

Rights-Based Constitutional Review in Italy*

by Paolo Passaglia**

SUMMARY: I. *Evolution of the model of constitutional review (constitutional review in context):*
a. *General constitutional set-up.* – b. *Original model of constitutional review.* – c. *Transformation of model.* – II. *Practice and endurance of constitutional review (constitutional review in practice):*
a. *Specific issues in recent case law.* – b. *Impact on other powers.* – c. *Prospects of transformed model and practice.*

I. Evolution of the model of constitutional review (constitutional review in context)

a. General constitutional set-up

The Italian tradition of constitutionalism dates back to the nineteenth century, although its fundamental principles were fully established only in the aftermath of World War II.

With regard to the nineteenth century, it is essential to draw a clear distinction between theory and practice. As far as theory is concerned, Italian culture had been very much influenced by the ideals of the French Revolution and contractarian theories at least since Napoleon's campaigns. In practice, however, during the European Restoration, reference to constitutionalism was the key element in the struggle to achieve a limited government, a struggle which produced however only ephemeral political victories or, at most, compromises between traditional and constitutional points of view. These compromises formed the basis of the unitary state, as demonstrated by the fact that the first King of Italy was designated, in 1861, "by the grace of God and the will of the Nation" and that the first Italian constitution, in fact granted by King Charles Albert to Sardinian subjects in 1848 and extended to all Italians thirteen years later, was named "statute" precisely to avoid the name "Constitution", which the Savoyard establishment considered too liberal.¹ Indeed, the notion of the "revolutionary" nuance of the term was deeply entrenched in Italian liberal culture, as

* Relazione svolta a *The Society of Legal Scholars Annual Seminar 2013*, svoltosi a Dublino il 2 e 3 luglio 2013

** *Professore associato* 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.

¹ On Italian constitutional history, see, *ex plurimis*, C. GHISALBERTI, *Storia costituzionale d'Italia (1848-1948)*, Rome-Bari, Laterza, 2000; R. MARTUCCI, *Storia costituzionale italiana. Dallo Statuto albertino alla Repubblica (1848-2001)*, Carocci, Rome, 2002; G. VOLPE, *Storia costituzionale degli italiani. I. L'Italietta (1861-1915)*, Rome, Carocci, 2009.

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 1830s, he stated that the constitution was “the law of free states, those which escaped the rule of privileges.”²

The first decades of the Italian unitary state were characterised by a confrontation between tradition and liberalism, in which the main issue to address was that of legitimacy: despite the traditional legitimacy supporting the Crown, the growing importance of the principle of democracy led to the establishment of the principle of parliamentary accountability. However, it would not be accurate to equate this development with the formation of a Westminster system of parliamentary democracy, both because the Crown retained essential prerogatives on foreign and military affairs, thereby also influencing the government as a whole, and because parliamentary accountability was sometimes “sterilised” by the practice of dissolving the Chamber of Deputies and closing legislative sessions for the purpose of freeing the government from control and censures.

The concept of constitutionalism was thus limited to an affirmation of the idea of a balance of powers. Limited government was still far from being an issue, for several reasons. First, the constitution (the so-called Albertine Statute) did not bind the legislature, so that effectively, Acts of Parliament (that had received the royal assent) could not be subjected to review for consistency with any higher law. Second, human rights were not conceived as a limit on government, since their recognition was not due to an adoption of an Anglo-Saxon meaning of the rule of law but was, rather, inspired by the German concept of *Rechtsstaat*: rights did not limit government simply because their existence derived from the recognition granted to them by the government and parliament. In this context, it was hard to even conceive of judicial review of legislation, although the judicial branch did sometimes attempt to introduce judicial review of parliamentary procedure at least. In any case, this weak form of judicial review was swept away during the Fascist dictatorship (1922-1943).³

The weakness of Italian democracy meant that it did not succeed in dealing with the troubles that stemmed from World War I, and the parliamentary regime soon gave way to a dictatorship, as happened in several other European countries where democracy was too young and fragile to resist the onslaught of populism. In Italy, the rejection of constitutionalism and, more generally, of liberal democracy (labeled “plutocracies” by Benito Mussolini) lasted over two decades and eventually

² P. ROSSI, *Cours de Droit constitutionnel professé à la Faculté de Paris, recueilli par M.A. Porée*, Paris, Librairie du Guillaumin, 1866, tome 1, 8 (the lectures collected were delivered in 1835-1836 and in 1836-1837).

³ 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, 1905, 705 ff.; A. PIZZORUSSO, *Garanzie costituzionali – Commentario della Costituzione*, G. Branca ed., Article 134, Bologna-Rome, Zanichelli-II Foro italiano, 1981, 43 ff.; F. ROSELLI, *Giudici e limiti al potere legislativo vigente lo Statuto albertino*, Rivista trimestrale di diritto e procedura civile, 1986, 476 ff.; J. LUTHER, *Idee e storie di giustizia costituzionale nell'Ottocento*, Turin, Giappichelli, 1990, 190 ff.

resulted in the moral disgrace of anti-Semitic laws and in the tragedy of World War II. After the war, the legal and political reconstruction began with the popular choice in favour of a republican system and with the election of a Constituent Assembly, that drafted the new Constitution and adopted it 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. 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")⁴ paralysed the concrete protection of many constitutional rights, especially social rights and rights to equality, for a long time, so that several constitutional provisions were implemented only in the 1970s.

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 Articles 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, i.e. 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.⁵

⁴ See P. CALAMANDREI, *L'ostruzionismo di maggioranza*, Il ponte, 1953, 129 ff., 274 ff., 433 ff.

⁵ Cf. P. COSTANZO, *Disposizioni transitorie e finali I-XVIII. Leggi costituzionali e di revisione costituzionale (1948-1993) – Commentario della Costituzione*, G. Branca and A. Pizzorusso (eds.), Disp. trans. VII, Bologna-Rome, Zanichelli-II Foro italiano, 1995, 143 ff.; M. BIGNAMI, *Costituzione flessibile, Costituzione rigida e controllo di costituzionalità in Italia (1848-1956)*, Milan, Giuffrè, 1997; A. SIMONCINI, *L'avvio della Corte costituzionale e gli strumenti per la definizione del suo ruolo: un problema storico aperto*, *Giurisprudenza costituzionale*, 2004, 3065 ff.; 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*, Atti del convegno tenuto a Roma il 14-15 giugno 2006, Turin, Giappichelli, 2008, 55 ff.

b. Original model of constitutional review

The provisions concerning constitutional review were much debated in the Constituent Assembly, because of the strong opposition to any review of legislation expressed by the Socialist and Communist parties, both deeply influenced by Jacobinism and its Soviet adaptation: the fundamental guardian of the Constitution could not be any entity other than the People, the sovereign. Their strategy during the Constituent Assembly⁶ was to delay establishment of a mechanism for judicial review as much as possible; and ultimately they did achieve some results, since the Constitution's text is significantly reticent on the Court precisely due to a motion submitted by a Communist Member of the Assembly, Giuseppe Arata, which deferred the task of providing for the concrete functioning of the Court to future Acts of Parliament. In this regard, it is noteworthy that the most important procedure for reviewing legislation, reference by ordinary courts, is not even mentioned in the Constitution, having been first regulated by [Constitutional Law No. 1 of 1948](#).⁷

Even the Parties that favoured judicial review agreed only on the objective: major disagreement emerged as to the way to pursue it. The Liberals proposed to adopt the American model, while the majority of centrist parties (including the Christian Democrats, by far the most important) looked, rather, to the Kelsenian model. This option was eventually chosen for at least two, apparently conflicting, main reasons. First, the long-standing French influence on Italian legal culture had introduced suspicion (or should it be called mistrust?) of judges and judicial activism; this "Jacobin" attitude was obviously shared by Socialists and Communists. The second reason was connected with the concern that most members of the judicial branch, especially at the higher levels, had been educated during the Fascist period and thus could not be sufficiently engaged in implementing the new constitutional principles and values: it was again a question of suspicion against judges which was, however, linked to the risk of excessive self-restraint. The caution shown by judges in their application of the Constitution before the Constitutional Court began to functioning was to prove that the risk was indeed very concrete.

