

The Italian Constitutional Court: Towards a 'Multilevel System' of Constitutional Review?

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INTRODUCTION

The Constitutional Court was introduced for the first time in Italy in the 1948 Constitution, enacted by the Constituent Assembly after the fall of the Fascist regime and the end of the World War II. The Constitution establishes a 'constitutional democracy',¹ that is, a form of government in which the sovereignty belongs to the people, but which has to respect a 'rigid' constitution, entrenched by a difficult amendment process. The previous Italian Constitution, the '*Statuto Albertino*' 1848, was a flexible Constitution, such as most of the European Constitutions of the 19th century; thus the problem of judicial review of legislation was never raised in the Kingdom of Italy, in which the doctrine of supremacy of Parliament was largely accepted both by state institutions (including the judiciary) and by scholars.²

The framers of the Italian Constitution, having opted for a 'rigid' constitution, decided to introduce a system of constitutional review that was ranked among the various 'guarantees of the Constitution' (articles 134-139).³ They rejected the few proposals oriented towards the introduction of a decentralized system, American-style, and, in accordance with the dominant constitutional trends in post-war Europe (particularly as expressed by Hans Kelsen), they designed a system of centralized review, with the creation of an 'ad hoc' organ of constitutional justice separate from the judiciary.⁴

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¹ Among Italian scholars, the concept of 'Constitutional Democracy' has been developed mainly by Zagrebelsky, G (1992) *Il diritto mite*, Einaudi.

² See Watkin, TG (1997) *The Italian Legal Tradition*, Ashgate Publishing.

³ The important link between a democratic state governed by law, a rigid constitution, and constitutional review, in the Italian experience, was pointed out in Rolla, G and Groppi, T 'Between Politics and the Law: The Development of Constitutional Review in Italy' in Sadurski, W (ed) (2002) *Constitutional Justice, East and West*, Kluwer Law International.

⁴ The debates in the Italian Constituent Assembly are summarized in Pizzorusso, A; Vigoriti, V and Certoma, CL (1983) 'The Constitutional Review of Legislation in Italy' *Tem. L.Q.* 56 at 503.

The experience of more than 50 years of judicial review in Italy (the Court was only actually established, as will be underlined in the following pages, in 1956) has seen an evolution towards a much more decentralized system, as the article will try to point out, a system in which the ordinary judges also play an important role in constitutional review.

This article is composed of four parts. Part II provides some basic features of constitutional review in Italy, dealing with the composition and competences of the Constitutional Court. In this part the limitation of competences and the importance of certified questions as the main gateway to invoke the Court's jurisdiction will be pointed out. Part III illustrates the evolution of the Italian model of judicial review towards a concrete model, by emphasizing the creativity of the Constitutional Court and the relations with the judiciary and the legislature. Part IV explores the performance of the Constitutional Court in the development and protection of constitutional values, by focusing on four main stages of the experience of the court. Finally, Part V provides some final remarks on the present role of the Court and some considerations on its possible future evolution.

BASIC FEATURES OF CONSTITUTIONAL REVIEW IN ITALY

Composition and competences of the Constitutional Court

The Constitutional Court's composition reflects the effort to balance the need for legal expertise, the characteristic of a judicial body, against the acknowledgment of the inescapably political nature of constitutional review:⁵ fifteen judges, chosen from among legal experts (magistrates from the higher courts, law professors, and lawyers with more than 20 years of experience), one-third of whom are named by the President of the Republic, one-third by Parliament in joint session and one-third by the upper echelons of the judiciary.⁶

One of the main features of proceedings in the Italian Court, the prohibition of dissenting (or concurring) opinions by judges (and the related principles of secrecy of deliberation and collegiality) has also been linked by scholars to the same necessity of finding a balance between politics and the law. According to them, the principle of collegiality is a way of protecting the Court from the pressures and interferences of politics, giving to the judges the opportunity to express their opinion freely, without having to justify their position outside the Court.⁷ On the other hand, the prohibition on disclosing the individual opinions of the judges has been criticized because it may result in opaque, non-transparent motivation. Over the years some attempts to introduce dissenting opinions have been made by the Court itself, but all failed due to lack of consensus.

⁵ This balance has been pointed out by Zagrebelsky, G (1988) *Giustizia costituzionale*, Il Mulino, that remains the most complete study on the Italian Constitutional Court. It is interesting to notice the early study on the US Supreme Court Justice Samuel Alito: Alito, SA (1972) *An Introduction to the Italian Constitutional Court* (unpublished undergraduate Woodrow Wilson School Scholar Project prepared for Professor Walter F. Murphy, on file with Mudd Library, Princeton University), available at: http://www.princeton.edu/~mudd/news/Alito_thesis.pdf.

⁶ This tripartite model has been used later in other countries: see for example Chile, Columbia, Dominican Republic, Ecuador, Guatemala, Indonesia, Korea, Mongolia, Paragua.

⁷ This is the point of view of Zagrebelsky, G (2005) *Principi e voti*, Einaudi.

The powers of the Constitutional Court, defined in article 134 of the Constitution, are typical of constitutional tribunals.

The Court has the power:

- a) to adjudicate on the constitutionality of laws issued by the national and regional governments;
- b) to resolve jurisdictional conflicts between organs of the state, between the state and the regions, and between regions;
- c) to adjudicate crimes committed by the President of the Republic (high treason and attempting to overthrow the Constitution).

Article 2 of Constitutional Law n. 1 of 1953 added a further power beyond those listed in the Constitution:

- d) to adjudicate on the admissibility of requests for referenda to repeal laws, which may be promoted by 500,000 voters, or five regional councils, pursuant to article 75 of the Constitution.

Limitations on the competences of the Constitutional Court and the importance of indirect review

Compared to other models of constitutional adjudication, especially the most recently established,⁸ these competences seem notable for being so apparently limited and minimalist.⁹

On the one hand, the Italian Constitutional Court does not have some competences which are present in other systems of constitutional law, and which could be labeled as political: for example, in many systems Constitutional Courts have powers relating to electoral issues, supervision of political parties and ascertaining the incapacity of the President of the Republic.

On the other hand, with regard to the Court's main competence of reviewing the constitutionality of laws, several limitations arise from articles 134-137 of the Constitution, Constitutional Law n. 1 of 1948 and Law n. 87 of 1953. These limitations concern the means of triggering constitutional review, the object of review and the types and effects of the Court's decisions.

