

# Making a Centralized System of Judicial Review Coexist with Decentralized Guardians of the Constitution: The Italian Way\*

Paolo Passaglia\*\*

### Abstract

In the aftermaths of World War II, a mechanism for constitutional review was set up, to provide the system with means of reacting against infringements of the Supreme Law. Even though a Constitutional Court was established, the Italian system of constitutional adjudication is only partially inspired by Kelsen's centralized model: actually, one its main features of the system is the cooperation between the Constitutional Court and ordinary courts. In the last decades, major changes have increased the system's rate of decentralization, in connection with European integration and, most notably, with the new role for ordinary courts in the context of constitutional review. In this regard, the Constitutional Court required ordinary courts to refrain from submitting a question of constitutionality until they had examined – and excluded – the possibility of interpreting the provision at issue so as to render it constitutional. The constitutionally oriented legislative interpretation can be linked to the fact that Constitution has deeply penetrated society and the courtrooms, to the point that currently the protection of the Constitution can be effectively achieved by ordinary means, so that Constitutional Court's guidance is needed much less frequently than in the past.

### I. Historical Background

The history of judicial review of legislation begins in the nineteenth century. At a first glance, this may be a surprising statement, since it was only in the aftermath of World War II that a written Constitution characterized by supremacy over the rest of the law came into force. However, in reality, by that time, the courts and legal scholarship had long been inquiring into the judicial review of legislation, both in Italy and in several other countries.<sup>1</sup>

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\*\* Full Professor of Comparative Public Law, University of Pisa. *Pro Tempore* Scientific Coordinator of the Comparative Law Area, Research Service, Constitutional Court of the Italian Republic. The author wishes to thank Sarah Pasetto for her comments and suggestions.

<sup>1</sup> For instance, extensive discussion among scholars on the possibility and the opportunity to introduce judicial review of legislation, even though the Constitutional Acts did not provide for any form of review, took place in France during the Third Republic. See eg J. Barthélème and

When Italy became a unitary State, the so-called Albertine Statute, adopted in 1848 for the Kingdom of Sardinia, was extended to the whole Italian territory as its first *constitution*.<sup>2</sup> The Statute defined itself as unamendable. Nevertheless, it was soon agreed that any act of Parliament could derogate from *constitutional* provisions. This was consistent with the strong influence exerted on Italian legal culture by the ideals of the French Revolution and Rousseau's theory of the law (of Parliament) as *the expression of the general will*, and the subsequent conception of (parliamentary) law as the product of the sovereign and materialization of rationality.<sup>3</sup>

Notwithstanding the resulting centrality of Parliament-enacted law, the judicial branch gradually developed a doctrine according to which legislation could be reviewed in procedural terms, since infringements of the Albertine Statute's provisions on the legislative process could empower courts to declare the final act as null and void. In other words, the breach of procedural provisions was deemed not only to indicate the act's unlawfulness, but – more radically – also to hinder its very existence from the legal point of view. Some scholars and judges thus stated that courts were allowed to refrain from applying the act solely because of their 'duty (...) to say what the law is'<sup>4</sup> – and the act was not law at all.

The founding principle of judicial review of legislation emerged gradually, but was never completely implemented by the judiciary, at least in relation to acts of Parliament: as a matter of fact, the most significant declarations of invalidity involved legislation adopted by means of governmental decrees and were delivered at a turning point of Italian history, namely just before and at the dawn of the Fascist regime. The dictatorship prevented further development of the doctrine and froze judicial activism, in favour of a rigid judicial deference

G. Jèze, 'Pouvoir et devoir des tribunaux en général et des tribunaux roumains en particulier de vérifier la constitutionnalité des lois à l'occasion des procès portés devant eux' *Revue du droit public et de la science politique en France et à l'étranger*, 138 (1912); P. Duez, 'Le contrôle juridictionnel des lois en France. Comment il convient de poser la question', in M. Hauriou ed, *Mélanges Maurice Hauriou* (Paris: Sirey, 1929), 211-249.

<sup>2</sup> It is noteworthy that the act was named *statute* precisely to avoid the name *Constitution*, which the Sardinian establishment considered too liberal. Indeed, the notion of the *revolutionary* nuance of the term *Constitution* was deeply entrenched in Italian liberal culture, as demonstrated by the definition of constitution given by Pellegrino Rossi, one of the most important figures of Italian liberalism; in his lectures on constitutional law in Paris during the eighteen-thirties, he stated that the constitution was 'the law of free states, those which escaped the rule of privileges': see P. Rossi, *Cours de Droit constitutionnel professé à la Faculté de Paris, recueilli par M.A. Porée* (Paris: Librairie du Guillaumin, 1866), I, 8 (the lectures collected were delivered in 1835-1836 and in 1836-1837).

<sup>3</sup> See J.-J. Rousseau, *Du contrat social, ou Principes du droit politique* (Amsterdam: Rey, 1762), II, Chapter VI.

<sup>4</sup> The words in brackets are from the opinion of the US Supreme Court in *Marbury v Madison* 5 US 137, 177 (1803).

towards the Executive (and political power more broadly).<sup>5</sup>

After World War II, the legal and political reconstruction began with the drafting of a new Constitution, that was adopted at the end of 1947. Italian constitutionalism thus entered a brand new phase, marked by the establishment of a human-rights oriented system and in which a new wave of jurisprudence inspired by natural law imposed limits on the government and even on the legislature, which were now bound by a Constitution conceived as the Supreme Law of the Land. In this connection, two features of the new Charter must be highlighted.

On one hand, for the first time, a genuine bill of rights was adopted to protect human rights from all kinds of infringement, by any type of authority: the only way to avoid the obligations enshrined in the Constitution was supposed to be through adopting constitutional amendments, for which it was necessary to follow a complex procedure that was practically guaranteed either to generate parliamentary opposition or to afford the People with the chance to block the majority's illiberal initiatives.<sup>6</sup>

On the other hand, for the first time, a mechanism for constitutional review was set up, to provide the system with an effective means of reacting against infringements of the Supreme Law. This aim was pursued by Arts 134-137 of the Constitution, which contained the provisions on the Constitutional Court. Oddly enough, but perhaps not surprisingly, these articles too were subjected to majority filibustering, since the Court began its functions only in 1956, ie over eight years from the Constitution's entry into force. However, constitutional review preceded the Constitutional Court thanks to Clause 2 of the VII Transitional and Final Provision of the Constitution, which allowed ordinary courts to decide the controversies that would ordinarily have been referred to the Constitutional Court.<sup>7</sup>

<sup>5</sup> Concerning attempts to establish a form of judicial review of legislation before the Fascist dictatorship, see F. Racioppi, 'Il sindacato giudiziario sulla costituzionalità delle leggi' *La legge*, 705 (1905); A. Pizzorusso, 'Garanzie costituzionali – Article 134', in G. Branca ed, *Commentario della Costituzione* (Bologna: Zanichelli-Il Foro italiano, 1981), 43; F. Roselli, 'Giudici e limiti al potere legislativo vigente lo Statuto albertino' *Rivista trimestrale di diritto e procedura civile*, 476 (1986); J. Luther, *Idee e storie di giustizia costituzionale nell'Ottocento* (Torino: Giappichelli, 1990), 190.

<sup>6</sup> Unfortunately, another way would be discovered very soon: delaying the implementation of constitutional provisions. The use and abuse of this *instrument* (a kind of *majority filibustering*: see P. Calamandrei, 'L'ostruzionismo di maggioranza' *Il ponte*, 129-136, 274-281, 433-450 (1953)) paralysed the concrete protection of many constitutional rights, especially social rights and rights to equality, for a long time, such that several constitutional provisions were implemented only in the nineteen-seventies.

<sup>7</sup> Cf P. Costanzo, 'Disposizioni transitorie e finali I-XVIII. Leggi costituzionali e di revisione costituzionale (1948-1993) – Disp. trans. VII', in G. Branca and A. Pizzorusso eds, *Commentario della Costituzione* (Bologna: Zanichelli-Il Foro italiano, 1995), 143; M. Bignami, *Costituzione flessibile, Costituzione rigida e controllo di costituzionalità in Italia (1848-1956)* (Milano: Giuffrè, 1997); A. Simoncini, 'L'avvio della Corte costituzionale e gli strumenti per la definizione

## II. The Establishment of a System of Judicial Review of Legislation

The history of the drafting of the Constitution, and in particular the debates held within the Constituent Assembly reveal a variety of attitudes towards the establishment of a system of constitutional adjudication. On one hand, a considerable part of the Assembly's members, especially to the political left, challenged the very idea of a body endowed with the power to review legislation; on the other hand, proponents of judicial review were divided between a minority that advocated for the adoption of a decentralized system based on the American model and a majority that favoured the establishment of a specialized body.

