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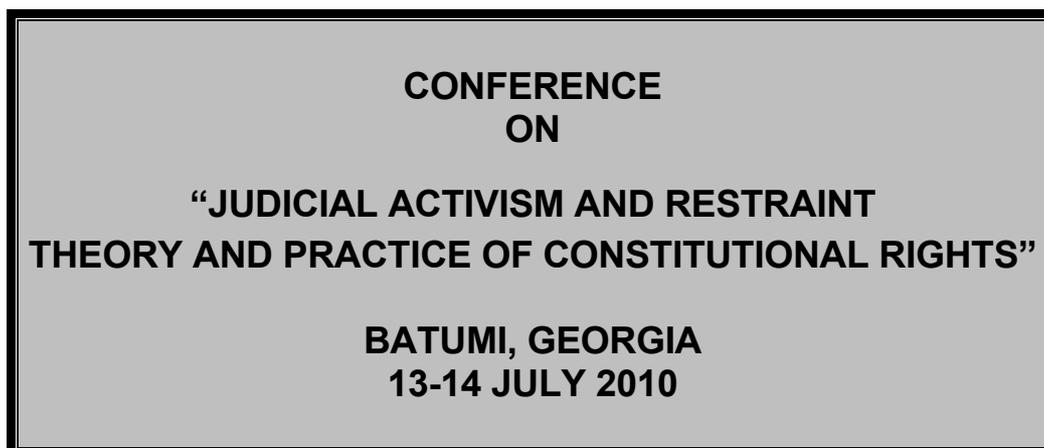
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REPORT

**“THE RELATIONSHIP BETWEEN CONSTITUTIONAL COURTS,
LEGISLATORS AND JUDICIAL POWER IN THE EUROPEAN SYSTEM
OF JUDICIAL REVIEW**

**TOWARDS A DECENTRALISED SYSTEM AS AN ALTERNATIVE TO
JUDICIAL ACTIVISM?”**

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The relationship between Constitutional Courts, Legislators and Judicial Power in the European System of judicial review

Towards a decentralised system as an alternative to judicial activism?

The “European Model of Judicial review” is the result of a long evolution that begun after the World War I and covers almost a century.

In this paper I would like firstly to stress some features of this system, according to the original model, the so-called “kelsenian” model: 1) centralization in a specialised constitutional court, 2) abstract review, 3) erga omnes effects of unconstitutionality decisions (part I).

Second, I wish to highlight some tendencies that are changing the European model, firstly by pushing it towards the concrete review, as it happened in most of the countries that “received” the original Kelsenian model, by the introduction of new avenues to trigger judicial review of legislation: these changes undermined the “abstract” review and determined a closer relationship of the constitutional court with the judicial power (part II).

Part III deals with some more recent transformations, that are pushing this model towards decentralization, by empowering ordinary courts with new competences, as a consequence of both internal and external pressures to each national system.

In part IV I will focus on the internal forces that push the European model towards decentralization, by trying to show that this transformation is a consequence of the refusal of judicial activism by the Constitutional Courts, in order to avoid conflicts with the legislator and, generally, the political system: this is the controlling idea of this paper. In doing so, I will pay special attention to the Italian experience of constitutional review.

Finally, I wish to point out that these late developments, if could satisfy the quest for legitimacy by Constitutional Courts, could challenge the foundational values that led so many countries in Europe to adopt a centralized model of judicial review (part V).

Part I

The original “Kelsenian Model of Judicial Review”

Constitutional adjudication is much older in America than in Europe.

In Europe the constitutional review of legislation was introduced only after World War I – for many reasons, that I cannot discuss here – in the Constitutions of Austria and Czechoslovakia, by the influence of Hans Kelsen, and it expanded to most of the countries later, after World War II, in different “waves”, that ended in the last decade of 20th Century.

By now, all European countries, apart from the Netherlands and UK have constitutional review of legislation.

The dominant model (with very few exception, among them Estonia, Sweden and Denmark, and in some ways Greece and Ireland) is based on specialized Constitutional Courts, following the “original” Austrian model of constitutional review.

That model (also called “Kelsenian” or simply “Austrian”) back then had some structural features, that distinguished it from the “American” model.

