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## THE ITALIAN SYSTEM OF JUDICIAL REVIEW OF LEGISLATION -The Diffuse System and the Centralized System Perspective-

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**Summary:** *This paper will cover the system of judicial review in Italy in the following manner:*

*I An overview of the systems of judicial review (general characteristics of the diffuse system, general characteristics of the concentrated system), which will explain the main differences between the two systems.*

*II The Italian system of judicial review will be examined through its history, legal sources, structure and independence of the Constitutional Court, the jurisdiction of the Constitutional Court, its scope and methods, the effects of the decisions of the Constitutional Court and methods of broadening the control of constitutionality.*

*III In the conclusion, it will be discussed whether the Italian system of judicial review is the centralized system or not.*

**Key words:** Judicial Review, Italian Legal System, Constitutionality, Constitutional Court

### I INTRODUCTION - AN OVERVIEW OF THE SYSTEMS OF JUDICIAL REVIEW

Judicial control of the constitutionality of legislation is an institution which exists in many countries of the contemporary world. The systems of judicial review differ

from state to state but, generally, it could be said that there are two basic systems: a diffuse and a concentrated one. Although the line between these two systems nowadays cannot be drawn with absolute preciseness, because of theoretical reasons they are often separated and compared by scholars. Nevertheless, this is one of the crucial features which determine the system of judicial review: the state's choice of either centralized or decentralized (diffuse) system<sup>1</sup>. In the diffuse system, all judicial organs have the power to determine the constitutionality of legislation. On the contrary, in the centralized system, a single judicial organ has this power.

## GENERAL CHARACTERISTICS OF THE DIFFUSE SYSTEM

As it is mentioned above, the diffuse system empowers all the judges and the courts of a particular country to act as constitutional judges and courts. This right is not only reserved for Constitutional or Supreme Court of a country. This power is the consequence of the principle of the supremacy of the Constitution<sup>2</sup>, which implies that if there is a conflict between a law and the Constitution the higher law must prevail: *lex superior derogat legi inferiori*. So, it is to the judiciary not to enforce such law in the concrete case.

The decentralized system is typical for common law countries. That is because of the doctrine called *stare decisis* which ensures that different courts don't have different decisions on the issue of constitutionality of the particular law<sup>3</sup>. Under the *stare decisis* doctrine the courts are bound by their prior decisions and by the decisions of higher courts in the same jurisdiction<sup>4</sup>. Enforcing the diffuse system of judicial review of legislation in civil law countries without this doctrine would cause a lack of legal certainty. Although there are countries of Roman law tradition which have implemented this kind of system<sup>5</sup> with larger or smaller changes, it is more suitable for common law countries.

Besides decentralization, other main characteristics of the diffuse system are<sup>6</sup>:

– **Nullity of the unconstitutional state act and declarative effect of the court's decision**

This rule means that the unconstitutional state act is null and void and it cannot produce any effect and there is no need for another state act to be produced to withdraw its quality of state act. So, the act is null and not annulable. Because of legal certainty, only courts have the power to declare acts void. That is why the court's decision is declarative. The act is considered as if it had never been valid and as if it had always been

<sup>1</sup> They are also called Austrian and American system

<sup>2</sup> A. R. Brewer-Carias, *Judicial Review in Comparative Law*, Cambridge University Press, Cambridge, 1989, p. 127.

<sup>3</sup> See F. RubioLlorente, *Constitutional Jurisdiction as Law-Making, Law in the Making*, ed. by Alessandro Pizzorusso, Springer-Verlag, Berlin-Heidelberg, 1988, p. 159-161.

<sup>4</sup> Mauro Cappelletti, *The Judicial Process in Comparative Perspective*, Clarendon Press, Oxford, 1989, p. 138-142.

<sup>5</sup> For example, in Mexico, Argentina, Brazil, and it also existed in Switzerland, Portugal, Greece and in Italy (from 1948 to 1956), M. Cappelletti, *supra*, p. 134, A. R. Brewer-Carias, *supra*, p. 128-131.

<sup>6</sup> See A. R. Brewer-Carias, *supra*, p. 131-135.

null and void. Consequently, court's decision on this matter has *ex tunc*, retroactive effects. The law is null and void from its enactment.