The latter solution was eventually chosen, also due to its vagueness: the establishment of a wholly new body meant that it was not necessary to determine whether it should be a real court or a sort of political body. This vagueness made the solution acceptable, at least as a lesser evil, even to left-wing parties.

Debates on the nature of the body to be established clearly reflected Hans Kelsen's idea that the power to review legislation was best allocated to a body that fell within neither the legislature nor the judiciary, and that was autonomous from any other power:<sup>8</sup>

‘the protection of constitutional principles (should) be performed by a body that, although independent from Parliament, considers laws not only from the perspective of citizens' individual rights, but that shares at the same the legislature's approach, without ever neglecting the “political point of view”; a body ultimately located in an intermediate position between primary legislation's opposing needs for constitutionality and legitimate authority’.<sup>9</sup>

del suo ruolo: un problema storico aperto' *Giurisprudenza costituzionale*, 3065 (2004); U. De Siervo, 'L'istituzione della Corte costituzionale: dall'Assemblea costituente ai primi anni di attività della Corte', in P. Carnevale and C. Colapietro eds, *La giustizia costituzionale fra memoria e prospettive: a cinquant'anni dalla pubblicazione della prima sentenza della Corte costituzionale* (Torino: Giappichelli, 2008), 55.

<sup>8</sup> See H. Kelsen, 'La Garantie juridictionnelle de la constitution (La Justice constitutionnelle)' *Revue du droit public et de la science politique en France et à l'étranger*, 197 (1928) (especially para IV).

<sup>9</sup> See C. Mezzanotte, *Il giudizio sulle leggi. Le ideologie del Costituente* (Napoli: Editoriale Scientifica, 2014), 75. With regard to the drafting of constitutional provisions concerning the Constitutional Court, see, moreover, G. D'Orazio, *La genesi della Corte costituzionale. Ideologia, politica, dibattito dottrinale: un saggio di storia delle istituzioni* (Milano: Giuffrè, 1981); G. Ferrari, 'La difficile nascita della Corte costituzionale' 81-82 *Studi parlamentari e di politica costituzionale*, 5 (1988); P. Costanzo, 'L'organizzazione e il funzionamento della Corte costituzionale nei lavori preparatori dell'assemblea costituente', in P. Costanzo ed, *L'organizzazione e il funzionamento della Corte costituzionale. Atti del Convegno di Imperia, 12-13 maggio 1995* (Torino: Giappichelli, 1996), 7; C. Margiotta Broglio, 'La Corte costituzionale

The search for balance within the Court is certainly represented well: first, by the constitutional provisions on the Constitutional Court's composition. According to these, the Court is a body whose members' legal skills are accompanied with an ability to grasp the political contexts in which legislation is adopted and is reviewed. The need to ensure the legal qualification of the Court's members results in rather strict conditions:

'(t)he judges of the Constitutional Courts shall be chosen from among judges, including those retired, of the ordinary and administrative higher Courts, university full professors of law and lawyers with at least twenty years practice' (Art 135, para 2 of the Constitution).

The diversity of approaches to law thus guaranteed is enhanced by the authorities endowed with the power to appoint or elect members:

'(t)he Constitutional Court shall be composed of fifteen judges, a third nominated by the President of the Republic, a third by Parliament in joint sitting and a third by the ordinary and administrative supreme Courts' (Art 135, para 1).

Second, the refusal to establish a body that risked being excessively enmeshed in politics and, at the same time, the need to ensure its relative distance from ordinary courts appears in the provisions on the powers entrusted to the Court.

The Constitutional Court wields two kinds of power: the power to decide special constitutional controversies, and the power to perform constitutional review of legislation.

The special controversies are those that arise from the distribution of power among the supreme bodies of the State, or between the central State and the Regions (Art 134, para 2, of the Constitution). The Constitutional Court also has the power to decide whether a referendum can be held, depending on whether its object falls within the domain determined by Art 75 of the Constitution. Finally, the Court decides on charges of high treason or attempts to subvert the constitutional order brought against the President of the Republic (Art 90 of the Constitution; before 1989, the same power was also wielded in relation to ministers). From a comparative point of view, it could be noted that the Italian Court was not endowed with many *accessory* competences: for instance, the Court – unlike many other European Constitutional Courts – does not have any say as far as elections are concerned.

italiana e il modello kelseniano' *Quaderni costituzionali*, 333 (2000); G. Volpe, 'L'accesso alla giustizia costituzionale: le origini di un modello', in R. Romboli ed, *L'accesso alla giustizia costituzionale: caratteri, limiti, prospettive di un modello* (Napoli: Edizioni Scientifiche Italiane, 2006), 3; G. Bisogni, *Teoria giuridica e giustizia costituzionale in Italia. Un profilo storico-filosofico* (Milano: Mimesis, 2012).

Notwithstanding its original hybrid (or rather, vague) nature, the Court soon identified itself as a judicial body, whose peculiar responsibilities prevented its straightforward inclusion in the system of courts. Therefore, one could conclude, on this point, that the Constitutional Court is a judicial body, that is separate from the other courts due to its powers and its means of adjudicating, which does not fail to take into account the political impact of its judgments.<sup>10</sup>

### III. A Weakly Centralized System

The definition of a centralized model might suggest that its adoption sought to establish a sort of monopoly over the review of legislation. Actually, it is fair to state that one of the main features of the Italian system of constitutional adjudication is, rather, the cooperation between the Constitutional Court and ordinary courts<sup>11</sup> in performing the functions that a constitutional court generally carries out in a centralized model.

The coexistence of a monopoly and a cooperation within a centralized model clearly requires to provide some clarifications. The main need is to clarify in general terms the notion of *centralized*. Later, it will be possible to identify the most significant features of the Italian system.

#### 1. The Features of a Centralized System

In Hans Kelsen's view, the opposite of the American decentralized model consisted in a specialized court that adjudicated special cases on the basis of special appeals lodged by special (political) authorities, without any connection with the actual implementation of the contested provisions (these features identified the so-called abstract review). Constitutional justice was thus conceived as being completely separate from ordinary justice.<sup>12</sup> A

<sup>10</sup> A detailed analysis of the establishment, the role, and the powers of the Constitutional Court is now available in English: see V. Barsotti, P.G. Carrozza et al, *Italian Constitutional Justice in Global Context* (Oxford: Oxford University Press, 2015).

<sup>11</sup> The Italian judiciary consists of various kinds of courts and magistrates. The ordinary judiciary is established and regulated by the law governing the judicial system (ie Arts 101-104 of the Constitution and regio decreto 30 January 1941 no 12). According to Art 102 of the Constitution, '(e)xttraordinary or special courts may not be established. Only specialized sections for specific matters within the ordinary judicial bodies may be established, and these sections may include the participation of qualified citizens who are not members of the Judiciary'. However, a limited number of special courts does exist. These are the administrative courts, the Court of Auditors, and military tribunals. Hereinafter, the term *ordinary* will also refer to special judges and courts: in particular, it will not be used in a technical sense, but rather to designate any court that decides *common cases*, as opposed to the *constitutional cases* adjudicated upon by the Constitutional Court.

<sup>12</sup> As a matter of fact, Kelsen strongly criticized the Austrian constitutional reform of 1929 that introduced review of legislation by means of judicial reference to the Constitutional Court:

system in which these features exist perfectly matches the Kelsenian model of constitutional adjudication.<sup>13</sup>

The reference to Kelsen's model becomes much more complicated when the constitutionality of legislative acts is or must be contested via ordinary courts. This occurs when the latter are empowered to refer to the Constitutional Court their doubts as to the consistency with the Constitution of a legislative provision that should be applied in proceedings before them. Such preliminary reference proceedings constitute the basis for a concrete review, because when the Constitutional Court reviews legislation, it cannot neglect the case from which the judicial proceeding originated and, eventually, the constitutional review requested.

In concrete review, the notion of monopoly appears to fade, for the simple reason that if the legislation is to be reviewed, the ordinary courts and the Constitutional Court must cooperate: without the activity of the former, the latter could not be accessed. The preliminary reference is in itself a review, since only if the ordinary court suspects of an inconsistency between the Constitution and legislation can there be scope for the Constitutional Court to adjudicate. Thus, two different reviews are necessary: the first aims to establish whether the conditions for accessing the Constitutional Court are met; the second is that which may result in a declaration of unconstitutionality. If there still is any monopoly on part of the Constitutional Court, this certainly does not lie in its power to review, but rather in its power to strike down legislation with general effects (ie with a judgment that affects the legal order as a whole, and not only the parties to the case).

Nevertheless, the monopoly over the power to strike down legislation can hardly ensure, *per se*, an effective *centralization* of the system. Insofar as ordinary courts have the exclusive power to decide whether to make a reference to the Constitutional Court, their first-stage decentralized review easily prevents any centralized review, and consequently neutralizes the

H. Kelsen, 'Judicial Review of Legislation. A Comparative Study of the Austrian and the American Constitution' 2 *The Journal of Politics*, 183 (1942).