First of all, access to constitutional review is rather circumscribed: the Italian system offers only *a posteriori*, indirect review, which arises mainly out of a separate judicial proceeding. The keys that open the door to constitutional review are primarily in the hands of ordinary judges, who therefore perform the important function of screening the questions that the Court will be called upon to answer. The constitutional proceeding

⁸ See for example the competences of the Constitutional Courts in Central and Eastern Europe countries: see in this special issue the essay of Lach and Sadursky. See also Favoreau, L 'Constitutional Review in Europe' in Henkin, L and Rosenthal, AJ (eds) (1990) *Constitutionalism and Rights: The Influence of the United States Constitution Abroad* Columbia University Press at 52-53.

⁹ For a general overview of the competences of the Constitutional Court see Cerri, A (2001) *Corso di giustizia costituzionale*, Giuffrè; Ruggeri, A and Spadaro, A (2004) *Lineamenti di giustizia costituzionale* Giappichelli; Malfatti, E; Panizza, S and Romboli, R (2003) *Giustizia costituzionale*, Giappichelli. Among the publications in English see Baldassarre, A (1996) 'Structure and Organization of the Constitutional Court of Italy' *St. Louis U. L.J.* 40 at 649; Pizzorusso, A (1988) 'Constitutional Review and Legislation in Italy', in Landfried, C (eds) (1988) *Constitutional Review and Legislation: an International Comparison*, Nomos Verlagsgesellschaft at 111; Dengler, DS (2001) 'The Italian Constitutional Court: Safeguard of the Constitution' *Dick. J. Int'l L.* 19 at 363.

begins with a 'certification order' whereby the judge suspends all proceedings and submits the question to the Constitutional Court. In that order, the judge must indicate the relevance and plausibility of the question, the law challenged, and the constitutional provision that it allegedly violates.

There is also an avenue of direct review, according to article 127 of the Constitution, but it is rather circumscribed. The national government and the regional government may challenge, respectively, a regional or a national statute within 60 days of its publication. In this way, direct review is only a tool for the guarantee of the constitutional separation of powers as between national and regional governments. Neither private citizens nor parliamentary groups nor local (sub-regional) governments can directly invoke the Court's jurisdiction.

Secondly, the 'object' of constitutional review is represented exclusively by laws. Delegated or administrative legislation is not reviewed by Constitutional Court, but by ordinary Courts.

Furthermore, the Court may not wander from the '*thema decidendum*' (that is, the object and parameter of review) identified in the application to the Court. As stated in article 27 of Law n. 87 of 1953, 'The Constitutional Court, when it accepts an application or petition involving a question of constitutionality of a law or act having force of law, shall declare, within the limit of the challenge, which of the legislative provisions are illegitimate.' In other words, constitutional review is limited to the question presented and must be carried out 'within the limit of the challenge.' Article 27 itself carves out an exception to this general principle: the Court may also declare 'which are the other legislative provisions whose illegitimacy arises as a consequence of the decision adopted'. At issue here is 'consequential unconstitutionality.'

Thirdly, there is a limited range of decisions that resolve the process of constitutional review. Aside from decisions that are interlocutory or reject a question on procedural grounds, decisions either *accept* or *reject* constitutional challenges, known respectively as *sentenze di accoglimento* and *sentenze di rigetto*. The consequences of these two sorts of decisions, including their temporal effects, are rather straightforwardly defined by law. Decisions that *reject* a constitutional challenge do not declare a law constitutional. They merely reject the challenge in the form in which it was raised. These judgments are not universally binding, that is, they are not effective *erga omnes*. Thus, the same question can be raised again, on the same or different grounds; only the judge who has certified the question cannot raise it again in the same lawsuit. For this reason, such judgments are said to be effective only as between the parties, that is, *inter partes*. On the other hand, judgments that *accept* a constitutional challenge are universally binding and are retroactive (*ex tunc*), in the sense that the constitutional rule cannot be applied from the day after the judgment has been published. This retroactivity is limited by what are called '*rapporti esauriti*,' which might be translated as 'concluded relationships' or '*res iudicata*'. For reasons of convenience and legal certainty, judgments do not affect situations that were already resolved by final judgments, claims that are barred by statutes of limitation, or the like. Yet there is an exception to this rule where a final criminal conviction has been entered pursuant to the law now declared unconstitutional: the law provides that such a conviction and any related punishment should cease.

Moving from a simple list of the Court's powers to statistics about its activities, the limited nature of its powers becomes even clearer. The vast majority of the Court's activity

is dedicated to constitutional review of laws, overshadowing its other powers, in particular with regard to jurisdictional disputes between the State and the Regions.

Within this category of constitutional review, particular importance is assumed by 'incidental' review or certified questions, which has absorbed most of the Court's energy during its more than fifty years, and which therefore deserves the bulk of our attention.¹⁰

EVOLUTION OF THE ITALIAN MODEL OF JUDICIAL REVIEW

A centralized and concrete model of constitutional review

An analysis of the powers granted by the Constitution and a glance at the procedures used are indispensable for understanding the mechanics of the Italian Constitutional Court, yet they are not sufficient for comprehending the role it plays in the legal system. To this end, one must consider other aspects, taking account of history and considering the provisions governing constitutional review in the light of the dynamism of its jurisprudence.

It is hard to understand the current system simply by looking at the statute books. Theory traditionally distinguishes between the American model of judicial review of legislation, which is diffuse, concrete, and binding as between the parties, and the Austrian model (*Verfassungsgerichtbarkeit*) which is centralized, abstract, and binding universally.¹¹ Judged against this backdrop, the Austrian model clearly had the greatest influence on the framers of the Italian Constitution.

Undoubtedly, the implementation of the Italian system has not maintained the purity of Kelsen's Austrian model, having introduced some features that approach the American model of judicial review.¹²

As an initial matter, the centralization of review has been mitigated by endowing ordinary judges with two important powers: first, as we already stated, the decision whether or not to raise a constitutional question; second, the constitutional review of secondary legislation. This peculiarity has a significant impact on how we classify the Italian system, since it indicates that it is not an absolutely centralized model of constitutional review, but rather a model with some features of diffuse review.

