), 23.

[48] See, exhaustively, G. Gorla, 'Les sections réunies de la Cour de Cassation en droit italien: Comparaison avec le droit français' *Il Foro italiano*, 116 (1976).

[49] Also L. Mengoni, 'Diritto vivente' *Jus*, 20 (1988). On the same lines, E. Betti, n 46 above, 228.

[50] L. Mengoni, 'Diritto vivente' n 49 above, 66.

conformity.[51] The theory whereby the Constitutional Court is allegedly subject to the judicial choices of the Court of Cassation is unfounded.[52]

The interpretative activity of the Constitutional Court, like that of any other court, has to take into account the evolution and changes that have taken place in the legal system and in society. It follows that the Constitutional Court, while being obliged to consider the prevalent positions, may, however, legitimately disregard them if necessary to carry out is tasks corrrectly. The so-called 'living law' is not, therefore, grounded in the current legal order,[53] especially because it is contrary to the values of constitutionality.[54] In the years immediately following Ascarelli's work of theorisation, the systematic unity of the legal system[55] was in fact acknowledged, and so the doctrine of 'compatible' interpretation came to be legitimated.

From the nineties onwards, the Constitutional Court has directly involved the ordinary courts in the interpretation of legislation in compliance with the Constitution. The ordinary courts are therefore endowed with the power to, and duty of, verifying in advance whether the legislative text can be given a meaning compatible with the Constitutional standard.

Constitutional case law therefore declares the inadmissibility, without deciding on the merits, of questions of legitimacy raised with regard to provisions interpreted incorrectly by the referring court. In these cases, in fact, the principle identified by the referring court stems from a hermeneutical procedure that does not respect axiological and systematic interpretation. In other words, the principle thus identified cannot represent a term of reference for a judgment on constitutionality because it does not exist in the legal system, from the ontological point of view.[56]

The effectiveness of constitutional principles, in fact, does not end with the duty to interpret provisions in a way that is compliant with the Constitution: in conforming the principle to Constitutional precepts, the interpreting court has to eliminate unconstitutional normative meanings.

The gowing affirmation of the duty of the referring court to interpret in compliance with the constitution as a necessary condition for raising a question

[51] ibid.

[52] In this vein, see V. Crisafulli, n 31 above, 100; V. Andrioli, 'Motivazione e dispositivo nelle sentenze della Corte costituzionale' *Rivista trimestrale di diritto e procedura civile*, 546 (1962); A. Spadaro, n 31 above, 261. See also, A. Pizzorusso, 'La Corte costituzionale', in G. Piva ed, *Potere, poteri emergenti e loro vicissitudini nell'esperienza giuridica italiana* (Padova: CEDAM, 1986), 371.

[53] See S. Bartholini, n 47 above, 27.

[54] Cf P. Perlingieri and P. Femia, n 47 above, 162.

[55] The unity of the legal system was already observed by the first judges of the Court: see, for example, F. Bonifacio, 'La Corte costituzionale e l'autorità giudiziaria, in G. Maranini ed, *La giustizia costituzionale* (Firenze: Vallecchi, 1966), 54. On the view of the legal system as various and complex unit, see P. Perlingieri, 'Complessità e unitarietà dell'ordinamento e unitarietà dell'ordinamento giuridico vigente' *Rassegna di diritto civile*, 188 (2005).

[56] In this vein S. Bartholini, n 47 above, 15.

of constitutionality appears to be radically opposed to the theory of 'living law'.[57]

The conflict also concerns the problem of delineating the hermeneutical work of the Constitutional Court. The majority opinion affirms the primacy of the constitutionally compliant interpretation: the annulment of an unconstitutional 'living' provision should be avoided whenever the disputed provision can be interpreted in accordance with the Constitution.[58] The question as to constitutionality should be upheld, in fact, only when both the referring court and the Constitutional Court have established that a constitutionally correct interpretation is impossible.[59] According to another view, the adapted interpretation allegedly has a subsidiary and subordinate role with respect to the canon of jurisprudential effectiveness.[60]

According to the doctrine of the 'living law', the principles enshrined in the Constitution only apply to interpretation in the ordinary courts; the Constitutional Court could always disregard them in favour of the criterion of historical concreteness.