<sup>13</sup> Comparing patterns of constitutional adjudication is one of the most important topics of comparative constitutional law. Traditional approaches all tend to draw a clear distinction between the American model and the European (or Kelsenian) model. See, eg, M. Cappelletti, *Judicial Review in the Contemporary World* (Indianapolis: Bobbs Merrill, 1971); F. Rubio Llorente, 'Constitutional Jurisdiction as Law-Making', in A. Pizzorusso ed, *Law in the Making. A Comparative Survey* (Assago-Milano: Springer-Verlang, 1988), 156. See also A. Pizzorusso, 'I sistemi di giustizia costituzionale: dai modelli alla prassi' *Quaderni costituzionali*, 521 (1982); L. Favoreu, *Les Cours constitutionnelles* (Paris: Presses Universitaires de France, 2<sup>nd</sup> ed, 1992). More recently, different approaches have emerged that focus on different models: see, for instance, S. Gardbaum, 'The New Commonwealth Model of Constitutionalism' 49 *American Journal of Comparative Law*, 707 (2001); M.V. Tushnet, 'New Forms of Judicial Review and the Persistence of Rights – And Democracy-Based Worries' 38 *Wake Forest Law Review*, 813 (2003); Id, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton: Princeton University Press, 2008).

power to strike down legislation.<sup>14</sup>

Hence, a major defining feature of a centralized system addresses the powers of the Constitutional Court to react to such a neutralization. In theory, judicial decisions concerning references can be appealed to a superior court (although there can obviously be no appeals against decisions by supreme courts); they can also be the subject of a direct appeal lodged by one of the parties with the Constitutional Court. In these two cases, the degree of centralization changes considerably, since only a direct appeal before the Constitutional Court endows it with the power to influence judicial activity related to the review of legislation; the appeals before the superior courts leave the Constitutional Court aside, thereby depriving it of the power to have a say on the constitutional matter concerned.

These features demonstrate that the notion of *centralized system* of judicial review of legislation is far from being an all-of-nothing alternative to American decentralization: actually, several degrees of centralization are possible, according to the kinds of appeals that can be brought before the Constitutional Court and to its powers to concentrate decisions concerning constitutional matters.

## **2. The Distinctive Features of the Italian System**

Even at a first glance, it is plain that in Italy, the choice for a centralized model of constitutional adjudication did not lead to a real monopoly for the Constitutional Court over the review of legislation. Several features of the system suggest that the Constituent Assembly opted for a system that could be described as a weakly centralized one.

### **a) A Centralized Review only for Primary Legislation**

A first distinction must be drawn between primary and subordinate legislation, since only primary legislation can be subject to centralized review.

The Constitutional Court is empowered to review all legislative acts, both national and Regional, and governmental decrees that have the same force as parliamentary legislation either by virtue of a delegation of power from the Parliament to the executive (Art 76 of the Constitution) or because an emergency that requires immediately-effective provisions has arisen (Art 77 of the Constitution).

The power to review primary legislation is not limited to acts adopted after the Constitution entered into force. Contrary to the German and the Spanish Constitutional Courts, which denied that they had any power to strike down legislation adopted prior to the Constitution, and thus allowed

<sup>14</sup> How such a neutralization could take place is a key issue which will be explored further below (para IV no 2 and para V).

ordinary courts to refrain from applying legislation that was inconsistent with the subsequently issued Constitution, the Italian Court opted for a centralized review of all primary legislation from its very first judgment, emphasizing the supremacy of the Constitution (assuming that this required the intervention of its *guardian*) instead of the application of the principle according to which *lex posterior derogat priori*.<sup>15</sup>

When it comes to subordinate legislation, however, the Constitutional Court does not exercise any competence: the consistency of this category of measures with (the Constitution and) primary legislation is ascertained by ordinary courts; these have the power to refuse to apply inconsistent measures, while administrative courts may also strike them down, and thus achieve general effects for their declarations.

### **b) An Abstract Review Confined to State v Regions Disputes**

As for review of primary legislation, two main ways to access the Constitutional Court were established.

One of the two forms of judicial review of legislation provided by Italian law is clearly inspired by the Kelsenian model: the abstract review, which addresses either appeals from the national government against a Regional legislative act or appeals lodged by a Region against a national legislative act. Complaints must be filed within sixty days following the publication of the challenged act(s). In these cases, the Court decides – in principle – without referring at all to the concrete implementation of legislative provisions, even though the submission of a complaint does not paralyze the implementation of questioned provisions, so that these may have already produced effects when the Court reviews them.<sup>16</sup> In these cases, the constitutional proceedings are designed to resolve disputes on the limits of the central State's and Regions' respective powers; the Court therefore either protects the autonomy of the Regions from encroachment by the central government, or protects the State's legislative power against misuse of power by Regional legislatures.<sup>17</sup>

<sup>15</sup> See Corte costituzionale 14 June 1956 no 1, available at <http://www.giurcost.org/decisioni/1956/0001s-56.html> (last visited 6 December 2016).

<sup>16</sup> This statement is true for complaints that fall under the 2001 constitutional reform. Previously, the review of provisions already in force was conceivable only for national primary legislation, since Regional legislation was challenged before the promulgation of the President of the Region, such that the law-making process was suspended and the Act could enter into force only after the Court had decided on its consistency with the Constitution. On this subject, see C. Padula, *L'asimmetria nel giudizio in via principale. La posizione dello Stato e delle Regioni davanti alla Corte costituzionale* (Padova: Cedam, 2006); in French, see M. Luciani and P. Passaglia, 'Autonomie régionale et locale et Constitutions – Rapport italien' *Annuaire international de justice constitutionnelle*, 229 (2006).

<sup>17</sup> As a matter of fact, the national government can censure any kind of breach of the Constitution; thus, its claim is not necessarily related to the aim of protecting the State's legislative power.

Although abstract review has undergone a significant evolution and a dramatic growth since 2003, when it comes to the number of appeals lodged and judgments delivered, it certainly cannot be defined as the *usual* way to access the Constitutional Court. Indeed, very few authorities have standing and only one of these – the national Government – is empowered to question the consistency of legislation with constitutional provisions: The Regions may only question national law with regard to the separation of legislative powers between the central State and the Regions. Given these limitations, abstract review alone would not guarantee an adequate protection of the Constitution. Indeed, the Italian system has been mainly characterized by another form of review.

### **c) The Concrete Form of Review as the System's Essential Feature**

Contrary to what Kelsenian orthodoxy would suggest, constitutional review can also be concrete, and, in fact, the concrete review has immediately become the core of the powers of the Constitutional Court, being by far the ordinary way to stimulate a constitutional review. The constitutionality of legislative acts must be invoked through the activity of ordinary (or administrative) courts, that are empowered to refer a question to the Constitutional Court when there are doubts as to the constitutionality of a legislative provision that should be applied in proceedings before them: thus, the Constitutional Court reviews the provisions' constitutionality on the basis of the case in which the issue arose, such that the concrete implementation of the provision is one of the elements that should be germane to the Court's judgment.<sup>18</sup>

This two-step procedure creates a hybrid system, in the sense that it is both decentralized and centralized. It is decentralized with regard to its first stage, because any ordinary court, from the lowest court to the Court of Cassation (the Italian Supreme Court), can raise a question on the constitutionality of a legislative provision; without these initiatives, the

<sup>18</sup> Due to the sheer number of contributions, it is impossible to compile a complete bibliography on the judicial reference procedure. Among the most recent ones, see, S. Bagni, *La questione incidentale nel controllo di costituzionalità. I sistemi italiano e spagnolo a confronto nel quadro dei modelli elaborati dalla dottrina* (Bologna: Clueb, 2007); L. Delli Priscoli and P.G. Demarchi, *L'eccezione di incostituzionalità: profili processuali* (Bologna: Zanichelli, 2008); N. Pignatelli, *Le "interazioni" tra processo amministrativo e processo costituzionale in via incidentale* (Torino: Giappichelli, 2008); G.L. Conti, 'Mantenere nel tempo il valore del giudizio incidentale di legittimità costituzionale', in C. Decaro et al eds, *La "manutenzione" della giustizia costituzionale. Il giudizio sulle leggi in Italia* (Torino: Giappichelli, 2012); A. Patroni Griffi, *Accesso incidentale e legittimazione degli «organi a quo»* (Napoli: Jovene, 2012); R. Romboli, 'Natura incidentale del giudizio incidentale e tutela dei diritti: in margine alla sentenza n. 10 del 2015' *Quaderni costituzionali*, 607 (2015).