Furthermore, the requirements that the question be relevant and explained by the certifying judge have introduced into the process features similar to those contained in systems of 'concrete review',¹³ although the Court will review the constitutionality of the statute, but it will not decide the case: the decision is up to the ordinary judge, that has to wait (as the ordinary trial is suspended) the decision on the constitutionality of the statute, before reassuming the proceedings.

¹⁰ Data about the work of the Court may be found in Celotto, A (2004) *La Corte costituzionale*, Il Mulino; Romboli, R (eds) (1990, 1993, 1996, 1999, 2002, 2005) *Aggiornamenti in tema di processo costituzionale*, Giappichelli and on the annual report of the President of the Court, published on the website of the Court: www.cortecostituzionale.it.

¹¹ See Cappelletti, M (1971) *Judicial Review in the Contemporary World*, Bobbs-Merrill; in this special issue see Gamper, A and Palermo, F, *Austria*.

¹² See Pizzorusso, A (1990) 'Italian and American Models of the Judiciary and of Judicial Review of Legislation: A Comparison of Recent Tendencies' *Am. J. Comp. L.* 38 at 373; Pasquino, P (1998) 'Constitutional Adjudication and Democracy. Comparative Perspectives: USA, France, Italy' *Ratio Juris* 11 at 38.

¹³ Concrete review in the meaning given by Cappelletti, M (1971) *Judicial Review in the Contemporary World*, Bobbs-Merrill.

The nature of the Italian system is highlighted by the Court's practice which, in some phases, has helped to increase the degree of concreteness of its judgments. In this regard, one can emphasize the following developments:

- a) The drastic reduction of time taken to decide a case and the consequent elimination of pending questions, that occurred in the early 1990s, means that a constitutional decision increasingly has concrete effects for the parties in the case at bar;¹⁴
- b) The Constitutional Court has increasingly employed its evidence-gathering powers before deciding questions.¹⁵ As a result, it can better understand the practical aspects of the question that gave rise to the constitutional challenge, the effects that would flow from the Court's judgment, and the impact of a judgment on the legal system;
- c) An interpretative continuum has arisen, in two respects, between the Constitutional Court and ordinary courts (in particular, the Court of Cassation and the supreme administrative court, called the 'Council of State'). On the one hand, the legal principles and interpretations of the Constitution provided by the Constitutional Court acquire force for all legal actors, especially courts that must directly apply the Constitution or review rules that are subordinate to statutes. On the other hand, when resolving constitutional questions, the Constitutional Court tends to address the legal provision in question not in the abstract, but as it has been concretely applied. The Court tends to rule on the 'living law', or the rule as it has been interpreted in case law. In this way, there seems to have been a tacit division of labour between the Constitutional Court and ordinary courts, so that each endorses and approves the other's interpretation within its own sphere. This tendency may be broken by the excessive speed of the Court in deciding cases: the object of the proceeding may very well be a statute for which the 'living law' has yet to be consolidated.¹⁶

According to these developments, one can undoubtedly affirm that the Italian system still remains a centralized system, but with an increasing presence of elements of a diffuse system.

Procedure and Practice of the Constitutional Court, 'Interpretative' and 'Manipulative' Judgments and Relations with Courts and the Legislature

The powers of the Italian Constitutional Court and the process of constitutional review were regulated in the years immediately after the entry in force of the Constitution and have not changed much since then.¹⁷ It should be noted, however, that unlike the procedure and practice of the ordinary courts, which are regulated in detail in the civil and criminal procedure codes those of the Constitutional Court are more flexible. The reason for this flexibility is due to the fact that, unlike the ordinary courts, the Constitutional Court has a much greater discretionality in interpreting its procedure and practice thus allowing

¹⁴ On this new phase of constitutional justice in Italy see the essays published in Romboli, R (eds) (1990) *La giustizia costituzionale a una svolta*, Giappichelli.

¹⁵ As I tried to show in my book: Groppi, T (1997) *I poteri istruttori della Corte costituzionale nel giudizio sulle leggi*, Giuffrè.

¹⁶ See Pugiotto, A (1994) *Sindacato di costituzionalità e "diritto vivente"*, Cedam.

¹⁷ See Const. Law 1/1948, Law 1/1953 and Law 87/1953.

it to modify the latter in order to achieve a desired goal or to more fully implement constitutional values.

This 'discretion' enjoyed by the Constitutional Court has divided scholars: some authors claim that the Constitutional Court's activity should be subjected to detailed rules of procedure that are spelled out with precision, while others believe that a certain measure of discretion is unavoidable, given the nature of judicial review. This disagreement mirrors the larger debate between those who emphasize the judicial nature of constitutional review and those who instead focus on its necessarily political nature.¹⁸

This flexibility is reflected most prominently in the way the Constitutional Court has devised different types of judgment which, as we shall see, have significantly influenced the development of Italy's legal system.¹⁹ One should note that the Constitution²⁰ and subsequent constitutional and statute laws governing the Constitutional Court only provide for judgments that accept or reject a constitutional challenge, however, the Constitutional Court has since developed a rich variety of judgments, which again as we shall see, are based on the necessity to respond to specific practical needs rather than drawing on abstract theory.

In particular, the various types of judgments arise from the necessity, recognized by the Constitutional Court, to consider the impact its decisions have on the legal system and on other branches of government, in particular Parliament and the judiciary.

This result was made technically possible by the theoretical distinction between '*disposizione*' and '*norma*,' or legal 'texts' and 'norms'.²¹ A 'text' represents a linguistic expression that manifests the will of the body that creates a particular legal act. A 'norm,' on the other hand, is the result of a process of interpreting a text. By use of hermeneutic techniques, one can derive multiple norms from a single text or a single norm from multiple texts. This distinction between text and norm is particularly important in that it permits the separation of the norm from the literal meaning of the text, in a way cutting the umbilical cord that link them at the moment the text is approved. This distinction allows the system to evolve, facilitating the interpreter's creative activity and helping to reduce the 'destructive' activity of the Court, with its consequent gaps in the legal system, giving it the ability to operate with more surgical precision.

Relationship with the courts

The need to establish a relationship with the courts, which are charged with interpreting statutory law, has led the Constitutional Court to issue two kinds of decisions, 'corrective' decisions and 'interpretative' decisions (which can come when the Court either strikes down or upholds a law). These two kinds of decision have allowed a division of labour

¹⁸ This debate has been summarized in the essays published in Romboli, R (ed) (1990) *La giustizia costituzionale a una svolta*, Giappichelli.