⁶ But not later, since their exclusion from Government (in 1947, after a journey of the then-President of the Council of Ministers, Alcide De Gasperi, to the U.S.) led them to oppose majority's filibustering.

⁷ On the adoption of the constitutional provisions on the Constitutional Court, see C. MEZZANOTTE, *Il giudizio sulle leggi. Le ideologie del costituente*, Milan, Giuffrè, 1979; G. D'ORAZIO, *La genesi della Corte costituzionale*, Milan, Giuffrè, 1981; G. FERRARI, *La difficile nascita della Corte costituzionale*, Studi parlamentari e di politica costituzionale, 1988, No.s 81-82, 5 ff.; 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, Turin, Giappichelli, 1996, 7 ff.; C. MARGIOTTA BROGLIO, *La Corte costituzionale italiana e il modello kelseniano*, Quaderni costituzionali, 2000, 333 ff.; 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*, Naples, Esi, 2006, 3 ff.

The choice in favour of a special court, endowed with the power to decide several constitutional controversies and, above all, to strike down legislation that was inconsistent with the Constitution did not translate, however, into a straightforward adoption of the Kelsenian model.

In fact, a hybrid system was established. In Italy, 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 (Article 134(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 Article 75 of the Constitution. Finally, the Court decides on charges of high treason or attack on the Constitution brought against the President of the Republic (Article 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.

As for review of legislation, both abstract and concrete forms were established.

Abstract review 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 paralyse the implementation of questioned provisions, so that these may have already produced effects when the Court reviews them.⁸ 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.⁹

⁸ It is worth noting that 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 Regional President, 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*, Padua, Cedam, 2006; in French, see M. LUCIANI and P. PASSAGLIA, *Autonomie régionale et locale et Constitutions – Rapport italien*, *Annuaire international de justice constitutionnelle*, 2006, 229 ff.

⁹ Actually, the national government can censure any kind of breach of the Constitution; thus, its appeal is not necessarily related to the aim of protecting the State’s legislative power.

In Italy, differently from what Kelsenian orthodoxy would suggest,¹⁰ constitutional review can also be concrete. The Constituent Assembly rejected the idea of giving individuals the power to appeal to the Court directly: the protection of individual rights – and, more generally, the constitutionality of legislative acts – must be invoked through the activity of ordinary 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.¹¹

This two-step procedure creates a hybrid system, in the sense that it is both deconcentrated and concentrated. It is deconcentrated 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 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,¹² 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*”, i.e. 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 need 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 court cannot be certain that the Constitutional Court

¹⁰ See Kelsen’s criticism of the Austrian constitutional reform of 1929 that introduced the instrument of judicial reference to the Constitutional Court: H. KELSEN, *Judicial Review of Legislation. A Comparative Study of the Austrian and the American Constitution*, *The Journal of Politics*, vol. IV, 1942, no. 2, 183 ff.

¹¹ Due to the sheer number of contributions, it is impossible to compile a complete bibliography on the judicial reference procedure. *Ex plurimis*, see, however, G. ABBAMONTE, *Il processo costituzionale italiano. Il sindacato incidentale*, Naples, Jovene, 1957; F. MODUGNO, *Riflessioni interlocutorie sull’autonomia del giudizio costituzionale*, *Rassegna di diritto pubblico*, 1966, 221 ff.; A. GARDINO CARLI, *Giudici e Corte costituzionale. Gli elementi diffusi del nostro sistema di giustizia costituzionale*, Milan, Giuffrè, 1988; CORTE COSTITUZIONALE, *Giudice a quo e promovimento del processo costituzionale*, Milan, Giuffrè, 1990; A. SPADARO, *Limiti del giudizio costituzionale in via incidentale e ruolo dei giudici*, Naples, Edizioni Scientifiche Italiane, 1990; 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*, Turin, Giappichelli, 2008.

¹² P. CALAMANDREI, *La illegittimità costituzionale delle leggi nel processo civile*, Padua, Cedam, 1950, XII.

would reject the question).¹³

In the second stage, the procedure is characterised by a strictly concentrated model: the Court itself affirmed the principle of the unity of constitutional justice, which means that only one court can issue judgments on the constitutionality of legislation.¹⁴ More precisely, 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 Constitutional Court, however, exceeds this operation by far, 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 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.

The power to strike down legislation is clear evidence that the Kelsenian conception of Constitutional Courts as “negative legislators”, which do not make law but only strike down legislation that is inconsistent with a higher law, was adopted.¹⁵

The principle of the unity of constitutional justice, and its corollaries, is limited to primary legislation. 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 (Article 76 of the Constitution)

¹³ On the conditions required for submitting a question of constitutionality to the Court, see M. CAPPELLETTI, *La pregiudizialità costituzionale nel processo civile*, Milan, Giuffrè, 1957; G. ZAGREBELSKY, *La rilevanza, un carattere normale ma non necessario della questione incidentale di legittimità costituzionale*, *Giurisprudenza costituzionale*, 1969, 1001 ff.; F. PIZZETTI and G. ZAGREBELSKY, “*Non manifesta infondatezza*” e “*rilevanza*” nell’*instaurazione incidentale del giudizio sulle leggi*”, Milan, Giuffrè, 1974; V. ONIDA, *Note su un dibattito in tema di “rilevanza” delle questioni di costituzionalità delle leggi*, *Giurisprudenza costituzionale*, 1978, 997 ff.; N. TROCKER, *La pregiudizialità costituzionale*, *Rivista trimestrale di diritto e procedura civile*, 1988, 796 ff.; F. DAL CANTO, *La rilevanza e il valore del fatto nel giudizio di costituzionalità delle leggi in via incidentale*, in E. MALFATTI, R. ROMBOLI and E. ROSSI (eds.), *Il giudizio sulle leggi e la sua “diffusione”*, Atti del seminario di Pisa svoltosi il 25-26 maggio 2001, Turin, Giappichelli, 2001, 145 ff.; G.P. DOLSO, *Giudici e Corti alle soglie del giudizio di costituzionalità*, Milan, Giuffrè, 2003; L. AZZENA, *La rilevanza nel sindacato di costituzionalità dalle origini alla dimensione europea*, Naples, Jovene, 2012.

¹⁴ See A. AGRÒ, A. CERRI and F. MODUGNO (eds.), *Il principio di unità del controllo sulle leggi nella giurisprudenza della Corte costituzionale*, 5th ed., Turin, Giappichelli, 2008.