Constitutional Court could not operate, since it has no power to initiate the constitutional review of legal provisions. Ordinary courts are thus the *gatekeepers* of constitutional review proceedings (this definition was suggested by Piero Calamandrei,<sup>19</sup> a legal scholar who had been a Member of the Constituent Assembly): their task is to decide whether a question of constitutionality, that can be raised either by the parties to the proceedings or by the court itself, should be submitted to the Constitutional Court. Submission requires two conditions to be met: first, the court must consider that to decide the case, it will have to apply the legislative provision in question (the condition of *rilevanza*, ie of influence on the decision); second, the court must have doubts as to the consistency of the legislative provision with the Constitution. In other words, the court needs not be confident of the provision's unconstitutionality, but simply lack certainty as to its consistency with the Constitution (the condition of *non manifesta infondatezza*; the referring court cannot be certain that the Constitutional Court would reject the question).<sup>20</sup>

In the second stage, the procedure is characterized by a centralized model: the Court itself affirmed the principle of the unity of constitutional adjudication, which means that only one court can issue judgments on the constitutionality of legislation.<sup>21</sup> More precisely, as described above, the Constitutional Court is the only authority empowered to strike down legislation: indeed, any ordinary court takes a stand on the constitutionality of a legislative provision, when it decides whether the conditions for submitting a question to the Constitutional Court have been met; the principle of unity of constitutional adjudication, however, implies that the Constitutional Court exceeds this operation, since it has the power to declare a provision unconstitutional, such that the provision is withdrawn and expelled from the legal system. The withdrawal is effective on the day after the judgment is published and has retrospective effect, because once the Court has issued a declaration of unconstitutionality the provision can no

<sup>19</sup> P. Calamandrei, *La illegittimità costituzionale delle leggi nel processo civile* (Padova: Cedam, 1950), XII.

<sup>20</sup> On the conditions required for submitting a question of constitutionality to the Court, see M. Cappelletti, *La pregiudizialità costituzionale nel processo civile* (Milano: Giuffrè, 1957); F. Pizzetti and G. Zagrebelsky, «Non manifesta infondatezza» e «rilevanza» nell'instaurazione incidentale del giudizio sulle leggi (Milano: Giuffrè, 1974); N. Trocker, 'La pregiudizialità costituzionale' *Rivista trimestrale di diritto e procedura civile*, 796 (1988); F. Dal Canto, 'La rilevanza e il valore del fatto nel giudizio di costituzionalità delle leggi in via incidentale', in E. Malfatti, R. Romboli et al eds, *Il giudizio sulle leggi e la sua "diffusione"* (Torino: Giappichelli, 2001), 145; G.P. Dolso, *Giudici e Corti alle soglie del giudizio di costituzionalità* (Milano: Giuffrè, 2003); L. Azzena, *La rilevanza nel sindacato di costituzionalità dalle origini alla dimensione europea* (Napoli: Jovene, 2012).

<sup>21</sup> See A. Agrò, A. Cerri and F. Modugno, *Il principio di unità del controllo sulle leggi nella giurisprudenza della Corte costituzionale* (Torino: Giappichelli, 5<sup>th</sup> ed, 2008).

longer be applied, neither to facts that may happen in the future, nor to facts that have already taken place but on which final judgment has not yet been entered.

**d) The Absence of a Means of Direct Appeal to the Constitutional Court: The Italian Separate but Equal Doctrine**

The Constituent Assembly rejected the idea of giving individuals the power to appeal to the Court directly. This choice had two major outcomes.

First, the protection of individual rights and, more generally, of the Constitution against legislative acts was concentrated on the concrete review enabled by judicial references: the conditions for making the judicial reference the ordinary way to access the Court were therefore fulfilled.

Second, the Constitutional Court was not endowed with the power to *control its docket*, in particular to decide whether a constitutional issue settled autonomously by the ordinary courts should have been settled, rather, only after a reference and a concrete review. This power is essential in other centralized systems, such as in Germany and Spain: in both of these systems, direct appeals lodged by individuals lie at the root of the most significant part of the Constitutional Courts work, and the cases brought before them can be considered as the response to the absence of actions to protect rights in ordinary courts. The contested absence of protection is the result of inappropriate consideration of the Constitution, that may possibly – but not necessarily – be demonstrated even by the refusal to refer the question of constitutionality regarding a legislative provision: in any case, what is disputed in a direct appeal to the Constitutional Court is that an issue concerning the respect of the Constitution was improperly decided. And what is relevant for the nature of the system of constitutional adjudication is that the Constitutional Court, while reviewing the judicial decision, and eventually the law that was applied in the decision, has the opportunity to *centralize* the constitutional issue, so as to supposedly decide it in the most appropriate way.

The Italian Constitutional Court does not have a similar power to *centralize*: the absence of a direct appeal leaves ordinary courts free to decide, and – above all – to have the final say, whether to submit to the Constitutional Court the constitutional matter at issue and, thus, even to decide whether or not a review of the legislation aimed at striking it down is needed.

Rather than a monopoly of the Constitutional Court, the judicial review of legislation appears to be the result of the concurrence of different courts, with different points of strength (and weakness): on one hand, the Constitutional Court can count on its monopoly to strike down a legislative provision or a legislative act; on the other hand, ordinary courts are endowed with the power to decide whether a review by the Constitutional

Court must take place and thus, at the end of the day, it is up to these courts to choose – to some extent – which of the judicial bodies will check the compatibility between the Constitution and the legislation. Since the Constitutional Court cannot do without ordinary courts and ordinary courts cannot do what the Constitutional Court is capable of doing (because of the monopoly in declaring null and void a legislative provision), a cooperation is required for the system to work.

Once the cooperation defined as the cornerstone of the whole system of judicial review, the Constitutional Court could hardly see itself as superior to ordinary courts. Maybe when it comes to judicial review of legislation, in Italy the *Plessy v Ferguson* doctrine still applies: as a matter of fact, the courts are supposed to be *separate but equal*.<sup>22</sup>

From time to time, a major change in the framework of the system is proposed through the introduction of a remedy to give standing to individuals seeking to protect their constitutional rights.<sup>23</sup> Such a reform would certainly enable the Constitutional Court to intervene in cases in which judicial references would fail. Nevertheless, the cost of these benefits would not be insignificant, because endowing individuals with standing for constitutional review leads to a massive increase in the cases to be decided. Ultimately, the alternative would be to accept either the protracting of constitutional proceedings and the consequent delay in decisions, or selectivity in deciding cases. The first option does not appear very attractive: the Italian Constitutional Court had experienced a backlog in the nineteen-eighties, and the reduction in the time required to decide a case that was achieved at the end of that decade was considered an important result for the protection of rights, since the principle that *justice delayed is justice denied* is unanimously shared. The second option is therefore almost necessary, but case selection in civil law countries is not as *normal* and *acceptable* as it may be in common law countries, where the practice plays an important part in the efficient operation of courts (the example of the US Supreme Court speaks for itself). On the contrary, the tradition in civil law countries tends to require courts to decide (all the) cases brought before them: the French concept of *déni de justice* (ie denial of justice),<sup>24</sup> as an infringement of the

<sup>22</sup> As it is well known, *Plessy v Ferguson* 163 US 537 (1896), is the United States Supreme Court decision upholding the constitutionality of state laws requiring racial segregation in public facilities.

<sup>23</sup> On these propositions, see R. Romboli, 'La riforma dell'amparo costituzionale in Spagna e l'introduzione di un ricorso individuale diretto in Italia', in G. Brunelli et al eds, *Scritti in onore di Lorenza Carlassare* (Napoli: Jovene, 2009), 1555; P. Passaglia, 'Sull'inopportunità di introdurre il ricorso diretto individuale: il dibattito italiano', in R. Tarchi ed, *Patrimonio costituzionale europeo e tutela dei diritti fondamentali. Il ricorso diretto di costituzionalità* (Torino: Giappichelli, 2012), 323.

<sup>24</sup> Art 4 of the French Civil Code of 1804 states that '(a) judge who refuses to give judgment on the pretext of legislation being silent, obscure or insufficient, may be prosecuted for being

fundamental right to justice, illustrates the Continental approach to the issue quite paradigmatically. If it is difficult to accept the introduction of individual constitutional appeal together with a procedure of case selection, then the only alternative could be to accept a *de facto* selection (eg by deciding minor cases by summary judgment), that could however lead to problems of excessive judicial subjectivity.

#### IV. The System's Gradual Decentralization

The provisions regulating the Italian system of constitutional review have not been fundamentally amended since the nineteen-fifties.<sup>25</sup>

Despite a rather steady legislative and constitutional regulation, the role and activity of the Constitutional Court have changed significantly over the years. On the whole, these changes have increased the system's rate of *decentralization*, contributing to a weakening of the original option in favour of a basically, but partly hybrid, Kelsenian model.

Setting aside several other factors, some changes concerning the specific role of the Constitutional Court as the body endowed with the power to review legislation must be considered.