¹⁹ On this judicial creativity see Pinardi, R (1993) *La Corte, i giudici ed il legislatore. Il problema degli effetti temporali delle sentenze di incostituzionalità*, Giuffrè; Pinardi, R (2007) *L'horror vacui nel giudizio sulle leggi. Prassi e tecniche decisionali utilizzate dalla Corte costituzionale allo scopo di ovviare all'inerzia del legislatore*, Giuffrè and examples cited by Pinardi. In English see Vigoriti, V (1972) 'Admonitory Functions of Constitutional Courts – Italy: The Constitutional Court' *Am. J. Comp. L.* 20 at 404.

²⁰ See Art. 136 It. Const.

²¹ This distinction was introduced by Crisafulli, V (1956) 'Questioni in tema di interpretazione della Corte Costituzionale nei confronti con l'interpretazione giudiziaria' *Giurisprudenza costituzionale* at 929 et seq.

between the ordinary courts and the Constitutional Court and have mitigated conflicts that arose during the Court's early years.²²

a) With its so-called '*corrective*' decisions, the Constitutional Court avoids the merits of the constitutional question and simply states that the statutory interpretation of the certifying judge is incorrect, in that he failed to consider either the teaching of other courts, a consolidated interpretation of the law in question, of the plain meaning of the text or, increasingly, of a possible interpretation that would conform to the Constitution.

b) With '*interpretative*' decisions, the Constitutional Court distinguishes between the text and the norm (see above) and either indicates to the certifying judge an alternative interpretation (norm) that is in pursuance of the Constitution thus rejecting the constitutional challenge (i.e. a *sentenza interpretativa di rigetto*) or it judges the interpretation given by the certifying judge to be contrary to the Constitution and strikes down that specific norm, but not the text itself (i.e. a *sentenza interpretativa di accoglimento*).

More specifically, in the case of a *sentenza interpretativa di rigetto* the Constitutional Court offers the ordinary courts an interpretation that would render the statute consistent with the Constitution, thereby saving it from unconstitutionality. With such an interpretative judgment the Constitutional Court declares the challenge 'unfounded' insofar as the law can be attributed a meaning consistent with the Constitution, which is different from the one given to it by the certifying judge or the petitioner. Among the possible meanings of the text, the Court chooses the one that is compatible with the Constitution, putting aside those which could conflict with the Constitution.

Such an interpretation offered by the Court is not, however, universally binding because these judgments reject the challenge and therefore they only have an *inter partes*.²³ It is effective only insofar as its opinion is persuasive or its authority as constitutional arbiter is convincing. A legal duty is created only in relation to the judge who raised the question, who cannot follow the interpretation he initially submitted to the Court.

c) Due to this fact ordinary judges have generally tended to ignore the Constitutional Court's interpretation, thereby persisting in an interpretation of the provision that is not in pursuance of the Constitution, thus demonstrating some of the underlying tensions between the Constitutional Court and the judiciary. Over time the Constitutional Court has thus increasingly delivered interpretative judgments that *accept* a challenge. In such judgments, the Court acknowledges the fact that the ordinary judges are interpreting the provision in an unconstitutional manner (even though other interpretations in pursuance with the Constitution would be possible) and it thus declares that specific interpretation unconstitutional. Because this is a judgment that *accepts* the constitutional challenge it

²² See Merryman, JH and Vigoriti, V (1967) 'When Courts Collide: Constitution and Cassation In Italy' *Am. J. Comp. Law* 15 at 665.

²³ The reason for this, as pointed out by an eminent constitutionalist and former President of the Italian Court Livio Paladin, is that Art. 136 of the Italian Constitution only deals with the generally binding effect of judgments that *accept* the challenge, but it is tacit with regard to the binding effects of judgments that *reject* a challenge. This 'silence' has been interpreted by the ordinary courts and by most legal scholars as signifying that the latter only have an *inter partes* effect. It is worth pointing out, in the context of this Special Issue that this constitutes an important difference with respect to two other countries with a constitutional justice system similar to Italy i.e. Germany and Spain. In these two countries *both* judgments that *accept* and judgments that *reject* the challenge are binding *erga omnes*, see Paladin, L (1988) 'La tutela delle libertà fondamentali offerta dalle Corti costituzionali europee: spunti comparatistici' in Carlassare, L (ed.) (1988) *Le Garanzie costituzionali dei diritti fondamentali*, Cedam, 11-25.

is binding *erga omnes* therefore the provision can no longer be interpreted in that way, however all other interpretations remain valid, therefore the Constitutional Court does not strike down the text itself, but only one of the norms it gives rise.

Relationship with the legislature

While '*interpretative*' judgments seem designed to address the relationship between the Court and ordinary courts, other sorts of decisions have instead affected the relationship between the Court and the legislature.²⁴

a) An especially delicate issue has been the use of '*additive*' judgments, whereby the Court declares a statute unconstitutional not for what it provides but for what it fails to provide. In this way, the Court manages to insert new rules into the legal system which cannot be found in the statutory text. This kind of decision runs contrary to Kelsen's model of constitutional review, according to which a constitutional court ought be a '*negative legislator*'. With these judgments, the Constitutional Court transforms itself into a creator of legal rules, thereby playing a role that in the Italian system belongs principally to Parliament. Yet in many cases, the mere nullification of an unconstitutional law would not solve the problem posed by the constitutional question, and the addition of a missing rule is the only way to remedy the violated constitutional value and, therefore, offers the only way for constitutional law to perform its task.

A first effort to limit the interpretative scope of such judgments is the principle that they are appropriate only where it is said, to use a poetical metaphor, as the Court did, that the judgment inserts only '*rime obbligate*', or '*obligatory verses*', into a statute. That is, the norm proposed by the Court is regarded by it as logically necessary and implicit in the normative context, thereby eliminating any appearance of discretionary choice.

b) A second effort to eliminate the interference with the parliamentary domain implied by these judgments has led, in recent years, to the development of a slightly different type of judgment, which is described as adding only '*principles*' rather than '*norms*' (see above). These are known as '*additive di principio*'. In these decisions, the Court does not insert new rules into the legal system, but only principles, rather like framework legislation, that the legislature must give effect to with statutes that are universally effective, indicating a deadline within which the legislature must act. In this way, the Constitutional Court strives to strike a balance between safeguarding the Constitution and preserving the discretionary powers of the legislator. In fact, as with additive judgments, the Court declares the statute unconstitutional, but in this case it leaves it up to Parliament to actually decide how to amend the provisions rather than itself providing a detailed set of rules. The problem is that these judgments pose problems with regard to their effectiveness vis-à-vis ordinary judges. In most cases judges have deemed it essential for Parliament to legislate on the basis of the guiding principles indicated by the Constitutional Court; however, on the other hand, in some cases they have considered the Court's decision to be directly applicable to the case at bar (i.e. they treat it like a standard additive judgment).²⁵

²⁴ Details and examples may be found in the books of Pinardi, quoted above at note 18.

