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REPORT

"The role of the Constitutional Court in the protection and development of constitutional values in Italy"

by

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I. Basic features of constitutional review in Italy

1. Composition and competences of the Constitutional Court

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] it means, a form of government in which the sovereignty belongs to the people, but it 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 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 public institution (including the judiciary) and by the scholarship.[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 at the introduction of a decentralized system, American-style, and, in accordance with the dominant constitutional trends in postwar 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]

The Constitutional Court's composition reflects the effort to balance the need for legal expertise, 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 twenty 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.

Many scholars link to the necessity to find a balance between politics and the law also one of the main features of the proceeding of the Italian Court, that is a rarity in the comparative perspective: the prohibition of the expression of dissenting (or concurring) opinion by the judges, the secret of deliberation and the related principle of collegiality. According to them, the collegiality principle is a way to protect the Court from the pressures and interferences of politics, giving to the judge the opportunity to express freely their opinion, without having to justify their position outside of the Court. [6]

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

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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] Luther J *Idee e storie di giustizia costituzionale nell'ottocento* (1990) Giappichelli.

[3] We pointed out the important link between a democratic state governed by law, a rigid constitution, and constitutional review, in the Italian experience, in Rolla G; 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; Volpe G; Sorrentino F; Moretti R; 'Garanzie costituzionali. Artt. 134-139'in Branca G (ed), *Commentario della Costituzione* (1981) Zanichelli.

[5] This balance has been pointed out by Zagrebelsky G *Giustizia costituzionale* (1988) Il Mulino, 1988, that remains the most complete study on the Italian Constitutional Court.

[6] This is the point of view of Zagrebelsky G *Principi e voti* (2005) Einaudi.

- the Court has the power:
- to adjudicate the constitutionality of laws and acts having force of law, issued by the national and regional governments;
- to resolve separation-of-power conflicts between organs of the national government, between the national and regional governments, and between regions;
- to adjudicate crimes committed by the President of the Republic (high treason and attack on the Constitution).
- Article 2 of Constitutional Law n. 1 of 1953 added a further power beyond those listed in the Constitution:
- to adjudicate the admissibility of requests for referenda to repeal laws, which may be sponsored by 500,000 voters or 5 regional councils pursuant to article 75 of the Constitution.

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

- Compared to other models of constitutional adjudication, especially the most recent ones, these competences seem notable for being so apparently limited and minimalist.[7]
- On the one hand, the Italian Constitutional Court has no powers beyond constitutional adjudication (aside from adjudicating crimes committed by the President of the Republic) which are present in other systems of constitutional law, and which could almost be labeled political: for example, many systems involve 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 power 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 that it reviews, and the types and effects of its decisions.
- First of all, access to constitutional review is rather circumscribed: 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

[7] For a general overview of the competences of the Constitutional Court see Cerri A *Corso di giustizia costituzionale* (2001) Giuffrè 1997; Ruggeri A; Spadaro A *Lineamenti di giustizia costituzionale* (2004) Giappichelli; Malfatti E; Panizza S; Romboli R *Giustizia costituzionale* (2003) Giappichelli.

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.

- The constitutional proceeding 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 not only the relevance and plausibility of the question, but also the 'object' and 'parameter' of review: that is, he must identify the challenged law and the constitutional provision that it violates. The Constitutional Court's first task is to verify the existence of these elements, before turning to the merits.
- Secondly, the 'object' of constitutional review is represented exclusively by laws and by acts having force of law. On the other hand, constitutional review encompasses neither sources of law inferior to statutes, unlike many other constitutional systems, nor court judgments.
- Furthermore, the Court may not wander from the 'thema decidendum' (that is, the object and parameter of review) identified in the certification 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 occurs '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 question as 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 (or, put another way, are effective erga omnes) and are retroactive, in the sense that the constitutional rule cannot be applied beginning on the day after the judgment is published. This retroactivity is limited by what are called *'rapporti esauriti,'* which might be translated as 'concluded relationships.' For reasons of convenience and legal certainty, judgments do not affect situations that were already resolved by final judgments or claims that are barred by statutes of limitations 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 the constitutional review of laws, overshadowing its other powers, in particular with regard to national-regional conflicts.

– 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[8].

II. Evolution of the Italian model of judicial review

2.1. 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 North American model ('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. Judged against this backdrop, the Austrian model clearly had the greatest influence on the framers of the Italian Constitution.

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

As an initial matter, the centralization of review has been mitigated by endowing ordinary judges with two important powers: first, as we already said, the decision whether or not to raise a constitutional question; second, the constitutional review of rules that are subordinate to statutes (a power of review that belongs exclusively to ordinary courts). 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, 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 proceeding.

The hybrid 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:

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

a) The drastic reduction of time taken to decide a case and the consequent elimination of pending questions, that happened in the early 1990s, means that a constitutional decision increasingly has concrete effects for the parties in the case at bar;[9]

b) The Constitutional Court has increasingly employed its evidence-gathering powers before deciding questions. [10]As a result, the Court 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 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 labor 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.[11]

One can undoubtedly affirm that the Italian system has evolved in a direction that blurs the distinction between the two traditional theoretical models, giving rise to a 'third way' or, perhaps more accurately, to a hybrid system that is open to the influences of both great models. As shown above, the Italian system contains elements from various systems of constitutional review: the system is centralized for laws and acts having force of law, but diffuse when reviewing a subordinate rule; the decisions of the Court are universally binding when they strike down a law, but are binding only between the parties when they turn away a constitutional challenge.