The recognition of the Constitutional Court's autonomy of interpretation does not mean, however, that it is free to attribute to the disputed provision a normative significance in contrast with constitutional principles, which holds a position of supremacy among the sources of Italian law.[61] Like all courts, the Constitutional Court is also subject to the principle of constitutional legality: this principle ensures that the autonomy with which it is endowed does not exceed its function. Both the Constitutional Court and the Ordinary Courts use interpretative instruments such as the balance of values, regulatory consistency and reasonableness.[62] The 'living law' cannot, therefore, come between who is called upon to interpret and the normative signifier of the provision.

[57] P. Perlingieri, 'Giustizia secondo Costituzione ed ermeneutica. L'interpretazione c.d. adeguatrice', in P. Femia ed, *Interpretatione* n 31 above, fn 55.

[58] V. Crisafulli, 'Il ritorno dell'art. 2 della legge di pubblica sicurezza davanti alla Corte costituzionale' *Giurisprudenza costituzionale*, 895 (1961); G. Vassalli, 'Interpretazione giudiziale e Corte costituzionale (a proposito di un recente progetto legislativo)' *Giustizia penale*, 130 (1966); F. Bonifacio, n 55 above, 53; F. Bonifacio, 'La magistratura e gli altri poteri dello Stato' *Rassegna di diritto pubblico*, 5 (1968); S. Bartholini, n 47 above, *passim*; G. Franchi, 'Certezza del diritto e legittimità costituzionale. (Sintesti storica del problema)' *Giurisprudenza italiana*, 9 (1970).

[59] P. Perlingieri, 'Giustizia' n 57 above, fn 55.

[60] A. Pugiotto, n 16 above, 157 (italics original), but see also 175. In a similar vein, see C. Lavagna, 'Considerazioni sulla inesistenza di questioni di legittimità costituzionale e sulla interpretazione adeguatrice' *Il Foro italiano*, 15 (1959), now in C. Lavagna, *Ricerche sul sistema normativo* (Milano: Giuffrè, 1984), 604; C. Lavagna, 'Sull'illegittimità dell'art. 2 del testo unico delle leggi di pubblica sicurezza come testo legislativo' *Giurisprudenza costituzionale*, 902 (1961); A. Pizzorusso, 'La motivazione delle decisioni della Corte Costituzionale: comandi o consigli?' *Rivista trimestrale di diritto pubblico*, 385, (1963); V. Onida, 'L'attuazione della Costituzione fra magistratura e Corte costituzionale', in Aa.Vv., *Scritti in onore di C. Mortati* (Milano: Giuffrè, 1977), 535.

[61] See, on this point, S. Bartholini, n 47 above, 11.

[62] In this vein, see P. Perlingieri, 'Giustizia' n 57 above, text to ns 154 and 160. Similarly, A. Pace, 'I limiti dell'interpretazione 'adeguatrice' *Giurisprudenza costituzionale*, 1073 (1963).

Contrary to the traditional understanding of the theory of 'living law', it has been observed[63] that it is not equated with simple judicial practice but is an operation that impacts on the law itself; thus, the incidence of case law is grounded in the acceptance of the provision as applied by the society to which the interpreting court belongs. Effectiveness is not to be sought in the application of case law without considering the appropriacy of the hermeneutical procedure.