– **The initiative power of the courts**

In a concrete case judges must apply the Constitution. So, it is their duty to consider the constitutionality of the law even if the parties in the particular process don't raise that question. On the contrary, this is not the case in most of the countries of the centralized system.

– **The incidental character of judicial review**

Above mentioned duty of the courts can only be exercised through a concrete cases brought before them. This system can operate only if the issue of constitutionality of the law is relevant to the decision in the concrete process.

– **The *inter partes* effect of the decision**

Because of incidental character of the system the court's decision on this matter has the effect which is restricted to the parties in the process. If the act is considered unconstitutional it only means that it is not applicable in that particular case. It doesn't mean that it can't be enforced in other cases. This rule is followed by the *stare decisis* doctrine because of the necessity of the legal certainty.

Despite this, every country's diffuse system has its own solutions and this general overview of the decentralized system of the judicial review of legislation is useful for comparison with centralized systems. This is only the basic logic of the diffuse system which, applied in a concrete legal system, can be modified in many ways.

## **GENERAL CHARACTERISTICS OF THE CONCENTRATED SYSTEM**

The main characteristic of the concentrated system is that there is one single organ empowered to review the legislation. That organ is either Supreme Court of a country or a court specialized for that kind of jurisdiction (Constitutional Court, Council or Tribunal).

This system was enforced for the first time in Austria in 1920. Since then it has been used in many countries of civil law legal tradition. Only a few common law countries gave power to a single court to review the legislation<sup>7</sup>.

Like in the diffuse system, the basic principle of the concentrated system is the supremacy of the Constitution. Unlike the decentralized system, the power to review the legislation is not given to all the courts but to one single court. That is the main difference which causes the majority of other differences between the two systems.

Cappelletti finds that there are three main reasons for civil law countries to adopt such a system<sup>8</sup>:

The first one is the continental conception of separation of powers. In civil law countries, invalidation of statute is considered as a political, a legislative act. Therefore, it

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<sup>7</sup> For example Ghana, Papua New Guinea and Uganda, A. R. Brewer-Carias, *supra*, p. 186-188.

<sup>8</sup> Mauro Cappelletti, *supra*, p 137-146.

must be conducted by legislative branch. It is generally accepted that some sort of control of the constitutionality must exist, but this power was never given to ordinary courts because of this conception.

The second reason is the absence of the *stare decisis* doctrine. In the diffuse system this doctrine ensures the uniformity of decisions on the question of constitutionality. This is why the decentralized system didn't work in Weimar Germany and in post war Italy. In Norway, Denmark and Sweden this problem is minor because the decentralization of the system in these countries is rather unimportant and exercised by judges with extreme moderation<sup>9</sup>.

The third one is unsuitability of the ordinary courts in civil law countries. The highest courts in these countries often have no structure to exercise this kind of jurisdiction. They already have plenty of cases and their procedure is unsuitable for reviewing the legislation. Cappelletti<sup>10</sup> alleges that the problem also arrives from the fact that continental judges are often "career judges" who have skills in application of the law but not in making policy judgments.

For all these reasons, the majority of civil law countries have chosen the centralized model of controlling the legislature by courts. Like in the case of the diffuse system it can be said that there are some general characteristics of all centralized systems besides the fact that there is only one organ dealing with the constitutionality of statutes. The main characteristics of the system are<sup>11</sup>:

– **Judicial review must be established and regulated by the Constitution**

This principle has its roots in rigid conception of separation of powers. Only the Constitution can give power of annulling the laws to a non-legislative body. Because of non-legislative character of the courts this system cannot be established by, for example, the decision of the Supreme Court.

– **The annul ability of unconstitutional state acts and the constitutive effects of the decisions**

This is a guarantee of constitutionality and legal certainty. The laws brought by the legislative branch must be considered valid and effective until they are annulled by the organ entitled by the Constitution to do so. Consequently, when a constitutional judge decides that the law is unconstitutional, generally, the decision has constitutive effects. In the majority of cases it has *ex nunc*, or *pro-futuro* effects. That is why a distinction between absolute and relative nullity of the law exists in this system. In the case of relative nullity the decision has *ex nunc* effects and in the case of absolute nullity the decision has *ex tunc* effects.