The main features of the “original” Austrian model were:

1) Centralization: only a specialized court, the constitutional court, is empowered to hold that a statute is unconstitutional. Ordinary judges are not allowed to set aside legislation, neither, in the original model, are allowed to refer the question to the Constitutional Court. They had to enforce legislation, although they thought it is not consistent with the Constitution.

2) Abstract review: the court may examine a statute in the abstract, without needing it to apply to any actual controversy among real adversaries. Sometimes the statute may be attacked before its publication. In the original model, access to constitutional court is strictly circumscribed: constitutional challenge could be brought only by public institutions, such as the government (federal or regional), a number of members of the parliament, the general prosecutor and so forth.

3) *Erga omnes* effects of unconstitutionality decisions: if the constitutional court holds a statute is unconstitutional, the statute is expelled from the legal system: Hans Kelsen said that the Court acts as a “negative legislature”: while the Parliament introduces statutes (as a positive legislature), the court’s role is to expunge those that are not consistent with the Constitution.

Part II

The “European Model of Judicial Review”: concrete review

This model (that is in contrast to the “American” model in all three points, as it is easy to notice) started moving towards a different model at the beginning by the change that affected the second structural point, abstract review.

Commencing with Italian and German Constitution, after World War II, almost every country (but France, till the constitutional reform of 2008) introduced new means of triggering constitutional review.

The most popular is “constitutional question”. Constitutional questions are raised by ordinary judges. When the ordinary judge has to decide a case, if he believes that the applicable statute is unconstitutional, he can refer the question to the constitutional court. 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 proceeding.

In some countries there is a third type of procedure, the “constitutional complaint”, which allows individuals to directly invoke Court’s jurisdiction if they consider that their fundamental rights have been violated (this procedure is very popular in Spain and Germany, and in Central and Eastern European countries as well).

Both of these new means (constitutional question and constitutional complaint) introduce some kind of “concrete review”: constitutional review is still centralized, but the constitutional court will review the statute not in abstract, but when it is applied in a case. However, the effects of decisions are still “*erga omnes*”.

There are differences between these two means (in many countries both are provided): the constitutional question gives the ordinary judges a responsibility as indirect guardians of the constitution, whereas the constitutional complaint directly empowers citizens and could have a pedagogical significance in new democracies, although the risk is overcharging the Court.

Part III

Towards decentralisation: internal and external pressures

After the structural changes I mentioned, it still exists in Europe a centralized model of constitutional adjudication, that is at one time abstract and concrete, depending on the access procedure.

What's more, in the last 20 years, most European countries are experimenting with an additional change in their system of constitutional review, that does not imply structural reforms. This change affects "centralization": ordinary courts are gaining new powers to check the validity of legislation.

As I said previously, the pressures towards decentralization are both internal and external.

1) Internal pressures: they are caused by the Constitutional Courts themselves, that, for many reasons, try to involve more deeply than the model provide ordinary judges in constitutional review, in order to share with them the task of safeguarding the constitution.

In other words, the centralization of the European model is being undermined through interpretation by ordinary judges, by request of Constitutional Court itself. Before referring a question to the constitutional court, an ordinary judge is expected in many countries (between them Italy) to look for an interpretation of the statute that will preserve its constitutional validity. Although they do not have the power to disregard statutes on constitutional grounds, they have the power to interpret them so as to make them cohere with the constitution. But everyone knows how difficult it is to identify the conditions that a reading of a statute must satisfy to be qualified as "interpretation", and the relationship with the text of the statutes does not help.

The European model is thus based on an instable distinction between the power to interpret (for ordinary judges) and the power to set aside (for the constitutional court), and the border is changing, in favour of judiciary, by request of constitutional courts.

There are many reasons that explain the development.

First of all, the overcharge of work that afflicts many Courts (mainly where the constitutional complaint is provided, as in Spain or Germany), and as consequences the delays in deciding (European Courts of Human Rights condemned Germany in 1997 for violation of art.6 of the Convention, which guarantees the right to a fair trial, because of the delay of German Constitutional Court; the same will happen to Spain).