¹⁵ 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. Concerning these so-called “manipulative judgments,” see G. SILVESTRI, *Le sentenze normative della Corte costituzionale*, *Giurisprudenza costituzionale*, 1981, I, 1684 ff.; L. ELIA, *Le sentenze additive e la più recente giurisprudenza della Corte costituzionale*, in *Scritti su La giustizia costituzionale in onore di Vezio Crisafulli*, Padua, Cedam, 1985, vol. I, 299 ff.; G. D’ORAZIO, *Le sentenze costituzionali additive tra esaltazione e contestazione*, *Rivista trimestrale di diritto pubblico*, 1992, 61 ff.; R. PINARDI, *L’horror vacui nel giudizio sulle leggi*, Milan, Giuffrè, 2007.

or because an emergency that requires immediately-effective provisions has arisen (Article 77 of the Constitution). 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.

c. Transformation of model

As outlined above, the provisions regulating the Italian system of constitutional review have not been fundamentally amended since the 1950s. 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*.

A third exception does not appear to be relevant in the present study, because [Constitutional Law No. 2 of 1967](#), that modified the tenure of Constitutional Judges and other aspects of the Court's organisation, did not directly interfere with its functions.

Despite a rather steady legislative and constitutional regulation, the role and activity of the Constitutional Court have changed significantly over the years. Several factors have contributed to this; most are not directly related to constitutional justice, but have nevertheless – and unsurprisingly – had major effects.

First, the political and social context in which the Constitutional Court operates has changed over the decades. In the 1950s, when the Court was established, and in the 1960s, a major issue was the implementation of many constitutional provisions, perhaps *the* major one. This failure to implement meant that old legislative provisions, most of which adopted during the Fascist dictatorship, were still in force, although being in many cases seriously inconsistent with the Constitution. Thus, the Court's main task was to strike down the provisions that were too obviously and seriously unconstitutional to be tolerated any longer. The Court acted as a substitute of the Parliament, then, in the sense that it remedied the omissions in the implementation of the new Constitution.¹⁶

Thanks to this activity, the Court gained legitimacy among lawyers, politicians and citizens. Indeed, the Court was in a very comfortable position: it was perceived as the guardian of the

¹⁶ For an analysis of the interactions between the Constitutional Court and the legislature, see, in French, P. PASSAGLIA, *Le Juge constitutionnel et le Législateur. L'expérience italienne*, Saarbrücken, Éditions Universitaires Européennes, 2011.

Constitution without necessarily being an anti-majoritarian institution,¹⁷ since no party could expressly uphold Fascist legislation against the Constitution.

Eventually, the old legislation was progressively eliminated entirely, either by the Court's declarations of unconstitutionality or by legislative repeal. In the 1970s and 1980s, the Constitution was at last (more or less) implemented. The Court's main task then became the review of republican legislation: the situation was thus changing, because most of the judgments concerned Acts that had resulted from a political choice of the current parliamentary majority. Nevertheless, the Court could still hardly be defined as an anti-majoritarian institution, simply because the type of democracy that characterised Italy was a "consensus democracy," as defined by Arend Lijphart.¹⁸

A brand new political situation emerged in the 1990s, when the electoral law was changed to set up a mixed plurality-proportional system, which transformed Italian democracy into a basically majoritarian one,¹⁹ with strong confrontations between the centre-left and centre-right coalitions. The enduring clash between the two coalitions put the Court in a far less comfortable position than before, because its judgments very often began to be interpreted as either disapproval or approval of the majority's political choices.²⁰

Moreover, the transition to a majoritarian democracy marked a turning point also as regards the public perception of the Constitution. From the 1948 to the 1994 Parliamentary elections, almost all the parties in the Chambers of Parliament had been part of the Constitution-making process and the vast majority of them had approved the Constitution; they therefore recognised its values as the foundation of both the legal system and of society as a whole. On the contrary, since the 1994 Parliamentary elections, new parties took a seat in the Chambers, parties that had not participated in the Constitution-making process and that, in some cases, did not perceive the Constitution as the fundamental benchmark for all political choices. The Constitution began to be called into question and gradually, the need for reforms arose;²¹ the fact that most of the reforms proposed were not

¹⁷ On the "Counter-Majoritarian Difficulty", see, of course, A.M. BICKEL, *The Least Dangerous Branch. The Supreme Court at the Bar of Politics*, Indianapolis, Bobbs-Merrill, 1962, 16 ff.

¹⁸ See A. LIJPHART, *Patterns of Democracy. Government Forms and Performance in Thirty-Six Countries*, New Haven, Yale University Press, 1999.

¹⁹ See, again, Lijphart's definition of patterns of democracy.

²⁰ Concerning the impact of the Constitutional Court on the political context, and its evolution through the decades, see P. BARILE, E. CHELI and S. GRASSI (eds.), *Corte costituzionale e sviluppo della forma di governo italiana*, Bologna, il Mulino, 1982; C. MEZZANOTTE, *Corte costituzionale e legittimazione politica*, Rome, Tipografia Veneziana, 1984; A. PIZZORUSSO, R. ROMBOLI and E. ROSSI, *Il contributo della giurisprudenza costituzionale alla determinazione della forma di governo italiana*, S. Panizza (ed.), Turin, Giappichelli, 1997; E. CHELI, *Il giudice delle leggi. La Corte costituzionale nella dinamica dei poteri*, 2nd ed., Bologna, il Mulino, 1999; A. RUGGERI and G. SILVESTRI (editors), *Corte costituzionale e parlamento. Profili problematici e ricostruttivi*, Milan, Giuffrè, 2000; E. BINDI, *La garanzia della Costituzione. Chi custodisce il custode?*, Turin, Giappichelli, 2010; F. DAL CANTO and E. ROSSI (editors), *Corte costituzionale e sistema istituzionale*, Atti del Seminario di Pisa del 4 e 5 giugno 2010, Turin, Giappichelli, 2011.

²¹ Actually, constitutional reforms were proposed even before, in the Eighties, by the Socialist Party; it was however in the next decade that the subject became a key-topic of political debate.

adopted (and have remained as yet unadopted) contributed to diminish the Constitution's legitimacy among the political classes and in public opinion. As a result, the legitimacy of the Constitutional Court too was called into question, since the Constitution is "the branch in which the Court is situated".²²

Among the reforms adopted, that on the development of Regional autonomies is certainly the most important. This achievement has had extremely significant consequences for the Constitutional Court. At the beginning of the Republic's history, only five of the twenty Regions of Italy (the five that enjoyed special autonomy) were functioning; all Regions were fully set up only in the 1970s. The increasing number of entities and their expanding powers were the main factors in the multiplication of direct complaints to the Constitutional Court, which acted as an arbiter in disputes between the central State and Regions, both in abstract constitutional review of legislation and in disputes arising from the adoption of administrative acts and judicial decisions. The 2001 constitutional reform reshaped and strengthened Regional autonomies and their relations with the State. Unfortunately, the new constitutional provisions were so unclear that much uncertainty concerning the boundaries of the powers of the different levels of government arose, thus bringing about a massive increase in the number of controversies that were referred to the Constitutional Court. As a result, the role of the latter within the constitutional system changed significantly, because its traditional main function of protector of individual rights lost its absolute dominance and now faced competition from the function of arbitration, which was once no more than marginal.

Disputes arise not only between the central State and the Regions. The last two decades have seen increasing conflicts between the political class and the judiciary. As a matter of fact, one of the main causes of the transition to a new system of government, at the beginning of the 1990s, was the discovery of, and judicial reaction to, a vast system of corruption. Criminal prosecutions against many political leaders, especially those of the Christian Democrat Party and the Socialist Party, the two main parties of the majority, led to a dramatic turnover in Parliament. The turnover did not however end the conflicts, since several new political leaders either deeply disapproved of what they called a "revolution by judiciary" that had taken place or were prosecuted themselves (for crimes that were not always related to political activity). The Constitutional Court was often asked to settle this type of disputes, which often concerned the immunity enjoyed by Members of Parliament in relation to their prerogative of free speech, which was frequently used (and sometimes abused) as a shield against criminal prosecutions.