V. The Ontological Foundation of 'Living Law'

Not only can the term 'living law' be understood in a variety of ways, it can take on different meanings over time. The expression 'living law' can also have an *ontological* meaning.[64]

According to this view, 'living law' is not equated with mere judicial practice: the judge becomes the interpreter of social conscience; however, even this notion is relative if it is not anchored to a foundation. Authoritatively, this foundation lies in the justice of the decision.[65]

The 'living law' is, in this sense, the only *true*,[66] or effective, one, not because it conforms to the interpretations and applications that one or many courts[67] have made of it, but because it results from systematic interpretation consistent with the entire legal order[68] as a unitary system.[69]

A principle that comes into being due to an error of interpretation by a judge, perhaps because it is not in line with constitutional standards or because it has been tacitly annulled by a later source, albeit fixed in the principles underlying the judgments of the highest courts – can never obscure the different 'living law', which draws its current meaning from the entire normative system.[70]

[63] C.M. Bianca, *Realtà sociale* n 12 above, passim.

[64] In this sense, M.R. Morelli, 'Il 'diritto vivente' nella giurisprudenza della Corte costituzionale' *Giustizia civile*, 173 (1995). Id, 'Ancora una nuova tipologia di decisione costituzionale: la 'interpretativa di inammissibilità'', commentary on the Corte costituzionale 26 September 1998 no 347, *Giustizia civile*, 2414 (1998), which recalls the studies on the concept of norms conducted by V. Crisafulli, 'Disposizione (e norma)' *Enciclopedia del diritto* (Milano: Giuffrè, 1964), XIII, 207.

[65] C.M. Bianca, 'Diritto vivente' n 14 above.

[66] V. Crisafulli, 'Disposizione' n 64 above, 208.

[67] Also S. Bartholini, n 47 above, 8.

[68] See, exhastively, P. Perlingieri, 'L'interpretazione della legge come sistematica ed assiologica. Il broccardo *in claris non fit interpretatio*, il ruolo dell'art. 12 dis prel. c.c. e la nuova Scuola dell'esegesi' *Rassegna di diritto civile*, 990 (1985), and now in Id, *Scuole* n. 47 above.

[69] See V. Crisafulli, n 64 above, 207; P. Perlingieri, 'Complessità' n 55 above, 188-202; F. Sorrentino, 'L'abrogazione nel quadro dell'unità dell'ordinamento giuridico' *Rivista trimestrale di diritto pubblico*, 3 (1972). Taking a different view, N. Irti, 'Leggi speciali - dal monosistema al polisistema e I frantumi del mondo' (sull'interpretazione sistematica delle leggi speciali), in Id, *L'età della decodificazione* (Milano: Giuffrè, 1999), 113 and 151 respectively; A. Falzea, 'La Costituzione e l'ordinamento' *Rivista di diritto civile*, 261 (1998), now in Id, *Ricerche di teoria generale del diritto e di dogmatica giuridica, I, Teoria generale del diritto* (Milano: Giuffrè, 1999), 456.

[70] Così V. Crisafulli, n 64 above, 207.

In this sense, therefore, the living norm is the only *true* one in a given temporal dimension of the legal order.[71] It follows, moreover, that a principle inevitably suffers from the constant historical development of the legal system.[72] The continuous evolution of the legal system and the reciprocal interactions among its sources[73] generate new and different principles based on the same provision. There is no contradiction, therefore, in the many cases where the principle has changed over time.[74] The meaning of legislative texts is not, in fact, determined once and for all at the moment of their production but is ever changing.[75]

The ontological notion of 'living law' therefore implies the necessarily evolutionary character of interpretation. The interpreter of law must grasp any changes to the norm, as evolution is a matter inherent to the legal order and not to the procedure of interpretation.[76] Legislative provisions can thus take on new and different meanings with respect to those stemming from previous interpretations.

In this respect, evolutionary and compatible interpretation is identified with systematic interpretation, respecting the unity of the legal order.[77] The great difference between the official doctrine of 'living law' and the ontological notion is evident. According to the scholarship around Ascarelli, the 'living law' is what results from the applications made in case law.