²⁵ See, tra le altre, the decisions n. 185/1998, n. 26/1999, n. 32/1999, n. 61/1999; n. 179/1999, n. 270/1999, n. 526/2000. As examples, the decision n. 26/1999 may be quoted. In that case, the Court declared unconstitutional that part of the law on the organisation of the prison system which failed to provide immunity for the prison

c) Another type of decision deriving from the necessity of caution in relation to the legislature is the so-called ‘admonitory’ decision or ‘*doppia pronuncia*’ – what one might call ‘repeat’ or ‘follow-up’ judgments. The Court has adopted this approach when it has faced highly politicized questions. In these cases, it has preferred to bide its time and hint at its decision that the challenged norm is unconstitutional, without explicitly declaring it so. The Constitutional Court has introduced a logical distinction between its judgment and its opinion: the former announces that the constitutional question is ‘inadmissible’; the latter, however, clearly indicates that the constitutional doubts are well-founded. Structurally, ‘*doppie pronuncie*’ imply that in the first instance the Court will reject the certified challenge, asking the legislature to act. If Parliament does not act and the question is raised again, the Court will respond with a judgment that accepts the constitutional challenge, declaring the law unconstitutional.

d) A further point is that the highly political nature of some issues, combined with the need to balance the defence of social rights against the state’s financial exigencies, has obliged the Constitutional Court to moderate the effects of its decisions that strike down laws as unconstitutional. In this way, the Court tries both to assure that the Government and Parliament have the time needed to fill the gap created by its nullification of a law, and to strike a balance between the constitutional rights central to the social welfare state and the limits to economic resources.

This problem is not unique to the Italian legal system. Comparative study offers several solutions. The Austrian Constitutional Court can postpone the effects of a judgment nullifying a law for up to one year, thereby letting parliament regulate the area and avoid legal gaps.²⁶ The German Federal Constitutional Court can also declare laws simply ‘incompatible’ (*Unvereinbarkeit*), without declaring them nullified, or can declare that a law is ‘still’ constitutional. In that case, the law is declared only temporarily constitutional. The Court retains its power to declare the law unconstitutional if the legislature does not modify the law to conform with its judgment.²⁷

In Italy, by contrast, the implications of the timing of a judgment that accepts a constitutional challenge are more rigidly established.²⁸ The Constitutional Court has tried, through its case law, to spread over time the effects of its decisions in two ways. First of all, it has imposed limits on the retroactive effects of its decisions accepting constitutional challenges (in order, for example, to protect certain trial proceedings) through what have been labeled judgments of ‘supervening unconstitutionality’. In these cases, the norm is not nullified *ab initio*, but only from the moment it is held to be invalid. The simplest example is when a new constitutional norm takes effect, but one could also imagine a change in the economic or financial environment, in social attitudes, or in a more general change in conditions that leaves a norm incompatible with the Constitution.

administration from actions for damages by prisoners when their rights have been infringed. The Court expressly declared ‘that the statute is unconstitutional due its defect in not providing jurisdictional guarantees, but the rules of judicial review of legislation do not allow for the introduction of the legislation needed to remedy such a defect. Thus, in order to carry out the principles of the constitution, the Court’s only option is to declare the unconstitutionality of the omission, and, at the same time, call for Parliament to exercise its legislative function to remedy the defect’.

²⁶ See the article on Austria in this issue.

²⁷ See the article on Germany in this issue.

²⁸ In fact, Art. 30.3 of Law 87/1953 clearly states that ‘norms that have been declared unconstitutional cannot be applied the day following the publication of the decision’.

Finally, the Court can postpone the effects of a declaration of unconstitutionality (for example, where judgments lead to expenses for the public treasury), leaving the legislature a fixed amount of time to act before the statute is nullified. These are decisions of ‘deferred unconstitutionality’, where the Court itself, based on the balancing of various constitutional values, pinpoints the date on which the law is nullified. Such decisions pose serious problems of compatibility with the Italian system of constitutional review, in that they do not affect the case in question, thereby detracting from the concrete nature of review that characterizes the system.

THE MAIN STAGES OF DEVELOPMENT OF ITALIAN CONSTITUTIONAL REVIEW IN THE LAST FIFTY YEARS

To evaluate the role played by the Constitutional Court in the Italian constitutional system, its relationship with other branches of government and with parliamentary democracy, one can delineate (at the risk of oversimplification) several stages in its development²⁹.

Promotion of reforms

The first period (from the 1950s, when the Court was established, to the early 1970s)³⁰ could be described as ‘implementation of the Constitution’ or ‘promotion of reforms’. This period was characterized by the central role played by the Constitutional Court in the modernization and democratization of the Italian legal system, as well as in the affirmation of the values contained in the new republican Constitution. In this process of systemic reform, the Court acted as a stand-in for Parliament, which was slow and timid in modifying statutes inherited from earlier times. In this phase, the Constitutional Court took on what might be described as a ‘didactic’ function, in that it breathed life into the Constitution’s principles and brought them to the attention of society, as well as a catalyzing function, as it renewed the legal system by eliminating norms contrary to the Constitution.

The Constitutional Court found itself constantly filling in for Parliament, which pursued statutory reform slowly and hesitatingly, and found itself in conflict with the highest levels of the judiciary, in particular with the Court of Cassation and the Council of State, according to whom programmatic constitutional norms did not provide grounds for judicially reviewing legislation. Beginning with its first judgment (n. 1 of 1956), which constitutes a landmark decision in Italian constitutional law, the Court affirmed

²⁹ We will follow the periods proposed by Cheli, E (1996) *Il giudice delle leggi*, Il Mulino. For an overview of the experience of the Court, see Volcansek, ML (2000) *Constitutional Politics in Italy: the Constitutional Court*, MacMillan. The decisions of the Court are available on its website, already quoted supra at note 8, and on the website www.giurcost.org, where it is possible to search for subject or words.