As far as protection of rights is concerned, another major change occurred especially at the end

²² This expression was used by Gaetano Silvestri, who is currently a Judge of the Italian Constitutional Court: see G. SILVESTRI, *Referendum elettorali: la corte evita un labirinto e si smarrisce in un altro*, *Il Foro italiano*, 1991, I, 1349.

of the twentieth century, in connection with European integration. On one hand, over the years the European Court of Human Rights had developed a body of case law concerning fundamental rights that created the conditions for it to compete with the Constitutional Court. Nevertheless, the possibility of invoking Strasbourg's adjudication requires all internal remedies to be exhausted first: because of this limitation, the Constitutional Court can easily intervene before the European Court, so that problems can arise at most in relation to the influence of European case law over constitutional case law. In other words, the Constitutional Court can be influenced by the Strasbourg Court only insofar as the interpretation of constitutional provisions is concerned. Thus, the competition between the two Courts relates to the kind of protection granted to a fundamental right and the settlement of conflicts between opposing rights, but does not imply an actual alternative between the protection granted at the national level and that granted by the Strasbourg Court.

Instead, the real "rival" of the Constitutional Court appears to be the Court of Justice of the European Union, that has been taking advantage of the expansion of the Union's competences, especially of the enforcement of the European Charter of Fundamental Rights. The latter allows the Court of Justice to develop a case law on rights 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, the protection of rights is ensured at both national and European levels. In Italy, 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).

The Constitutional Court's role as a protector of rights has also been changing, in relation to the type of interaction established with ordinary courts. As mentioned above, 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 recognised 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 a law and not only a political document that requires legislative implementation.

One of the most powerful demonstrations of the cooperation established between the Constitutional and ordinary courts over the years concerns to legislative interpretation. The time when conflicts between the Constitutional Court and the Supreme Court of Cassation as to which of the two authorities had the 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 recognising 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.²³ 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,”²⁴ the latter being – in the Italian adaptation – the law as it “lives”, i.e. 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.

The emphasis on the importance of judges is certainly related to the growing awareness of the complexity of contemporary societies. This complexity 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, both in theory and in practice. In theory, a written Constitution conceived as the Supreme Law of the Land is not compatible with Rousseau’s idea that (enacted) law is the expression of the general will, which is rational by nature.²⁵ But it is even more important to draw attention to the practical aspect of the issue: because of contemporary societies’ complexity, another traditional key feature of enacted law – its generality – has also lost validity. In the jurisprudence of the Enlightenment period, generality was the basis for equality, and therefore the best way to achieve Justice; today, social complexity requires specific regulations rather than general rules, since every case appears to

²³ On this subject, see G. CAMPANELLI, *Incontri e scontri tra Corte suprema e Corte costituzionale in Italia e in Spagna*, Turin, Giappichelli, 2005, 217 ff.

²⁴ R. POUND, *Law in Books and Law in Action*, in *American Law Review*, vol. 44, 1910, 12 ff.

²⁵ See J.-J. ROUSSEAU, *Du contrat social, ou Principes du droit politique*, Rey, Amsterdam, 1772, Livre I, Chapitre VI.

be different from another. In other words, the best solution for a 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 recognised 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.²⁶

The increasing consideration for the role played by ordinary courts formed the basis for a new type of dialogue between the Constitutional Court and ordinary courts, the latter having been authorized – to a certain extent – to set aside the duty to refer to the former. As will be seen below, 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 ultimate consequence is the creation of a new balance in the protection afforded to fundamental rights, in which the role of ordinary courts has been enhanced at the expense of the Constitutional Court.

Combining the increasing number of conflicts that the Constitutional Court is called upon to settle and its diminishing activity on the protection of rights, the statement of a former President of the Court, Professor Valerio Onida, does not appear to be wrong: in his view, the institution, originally conceived as “(the) Court of rights”, is turning into “(a) Court of conflicts”; in other words, the tasks that were once secondary are becoming ever more essential, in the ordinary activity of the Court.²⁷

Whatever one may think of this statement, it can hardly be denied that it reflects the recent trends in the means of access to the Constitutional Court.

²⁶ The doctrine was expressed, in the 1990s, by Gustavo Zagrebelsky, and thus it probably 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*, Turin, Einaudi, 1992 (translated in Spanish: *El derecho ductil*, Madrid, Trotta, 1995, and in French: *Le droit en douceur*, Paris, Economica, 2000).

²⁷ Cf. V. ONIDA, *La giustizia costituzionale nel 2004. Introduzione del Presidente*, Palazzo della Consulta, January 20, 2005, http://www.cortecostituzionale.it/documenti/relazioni_annuali/Relazione%20breve%20Onida_.pdf, 19.

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 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 80% of judgments and in some years were accountable for over 90%. The Court delivers averagely 400-500 judgments every year, which means that at least 300 judgments (but often more than 400) would reach the Court through references, while the other competences of the Court did not exceed, altogether, a hundred judgments per year.

These data justify the definition of the Court as the Court of rights. In principle, references from an ordinary court seek to ascertain the compatibility of legislative provisions with the parties’ constitutional rights. On the contrary, the other forms of review are all more or less related to conflicts that have arisen either between the central State and Regions (in relation to a legislative act, in abstract review of constitutionality, or other kind of acts, in conflicts concerning the division of – other – powers), or between bodies and institutions of the State (conflicts between the supreme bodies of the State).

In the early 2000s, the situation changed dramatically. References decreased, along with the judgments to which they gave rise, whereas conflicts increased, especially between the central State and the Regions and in relation to legislative acts, i.e. abstract review of legislation. The latter, which once constituted less than 10% of the judgments delivered by the Court every year, exceeded 20% in 2004 and, apart from 2007 and 2008, was never to drop below this proportion again; moreover, since 2009 there has been a rather constant increase of these judgments that reached, in 2012, 47% of the total judgments of that year. Meanwhile, after 2002, constitutional review originating from judicial references was never again to account for 80% of total judgments; indeed, this percentage has since decreased, falling to between 60% and 70%, until 2009 (with the exception of 2008, when it reached almost 75%). More recently, the proportion has dropped even further, barely exceeding 55% in 2010 and 2011. 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 45%: concrete review had been overtaken by abstract review. 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. Some of the factors mentioned so far can give part of the answer. The others require a consideration of recent constitutional case law. This will be the main aim of the next part of this

study.

II. Practice and endurance of constitutional review (constitutional review in practice)

a. Specific issues in recent case law

The ongoing transformation of the Italian model of constitutional justice is confirmed by some trends that may be seen in recent case law. In this connection, two subjects require special attention: the relationships between constitutional review and reviews for Conventionality, on one hand, and the connections between constitutional review and legislative interpretation, on the other. A third subject too, that of references to foreign law and the use of comparative law, appears to be of some interest.

i) Constitutional law and supranational law: impact on judicial review of legislation

The growing influence of supranational law on the Italian legal system and the Constitutional Court's role has been seen above. Now we will analyse the impact of the development of supranational law (and supranational courts) on constitutional case law.²⁸ To this end, the Constitutional Court's approach to European Union law must be clearly distinguished from that adopted towards the European Convention on Human Rights (ECHR).