In ontological terms, a norm is 'living' when it derives from a methodologically correct interpretation procedure: this only happens when interpretation is systematic, axiological, and respects the complexity of the legal order. There can only be one norm resulting from a correct interpretation; the living law is the only 'true' law in a given temporal dimension within the legal order.[78]

With regard to the interpretative powers of the Constitutional Court, according to the official doctrine relating to the 'living law', assessment of constitutionality concerns the rule that results from the prevalent interpretation and application. In ontological terms, on the other hand, the assessment concerns the norm that

[71] In this sense, S. Bartholini, n 47 above, 15, fn 11, observes that if two or more principles can be derived from the same provision, this excludes the possibility of both of them coexisting in the system. Also G. Silvestri, 'Le sentenze normative della Corte costituzionale' *Giurisprudenza costituzionale*, 1702, (1981), observes that each legal provision contains only one rule.

[72] Again, V. Crisafulli, n 64 above, 208.

[73] On this subject, see P. Perlingieri and P. Femia, n 47 above, 22.

[74] V. Crisafulli, n 64 above, 207; M.S. Giannini, 'L'illegittimità degli atti normativi e delle norme' *Rivista italiana di scienze giuridiche*, 50 (1954). In a critical sense, R. Guastini, 'Soluzioni dubbie. Lacune e interpretazione secondo Dworkin' *Rivista italiana di scienze giuridiche*, 454 (1983).

[75] R. Dworkin, 'Non c'è soluzione corretta?', Italian translation by R. Guastini, in *Materiali per una storia della cultura giuridica*, 469 (1983); in senso critico R. Guastini, n 74 above, 454.

[76] S. Romano, 'Interpretazione evolutiva', in Id, *Frammenti di un dizionario giuridico* (Milano: Giuffrè, 1983), 119. In the same vein, P. Perlingieri, 'Giustizia' n 57 above, fn 190. See also N. Lipari, 'Valori costituzionali e procedimento interpretativo' *Rivista trimestrale di diritto e procedura civile*, 876 (2003).

[77] P. Perlingieri, 'Giustizia' n 57 above, fn 185.

[78] V. Crisafulli, n 64 above, 208.

results from following a correct interpretation procedure, ie one that is complete from the systematic point of view and adequate from an axiological one.[79] In these terms, it is not sufficient for a law to be applied in an unconstitutional way for it to be declared unconstitutional,[80] as the Court has the power and duty to interpret the provision autonomously both from the point of view of the settled interpretation in the case law of the Court of Cassation and that of the interpretation of the referring judge.

In this regard, Constitutional Court rulings on inadmissibility are significant, even in cases where, with their referral order, referring courts have adopted an interpretation in accordance with the prevalent position in the case law.

In such cases, the Constitutional Court has observed that the referring court has doubts as to the constitutional legitimacy of the interpretation of the disputed provision in case law.[81] It follows that the Constitutional Court, in issuing an order of inadmissibility, refuses to be bound to give a judgment on the contested provision according to the canon of the effectiveness of case law and invites the ordinary court to interpret the rule in a way that is in accordance with the constitution even given a uniform case law[82] of the Court of Cassation,[83] the Council of State,[84] or any other adjudicating body[85] are unambiguous.

These inadmissibility orders have specific value when the referring court is the Court of Cassation,[86] and its Joint Sections in particular.[87] The idea of a

[79] V. Crisafulli, 'Ancora delle sentenze' n 31 above, 99.

[80] V. Crisafulli, 'Una sentenza «difficile»' *Giurisprudenza costituzionale*, 1174 (1966).

[81] In this sense, Corte costituzionale 6 March 1995 no 82, *Giurisprudenza costituzionale*, 740 (1995).

[82] Corte costituzionale 30 January 2002 no 3, *Giurisprudenza costituzionale*, 31 (2002). In the same vein, Corte costituzionale ordinanza 24 May 2000 no 158, *Giurisprudenza costituzionale*, 1425 (2000); Corte costituzionale ordinanza 16 November 2001 no 367, *Giurisprudenza costituzionale*, 3693 (2001).