³⁰ The Constitutional Court was not established until 1956, with a delay of eight years. The difficulty of establishing the Court was due to the resistances of the government, which tried to avoid the counter-majoritarian limitation always determined by constitutional justice. During this period of time, according to the VII transitional provision of the Constitution, judicial review had to be carried out the ordinary courts, following the decentralized system. The lack of the ‘constitutional sensibility’ of the ordinary judges explains the small number of cases in which a statute was set aside because unconstitutional. See Adams, JC and Barile, P (1953) The ‘Implementation of the Italian Constitution’ *Am. Pol. Sc. Rev.* 61 at 66 *et sequitur*; Dietze, G (1958) ‘America and Europe – Decline and Emergence of Judicial Review’ *Va. L. Rev.* 44 at 1258.

the binding nature of all constitutional norms (thereby overriding the classic distinction between preceptive and programmatic norms), specifying their binding character not only in relation to the government, but also private parties, and reiterated its power to review laws that predated the Constitution.³¹ In this way, thanks also to the stimulus provided by progressive elements of the judiciary, which raised numerous constitutional challenges to laws enacted before the Constitution concerning liberty as well as social and economic rights, the Constitutional Court was able to purge the legal system of numerous unconstitutional norms dating back to the 19th century as well as to the fascist era (1922-1943). Worthy of note are the Court's actions to protect personal liberty (such as its judgments in connection with the public security law of 1931 and the old system of unlimited pretrial detention, judgment n. 11 of 1956); freedom of expression (which was purged of the worst lingering traces of fascism such as the multiple permits to be obtained from the police, judgments n. 9 of 1965 and n. 49 of 1971); freedom of assembly (the Court declared unconstitutional a law that required prior notice for assemblies in public places, judgment n. 27 of 1958); and gender equality (the Court declared unconstitutional, in judgment n. 33 of 1960, a 1919 law that excluded women from a vast array of public positions).

In this initial phase, the Constitutional Court was considered, both by legal scholars and public opinion, the principal (if not the only) interpreter and defender of the Constitution and of the values it embodied. It is this stage that explains how the Constitutional Court garnered its authority and prestige within the Italian legal system and laid the foundations of its legitimacy.

Mediation of social and political conflicts

The second stage ran from the mid-1970s to the mid-1980s and has been described as that of 'mediation of social and political conflicts'. This was a period in which, after the 'cleansing' of pre-constitutional legislation, the object of constitutional review was no longer pre-constitutional legislation, but recent laws that had been drafted and approved by the republican Parliament. For this reason, the Court took on a more politicized role characterized by balancing techniques, essentially in the search for equilibrium and mediation among the various interests and values involved in constitutional questions. The Court slowly changed the nature of its judgments. No longer was it simply a question of applying the traditional syllogism that compared an inferior norm to a superior one. Instead, it became a matter of considering all the constitutional values at stake, of weighing them and establishing not which would prevail, but what was the best balance possible among them. In sum, one can say that at this stage the Constitutional Court evaluated the choices of the legislature to determine whether it had adequately taken into account all the values and constitutional principles that might affect a certain issue. This operation was made technically possible by an evolving interpretation of the principle of equality. From article 3 of the Constitution, according to which all are equal before the law, can be drawn

³¹ On the first decision see Adams, JC and Barile, P (1957-1958) 'The Italian Constitutional Court in Its First Two Years of Activity', *Buff. L. Rev.* 7 at 250. Cf. also here the article by Harding and Leyland in this issue, which adverts to a similar critical decision in Indonesia. On the first years see Evans, M (1968) 'The Italian Constitutional Court' *Int'l & Comp. L. Q.* 17 at 602; Farrelly, DG (1957) 'The Italian Constitutional Court' *Italian Quarterly* 1 at 50; Farrelly, DG and Chan SH (1957) 'Italy's Constitutional Court: Procedural Aspects' *Am. J. Comp. L.* 6 at 314; Treves, G (1958) 'Judicial Review of Legislation in Italy' *Journal of Public Law* 7 at 345.

a duty of reasonableness imposed on the legislature, so that it not only must regulate different situations differently, but must also refrain from using arbitrary criteria. In order for a norm not to be unconstitutional, one must avoid contradictions between the goals of a law and the concrete normative rules, between the objective pursued and the legal tools used to achieve it. In sum, one must avoid irrational contradictions between the goals of the law and the content of its text.³² In these years, the Court acted in numerous areas that characterize a secularizing society. It is enough to mention its judgments regarding divorce; abortion (see judgment n. 27 of 1975, which sought to strike a difficult balance between protecting the fetus and safeguarding the mother's health); church-state relations; family rights; the right to strike (the Court declared political strikes unconstitutional, judgment n. 290 of 1980); and numerous issues connected with the right to work and social welfare. In this way, the Court struck down what it termed 'unjustified discrimination' in the salaries of public employees (judgment n. 10 of 1973); upheld the 'Workers' Statute' (judgment n. 54 of 1974); and issued innumerable additive judgments that increased state spending that aimed at equalizing (upward) welfare and wages (judgments n. 141 of 1967 and n. 103 of 1989). Emblematic of this stage are also the many decisions concerning radio and television, decisions in which the Court found itself hounding and scolding the legislature in the name of freedom of expression, yet without ever succeeding in completely guiding its choices into conformity with the Constitution (see, among the many decisions, judgment n. 202 of 1976, which definitively opened the doors to local radio and television broadcasting).

The elimination of the case backlog

Paradoxically, the Constitutional Court's tremendous success during the first stages of its activity turned out to be one of the principal factors that rendered the system of constitutional review ineffective. The massive quantity of questions raised made it rather difficult to issue decisions at an acceptable pace. The increase in the number of questions gave rise to a significant backlog and a prolongation of the process. This spiral threatened not only to swamp the Constitutional Court, but also to impair its institutional functioning. The time factor, the length of the proceeding, is crucial for the impact of constitutional decisions on the legal system. Fortunately, the members of the Court, aware of these risks, dealt with this problem through a series of reforms of the Court's procedural rules.³³ These reforms gave rise to a third stage known as 'operational efficiency' that ran from the mid-1980s to the mid-1990s. The main goal of this new phase was to reduce the time taken for a constitutional decision and the number of pending cases, through declarations of inadmissibility in summary orders (*ordinanze*) of a large number of cases that were obviously inadmissible or trivial, as well as through the selection of cases on which the Court could focus its attention. To this end, the Constitutional Court adopted numerous procedural innovations (organization of work, streamlining of debate, deciding cases by summary order, and so on) that helped to reach these goals. At the beginning of the 1990s,

³² An earlier example of this technique is judgment n. 46 of 1959.