The interaction between European 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. Since then, the situation has changed little, even though the 2001 reform of Article 117 of the Constitution recognised the primacy of European law over national legislation through the new Clause 1, according to which: "[l]egislative powers shall be vested in the State and the Regions in compliance with the Constitution and with the constraints

²⁸ On this subject, see, *ex plurimis*, P. FALZEA, A. SPADARO and L. VENTURA (eds.), *La Corte costituzionale e le Corti d'Europa*, Turin, Giappichelli, 2003; A. D'ATENA and P. GROSSI (editors), *Tutela dei diritti fondamentali e costituzionalismo multilivello*, Milan, Giuffrè, 2004; P. BILANCIA and E. DE MARCO (eds.), *La tutela multilivello dei diritti*, Milan, Giuffrè, 2004; N. ZANON (ed.), *Le Corti dell'integrazione europea e la Corte costituzionale italiana*, Naples, Edizioni Scientifiche Italiane, 2006; V. SCIARABBA, *Tra Fonti e Corti. Diritti e principi fondamentali in Europa: profili costituzionali e comparati degli sviluppi sovranazionali*, Padua, Cedam, 2008; P. PERLINGIERI, *Leale collaborazione tra Corte costituzionale e Corti europee*, Naples, Esi, 2008; D. BUTTURINI, *La tutela dei diritti fondamentali nell'ordinamento costituzionale italiano ed europeo*, Naples, Esi, 2009; T. GIOVANNETTI, *L'Europa dei giudici. La funzione giurisdizionale nell'integrazione comunitaria*, Turin, Giappichelli, 2009; G. MARTINICO, *L'integrazione silente. La funzione interpretativa della Corte di giustizia e il diritto costituzionale europeo*, Naples, Jovene, 2009; G. DE VERGOTTINI, *Oltre il dialogo tra le Corti. Giudici, diritto straniero, comparazione*, Bologna, il Mulino, 2010; G. ROLLA (sous la direction de), *Il sistema europeo di protezione dei diritti fondamentali e i rapporti tra le giurisdizioni*, Milan, Giuffrè, 2010.

In English, see G. MARTINICO and O. POLLICINO, *The Interaction between Europe's Legal Systems. Judicial Dialogue and the Creation of Supranational Laws*, Cheltenham, UK, Edward Elgar, 2012. In French, see M. LUCIANI, P. PASSAGLIA, A. PIZZORUSSO and R. ROMBOLI, *Justice constitutionnelle, justice ordinaire, justice supranationale: à qui revient la protection des droits fondamentaux en Europe? – Rapport italien*, *Annuaire international de justice constitutionnelle*, 2004, 251 ff.

deriving from European Union law and international obligations”.

In [Judgment No. 170 of 1984](#), the Constitutional 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,²⁹ however, the Constitutional Court recognised European 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 favour of the special provision (the European one) over the general (national) one; the national provision thus still remained in force, because only European acts prevented it from being applied. Thus, the Constitutional Court *de facto* granted immediate operation to the primacy of European law, as the European Court of Justice had ordered in the *Simmmenthal* judgment of 1978;³⁰ 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 European 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 Article 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 organisations that pursue such an objective); however, as mentioned above, after 2001 the relevant constitutional provision is Article 117(1).

For the Constitutional Court, [Judgment No. 170 of 1984](#) 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 1990s, the Constitutional Court ordered ordinary courts to refer to it only once the interaction between European 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.³¹ This attitude is still adopted by the Court when a double preliminary reference is possible.

²⁹ See above, Paragraph I.b.

³⁰ Judgment of the Court of 9 March 1978, *Amministrazione delle Finanze dello Stato v Simmenthal SpA*, Case C-106/77.

³¹ See, in particular, judgment no. 536 of 1995, which has been repeatedly followed so far.

The only power that the Constitutional Court reserved for itself – by virtue of the so-called “counter-limits” doctrine, the *dottrina dei controlimiti* – was that to review the compatibility of European law with the supreme principles of the Italian legal order and inalienable individual rights,³² 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 a European measure 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 [Judgments No.s 102](#) and [103 of 2008](#), 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 European and national legal orders. Case law recently issued by other Constitutional Courts throughout Europe (such as the Spanish Constitutional Tribunal and, some weeks ago, the French Constitutional Council) shows that dialogue between

³² The “counter-limits doctrine” was first affirmed in Judgment No. 98 of 1965 and was confirmed in several others, such as No.s 173 of 1973, 170 of 1984 and 232 of 1989.

supreme and constitutional courts, at both supranational and national levels, is necessary for European integration; but, above all, dialogue is mandatory for Constitutional Courts, if they wish to avoid being pushed to the margins and thus lose much of their role.

In this connection, it is noteworthy that some years ago, a former President of the Constitutional Court, Professor Gustavo Zagrebelsky, expressed his fear that the Court would suffer a “soft euthanasia”, due to its failure to participate in the process of European integration.³³ The overruling in relation to the possibility of submitting references to the Court of Justice appears to be a first response, and a rather vigorous one at that.

As far as interaction with the ECHR (and the Court of Strasbourg - ECtHR) is concerned, the Constitutional Court has been far less passive, probably because of the different position of Council of Europe legislation with respect to European Union legislation; the primacy of the latter requires recognition, whereas the position of the former within the Italian system requires definition by the Constitutional Court. This definition has changed over the years, especially pursuant to the 2001 constitutional reform. As a matter of fact, it is striking that the Constitutional Court has always considered the ECHR to be an ordinary international treaty, with only one notable exception: in [Judgment No. 10 of 1993](#), it emphasised the Convention’s peculiarities to prevent primary legislation from derogating from or repealing it, on the basis of the fact that it must be conceived as a direct implementation of Article 2 of the Constitution, that recognises and guarantees inalienable human rights.³⁴

[Judgment No. 10 of 1993](#) was, however, an exception to a rather consistent body of case law. That judgment adopted a remarkably different approach: in general, the Court underlined that, since, within national legal orders, dualism leads to international treaties acquiring the force of the national measure that incorporates them, the European Convention was classified as having legislative force because an Ordinary Law, No. 848 of 1955, authorised its ratification and ordered its incorporation into the Italian legal system.

Thanks to Article 117(1) of the Constitution, as amended in 2001, national and regional legislatures must act “in compliance [...] with the constraints deriving from [...] international obligations”; thus, the ECHR, being an “international obligation,” now prevails over national legislative acts.

The constitutional provisions do not provide further details. Therefore, it was for the Constitutional Court to specify how and to what extent this primacy could be affirmed. In theory,

³³ Cfr. G. ZAGREBELSKY, *Corti europee e corti nazionali*, in S.P. PANUNZIO (editor), *I costituzionalisti e l'Europa. Riflessioni sui mutamenti costituzionali nel processo d'integrazione europea*, Milan, Giuffrè, 2002, 553.

³⁴ Article 2 of the Constitution states that “[t]he Republic recognizes and guarantees the inviolable rights of the person, both as an individual and in the social groups where human personality is expressed.”

the approach could have been the same one adopted in relation to European Union law, and in fact some ordinary courts, after 2001, decided on the compatibility of national legislative acts with the ECHR themselves, just as they were empowered to do in relation to European Union law. However, in [Judgments No.s 348 and 349 of 2007](#), the Constitutional Court opted for a different approach that minimised the impact of the constitutional reform from at least two points of view. First, there was little doubt that the Convention's primacy referred to legislation and not to the Constitution (whereas for European Union law, the question is yet to be settled); in any case, the Court dissolved any doubts still lingering, by recognising the ECHR's primacy only *vis-à-vis* legislation. Due to the Convention's intermediate position, infringements result in breaches of the hierarchy of the sources of law. This breach amounts, ultimately, to an inconsistency with the constitutional provision that established the ECHR's primacy. In other words, breach of the Convention's provisions is an indirect infringement of Article 117(1) of the Constitution.