[83] For example, see Corte costituzionale ordinanza 30 December 1987 no 636, *Giurisprudenza costituzionale*, 3775 (1987); Corte costituzionale ordinanza 12 May no 548, *Giurisprudenza costituzionale*, 192 (2000), with a commentary by F. Gambini, 'Un' ipotesi di conflitto fra Corte e giudice sull'esistenza del diritto vivente'; Corte costituzionale ordinanza 22 June 2000 no 233, *Giurisprudenza costituzionale*, 1804 (2000); Corte costituzionale ordinanza 1 April 2003 no 109, all available at www.cortecostituzionale.it.

[84] Corte costituzionale ordinanza 3 November 2000 no 466, *Giurisprudenza costituzionale*, 3659 (2000), with commentary by A. Sandulli, 'La motivazione del provvedimento nei pubblici concorsi ed il sindacato di costituzionalità del diritto vivente'; Corte costituzionale ordinanza 6 July 2001 no 233, *Giurisprudenza costituzionale*, 2078 (2001); Corte costituzionale 4 July 2003 no 229, *Giurisprudenza costituzionale*, 1958 (2003).

[85] Concerning the 'living law' of the Council of Administrative Justice for the Sicilian Region, see Corte costituzionale ordinanza 20 March 1998 no 70, *Giurisprudenza costituzionale*, 724 (1998). With regard to the position of the military judiciary, see Corte costituzionale ordinanza 17 May 2001 no 141, *Giurisprudenza costituzionale*, 1163 (2001), with an editorial by R. D'Alessio.

[86] For example, Corte costituzionale 27 July 2001 no 322, *Giurisprudenza costituzionale*, 2595 (2001), and also *Il Foro italiano*, 302 (2001), with a commentary by R. Caponi, 'Interpretazione conforme a Costituzione e diritto vivente nelle notizioni postali'.

[87] Corte costituzionale ordinanza 19 October 2001 no 338, *Giurisprudenza costituzionale*, 2884 (2001), with a commentary by A. Cardone, 'Nomofilachia Funzione di nomofilachia della

Constitutional Court with no powers of interpretation therefore appears inconsistent and even perhaps goes beyond Ascarelli's actual intentions.

VI. Rereading Ascarelli's Theory: The 'Living Law' from Limitation to the Interpretative Power of the Constitutional Court to Hermeneutical Criterion

The theorisation of the 'living law' seems to reveal a contradiction with the theoretical premises of Ascarelli's conception of hermeneutical activity. He did not raise the question of what the best interpretative method might be but that of the nature of interpretation as an activity pertaining to the historical development of the law.[88]

As already observed, Ascarelli envisaged a circular hermeneutical process. What is interpreted is not, therefore, a norm, but a text: it is through the interpretation of the text, ie, a given that can be considered past and historical, that the norm is formulated as present and indeed projected into the future.

Hermeneutics in Ascarelli's conception is not a merely deductive procedure: it has creative value. The law has a historical nature: interpretation is therefore necessarily evolutionary and represents a factor in the historical development of law. In this light, the text does not become positive law until society appropriates it and makes it an applied and accepted rule.[89] By shifting the focus from codified written law to the law that lives and develops in society, Ascarelli identified the *juridical dynamic*, ie 'socially animating' law, with interpretation in case law and contractual practice.[90]

The activity of the interpreter of the law is therefore creative and must be evolutionary in its conception; it contributes to the development of law. It is not a mere reproduction of the given but implies assessment by the interpreter. The interpreter of the law is not an external but an internal element of the law. The activity of the interpreter is central to the development of the law.[91] In this way, interpretation changes because the passage of time and the changing problems lead to the adjustment of patterns, to different constructions, and therefore to a continuous adaptation of the *corpus juris* given to changing reality.[92]

Cassazione e pronunce della Corte Costituzionale'; Corte costituzionale ordinanza 12 July 2001 no 340, *Il Foro italiano*, 2552 (2002), with a commentary by A. Barone. See in particular, Corte costituzionale 27 July 2001 no 322, *Giurisprudenza costituzionale*, 2595 (2001).