³³ See La Greca, G (1997) 'Current Situation and Planned Reforms in the Light of Italian Experience' *The Supreme Court and the Constitutional Court: Third Meeting of Presidents of Supreme Courts of Central and Eastern European Countries*, Council of Europe at 9.

the number of pending cases was significantly lower and the length of constitutional review cases had been reduced to nine months.

In order to reach this result some sacrifices had to be made, as pointed out by scholars who during these years focused their attention on constitutional procedure. For example, the number of decisions increased, but often at the expense of more summary opinions. The method for organizing work reduced the collegiality of decision-making and the importance of the parties' arguments, simultaneously increasing the procedural discretion of the Constitutional Court. In sum, operational efficiency does not always equate to effective decision-making. Insufficiently explained opinions are less persuasive and carry the risk of reducing consensus, both among scholars and the public and, as a consequence, of reducing the Court's legitimacy. Various procedural ideas have been advanced to promote more carefully reasoned opinions, in particular the introduction of dissenting opinions.³⁴ Likewise, some have proposed allowing interested parties to participate in constitutional proceedings even though they are not involved in the lawsuit giving rise to the constitutional question, in order to offer the Court more viewpoints in evaluating constitutional claims.³⁵ Yet none of these attempts has so far produced any change in constitutional procedure.

The Court during the 'transition years'

Once the case backlog had been eliminated, the Italian system of constitutional review entered a new stage, whose features are still unclear.

First, the brief time that passes between the raising and determination of a question means that the object of the Court's review is ever more frequently neither a law of the fascist period nor a law passed by a previous legislature, but a law that has just been adopted: that is, one supported by a current political majority. This rapidity has important consequences for the relationship between the Constitutional Court and Parliament as well as the judiciary. As for the former, the Court is inevitably drawn into current political conflicts. When politically and socially important issues are at stake, connected with recently approved laws that are often the result of delicate compromises and long debates, it is unavoidable that the Court's decisions are politically influenced and that its legal judgments are viewed both by the public and scholars as decisions of mere political convenience.³⁶ The difficulties in these cases are obvious. In order to preserve the authority of their decisions, the Court's opinions take on special importance, particularly in their ability to persuade on the rhetorical rather than the logical level. As regards relations with the ordinary courts, the Court's rapid turnaround and the fact that it confronts 'new' laws means that the Court is forced to rule on the constitutionality of laws that have not yet received a consolidated judicial interpretation, the so-called 'living law'. The Court is therefore called upon to perform the task of interpreting the law subject to review, a task that belongs to the judiciary rather than the Constitutional Court. This raises afresh the

³⁴ Panizza, S (1998) *L'introduzione dell'opinione dissenziente nel sistema di giustizia costituzionale*, Giappichelli.

³⁵ D'Amico, G (1991) *Parti e processo nella giustizia costituzionale*, Giappichelli.

³⁶ See Rolla, G and Groppi, T 'Between Politics and the Law: The Development of Constitutional Review in Italy' in Sadurski, W (eds) (2002) *Constitutional Justice, East and West*, Kluwer Law International.

problem of relations with the judiciary that the use of the 'living law' was thought to have overcome.

Second, the Constitutional Court finds itself interpreting constitutional texts that embody principles of the welfare state, that is, that recognize social rights, in an environment marked by the financial crisis of the state and by economic austerity policies. The Court is trapped between Scylla and Charybdis: between the danger of abdicating its role of supreme guarantor of the Constitution and the social rights it protects, and the danger of provoking serious economic repercussions with its decision. The Court's concern for the financial consequences of its decisions is readily perceptible from a survey of its activity. Indeed, it frequently issues evidence-gathering orders to acquire information about the costs of possible judgments striking down laws. Furthermore, a look at the Court's case law shows its tendency to significantly reduce, compared to the earlier stages, the number of decisions based on the principle of equality and designed to equalize unequal situations upward. On the contrary, on some occasions the Court has chosen the opposite path; faced with challenges raised in the name of equality, it has decided to equalize the situations downward, raising before itself *sua sponte* the question of the constitutionality of the baseline offered by the certifying judge (the *tertium comparationis*). This was the situation with regard to the personal income tax on pensions of parliamentary deputies. The favourable treatment they received was invoked as the baseline for all citizens in a case involving the income of employees. The Court did not hesitate to question *sua sponte* the favorable treatment accorded to these pensions, and declared them unconstitutional (n. 289 of 1994).

In the hope of balancing these two goals – on the one hand to fulfil its role of constitutional guardian, in particular of social rights, and on the other hand not to directly create state budgetary burdens without adequate financial support – the Constitutional Court has from the mid-1990s developed the innovative decisional techniques mentioned earlier, in particular judgments that 'add principles' rather than norms. These decisions are aimed at recognizing rights, but leaving it to the legislature to choose the means for implementing them and the funds to meet their costs. Illustrative of this tendency is judgment n. 243 of 1993. In that decision, the Court declared unconstitutional norms that excluded a cost-of-living adjustment from the calculation of severance pay benefits, but held that its decision could not take the form of the mere nullification of a law, or of an additive judgment. Rather, it fell to the legislature to choose the appropriate means 'in view of the selection of economic political choices needed to provide the necessary financial resources'.

Third, the constitutional reform of the State-regions relationship in 2001 created an unexpected increase in the number of direct complaints. The consequence was an increase in the number of decisions enacted in this kind of review from 2% in 2002 to 24.41% in 2006. For some years (between 2003 and 2006), most of the activity of the Court was devoted – independently of the will of the Court itself, but simply as a consequence of the number of state-regions disputes – to the solution of problems of division of competences between different levels of government, more than to the guarantee of fundamental rights.³⁷

Finally, the current stage of constitutional jurisprudence is occurring in an unstable political and institutional context characterized, since 1992, by the weakening of the

³⁷ See Del Duca, LF and Del Duca, P (2006) 'An Italian Federalism? The State, Its Institutions and National Culture as Rule of Law Guarantor' *Am. J. Comp. L.* 54 at 799.

established balance of political power, with the collapse of the old party system, the change in the electoral system, the birth of alliances and alignments that have not yet sufficiently consolidated their positions, and the emergence, after 40 years of a consociational political system, of a majority system based on the alternation in government of two main coalitions.