The remaining issue concerns the form with which such an infringement should be declared. It is precisely on this subject that the second important element of the Constitutional Court's approach emerges. Once the Court has established that the contrast between the Convention and national legislation has led to an (indirect) violation of the Constitution, the solution adopted in relation to European Union law could not be applied here, due to the principle of the unity of constitutional justice: only the Constitutional Court can decide upon the unconstitutionality of legislative acts. Thus, conflicts cannot be settled with a declaration from an ordinary court; the constitutional review of legislation performed by the Constitutional Court becomes essential. As a result, it is the Constitutional Court that ensures the compatibility of the Italian legal order with the ECHR's provisions, either by deciding judicial references or appeals seeking abstract review.

Once the authority empowered to review legislation has been determined, the next issue to be addressed concerns the ECHR's actual contents. In this regard, constitutional case law is rather unanimous in recognising the authority of the ECtHR to – as Chief Justice Hughes had stated, with reference to the U.S. Constitution – say “what the Convention is.” As a result, the ECtHR's case law is considered the “voice” of the Convention, and the interpretations issued therein bind all national courts, including the Constitutional Court.

In practice, settling a conflict between the ECHR and national law requires the Constitutional Court to compare the two, not only to declare their compatibility or their incompatibility, but also to establish which law best protects fundamental rights. The comparison can lead to different outcomes, that were detailedly analysed in [Judgments No.s 311 and 317 of 2009](#).

The simplest case is when compatibility is affirmed: no problems arise, and the national legislative provision is applied, since it is consistent with both the Constitution and the European

Convention.

When the comparison leads to the recognition that the national legal system, combining constitutional and legislative provisions, offers better protection for the right at issue, the only possible consequence is that the national provisions must be applied: the ECHR's primacy over national legislation gives way, because of its inconsistency with the Constitution. After all, the Convention itself accepts this consequence, if its Article 53 states that "[n]othing in [the] Convention shall be construed as limiting or derogating any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a party."

The thorniest problems, however, arise in the opposite case, when the protection available under the national legal system is lacking compared to the ECHR. To deal with this situation, the Constitutional Court departed from a rigorous implementation of the principle of hierarchy and opted, rather, for a substantive approach, aiming to protect rights and freedoms to the utmost, "even by developing the potentialities of the constitutional provisions" ([Judgment No. 317 of 2009](#)). In other words, the ECHR can influence constitutional interpretation, insofar as a legislative provision that would be consistent with the Constitution is subject to a declaration of unconstitutionality, because of the absence of protection that emerges from its comparison with the ECHR.

One question remains: what criteria are to be used in this comparison? *Prima facie*, the object of the comparison could clearly not be anything other than the right or freedom at issue. In fact, the Constitutional Court adopted a more comprehensive approach, requiring a comparison to be made between the right at issue and other relevant interests protected by the Constitution (for example, freedom of speech cannot be analysed individually but must be considered in conjunction with the protection of other subjects' privacy, honour, etc.): thus, the comparison cannot refer to a single right, but rather to a specific situation and its regulation by the legal system as a whole. This appears to be the choice that the Constitutional Court has made to give effect to the power, recognised by the ECtHR to national authorities, to consider overriding reasons in the public interest, and thus adapt the legal framework of rights protection to national peculiarities.

ii) Constitutional review and legislative interpretation

In the Constituent Assembly, the establishment of a Constitutional Court was the result of the favour shown for the Kelsenian model, albeit with some significant adaptations. The choice was influenced, as already mentioned, by the social and political situation and, in particular, by a certain distrust of judges' capacity to implement the new constitutional values. However, as we have also seen, the situation has since changed and, as far as judges are concerned, their capacities have greatly increased, to the point that their constitutional awareness could no longer be reasonably

questioned.

The Constitutional Court itself accepted the new situation and even supported it. Indeed, it 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 [Judgment No. 356 of 1996](#), 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 at issue so as to render it constitutional.³⁵ 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 Article 1 of [Constitutional Law No. 1 of 1948](#) and Article 23 of [Ordinary Law No. 87 of 1953](#), now ordinary courts must first examine the possibility of making the legislative provision conform to the Constitution by means of interpretation.³⁶ 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, in particular Section 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, Section 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,

³⁵ On this subject, see G. SORRENTI, *L'interpretazione conforme a Costituzione*, Milan, Giuffrè, 2006; P. FEMIA (ed.), *Interpretazione a fini applicativi e legittimità costituzionale*, Naples, Edizioni Scientifiche Italiane, 2006; R. ROMBOLI, *Qualcosa di nuovo ... anzi d'antico: la contesa sull'interpretazione conforme alla legge*, in P. CARNEVALE – C. COLAPIETRO (sous la direction de), *op. cit.*, 89 ff.; M. D'AMICO and B. RANDAZZO (eds.), *Interpretazione conforme e tecniche argomentative*, Atti del Convegno di Milano svoltosi il 6-7 giugno 2008, Turin, Giappichelli, 2009; CORTE COSTITUZIONALE, *Corte costituzionale, giudici comuni e interpretazioni adeguate*, Atti del Seminario (Roma, 6 novembre 2009), Milan, Giuffrè, 2010; E. LAMARQUE, *Corte costituzionale e giudici nell'Italia repubblicana*, Rome-Bari, Laterza, 2012.

³⁶ 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.

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 that in Italy, declarations of incompatibility are the prerequisite for a decision of unconstitutionality.³⁷

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, i.e. 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. These decisions prove that in abstract review of legislation, the same body is entitled to experiment with interpretations to achieve consistency with the Constitution; then, should the experiment fail, 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.

iii) The use of comparative law

The recent evolution of constitutional case law emphasises the importance that the Constitutional Court has always given to the judgments issued by other courts. It is rather common to find quotations from (or at least mentions of) judgments issued by the Court of Cassation or the State Council (the highest court for administrative justice), especially since the doctrine of “living law” was established. Similarly, the evolution of European case law led to an ever-increasing number of quotations from European Union acts and judgments rendered by the Court of Justice. The role of supreme interpreter of the Convention assigned to the ECtHR largely justifies and explains the abundance of quotations from this Court’s judgments.

On the contrary, in the Constitutional Court’s judgments, references to foreign law are extremely rare. Moreover, the few references that can be found are very general, perhaps even too general to identify, in relation to a given country, a specific judgment, constitutional provision or legislative

³⁷ For the opposition between weak and strong forms of judicial review, see M.V. TUSHNET, *New Forms of Judicial Review and the Persistence of Rights – And Democracy-Based Worries*, in *Wake Forest Law Review*, vol. 38, 2003, 813 ff.; ID., *Alternative Forms of Judicial Review*, in *Michigan Law Review*, vol. 101, 2003, 2781 ff.; ID., *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law*, Princeton, Princeton University Press, 2008.

act.³⁸ Exceptions to this are truly infrequent. In recent years, the most notable ones are perhaps the judgment on the regulation of compound interests, that cites legislative provisions of France, Germany and Spain as well as the British “no interest rule” ([Judgment No. 341 of 2007](#)), and a major judgment on the distribution of legislative power between the central State and Regions, that quotes the U.S. Constitution’s Supremacy Clause and German concurrent legislative powers ([Judgment No. 303 of 2003](#)).