In addition, there is a problem of legitimacy, related to the effects of the decisions of constitutional courts: as I pointed out, decisions to set aside a statute have "erga omnes" effects, in the cases of abstract review and concrete review as well. To strike down a statute has a relevant political impact in front of a democratic elected legislature, whereas a creative interpretation by ordinary courts is limited to the concrete controversy and it does not imply any invalidation of popular law. One could argue that constitutional courts can enact interpretative decisions (decisions that say that a statute should be interpreted, or not interpreted in a certain way), and of course they do in a certain measure. However, in many cases they prefer to leave the interpretative task to the ordinary judges, in order to not invade their competence.

2) External pressures towards decentralization: they are caused by the process of supranational integration in the context of the European Union.

As consequence of European Court of Justice judgements about primacy of EU law over domestic law, in the vast majority of European Union countries, ordinary judges have no power to set aside a domestic statute that is inconsistent with the national constitution, but they can

set aside that statute if it runs counter EU law: if ordinary courts are required to set aside legislation that contradicts EU law, it seems difficult to justify why they cannot do the same when that legislation violates national constitution.

Part IV

A decentralised system as an alternative to judicial activism?

The experience of the Italian Constitutional Court

I would like now to focus on Italian experience of judicial review, in order to show an example of the tendency towards decentralisation.

First of all, I must point out that in Italy, in the context of a centralized system with a specialized constitutional court, the access to constitutional review is rather circumscribed: according to the 1948 Constitution the Italian system offers only *a posteriori* review, which arises out mainly of a separate judicial proceeding (indirect review). There is also an avenue of direct review, according to the 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 sixty days from its publication. In this way, the direct review is only a tool for the guarantee of the constitutional separation of powers between national and regional governments. Neither private citizens nor parliamentary groups nor local (sub regional) governments can directly invoke the Court's jurisdiction.

The indirect review is the only general avenue for submitting a question to the Constitutional Court, that is not related with the division of competences. 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.

In order to submit a question to the Constitutional Court, a judge must explain why it is relevant and not patently groundless. As for the first requirement, the judge must establish that judgment in the pending case 'could not be reached independently of the resolution of the constitutional question.' In other words, the challenged law must be necessary and unavoidable for resolution of the lawsuit. With regard to the second requirement, the judge must entertain a plausible doubt about the constitutionality of the legal rule that must be applied to resolve the case at bar. The judge must not express an opinion about the constitutionality of the rule (that job belongs to the Constitutional Court) but must determine whether the challenge has any colorable legal basis.

Secondly, according to the Constitution (art. 136), decisions of unconstitutionality are universally binding and are retroactive (*ex tunc*), in the sense that the rule declared unconstitutional cannot be applied from the day after the judgment has been published.

The Italian Constitutional Court has shown most creativity in the effects of its own decisions, especially in their effects on the legal system.

The rich variety of judgments that characterize the Italian constitutional system arise from the creativity of the Court, which has found ways to solve problems not so much by drawing on abstract theory, but on the necessity to respond to specific practical needs.

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

This result was made technically possible by the theoretical distinction between '*disposizione*' and '*norma*,' or legal 'texts' and 'norms'. 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.

A. Relationship with the Judiciary

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 decisions have allowed a division of labor between the ordinary courts and the Constitutional Court and have mitigated conflicts that arose during the Court's early years.

a) With its so-called '*corrective*' decisions, the Constitutional Court avoids the merits of the constitutional question. It limits itself to stating 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 adopts one of the possible interpretations of the challenged text, choosing one that is either consistent with the Constitution (i.e., a *sentenza interpretativa di rigetto*) or one that is contrary to the Constitution (i.e., a *sentenza interpretativa di accoglimento*).