These elements have resulted in an increase in the political role played by the Court. There has been an increase, both quantitative and qualitative, in the competences of the Constitutional Court with strong political ramifications, such as those related to conflicts over the attribution of powers among the branches of government and the admissibility of referenda to repeal laws. As a result, there has been a tendency to emphasize the Constitutional Court's role as an arbiter in political and constitutional conflict, a role from which the Court has not sought to extract itself. In this vein, it is worth noting its judgment concerning votes of no-confidence in individual ministers (which the Court found constitutional, even in the absence of express constitutional provisions, on the ground that they are inherent in the form of parliamentary government: judgment n. 7 of 1996); the cases regarding decree-laws (the Court went so far as to declare the unconstitutionality of reissuing them, in judgment n. 360 of 1996, because they violate legal certainty and would change the structure of government; see also n. 171 of 2007); the case law governing the immunity of parliamentary deputies for statements made in the performance of their official functions (in this regard, after many years of uncertainty, the Court annulled a parliamentary vote of immunity deemed to have been adopted in the absence of any functional nexus between the declaration of the deputy and his parliamentary activity: judgment n. 289 of 1998); the case related to the power of mercy of the President of Republic and his relationship with the Minister of Justice (judgment 200 of 2006, in which the Court ruled that this is a typical presidential power and that the Minister cannot influence the decision); and the case regarding the immunity of the higher power of the state (judgment n. 24 of 2004, in which the Court ruled the unconstitutionality of the statute that determined a complete immunity).

CONCLUSIONS

More than 50 years of constitutional review in Italy have brought about a consolidation of the position of the Constitutional Court. It is an important institutional actor, well accepted by public opinion and respected by the political system.³⁸

In the last few years, however, something has changed. The traditional sources of legitimacy of the Court (the Constitution itself and the dialogue with public opinion) seem weaker than in the past, having been dried up by the loss of legitimacy of the Constitution itself, testified by the need, more and more widely acknowledged, of reform,³⁹ and the apathy of the public.

In order to preserve its legitimacy and to defend itself against an increasingly aggressive political power, the attitude of Court has been very cautious: so far the Court has decided

³⁸ As it is testified by the fact that only in very few cases does Parliament reenact a law already set aside by the Court.

³⁹ An important constitutional reform, aimed at amending more than 50 articles of the Constitution, was passed by Parliament in 2006, but rejected by the people in a national referendum.

not make a direct link with public opinion. Instead, it preferred to 'disappear' from the headlines, devolving a large part of its job to other actors.⁴⁰

We can point out two main paths that have been followed by the Court towards this new, low-profile role.

First of all, the Court tries to decentralize its work maximally, involving ordinary judges more deeply in constitutional review than the European model of judicial review normally provides for, in order to share with them the task of safeguarding the Constitution. Before referring a question to the Constitutional Court, an ordinary judge is expected to look for an interpretation of the statute that will preserve its constitutional validity. Although ordinary judges cannot disregard statutes on constitutional grounds, they can interpret them. But it is obviously difficult to identify the conditions that a reading of a statute must satisfy to qualify as 'interpretation'. The European model is thus based on an unstable distinction between the power to interpret (for ordinary judges) and the power to set aside (for the Constitutional Court): in Italy the distinction is changing, in favor of the judiciary, by request of the Constitutional Court itself.

Secondly, the Court looks increasingly to supranational jurisdictions. The shift of Italian case-law in this regard in 2007 and 2008 was extremely significant. In judgments n. 347 and 348 of 2007 the Court established that the ECHR and the interpretation given to it by the European Court of Human Rights are 'intermediate law' (*norme interposte*) which falls between mere statute and the Constitution, and can be used as a parameter in reviewing the constitutionality of a national statute. In judgments n. 102 and 103 of 2008 the Court defined itself for the first time as a 'court or tribunal of a Member State' for the purposes of Article 234 (formerly Article 177) of the EC Treaty, in order to apply to the European Court of Justice and ask for a preliminary ruling on the interpretation of European Community law.⁴¹ It should be remembered that in its previous case law, particularly in the ordinance n. 536/ 1995, the Italian Constitutional Court had always excluded that possibility in broad terms.

Both tendencies imply a transfer of power from the Constitutional Court to other bodies: ordinary judges on one hand, supranational judges on the other hand. The Court chooses to devolve many of its powers, to become 'the last resort' in defending the Constitution against extraordinary attacks.

Thus, as a consequence of this evolution, the question today in Italy concerns the very future of the centralized constitutional review.

On the one hand, the search for legitimacy might determine its impoverishment and even its disappearance. In that case, the price to be paid in the name of legitimacy would be too high. In addition, there are no guarantees that the legitimacy of the ordinary judiciary or of the supranational courts is better established than that of the Constitutional Court. The Constitutional Court, with its visibility, its history, its roots and its powerful resources is still more suitable than any other court in order to face the 'democratic objection'. On the other hand, we might witness not at a disappearance but a

⁴⁰ On this attitude see Nardini, WJ (1999-2000) 'Passive Activism and the Limits of Judicial Self-Restraint: Lessons for America from the Italian Constitutional Court' *Seton Hall L. Rev.* 30 at 1.

⁴¹ On the previous jurisprudence of the Court in relation to the EC law, see Cartabia, M (1990) 'The Italian Constitutional Court and the Relationship Between the Italian Legal System and the European Community' *Mich. J. Int'l L* 12 at 173.

transformation, from a centralized system of judicial review towards a 'multilevel system', in which ordinary courts and supranational courts also contribute to the guarantee of the national Constitution, but under the direction and the control of the Constitutional Court. In that case, the Constitutional Court would play a new role: not the sole guarantor of the Constitution, but a kind of signalman (*'manovratore di scambi'*) in a system with many actors.

This new trend has just begun. We will see in the next years where this evolution will bring the Italian Constitutional Court.