– **The power to initiate the judicial review**

In most of continental law countries, the Constitutional Court cannot raise the question of (un)constitutionality of the law. In general, the ordinary courts have this initiative power and duty. But once the issue is raised, the Constitutional Court has the power to consider questions of constitutionality other than the ones that are already raised.

<sup>9</sup> Mauro Cappelletti, *supra*, p. 141.

<sup>10</sup> Mauro Cappelletti, *supra*, p. 143.

<sup>11</sup> See A. R. Brewer-Carias, *supra*, p. 185-194.

– **Principal (direct) and incidental character of the judicial review**

There are two ways to bring an issue before the Constitutional Court. These two ways are called principal and incidental way. In the first case, which is normal for the centralized systems, questions are brought by a direct action of a state organ or through *actio popularis*. In the second case questions are brought by the ordinary court because the issue occurred in a process before that court. The latter doesn't change abstract character of the proceeding before the Constitutional Court. The Court is deciding without taking into account the facts of the concrete case in which the question of constitutionality occurred. That leads to another characteristic of the concentrated system.

– **Legislative character of the decisions and the *erga omnes* effect**

When the Constitutional Court is deciding, the question is only if there is a logical compatibility between the law and the Constitution. Consequently, decisions have quasi-legislative effect. The Court is playing a role of legislative organ. This power is only exercised in a negative manner, because the Court annuls the laws and never brings a new one. The system is often called “a system of negative legislation”<sup>12</sup>. This raises many controversial questions and one of them is of the huge importance: the problem of legitimacy of the judicial review of legislation<sup>13</sup>.

The main consequence of this rule is the *erga omnes* effect of the Court's decision. The decision annuls the unconstitutional law and that must be respected not only by the parties to the process, but also by both state organs and citizens.

It must be said that dividing all systems of judicial review in two groups can only be theoretical. Most of countries combine these two systems and it is ‘the mixed system’ that prevails in contemporary world, especially in Europe. The Italian system of judicial review is a good example of the centralized system with many elements of the diffuse system.

## II THE ITALIAN SYSTEM OF JUDICIAL REVIEW

The Constitutional Court was introduced in Italy for the first time under the Constitution of 1948. Before that, some kind of control of the constitutionality of laws had been discussed in 1925, but had lain dormant until the fall of the fascism<sup>14</sup>. In 1946, when the Constituent Assembly started to work on the new Constitution, the only models of such an institution were the United States Supreme Court and Hans Kelsen's Austrian Court (1920-1934). The latter system inspired the drafters of the Italian Constitution<sup>15</sup>. The draft was presented to the Assembly on January 21st 1947, and this Constitutional Court solu-

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<sup>12</sup> This is Hans Kelsen definition taken from A. R. Brewer-Carias, *supra*, p. 191.

<sup>13</sup> See Eivind Smith, *The Legitimacy of Judicial Review of Legislation – a Comparative Approach*, Constitutional Justice Under Old Constitutions, edited by Eivind Smith, Kluwer Law International, the Hague, 1995, p. 363-402.

<sup>14</sup> See Mary L. Volcansek, *Constitutional Politics in Italy- The Constitutional Court*, St. Martin's Press, Inc., New York, 2000, p. 13-20 .

<sup>15</sup> Commission that consisted of 75 members of the parliament

tion was subjected to criticism. It was said that this solution is not democratic and that control of the constitutionality of laws is not susceptible to control of the people. It was even said that constitutional system which places the judges above the parliament is "bizarre"<sup>16</sup>. There was also an idea that this power should belong to the highest of ordinary courts, the *Corte di Cassazione*. Nevertheless, the final form of the Constitution was adopted on December 22nd 1947 and took effect on the first day of 1948, including the part called "Constitutional Guarantees", which describes the Constitutional Court.

The Constitutional Court was introduced mainly because of the experience that was a mixture of flexible Fundamental Law (*Statuti Albertini*) of 1848 and fascistic government. There was a strong need to protect the Constitution and human rights against legislative power. Despite this, the Italian Constitutional Court did not begin to function until 1956. That is because the article 137 of the Constitution required parliamentary action to determine "all other provisions necessary for the establishment and functioning of the Court". The implementation of the Constitutional Court was not on the top of the agenda of the governing party because of political reasons. In the meanwhile, the diffuse system of judicial review persisted. From 1948 to 1956 all ordinary courts had the power not to apply laws they considered unconstitutional.