##### 1. The Decentralized Judicial Review of Legislation Imposed by EU Law

As for many other European systems, a major change for Italian constitutional review occurred in connection with European integration. With regard to the Council of Europe's impact on the Italian legal order, over the years the European Court of Human Rights (ECtHR) has developed a body of case law concerning fundamental rights that created the conditions for it to compete with the Constitutional Court. Nevertheless, the ECtHR decides on the cases at issue adjudicating only with regard to possible breaches of individual rights; it does not review legislation. As a result, the competition between the national and the European Courts relates to the kind of protection granted to a fundamental right and the settlement of conflicts between opposing rights.

When it comes to judicial review of legislation, the real *rival* of the Constitutional Court appears to be the Court of Justice of the European Union (CJEU), that has been taking advantage of the expansion of the Union's

guilty of a denial of justice'.

<sup>25</sup> Nevertheless, there are some exceptions that should be mentioned. The first is the restriction of the criminal cases that can be brought before the Constitutional Court (since the constitutional reform of 1989, ministers are no longer subject to the Court's jurisdiction). The second is the change introduced in 2001 regarding abstract review of Regional law; whereas previously this review occurred *a priori*, now it takes place *a posteriori* (see n 16 above).

competences, especially of the enforcement of the European Charter of Fundamental Rights. The latter allows the Court of Justice to develop a case law that has the potential to become a genuine alternative to that issued by the Constitutional Court, for the simple reason that the preliminary ruling mechanism is very similar to the internal system for referring cases to the Constitutional Court: indeed, judges can often choose between the two, to determine which (the constitutional or the European one) is more convenient to pursue. The dialogue between national courts and the Court of Justice has much intensified, so that the Constitutional Court no longer enjoys a *monopoly* in interacting with ordinary courts. In other words, review of legislation takes place at both national and European levels: the main difference consists in the standards that apply: namely – and roughly – the Constitution at the national level, and EU primary legislation, in Luxembourg.

The interaction between EU law and Italian law had been a very controversial subject for several years, until the Constitutional Court accepted, in 1984, the principle of primacy of what was then called *Community* law over national law.<sup>26</sup> Since then, the situation has changed little, even though the 2001 reform of Art 117 of the Constitution recognized the primacy of EU law over national legislation through the new Clause 1, according to which:

‘(I)ndicative powers shall be vested in the State and the Regions in compliance with the Constitution and with the constraints deriving from European Union law and international obligations’.

<sup>26</sup> On this subject, see, *ex plurimis*, P. Falzea, A. Spadaro and L. Ventura, *La Corte costituzionale e le Corti d'Europa* (Torino: Giappichelli, 2003); A. D'Atena and P. Grossi, *Tutela dei diritti fondamentali e costituzionalismo multilivello* (Milano: Giuffrè, 2004); P. Bilancia and E. De Marco, *La tutela multilivello dei diritti* (Milano: Giuffrè, 2004); N. Zanon, *Le Corti dell'integrazione europea e la Corte costituzionale italiana* (Napoli: Edizioni Scientifiche Italiane, 2006); V. Sciarabba, *Tra Fonti e Corti. Diritti e principi fondamentali in Europa: profili costituzionali e comparati degli sviluppi sovranazionali* (Padova: Cedam, 2008); P. Perlingieri, *Leale collaborazione tra Corte costituzionale e Corti europee* (Napoli: Edizioni Scientifiche Italiane, 2008); D. Butturini, *La tutela dei diritti fondamentali nell'ordinamento costituzionale italiano ed europeo* (Napoli: Edizioni Scientifiche Italiane, 2009); T. Giovannetti, *L'Europa dei giudici. La funzione giurisdizionale nell'integrazione comunitaria* (Torino: Giappichelli, 2009); G. Martinico, *L'integrazione silente. La funzione interpretativa della Corte di giustizia e il diritto costituzionale europeo* (Napoli: Jovene, 2009); G. De Vergottini, *Oltre il dialogo tra le Corti. Giudici, diritto straniero, comparazione* (Bologna: Il Mulino, 2010); G. Rolla, *Il sistema europeo di protezione dei diritti fondamentali e i rapporti tra le giurisdizioni* (Milano: Giuffrè, 2010); E. Falletti and V. Piccone, *Il nodo gordiano tra diritto nazionale e diritto europeo* (Bari: Cacucci, 2012); P.L. Portaluri, *L'Europa del diritto: i giudici e gli ordinamenti* (Napoli: Edizioni Scientifiche Italiane, 2012); R. Cosio and R. Foglia, *Il diritto europeo nel dialogo delle corti* (Milano: Giuffrè, 2013). In English, see G. Martinico and O. Pollicino, *The Interaction between Europe's Legal Systems. Judicial Dialogue and the Creation of Supranational Laws* (Camberley Surrey: Edward Elgar, 2012). In French, see M. Luciani, P. Passaglia, et al, 'Justice constitutionnelle, justice ordinaire, justice supranationale: à qui revient la protection des droits fondamentaux en Europe? – Rapport italien' *Annuaire international de justice constitutionnelle*, 251 (2004).

In *Corte costituzionale* 5 June 1984 no 170, the Court allowed ordinary courts to decide conflicts between Community law having direct effect and national legislation, in the sense that the latter cannot be applied if it is inconsistent with the former. To avoid derogating from the principle of the unity of constitutional justice, however, the Constitutional Court recognized EU law's primacy only pragmatically, rather than theoretically: the decision on whether to apply national law was not to be considered as resulting from an illegitimacy, but simply as the consequence of judicial choice in favor of the special provision (the European one) over the general (national) one; the national provision thus still remained in force, because only EU acts prevented it from being applied. Thus, the Constitutional Court *de facto* granted immediate operation to the primacy of EU law, as the European Court of Justice had ordered in the *Simmenthal* judgment of 9 March 1978;<sup>27</sup> but the price to pay was the elimination of the Constitutional Court's power to review the compatibility of national legislation with European law. Previously, this was conceived as a matter of constitutionality, since a breach of EU law meant that the legislation (also) infringed the constitutional provision that obliges Italian legislatures (at both national and regional levels) to act in conformity with European law. Before 2001, the fundamental constitutional provision was Art 11, according to which 'Italy agrees, on conditions of equality with other States, to the limitations of sovereignty that may be necessary to a world order ensuring peace and justice among the Nations' (European integration being perceived as establishing organizations that pursue such an objective); however, as mentioned above, after 2001 the relevant constitutional provision is Art 117, para 1.

The *Corte costituzionale* 5 June 1984 no 170 marked the beginning of the trend of self-exclusion from European matters that led to the longstanding refusal to engage in any dialogue with the European Court of Justice. Indeed, the Constitutional Court *exiled* itself from the interaction between European and national law. This became plain when, in the nineteen-nineties, the Constitutional Court ordered ordinary courts to refer to it only once the interaction between EU and national law had been settled: if the compatibility between the two was at issue, ordinary courts were supposed to first submit the question to the Court of Justice through a reference for a preliminary ruling; only once the Court of Justice had decided, could the Constitutional Court be called upon to settle the constitutional issue.<sup>28</sup>

The only power that the Constitutional Court reserved for itself – by virtue of the so-called *counter-limits* doctrine, the *dottrina dei controlimiti*

<sup>27</sup> Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA*, [1978] ECR 629.

<sup>28</sup> See, in particular, *Corte costituzionale* 29 December 1995 no 536, *Giustizia civile*, I, 930 (1996), which has been repeatedly followed so far.

– was that to review the compatibility of European law with the supreme principles of the Italian legal order and inalienable individual rights,<sup>29</sup> thereby expressing a position that is not too different from that adopted by the German Federal Constitutional Court with the *Solange I* doctrine. Unlike the evolution experienced by German case law, however, in Italy the doctrine has not changed, so far. Still, it was merely a theoretical reservation, since it is difficult to imagine the Italian Constitutional Court declaring an EU act to be inconsistent with inalienable rights. Indeed, since the counter-limits doctrine was established, the Court has never applied it in practice.

The refusal to participate in European judicial integration was confirmed for a long time by the attitude towards references for preliminary rulings. The Constitutional Court considered itself to not be in the position to make such references, since it could not be conceived as a *judge* in the sense envisaged by the EC Treaty. The idea was that if a conflict between European and national law existed, it was not for the Constitutional Court to request the Court of Justice to settle it: the doctrine imposing an obligation on ordinary courts to settle the question *before* submitting a constitutional reference released the Constitutional Court from having to defer to the Luxembourg Court. This reasoning held as long as the Constitutional Court had to decide a judicial reference, but the problem persisted in cases of abstract review, because there was no judge (and thus no institution empowered to refer questions to the Court of Justice for a preliminary ruling) that could take part in the proceedings, and the Constitutional Court's self-exclusion could not be remedied by other courts.