[88] A. Asquini, 'Il pensiero giuridico di Tullio Ascarelli', in Id et al eds, *Studi in memoria di Tullio Ascarelli* (Milano: Giuffrè, 1969), LXXX.

[89] P. Grossi, 'Le aporie dell'assolutismo giuridico (Ripensare, oggi, la lezione metodologica di Tullio Ascarelli)', in Id et al eds, *Nobiltà del diritto. Profili di giuristi* (Milano: Giuffrè, 2008), 485.

[90] ibid 445.

[91] T. Ascarelli, *Prefazione a Studi di diritto comparato e in tema di interpretazione* (Milano: Giuffrè, 1952), XXIV.

[92] T. Ascarelli, 'Contrasto di soluzioni e divario di metodologie' *Banca borsa e titoli di credito*, 478 (1953).

In Ascarelli's work there is a recurrent dichotomy between the testimony of the creative and evolutionary character of hermeneutical activity and the need for certainty and stability in the legal system. The law is stable but not immobile; it adapts continuously while remaining certain.[93] Interpretation is the means to reconcile the static nature of the legal system and the dynamism of social life. Ascarelli's theory potentially appears, in other words, to allow for the idea of a possibly changing meaning of the phrase 'living law' over time, even if this is not fully expressed.[94]

His idea probably did not aim to refute the Constitutional Court's power to interpret a provision but to suggest a hermeneutical instrument for it to resolve cases where the text of the legislation is equivocal.[95] 'Living law' is not therefore a given, historicized by consolidated interpretation and no longer surmountable. Rather, it constitutes a hermeneutical criterion that suggests one of the meanings that can be attributed to the provision.

The legal norm reveals, in its effectiveness, the link between norm and value. The norm does not remain fixed in itself but is subject to evolutionary dynamics and can thus take on a plurality of content over time. On a case-by-case basis, a norm adapts its content to conform to the new values and the dimension that the protected interest assumes over time in the social consciousness, also in relation to values of higher rank. The 'living law' represents, therefore, an objective phenomenon, linked to the axiological nature of the norm and the dynamics of the ordering system: the activity of the interpreter of the law does not create, but reveals the norm. The 'living law' exists *in the moment* but *not only* as a result of interpretation.[96] Hermeneutical activity is evolutionary in nature because it seeks to ascertain the meaning that principles assume at the moment of application.

This different conception of the theory of 'living law' is accepted by constitutional case law itself: the Constitutional Court, in fact, refers to 'living law' when rejecting questions raised on the basis of incorrect interpretations by the referring court. In such cases, this happens because the prevailing interpretation in case law is also constitutionally adequate.[97] An example of 'living law' in the

[93] T. Ascarelli, 'L'idea di codice nel diritto privato e la funzione dell'intrepretazione', in Id, *Saggi giuridici* (Milano: Giuffrè, 1949), 189.

[94] On the difficulty of reconciling the need for certainty with the need to adapt and develop the law, P. Grossi, 'Le aporie' n 89 above, 486.

[95] In this vein, T. Ascarelli, 'Giurisprudenza costituzionale' n 15 above, 152. For F. Bonifacio, 'La magistratura e gli altri poteri dello Stato' *Rassegna di diritto pubblico*, 7 (1968), choosing to adhere to the prevailing interpretation is, however, a choice that presupposes that those who make it have the power to do so.

[96] M.R. Morelli, 'Il diritto vivente nei giudizi di costituzionalità', Relazione al Convegno 'Il diritto vivente', Rome, 12 April 2018, available at magistraturaindipendente.it.; Id, 'Il «diritto vivente» nella giurisprudenza della Corte costituzionale' n 64 above, 173.