The almost-complete absence of references to foreign law could suggest that the Constitutional Court does not seek to engage in dialogue with its peers, preferring rather to ignore the subject of comparative law. However, this conclusion can be rebutted, as several factors demonstrate, instead, that foreign law does have a significant place in Italian constitutional case law.

Aside from the abovementioned (general) references, it is noteworthy that within the Court’s Research Department there is a Comparative Law Division, that provides information on current constitutional and legal news in several countries and, for the most important developments, reports on the state of the art.

Thus, the question arises as to why the Constitutional Court’s judgments contain hardly any references to foreign law. This has nothing to do with the structure of the judgment or the style of its writing: unlike the French “*vis-con-dis*” model (according to which the judgment has three parts, the *visas*, the *considérants* and the *dispositif*), in Italy most of the judgments (and the most important ones) are written entirely in the form of a dissertation. Nor does it have to do with a desire to defend sovereignty: actually, it cannot be excluded that, at least in some cases, a wish to refrain from expressly admitting that arguments are gathered from foreign systems is a valid reason for avoiding the inclusion of precise references; however, it could be retorted that general references are seldom used. Especially, the Court does not conceal its interest for comparative law, as demonstrated by its official website, which devotes a specific section to its “Comparative Law Studies.”³⁹

There are also other reasons that appear to deserve special consideration. First, the omission of express references could be traced to Italian jurists’ traditional caution in using foreign languages (apart from Latin) when drafting judgments. This leads to the core of the matter: using foreign references requires one to either write in another language or translate; but translations can be sometimes misleading, and risks of mistakes or inaccuracies cannot therefore be avoided. More generally, these risks are connected to the perfect understanding of foreign legal systems, that is jeopardised not only because of the language, but also because of the law itself. In civil law

³⁸ See G.F. FERRARI and A. GAMBARO (editors), *Corti nazionali e comparazione giuridica*, Napoli, Esi, 2006.

³⁹ See http://www.cortecostituzionale.it/ActionPagina_1123.do.

countries, such as Italy, enacted law has led to nuances and peculiarities that foreign lawyers cannot always grasp. In other words, Italian lawyers might find it difficult to transpose foreign law arguments into their legal reasoning, not only if these come from considerably different systems (such as, for instance, common law countries), but also if they come from apparently similar systems, since appearances do not always correspond to reality. After all, it is probably not a coincidence that quotations from foreign law are used, for the most part, within the circle of English-speaking common law countries, where neither the language nor the comprehension of the legal system can be considered insurmountable issues.

b. Impact on other powers

The Constitutional Court has played a key role within the Italian legal system. This is true as regards the first decades of its functioning, and remains so even for more recent times characterised by important innovations in the political situation. The transition to a majoritarian democracy, as seen above, was characterised by a high degree of discord, both between left-wing and right-wing coalitions and between the political classes and the judiciary. The Constitutional Court has arbitered most of these disputes, especially those between the political classes and the judiciary. As far as conflicts between political coalitions are concerned, the Court has had greater difficulties, due to the absence of power for the opposition to directly contest the majority's decisions. Notwithstanding this problem, the Court fulfilled its function thanks to both judicial references and direct complaints submitted by the Regions. Actually, after the constitutional reform of 2001, the Regions opened a third field of conflicts, concerning the distribution of legislative and administrative powers between the central State and the Regions. Naturally, the Constitutional Court was asked to decide these controversies. Moreover, while arbitrating, the Court was effectively also asked to implement the new constitutional provisions, due to the absence of organic legislation to substantiate the remarkable innovations introduced.

The social and economic crises of recent years have exacerbated many conflicts, especially in relation to the policy choices made to deal with the crisis and manage decreasing funds. From time to time, the Court was called upon to settle some of these conflicts, and always succeeded in ensuring the protection of the basic principles of the legal system. This is no small achievement, considering that difficulties can enhance the importance of finding solutions, to the point that even law can be neglected to a certain extent: in his classification of social systems, Ugo Mattei identifies a category of systems based on the "rule of politics" where the pursuit of a political objective (e.g. economic development or self-sufficiency) prevails (or can prevail) over compliance with legal rules. Taking these risks into account, the Constitutional Court's role can be described as protecting

the “rule of law” in times of crisis, *vis-à-vis* the danger of slipping into a “rule of politics”. In the 1980s, Louis Favoreu stated that the French Constitutional Council led politics to be captured by law⁴⁰ in a country where, in 1981, a Member of Parliament could still boldly reply to critiques moved by the opposition by saying “you are legally wrong because you are a political minority;”⁴¹ in the last two decades, the Italian Constitutional Court has ensured that politics, that had already been captured by law, remained submissive to the law even when this submission could not be taken for granted.

To accomplish this task, the Court had only one instrument: referring to the Constitution and emphasising its binding effects over all decisions and policies; in other words, by reasserting the conception of the Constitution as the Supreme Law.

As a matter of fact, even the new approach to judicial legislative interpretation mentioned above is 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 is 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, disregarding the Constitution, or conformably to the Constitution, disregarding the law, the Court must determine which of these conflicting rules governs the case.”⁴²

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).

On the basis of these statements, it is not surprising that the evolving concept and strength of the Constitution have produced changes in the system of constitutional justice, and it is reasonable to

⁴⁰ See L. FAVOREU, *La politique saisie par le droit. Alternances, cohabitation et Conseil constitutionnel*, Paris, Economica, 1988.

⁴¹ The statement was expressed by a Socialist member of the National Assembly on 13 October 1981, during a debate concerning a law regulating the nationalisation of factories.

⁴² [Marbury v. Madison](#), 5 U.S. 137 (1803), at 178.

expect further transformations in the near future.

c. Prospects of transformed model and practice

In the 1990s, the Constitutional Court delivered at least 471 judgments every year (except for 1996, when it delivered “only” 437 judgments); after 2002, the judgments never exceeded 482 (in 2005). Last year, they were only 316, the lowest number since 1984. Admittedly, a change is taking place.

Considering that conflicts between the central State and Regions have increased, and thus the number of judgments leading to abstract review of legislation has been rising, and considering that the number of conflicts either between State and Regions or between supreme bodies of the State arising from administrative or judicial acts has little impact, it cannot be doubted that the significant reduction of the judgments issued is the consequence of the dramatic fall in judicial references.

This fall can be easily explained by the concurrence of supranational courts and, above all, by the new approach to legislative interpretation.

The problem does not lie in the numbers, but rather in the type of cases that are submitted to the Constitutional Court. On one hand, the Court must often deal with minor issues, in which the constitutional matter remains on the background; thus, the number of judicial references could, and probably should, decrease even further. On the other, by giving ordinary courts the power to conform legislation through interpretation, the Constitutional Court accepted the risk that it would not be called upon to decide pivotal constitutional matters, since the condition for avoiding a reference to the Constitutional Court is to argue that the legislation *can* be interpreted consistently with the Constitution. In recent years, for instance, high-profile debates on constitutional matters such as euthanasia and living wills or the definition of asylum seekers, to mention only a few, did not lead to a judgment by the Constitutional Court, because the Court of Cassation had the power to end them. One could surely ask whether it is acceptable that the Constitutional Court, the supreme interpreter of the Constitution, did not take part on debate on such matters.