Taking these problems into consideration, the Constitutional Court eventually changed its attitude with others judgments (Corte costituzionale 15 April 2008 no 102 and no 103), at least as far as abstract constitutional review is concerned. The Court accepted to define itself as a *judge* in the sense envisaged by the Treaty on European Union, so that it is empowered (or rather, obliged – with the exception carved out by the *acte clair* doctrine –, since it is the only jurisdiction that can take part in the proceedings) to submit a reference for a preliminary ruling. This is a very important step towards a more cooperative attitude in European matters, and the best indication yet that the Constitutional Court has finally agreed to engage in dialogue with the European Court of Justice and transcended its traditional conception of the separation of the EU and national legal orders. The new attitude was confirmed even in judicial reference procedure, when the

<sup>29</sup> The *counter-limits doctrine* was first affirmed in Corte costituzionale 27 December 1965 no 98, *Giurisprudenza costituzionale*, 1322 (1965) and was confirmed in several others (such as Corte costituzionale 28 November 1973 no 173, *Giurisprudenza costituzionale*, I, 2401 (1973); Corte costituzionale 5 June 1984 no 170, *Giurisprudenza costituzionale*, I, 1098 (1984) and Corte costituzionale 21 April 1989 no 232, *Giustizia civile*, I, 315 (1990)).

Constitutional Court, in *ordinanza* 18 July 2013 no 207, overruled its previous judgments on the point and accepted to make a reference for preliminary ruling.

The evolution of the Constitutional Court's case law and its cooperative attitude has helped to overcome the practical problems that arose regarding the relationship between EU law and the national Constitution. When dealing with the system of judicial review, however, European integration has indisputably led not only to the establishment of a competitor of the Constitutional Court, in terms of its power to review national legislation through the *de facto* review operated in interpreting EU law, but also – and especially – to the creation of a decentralized system in which national ordinary courts are empowered to review even primary legislation, and – where appropriate – declare it incompatible with EU law and thus refuse to apply it. The impact of this power on the system of constitutional adjudication is clear, and becomes even more so if it is considered that to date, no safeguard for the Constitutional Court's role in the legal system has been established, unlike the *question prioritaire de constitutionnalité* that was introduced some years ago in France (the notion of *priority* referring to the ordinary courts' obligation to raise a question of unconstitutionality *before* proceeding to a review for compatibility with supranational law).<sup>30</sup>

## 2. The Huge Transformation of the Concrete Form of Review

The ability to hear references from ordinary courts has always been by far – at least until the last few years – the Constitutional Court's most important competence, because, on the one hand, the vast majority of judgments issued defines this type of procedure and, on the other, most of the major constitutional case law had been decided pursuant to such references. Until ten years ago, references were the source of over eighty per cent of judgments and in some years were accountable for over ninety per cent.<sup>31</sup> The Court delivers averagely four hundred/five hundred judgments every year, which means that at least three hundred judgments (but often more than four hundred) would reach the Court through references, while the other competences of the Court did not exceed, altogether, a hundred judgments per year.

In the early two-thousands, the situation changed dramatically. References decreased, along with the judgments to which they gave rise, whereas

<sup>30</sup> See Art 61-1 of the French Constitution, introduced by the 2008 reform and Ordinance no 58-1067, as amended by Organic Law no 2009-1523, on the implementation of Art 61-1 of the Constitution.

<sup>31</sup> See P. Passaglia, 'Les âges du contrôle de la constitutionnalité des lois par voie d'exception en Italie', in L. Gay ed, *La question prioritaire de constitutionnalité. Approche de droit comparé* (Brussel: Bruylant, 2014), 573, and statistical reports at 699.

conflicts increased, especially between the central State and the Regions. In 2012, for the first time in the Constitutional Court's history, the judgments originating from references accounted for less than half of the total amount, not even reaching forty-five per cent: concrete review had been overtaken by abstract review.<sup>32</sup> The same occurred in 2013, while over the next two years, concrete review regained momentum, again exceeding the share of fifty per cent of total judgments. In absolute numbers, however, there have been little changes, due to the overall decrease in the judgments delivered by the Court: this fell from three hundred twenty-six in 2013 to two hundred and seventy-six in 2015.<sup>33</sup>

Only a few years ago, these results would have been simply inconceivable.

Analysis of the recent evolution is, of course, crucial when dealing with the transformation of the model of Italian constitutional justice. And once the increasing number of conflicts has been explained, the core question is to understand the reason why judicial references have been decreasing.

### **a) A New Role for Judges**

As outlined above, with specific regard to the concrete review, the structure of the system of judicial review has been dramatically evolving in relation to the type of interaction established with ordinary courts. One of the reasons that led to the establishment of the Constitutional Court was that ordinary courts were not considered sufficiently responsive to the new constitutional values. Since the entry into force of the Constitution, the situation has changed significantly: the Constitution has been recognized as the foundation of the legal system; constitutional provisions have proven to be effective in shaping a new civil society; and legal education has considered constitutional law to be a key field of study. All these factors have resulted in judges adopting a different approach to the Constitution: they have increasingly chosen to apply it directly, considering it a law and not only a political document that requires legislative implementation.

This different approach to the Constitution seems to be rather closely related to the growing awareness of the complexity of contemporary societies. A complexity that has set a new balance in the relations between enacted law and case law: indeed, the idea that it is possible to meet any social need through legislation, as the most appropriate way to ensure equality and justice, is no longer defensible. Contemporary societies' complexity, in fact, requires specific regulations rather than general rules, since every case appears to be different from another. In other words, the best solution for a

<sup>32</sup> Ibid 592 and statistical report at 712.

<sup>33</sup> See the statistical report: Court's Research Department, *Giurisprudenza costituzionale dell'anno 2015. Dati quantitativi e di analisi*, available at [www.cortecostituzionale.it/documenti/interventi\\_presidente/Dati\\_2015.pdf](http://www.cortecostituzionale.it/documenti/interventi_presidente/Dati_2015.pdf) (last visited 6 December 2016).

case is that which enables consideration of the individual situation in as much detail and as precisely as possible. If every case is different from another, there is no general rule that can even aspire to take all possible variables into account without creating the risk of hyper-regulation, which would have the consequence of requiring judges to apply provisions that may be logical in theory, but, once applied to a specific case, could lead to a situation where the *summum jus* is equivalent to *summa iniuria*.

These considerations formed the basis for a new conception of enacted law; although this was never recognized as an *official* doctrine, it nevertheless greatly influenced legislation and case law in practice.

Pursuant to this doctrine, enacted law must be *flexible*, in the sense that it should be limited to the expression of principles and general rules. As a result, also the judiciary's role should change, since it should be for the judge to apply those principles and general rules and deliver a decision that takes all the elements of individual cases into account, to reach a solution that matches Justice as much as possible.<sup>34</sup>

The increasing consideration for the role played by ordinary courts formed the basis for a new role for judges. In Italy, as in many other civil law countries, the influence of the French model resulted in a *downgrading* of the role of judges, who were supposed to be nothing more than 'the mouth that pronounces the words of the (enacted) law, inanimate beings who can moderate neither its force nor its rigour'.<sup>35</sup> The end of the utopian conception of the law as the expression of rationality, and the need to do justice on a case-by-case basis, gave judges a pivotal role in ensuring a new approach to the law, freeing them from strict deference to the will of legislatures.

This evolving attitude towards enacted law has created the conditions for major changes to occur in the dialogue between the Constitutional Court and ordinary courts, the latter having been authorized to frequently set aside the duty to refer to the former.

### **b) The Legislative Interpretation as an Increasingly Viable Alternative to Reference**

One of the most powerful demonstrations of the cooperation established between the Constitutional and ordinary courts over the years concerns legislative interpretation. The time when conflicts between the Constitutional Court and the Court of Cassation as to which of the two authorities had the

<sup>34</sup> The doctrine was expressed, in the nineteen-nineties, by Gustavo Zagrebelsky, and thus it probably (greatly) influenced the Constitutional Court's case law while Zagrebelsky was a member of the Court (as well as in the aftermath of his mandate). See G. Zagrebelsky, *Il diritto mite. Leggi, diritto, giustizia* (Torino: Einaudi, 1992).

<sup>35</sup> See Ch.-L. de Secondat Montesquieu, *De l'Esprit des Lois* (Paris: Chatelain, 1748), Book XI, Chapter VI.

final word over legislative interpretation is long past. In the 1960s, those conflicts had led to the so-called *war between the Courts*, that eventually ended with the courts mutually recognizing their respective responsibilities. Today, the Constitutional Court is acknowledged as the supreme interpreter of the Constitution, and the Court of Cassation as the supreme interpreter of legislation.<sup>36</sup> Since then, the Constitutional Court defers to the Cassation's interpretation of laws, claiming only the power to strike down legislation or, at most, proposing its own interpretation of primary legislation when there is no consolidated interpretation. This is the *living law* doctrine, an expression that may recall Roscoe Pound's distinction between *the law in books* and *the law in action*,<sup>37</sup> the latter being – in the Italian adaptation – the law as it *lives*, ie the law resulting from the way in which a text (the legal provision) is interpreted. By accepting this doctrine, the Constitutional Court bound itself to accepting the consolidated interpretation of a provision; thus, the Court cannot override an interpretation that is generally adopted by ordinary courts.<sup>38</sup>

Over the years, the Constitutional Court itself became the forerunner of a new role for ordinary courts in the context of constitutional review, by encouraging a new approach to legislative provisions, based on the expansion of judicial means of interpretation. In *Corte costituzionale* 22 October 1996 no 356, the Court expressed the new approach with words that would later be repeated continuously:

‘(i)n principle, legislative acts are not declared unconstitutional because it is possible to interpret them so as to render them unconstitutional (and there are courts willing to apply such an interpretation), but because it is impossible to interpret them so as to render them constitutional’.