2.2. '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, although it has to be pointed out that the constitutional review, unlike other judicial proceedings, is marked by a greater degree of procedural flexibility. This flexibility arises not from the lack of a dedicated set of rules, but from the Constitutional Court's freedom to interpret and apply its procedural rules. The Constitutional Court, unlike other Italian courts, possesses normative powers with respect to its own proceedings that find expression either in the adoption of formal procedural rules (that is, 'rules for proceedings before the Constitutional

[9] On this new phase of constitutional justice in Italy see the essays published in Romboli R (ed) *La giustizia costituzionale a una svolta* (1990) Giappichelli.
[10] As I tried to show in my book: Groppi T *I poteri istruttori della Corte costituzionale nel giudizio sulle leggi* (1997) Giuffrè.
[11] See Pugiotto A *Sindacato di costituzionalità e "diritto vivente"* (1994) Cedam.

Court') or in simple procedural decisions. This room for maneuver allows the Court to modify its prior practice, or procedural rules themselves, in order to achieve a desired goal, or to more fully effectuate 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 established procedural rules 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.[12]

In this way, the Constitutional Court has revamped its own procedural tools, primarily through interpretation rather than rulemaking. The Italian Constitutional Court has shown most creativity in the effects of its own decisions, especially in their effects on the legal system.

The Constitution and statutes govern only the structure and effects of judgments that accept or reject a constitutional challenge. 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.[13]

This result was made technically possible by the theoretical distinction between 'disposizione' and 'norma,' or legal 'texts' and 'norms'.[14] 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 courts

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

[13] On this judicial creativity see Pinardi R *La Corte, i giudici ed il legislatore. Il problema degli effetti temporali delle sentenze di incostituzionalità* (1993) Giuffré; Pinardi R *L'horror vacui nel giudizio sulle leggi. Prassi e tecniche decisionali utilizzate dalla Corte costituzionale allo scopo di ovviare all'inerzia del legislatore* (2007) Giuffré.

[14] On this distinction see Crisafulli V *Lezioni di diritto costituzionale*, vol.2, *La giustizia costituzionale* (1984) Cedam.

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).

c) 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.

d) 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.

e) 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.

b) 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.

c) 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.

d) 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.

e) 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.

III. 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 development.[15]

[15] We will follow the periods proposed by Cheli E *Il giudice delle leggi* (1996) Il mulino 1996. The decision 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.

3.1 Promotion of reforms

The first period (from the 1950s, when the Court was established, to the early 1970s)[16] 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 in Italian constitutional law, the Court affirmed 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. 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 to the nineteenth century as well as to the fascist era. 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), freedom of expression (which was purged of the worst lingering traces of fascism, the multiple permits to be obtained from the police), 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 government, even though it was a body created out of nothing by the Constituent Assembly, and laid the foundations of its legitimacy.

[16] The Constitutional Court was established only in 1956, with a delay of eight years. The difficulty of establishing the Court was due to the resistances of the government, that tried to avoid the counter majoritarian limitation always determined by the constitutional justice. During this period of time, according to the VII transitional rule of the Constitution, the judicial review was up to the ordinary courts, following the decentralized system. The lack of the 'constitutional sensibility' of the ordinary judges explains the little amount of cases in which a statute was set aside because unconstitutional.

3.2 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 preconstitutional legislation, the object of constitutional review was no longer preconstitutional 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, its exercise of discretion, 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 equality principle. From article 3 of the Constitution, according to which all are equal before the law, can be drawn a duty of reasonableness for the legislature, so that it not only must regulate different situations differently, but also must not use 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. 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 the 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), 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) the system of state welfare and wage payments. 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).

3.3. 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 has 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 function. 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 in the late 1980s through a series of reforms of the Court's procedural rules. 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 questions, through declarations of inadmissibility in summary orders (ordinanze) of a large number of questions that were obviously inadmissible or frivolous, as well as through the selection of cases on which to focus the Court's attention. To this end, the Constitutional Court adopted numerous procedural innovations (organization of work, streamlining of debate, deciding cases by summary order, etc.) that helped to reach these goals. At the beginning of the 1990s, the number of pending questions was significantly lower and the length of constitutional review had become 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' contributions, 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, about the decisions of the constitutional tribunal and, as a consequence, of reducing its legitimacy. Various procedural ideas have been advanced to promote more carefully reasoned opinions, in particular the introduction of dissenting opinions. 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. Yet none of these attempts has produced any change in constitutional procedure.

3.4. The Court during the "transition years"

Once that the case backlog has been eliminated, the Italian system of constitutional review has entered 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 statues 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.

Thus, as a consequence of this evolution, the very question today in Italy concerns the future of the centralized national constitutional justice. The search for legitimacy, in the end, may determine its impoverishment and even its disappearance.

The price to be paid in the name of legitimacy seems to be too high. What's more, there are no guarantees that the legitimacy of judiciary or of the supranational courts is better established. Thus, it does not seem to be a fair solution to discharge the weight and the responsibility of judicial review of legislation over them. The Constitutional Court, with its visibility, its history, its roots and its powerful resources is still more suitable in order to face the "democratic objection".