In particular, in the absence of 'living law,' the Court proposes to the courts an interpretation that would render the statute consistent with the Constitution, thereby saving it from unconstitutionality. With such an interpretative judgment that 'rejects' a challenge, the Court reaches the merits and declares the challenge 'unfounded' insofar as the law can be attributed a meaning consistent with the Constitution, which is different from the one given 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. 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. In the case at bar, the norm cannot be applied according to the interpretation initially proffered by the judge in the certified question.

c) Faced with this tendency of judges to ignore legal interpretations offered by the Court, the Court has discerned a need to overcome the structural limits of interpretative judgments that *reject* a challenge. It has therefore issued interpretative judgments that *accept* a challenge. In such judgments, the Court chooses among the possible meanings of a norm and declares unconstitutional the one that is incompatible with the Constitution. All other possible meanings of the text remain available; the interpretative approach is similar to that of the kind of judgment discussed just above, but the practical effects are different. With interpretative judgments that *accept* a challenge, the Court does not eliminate the text from the legal system, but only one of the norms to which the text could give rise. The text, in other words, continues to be applied and is therefore effective, except for the norm deemed unconstitutional.

B. 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.

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 our 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 creative impact of such judgments is the rule that they are appropriate only where it is said, to use a poetical metaphor, that the judgment inserts only '*rime obbligate*,' or 'obligatory verses,' into a statute. That is, the norm proposed by the Court is logically necessary and implicit in the normative context, thereby eliminating any discretionary choice.

b) A second effort to eliminate the interference with the parliamentary realm implied by these judgments has led, in recent years, to the development of slightly different judgments, which are described as adding only 'principles' rather than norms. These are known as '*additive di principio*.' In these decisions, the Court does not insert new rules into the legal system, but only principles that the legislature must implement with statutes that are universally effective. In its opinions in such decisions, the Court indicates a deadline within which the legislature must act and sets forth the principles it must follow. In this way, a single decisional tool manages to combine the contents of an 'additive' judgment with a sort of 'delegation' order, in order to reconcile the immediacy of the Court's 'acceptance' of the constitutional challenge with the preservation of the legislature's discretion. These judgments pose greater problems with regard to their effectiveness vis-à-vis ordinary judges. Although in most cases it is considered that legislative action is needed to apply the principle, in some cases judges have considered themselves capable of applying the Court's decision to arrive at a rule governing the case at bar.

c) Another type of decision born of the necessity of caution in relation to the legislature are the so-called 'admonitory' decisions or '*doppie pronunce*'--what one might call 'repeat or follow-up judgments.' The Court has resorted to these tools 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 split 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 pronunce*' 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) Finally, the highly political nature of some issues, combined with the need to balance the defense of social rights against the state's financial crisis, have obliged the Constitutional Court to modulate the temporal 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 scarcity of economic resources.

This problem is not unique to the Italian legal system. Comparative law 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. The German federal 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 the court's judgment.

In Italy, by contrast, the temporal effects of judgments that accept a constitutional challenge are rigidly established. 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 at which it becomes defective. 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.

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 at bar, thereby detracting from the concrete nature of review that characterizes the system.

C. Recent developments: the dismissive attitude of the Constitutional Court and the new role of the Judiciary

If one looks closely at the case law, in order to better understand the role played by the Court, it is possible to notice that, once eliminated all the preconstitutional legislation and reduced the time for decisions, in the last 20 years the Court entered in a new stage, whose features are still unclear.

First, the brief time that passes between when a question is raised and decided means that the object of the Court's review is ever more frequently a law that has just been adopted: that is, laws that are 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 grand 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. The difficulties in these cases are obvious. In order to preserve the decisions' authority, the Court's opinions take on special importance, particularly in their ability to persuade on the rhetorical rather than the logical level. As for the latter aspect, that of relations with the 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 problem of relations with the judiciary that the use of the 'living law' was thought to have overcome.

Second, the constitutional tribunal 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 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 favorable treatment only they received was invoked as the baseline due to all citizens in a case involving the income of employees. The Court did not hesitate to question *sua sponte* the favorable treatment accorded to pensions, and declared them unconstitutional. (n. 289 of 1994).

In hopes of balancing these two goals – on the one hand to fulfill its role of constitutional guardian, in particular of social rights, and on the other 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 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 determined 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, that grew from 2% del 2002 till 24,41% in 2006. For some years (between 2003 and 2006), most of the activity of the Court was devoted to the solution of problems of division of competences between different levels of governments, more than to the guarantee of fundamental rights.

Finally, the current stage of constitutional jurisprudence is occurring in an unstable political and institutional context characterized, since 1992, by the weakening of the 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 emerging, after forty years of a consociative political system, of a majority system based on the alternance in government of two main coalitions.