This led to constitutional case law that required ordinary courts to refrain from submitting a reference to the Constitutional Court until they had examined – and excluded – the possibility of interpreting the provision

<sup>36</sup> On this subject, see G. Campanelli, *Incontri e scontri tra Corte suprema e Corte costituzionale in Italia e in Spagna* (Torino: Giappichelli, 2005), 217.

<sup>37</sup> R. Pound, ‘Law in Books and Law in Action’ *American Law Review*, 12 (1910).

<sup>38</sup> For Italian scholars, the *living law* doctrine is one of the most important research topics. See, *ex plurimis*, A. Pugiotto, *Sindacato di costituzionalità e «diritto vivente»* (Milano: Giuffrè, 1994); V. Marinelli, *Studi sul diritto vivente* (Napoli: Jovene, 2008); E. Resta, *Diritto vivente* (Bari-Roma: Laterza, 2008); M. Cavino, *Esperienze di diritto vivente. La giurisprudenza negli ordinamenti di diritto legislativo* (Milano: Giuffrè, 2009), I; M. Cavino, ‘Diritto vivente’ *Digesto delle discipline pubblicistiche – Aggiornamento* (Torino: UTET, 2010), 134; A.S. Bruno and M. Cavino, *Esperienze di diritto vivente. La giurisprudenza negli ordinamenti di diritto legislativo*, II (Milano: Giuffrè, 2011); for a greater focus on case law, see, recently, L. Salvato, *Profili del «diritto vivente» nella giurisprudenza costituzionale*, available at [www.cortecostituzionale.it/documenti/convegni\\_seminari/stu\\_276.pdf](http://www.cortecostituzionale.it/documenti/convegni_seminari/stu_276.pdf) (last visited 6 December 2016).

at issue so as to render it constitutional.<sup>39</sup> A third condition for the submission of a judicial reference to the Constitutional Court was thus introduced by means of case law: in addition to *rilevanza* and *non manifesta infondatezza*, established, respectively, by Art 1 of legge costituzionale 9 February 1948 no 1 and Art 23 of legge 11 March 1953 no 87, now ordinary courts must first examine the possibility of making the legislative provision consistent with the Constitution by means of interpretation.<sup>40</sup> Indeed, it is a well-established doctrine that the Constitutional Court will not decide on the merits of a case unless the referring court has documented the need for the reference due to the inefficiency of interpretation alone.

From a comparative point of view, the new condition may call to mind the UK Human Rights Act 1998, s 3(1) on the interpretation of legislation. This could be redrafted as follows to adapt it to the Italian situation: ‘(s)o far as it is possible to do so, primary legislation (...) must be read and given effect in a way which is compatible with the (Constitution)’. To continue the comparison between the UK system and judicial reference in Italy, s 4(2) of the Human Rights Act could be redrafted as follows: ‘(i)f the court is satisfied that the provision is incompatible with (the Constitution), it may make a declaration of that incompatibility’. However, the similarities with the United Kingdom end there, since a British declaration of incompatibility leads (or at least should lead) to political decisions to amend the legislation in question, whereas Italian declarations give rise to a review for constitutionality. To sum up, while in a weak form of judicial review, as that established in the UK, a declaration of incompatibility is a substitute for a decision of unconstitutionality, in a strong form of judicial review, such as

<sup>39</sup> The importance of the subject is demonstrated by the sheer number of works on it. See, among many others, G. Sorrenti, *L’interpretazione conforme a Costituzione* (Milano: Giuffrè, 2006); P. Femia, *Interpretazione a fini applicativi e legittimità costituzionale* (Napoli: Edizioni Scientifiche Italiane, 2006); R. Romboli, ‘Qualcosa di nuovo ... anzi d’antico: la contesa sull’interpretazione conforme della legge’, in P. Carnevale and C. Colapietro eds, *La giustizia costituzionale fra memoria e prospettive* n 7 above, 89; M. D’Amico and B. Randazzo, *Interpretazione conforme e tecniche argomentative* (Torino: Giappichelli, 2009); F. Amirante et al, *Corte costituzionale, giudici comuni e interpretazioni adeguatrici* (Milano: Giuffrè 2010); A. Ciervo, *Saggio sull’interpretazione adeguatrice* (Roma: Aracne, 2011); F. Mannella, *Giudici comuni e applicazione della Costituzione* (Napoli: Editoriale Scientifica, 2011); E. Lamarque, *Corte costituzionale e giudici nell’Italia repubblicana* (Bari-Roma: Laterza, 2012); G. Laneve, *La giustizia costituzionale nel sistema dei poteri*, Vol I, *Interpretazione e giustizia costituzionale: profili ricostruttivi* (Bari: Cacucci, 2014); M. Ruotolo, *Interpretare: nel segno della Costituzione* (Napoli: Editoriale Scientifica, 2014); F. Modugno, ‘Al fondo della teoria dell’ “interpretazione conforme alla Costituzione”’ *Diritto e società*, 461 (2015).

<sup>40</sup> The question should arise on the compatibility of the new condition and the *non manifesta infondatezza*, since when the Constitutional Court requires ordinary courts to state that it is impossible to give the provision a constitutional interpretation, it can be hardly maintained that to the condition for submitting a question to constitutional review is only a lack of certainty as to the provision’s consistency with the Constitution.

that in Italy, declarations of incompatibility are the prerequisite for a decision of unconstitutionality.<sup>41</sup>

This conclusion should not be limited to judicial references and concrete review of legislation. As a matter of fact, in abstract review too, the idea that a decision of unconstitutionality is the last resort is well-entrenched. This is demonstrated by the rather high number of *interpretative dismissals* issued by the Court, ie decisions in which the Constitutional Court does not declare a provision unconstitutional but rather offers an interpretation itself, one that makes the provision compatible with the Constitution: originally, this type of decision was used only in concrete review, where it is conceived as a normal form of dialogue between the Constitutional Court and the referring court on how to provide a constitutionally compatible interpretation of a provision. In recent years, the usage of interpretative decisions has also become rather frequent in disputes between the central State and the Regions concerning legislation; therefore, in abstract review too, the Constitutional Court is entitled to experiment with interpretations that seek to achieve consistency with the Constitution.

Only in the event that the experiment fails, the Court comes to decide whether there are grounds for a declaration of unconstitutionality. Reference to a Latin maxim warns against extremity in dealing with the validity of legal acts: *utile per inutile non vitiatur*, meaning that *the useful must not be vitiated by the useless*.

This reference helps remarkably in understanding the approach adopted by the Constitutional Court. Nevertheless, a question remains: to what extent can legislative interpretation be an alternative to a reference? In other words, how far can the judge go in interpreting a legislative provision so as to make it consistent with the Constitution?

The answer is far from obvious. At a first glance, a literal approach may help, assuming that a judge is to *restrain* himself or herself and interpret the provision in accordance with the meaning of the words that he or she reads.

This common-sense conclusion, however, is only apparently indisputable. As a matter of fact, in Italy, rules of interpretation are not rigidly stated. Thus, the literal approach is only one of many approaches from which the judge can choose: if it is reasonable to deem that the provisions' formulation is to always be the starting point in interpretation, judges are not prevented from departing from strict deference to the words, to take into account the true intention of the legislature or even societal evolution and changes in the broader legal order.

Ultimately, it is not possible to establish a clear rule; therefore, when it comes to the limits of *constitutionally oriented* interpretation, it is for the

<sup>41</sup> For the opposition between weak and strong forms of judicial review, see M.V. Tushnet, *Weak Courts, Strong Rights* n 13 above.

judge to decide whether a departure from the literal approach is or is not reasonable. In this regard, the Constitutional Court itself, despite some *swaying* over the years, appears to have reached a conclusion that calls upon judges and their *prudence*. A recent judgment is rather explicit in upholding the idea that the Court asks judges to display both their legal skills and their reasonableness in deciding whether *to interpret* (the provision consistently with the Constitution) or *to refer* (the question of constitutionality to the Constitutional Court):

‘(t)he obligation to come to an interpretation consistent with the Constitution gives way to the incidental question of constitutionality whenever the said interpretation is inconsistent with the wording of the provision and proves to be quite eccentric and bizarre, especially in light of the context in which the provision is placed’; ‘interpretation according to the Constitution is a duty and has unquestionable priority over any other (...), nonetheless it belongs to the family of exegetical approaches – available to the judge when he/she exercises the judicial function – having declaratory nature’;

‘(t)herefore, when, by means of these approaches, it is impossible to derive, from the words of the provisions, any interpretation consistent with the Constitution, the judge is required to refer the question of constitutionality to the (Constitutional) Court’.<sup>42</sup>

### **c) The Entrenchment of the Constitution and Its Impact on the Reference Proceeding**

As described above, the constitutional case law of the last two decades has strengthened ordinary courts’ powers, reserving for the Constitutional Court only those matters that cannot be solved by ordinary judicial interpretation.