[97] In such cases, the living norm of official doctrine and the living norm in the ontological sense do not conflict. Cf A. Giuliani, 'Le disposizioni sulla legge in generale: gli articoli da 1 a 15', in P. Rescigno ed, *Trattato di diritto privato* (Torino: UTET, 1999), 446, which observes that if

ontological sense can be found in Constitutional Court ruling no 221 of 21 October 2015.[98]

The Court was called upon to rule on the constitutional legitimacy of Art 1, para 1 of legge no 164 of 14 April 1982 (Rules on the rectification of gender attribution).[99] The case concerned an application for the rectification of anagraphic sex attribution in order to obtain recognition of a new gender identity without altering primary sexual characteristics.

The question of constitutional legitimacy had been raised by the magsitrate of the Court of Trento with regard to a conflict with Arts 2 and 117, para 1 of the Constitution, in relation to Art 8 of the European Convention on Human Rights. The law requires the modification of primary sexual characteristics in order to rectify the attribution of gender, which would seriously undermine the exercise of the fundamental right to gender identity.

In the opinion of the referring court, the disputed provision was allegedly in conflict with Arts 2 and 117, para 1 of the Constitution in relation to Art 8 of the ECHR, since the provision of the necessity, for the purposes of the rectification of gender attribution at the records office, for the subsequent modification of the primary sexual characteristics through highly invasive clinical treatment would seriously undermine the exercise of one's fundamental right to gender identity.

In its judgment of 20 July 2015 no 15138, the Court of Cassation had recognized that surgery altering primary anatomical sexual characteristics was not obligatory for the purposes of sex rectification in civil registries. The Supreme Court, also analyzing the case law of the European Court of Human Rights, provided an interpretation compliant with the Constitution of the laws suspected of unconstitutionality.

In the light of the previous Constitutional interpretation by the Supreme Court, the Constitutional Court declared the question of the constitutionality of Art 1, para 1 of legge no 164 of 1982 unfounded.[100]

In the above-mentioned judgment of the Supreme Court, constitutional principles are applied directly; the court, therefore, not only has an exegetical role but interprets the values expressed by the evolving social conscience.[101] The constitutional principle is a factor that has an effect on the meaning to be attributed to the silence of the legislator and makes it possible to uphold a new request before the court for a hypothesis not contemplated by the law.

the meaning of 'living law' is constitutionally correct, the Court will reject the question of constitutionality raised by the referring course based on a different, and incorrect, interpretation.

[98] Corte costituzionale 21 October 2015 no 221, available at www.cortecostituzionale.it.

[99] This provision establishes that 'rectification shall be made pursuant to a judgment of the court which has the force of *res judicata* attributing to a person a sex other than that stated in their birth certificate as a result of changes to his or her sexual characteristics'.

[100] Corte costituzionale, n 98 above.

[101] A. Giusti, 'Tutela effettiva dei diritti, ordinamento vivente e coscienza sociale nelle sentenze della Corte di cassazione', Relazione al convegno 'Il diritto vivente', Roma, 12 aprile 2018, available at www.magistraturaindipendente.it.

It will be recalled that the Court of Cassation does not create the principle[102] but grasps it in the potential of its *ratio*. The reference to 'living law', that is, to the interpretation of the Court of Cassation is not due, in this case, to the Court's subjection to 'living law' but to the consideration of the constitutionally appropriate interpretation.

The Constitutional Court, therefore, considers the law to be 'living' not because it results from its applicative practice, but because it stems from correct hermeneutical procedure. Hence the expression of positivism based on values. (Values-based positivism).[103] In this sense, 'living law' is not opposed to positive law: taking the text of the law as a starting point, the interpreter of the law looks at the context of values in the light of evolving society. The dynamic element of the principle, that is, the interest underlying it, takes on different meanings over time; the court interprets the social conscience at the moment of application.

When the evolution of this interest means that it becomes incompatible with the written law, it is necessary to declare it unconstitutional; however, if the signifier allows it, the new dimension of the protected interest can be brought back into its proper sphere by means of the evolutionary interpretation, corresponding to the overall system of values of the legal order.

[102] ibid.
[103] ibid.