These elements determined an increase in the political role played by the Court. There has been an increase, both quantitative and qualitative, in the powers 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 (judgement 200 of 2006, in which the Court ruled that this is a typical presidential power and that the Minister cannot influence the decision); 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).

In this difficult stage, marked also by the need, more and more widely acknowledged, to amend the Constitution, the traditional sources of legitimacy of the Court seem weaker than in the past. In order to preserve its legitimacy and to defend itself from an increasing aggressive political power, the response of the Court follows main paths.

First of all, the Court tries to decentralize at maximum its work, involving more deeply than the European model of judicial review provides ordinary judges in constitutional review, 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. By now, although ordinary judges do not have the power to disregard statutes on constitutional grounds, they have the power to interpret them so as to make them cohere with the constitution. But everyone knows how difficult it is to identify the conditions that a reading of a statute must satisfy to be qualified as "interpretation", and the relationship with the text of the statutes does not help. The European model is thus based on an instable distinction between the power to interpret (for ordinary judges) and the power to set aside (for the constitutional court): in Italy the border is changing, in favor of judiciary, by request of the Constitutional Court itself.

Secondly, the Court looks every day more at the supranational jurisdictions. The shift of the Italian case-law at this regard in 2007 and 2008 was amazing. In the judgments n. 347 and 348 of 2007 the Court established that the ECHR and its interpretation given by the European Court of Human Rights are 'intermediate law' (*norme interposte*) which falls in-between the mere Statute and the Constitution and can be used as parameters in reviewing the constitutionality of a national statute. In the 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 art. 234 (former art. 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 Community law. It should be remembered that in its previous case law, particularly in the ordinance n. 536/1995, the Italian Constitutional Court had always excluded in broad terms that possibility.

Both tendencies implies a transfer of power from Constitutional Court to other bodies: ordinary judges from one hand, supranational judges from the other hand. The Court choose to dismiss many of its powers, to become 'the last resort' of the Constitution face to extraordinary attacks.

Part V

Is a more decentralised system a good option for European countries?

Finally, to fully understand the consequences of this development towards the decentralization of constitutional adjudication, I shall examine shortly the reasons for this institutional design (centralization); thus the reasons that explain why the American alternative was set aside by Hans Kelsen and never was successful in Europe.

An important reason to justify the European model relates to the principle of legal certainty, which is highly valued in civil law countries: if all courts were authorized to review the constitutionality of legislation, a divergence of judgement would emerge among them, without having the doctrine of precedent which makes the decision that are rendered by the highest courts binding on the lower courts.

The second reason traditionally given is related to the “democratic objection”: how can an unelected Court strike down a statute that is a product of a democratic legislature? The option in favour of a centralized control allows to have a specialized Constitutional Court, the members of which are selected in a way that is relatively democratic. Constitutional judges are usually appointed by political bodies (parliament, cabinet, president of republic) and the term is usually limited. This is very important in countries where the ordinary judges are selected by more bureaucratic procedures, that excludes every interference by democratic branches.

In light of these reasons, the question raised by the decentralization is if they are still relevant and actual, or if they are outdated and old-fashioned.

Many scholars proved that legal certainty does not raise more difficult problems in civil law countries than it does in common law countries, and it does not seem to be a priority on order to defend a centralized model anymore.

The democratic objection, as it is commonly raised, should not be considered as relevant, when, as I tried to show, every other day ordinary judges struck down domestic legislation inconsistent with EU law.

However, we should point out that at the moment (in the lack of an EU Constitution), EU law is not comparable with a Constitution: EU legislation used to be very detailed, and does not allow judges many interpretative space. Furthermore, the last word on the consistency of a domestic statute with EU law is centralized in the EU Court of Justice.

What’s more, the legitimacy of the judiciary (as well as of the Constitutional Court) is still questioned in many countries. Thus, it does not seem to be a fair solution to discharge the weight and the responsibility of judicial review of legislation over ordinary courts.

Constitutional Courts, with their visibility and their powerful resources are still more suitable in order to face the “democratic objection”, than ordinary judges.