The new approach to judicial legislative interpretation can be easily connected to the rising awareness that a Constitution is above all a source of law, no matter how peculiar it may be and no matter how important its political dimension. Also, a Constitution conceived as a source of law must be treated as a source of law, just like any other. After all, this is nothing more than an application of Chief Justice Marshall’s legacy, which was to see *the very essence of judicial duty* in deciding on the operation of each of the conflicting laws, the Constitution being one of them:

‘if both the law and the Constitution apply to a particular case, so that the Court must either decide that case conformably to the law,

<sup>42</sup> See Corte costituzionale 19 February 2016 no 36, *Foro amministrativo*, 530 (2016).

disregarding the Constitution, or conformably to the Constitution, disregarding the law, the Court must determine which of these conflicting rules governs the case'.<sup>43</sup>

Thus, also the interplay between the Constitutional Court and ordinary courts is influenced by the growing need to make the Constitution the cornerstone of the entire legal system. Paradoxically, the way to pursue this objective requires a diminution of the factual importance precisely of the first guardian of the Constitution: the more the Constitution is perceived as a law that differs from others only because of its supremacy, the less is the Constitutional Court needed to assess this supremacy; the more widely is the Constitution applied (especially to influence legislative interpretation), the less must the Constitutional Court apply it (especially to react against infringements by legislative acts).

#### **V. Centralized vs Decentralized Systems: Is It Time to Reconsider the Alternative? A Few Concluding Remarks**

The evolving concept and strength of the Constitution have produced changes in the system of constitutional justice, and it is reasonable to expect, in the near future, a strengthening of the trends described above.

With regard to abstract review, it is likely to remain a significant part of the Constitutional Court's docket. It may also be improved with other ways to access the Court. For example, reforms could focus on constitutional review of parliamentary elections, or could grant the parliamentary opposition the power to submit questions of constitutionality, so that legislative acts that would be difficult to refer to the Constitutional Court could be brought before it, thanks to the dissenting minority of Parliament. These reforms, associated with others, would create a *more perfect* system, thus empowering the guardian of the Constitution to accomplish its tasks even in areas where currently a lack of protection can be observed.

Setting aside possible constitutional and legislative reforms, the core issue for the judicial review of legislation still appears to be the concrete form of review.

The development of *constitutionally oriented* legislative interpretation reduced the number of judicial references to the Constitutional Court. It is worth asking whether this process has gone too far, whether the Court designed for itself a role that is now becoming excessively marginal. In other words, the question is whether a centralized system of constitutional review can tolerate the importance that the Constitutional Court has granted to

<sup>43</sup> *Marbury v Madison* 5 US 137 (1803).

ordinary courts.<sup>44</sup> A negative answer would lead to calls for an overruling in constitutional case law, to force ordinary courts to submit constitutional questions as soon as a doubt of constitutionality arises: this would mean reverting to the original distribution of responsibilities between the Constitutional Court and ordinary courts, the distribution suggested by the constitutional and legislative provisions that regulate constitutional justice through the condition of *non manifesta infondatezza*.

However, ultimately, this point of view would amount to nothing more than turning back time. Thus the question is whether the Constitutional Court and the legal system as a whole can ignore the fact that Constitution has deeply penetrated society and the courtrooms, to the point that the system of constitutional justice as conceived many decades ago no longer suits present needs. Indeed, such a change in the conception of the Constitution has occurred that perhaps the Constitutional Court's guidance in implementing the Constitution is no longer needed; or rather, is needed only infrequently, and not constantly, as it had been in the past. As a result, instead of trying to revitalize judicial references to the Constitutional Court, the core of the problem could be addressed by accepting the fact that since constitutional consciousness has *grown up*, the reference proceeding has begun to *grow old*.

Maybe, the time has come to think of the Italian system of constitutional review from a different point of view. When the Constitution was adopted, the establishment of special proceedings to review primary legislation was necessary to effectively guarantee the Supreme Law; and such a purpose fully justified the introduction of a double-track form of protection that, from the ordinary courts' perspective, could be seen as *unnatural*, since it implied – for the court before which the case was brought – the deprivation of the power to decide it fully. From a more general perspective, rather than depriving ordinary courts of power, this double-track protection was the means to achieve more efficient protection.

Currently, due only to the entrenchment of the Constitution, ordinary courts no longer appear inadequate to protect the Constitution. Ultimately, the real argument in favour of a centralized form of concrete review lies in the Constitutional Court's power to strike down legislation, a power that is supposed to ensure legal certainty better than any declaration delivered by ordinary courts, which are subject to reversal or overruling.

<sup>44</sup> For the analysis of the evolution towards a decentralized model, see E. Malfatti, R. Romboli et al, *Il giudizio sulle leggi e la sua "diffusione"* n 20 above; A.M. Nico, *L'accentramento e la diffusione nel giudizio sulle leggi* (Torino: Giappichelli, 2007). I began to address the issue in a previous work in English: see P. Passaglia, 'The Italian System of Constitutional Review: A Kelsenian Model Moving Towards a Decentralized Model?', in J. Bell and M.-L. Paris eds, *Rights-Based Constitutional Review: Constitutional Courts in a Changing Landscape* (Camberley Surrey: Edward Elgar, 2016), 247.

In a civil law country as is Italy, the absence of a doctrine of precedent traditionally undermines any attempt to establish legal certainty focusing on case law. Nevertheless, in recent decades, the idea that the system works as if a doctrine of precedent (albeit not binding) did exist has gained momentum,<sup>45</sup> to the point that the very notion of legal certainty has dramatically changed, and the Constitutional Court's<sup>46</sup> function as *negative legislator* is only part of the solution: as shown by the abovementioned *living law* doctrine, it is impossible to dissociate the words of the provision from its interpretation. Therefore, certainty is no longer the result of enacted law alone. To gain knowledge of the law, reading acts of Parliament is only a part of the activity required, because it is also necessary to engage in a thorough analysis of case law. In other words, legal certainty is the result of both clear enacted law (and thus, among other things, of the removal of legislative provisions that are inconsistent with the Constitution) and of a relatively predictable case law.

If – the absence of a doctrine of precedent notwithstanding – Italian case law can be considered sufficiently predictable,<sup>47</sup> it may be possible to reconsider the alternative between centralized and decentralized forms of concrete review. This does not necessarily mean that the Italian system of judicial review should or could be subverted to introduce a wholly decentralized system. If such a reform appears to be very difficult to accomplish (and perhaps also to conceive), a humbler but no less significant achievement could be the genuine recognition of *constitutionally oriented* interpretation by ordinary courts as a full form of constitutional adjudication, equal in rank to the Constitutional Court's concrete review. This recognition may act as the ultimate enshrinement of the notion that the Constitution is a legal act to be applied whenever possible, for the simple reason that it is the *Supreme Law of the Land* and that its observance is the foremost and essential duty of all.

<sup>45</sup> See, in particular, A. Pizzorusso, 'Fonti del diritto – Disposizioni sulla legge in generale art. 1-9', in A. Scialoja and G. Branca eds, *Commentario del Codice civile* (Bologna: Zanichelli-Il Foro italiano, 2<sup>nd</sup> ed, 2011), 705.

<sup>46</sup> The notion of *negative legislator*, referred to Constitutional Courts, was developed by Kelsen himself (see H. Kelsen, 'La Garantie juridictionnelle de la constitution (La Justice constitutionnelle)' n 8 above) to emphasize the role of Courts, which do not make law but only strike down legislation that is inconsistent with a higher law. As a matter of fact, currently such a definition could be confirmed with difficulty, if anything because the Court has granted itself the power not only to strike down provisions, but also individual words or expressions in the text of a provision. In this case, by erasing part of the text but not the provision itself, the Court changes the contents of the provision. The distance from the idea of *negative legislator* is even greater when the Court declares a legislative provision to be unconstitutional for what it fails to contain, and thus adds a part to its contents to make the provision consistent with the Constitution.

<sup>47</sup> With regard to the impact of precedents on Italian case law, see, in English, M. Taruffo and M. La Torre, 'Precedent in Italy', in D.N. MacCormick and R.S. Summers eds, *Interpreting Precedents: A Comparative Study* (Farnham: Ashgate Dartmouth, 1997), 141.