Avoiding the Constitutional Court is not only due to the choices made by ordinary courts. There is longstanding debate on whether the Court’s impossibility to intervene on certain important issues is due to the presence of certain immunities (e.g., the Court cannot review Parliamentary election proceedings because of Article 66 of the Constitution, according to which the Houses of Parliament are the only judges of their own elections):⁴³ in other words, there are some off-limits zones for constitutional justice. Moreover, some legislative acts are not supposed to be applied in proceedings

⁴³ Article 66 of the Constitution: “Each House verifies the credentials of its members and the causes of disqualification that may arise at a later stage.”

before ordinary courts, since it is difficult to meet – as a U.S. scholar would say – the requirement of a “case and controversy”, and thus the conditions for submitting a judicial reference (in particular, that of “*rilevanza*”) are very difficult to meet (for example, the legislation on the structure of public administration): for this reason, it is very unlikely that the Constitutional Court will have its say, since the system of constitutional justice lacks efficient alternatives for access to the Court.⁴⁴

All these arguments lead to the recognition that the Constitutional Court’s marginalisation on important constitutional issues may be the result of two factors, which are entirely independent of each other: the first has to do with constitutional case law, and the second with the system’s framework.

As far as systemic problems are concerned, the main solution is to reform either the Constitution or the legislative provisions on the Constitutional Court, to allow other subjects, entities or authorities to submit questions, through new forms of proceedings or appeals. From time to time, the introduction of a remedy resembling the German *Verfassungsbeschwerde* or the Spanish *amparo* is proposed, to give standing to individuals seeking to protect their constitutional rights.⁴⁵ Such a reform would certainly enable the Constitutional Court to afford better protection to rights and to intervene in cases where judicial references would be impossible or highly unlikely. Nevertheless, the cost of these benefits would not be insignificant, because the German and Spanish experiences demonstrate that 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 1980s, 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, as shown, for example, by Organic Law No. 6 of 2007 that amends

⁴⁴ As far as problems in acceding the Constitutional Court are concerned, see R. BALDUZZI and P. COSTANZO (editors), *Le zone d’ombra della giustizia costituzionale. I giudizi sulle leggi*, Turin, Giappichelli, 2007; R. PINARDI (editor), *Le zone d’ombra della giustizia costituzionale. I giudizi sui conflitti di attribuzione e sull’ammissibilità del referendum abrogativo*, Atti del seminario di Modena del 13 ottobre 2006, Turin, Giappichelli, 2007.

⁴⁵ On these propositions, see P. CARROZZA, R. ROMBOLI and E. ROSSI, *I limiti all’accesso al giudizio sulle leggi e le prospettive per il loro superamento*, in R. ROMBOLI (ed.), *L’accesso alla giustizia costituzionale: caratteri, limiti, prospettive di un modello*, op. cit., Naples, Edizioni Scientifiche Italiane, 2006, 759 ff.; R. ROMBOLI, *La riforma dell’amparo costituzionale in Spagna e l’introduzione di un ricorso individuale diretto in Italia*, in *Scritti in onore di Lorenza Carlassare*, Naples, Jovene, 2009, vol. IV, 1555 ff.; 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*, Atti del Convegno di Pisa, 19-20 settembre 2008, Turin, Giappichelli, 2012, 323 ff.

the Spanish organic law on the Constitutional Court. The problem is that 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 U.S. 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*” (denial of justice),⁴⁶ as an infringement of the 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 (e.g. by deciding minor cases by summary judgment), that could however lead to problems of excessive judicial subjectivity.

Other types of remedies would create fewer problems, and would ensure constitutional review in fields that currently appear off limits. 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.

As noted earlier, in Italy the Constitutional Court possesses a rather limited set of competences: the reforms mentioned above, 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.

These new competences would strengthen the Court’s role without changing its essence. This would not be the case, however, with regard to certain changes in constitutional case law. As described above, 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, since many important constitutional issues escape its review. In other words, the question is whether a concentrated system of constitutional review – as the current Italian system – can tolerate the importance that the Constitutional Court has granted to ordinary courts.⁴⁷ 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

⁴⁶ Article 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 guilty of a denial of justice.”

⁴⁷ For the analysis of the evolution towards a deconcentrated model, see E. MALFATTI, R. ROMBOLI and E. ROSSI (eds.), *Il giudizio sulle leggi e la sua “diffusione”*, *op. cit.*; A.M. NICO, *L’accentramento e la diffusione nel giudizio sulle leggi*, Turin, Giappichelli, 2007.

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. That may lead to a reversal: instead of trying to revitalise 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. Adopting this view, the question should be whether it is time for a major change in Italian constitutional justice: the reasons that led to the compromise based on the establishment of a hybrid-Kelsenian model are no longer compelling, and ordinary courts can now be entrusted with review of legislation.

It does not look like this point of view will shift the Italian system towards the American model in the near future. The time needed for such a change would be, in any case, rather long. Current practice is probably the closest that the constitutional and legislative framework can get to the American model. The next step would require constitutional reforms that seem far from being accepted, and even proposed, among the political classes, if one considers that judicial review of legislation would require politics to empower courts, in a time when conflicts between the two are frequent and, above all, in a system where, although the definition of the judiciary as the “mouth that pronounces the words of the law”⁴⁸ can no longer be reasonably supported, is still very much influenced by the traditional conception of judges as being subject to enacted law.⁴⁹ The point is, however, that although this reform lacks political viability, it does not mean that, in theory, it is impossible for the Italian legal system to adopt the American model. An often-raised objection to judicial review of legislation is that in civil law countries, the absence of a doctrine of binding precedent would seriously endanger legal certainty. However, comparative and historical arguments prompt a dissent: there are civil law countries that adopt the American model (e.g. Argentina) and in the past, this model was adopted in other civil law countries (e.g. Romania, in the early twentieth

⁴⁸ See CH.-L. DE SECONDAT MONTESQUIEU, *De l’Esprit des Lois* (1748), J.-M. Tremblay ed., Collection «*Les classiques des sciences sociales*», Université du Québec à Chicoutimi, 2002 [http://classiques.uqac.ca/classiques/montesquieu/de_esprit_des_lois/partie_2/esprit_des_lois_Livre_2.pdf], Livre XI, Chapitre VI (p. 52).

⁴⁹ Indeed, Article 101(2), of the Constitution states that “[j]udges are subject only to the law.”

century); other attempts to adopt it failed simply due to political hostility (see the long-lasting debate during the French Third Republic or even the position of liberals in Italian Constituent Assembly). But there is another argument that cannot be neglected: it is hard to maintain that in civil law countries, judicial precedents are completely devoid of authority; in Italy, for instance, case law is not formally considered to be a source of law, but in practice it operates as if it were one. Indeed, judicial precedents are regarded as having great authority, especially those delivered by the supreme courts, namely the Court of Cassation and the State Council. As far as judicial activity is concerned, the theoretical opposition between common law and civil law must be radically reshaped in light of actual practice. And in reshaping, the conditions for the adoption of the American model do not appear to be out of reach. It is hard to determine whether such a reform would bring, in practice, significant benefits to the protection of individual rights. More generally, it does not appear reckless to assert that, in light of the legal evolution and the political situation described above, a deconcentrated model of constitutional review would greatly help to strengthen the Constitution, for the simple reason that it would magnify the number of subjects empowered to recognise its position as the Supreme Law of the Land.