Finally, the legislation necessary for the functioning of the Court was passed by the same political forces that had approved the Constitution, and April 23rd 1956, the Court held its first session<sup>17</sup>.

## LEGAL SOURCES<sup>18</sup>

The rules concerning the Constitutional Court cannot be found only in the Constitution. There are also other documents relevant for the existing system of judicial review in Italy. Articles of the Constitution which regulate judicial review are 127 and 134-137. Article 137 leaves to the legislator to regulate the definition of the conditions, the forms, the methods of access, the guarantees of independence of the constitutional judges and every other necessary issue relevant for this matter and not already regulated in the Constitution. The rules implementing article 137 are actually governing the procedure before the Constitutional Court. They can be found in constitutional statutes no. 1 of 1948 and no. 1 of 1953, and in ordinary statute no. 87 of 1953. Although article 137 refers only to future primary legislation, statute no. 87 of 1953 also mentions other sources. These sources have regulatory nature and they were adopted by the Court itself in 1956<sup>19</sup> and 1958<sup>20</sup>. Leaving to the Court to establish its own rules is a solution not so common in countries of Roman law tradition. "Considering that in Italy, as in most civil law countries, the courts (even those at the top of the judicial hierarchies) are not vested with any

<sup>16</sup> Palmiro Togliatti, communist member of the Parliament, Mary L. Volcansek, *supra*, p. 14.

<sup>17</sup> Vittoria Barsotti – Vincenzo Varano, *Standing to Raise Constitutional Issues*, Italian National Reports to the XVth International Congress of Comparative Law, Brisbane, 2002, p. 602.

<sup>18</sup> More detailed information on legal sources can be found on <http://www.corteconstituzionale.it>

<sup>19</sup> Norme integrative per i giudizi davanti alla Corte costituzionale

<sup>20</sup> Regolamento generale

rule making power, and that generally every step of the ordinary civil and criminal procedure must be regulated by statute, the power recognized to the Constitutional Court is of considerable importance and shows its peculiar role in the Italian system of government. In fact, in order to justify the nature of the Court's power, these norms are qualified as 'rules of a supreme body', and therefore ranked as primary sources, given the position of the Court as a 'constitutional organ' independent from all other state organs"<sup>21</sup>.

## STRUCTURE AND INDEPENDENCE OF THE COURT

The independence of the judges of Constitutional Court is a result of the paritarian system of their appointment. Their naming is not attributed to representative organs, like in some other countries, but to the three traditional powers of the state. The Constituent Assembly chose to divide authority for naming the Court's 15 judges between the President of the Republic, the Parliament and the judicial power. The judges are appointed in the following manner: one third is appointed by the President of the Republic, another one-third by the two houses of the Parliament in a joint sitting and the final third by the judges of the ordinary and administrative courts. The judges are chosen from among judges, law professors and lawyers with at least 20 years of experience.

The five judges that are appointed by the judiciary are divided into three groups: three are elected by the Court of Cassation, one by the Council of State and one by the Court of Accounts. These provisions are established by statute no. 87 of 1953 and the procedure has been slightly moderated during the time (such as provision for second ballots in the event of no majority on the first).

The same statute of 1953 establishes rules for the judges elected by the Parliament. They are elected in a joint sitting of two chambers using secret ballot. To win on a first ballot a nominee must get three-fifths of the total number of members of the Parliament. On succeeding ballots required majority drops to three-fifths of those voting<sup>22</sup>.

The implementing legislation didn't regulate the naming of the judges by the President. That was a cause of disputes because of an apparent conflict between articles 89 and 135 of the Constitution. Article 89 states that actions of the President are valid only if countersigned by the proposing ministers. On the other hand, article 135 mentions the President alone as the appointing authority for the Constitutional judges. The problem was solved by the appointment of the first presidential appointees who were named by the President alone. The precedent was set. The President appoints the judges without formal consultation, the Council of Ministers co-signs the appointment but that is now a mere formality<sup>23</sup>, although these appointees follow partisan affiliations of the Parliament.

Tenure of the judges is 9 years (from 1967) and they have a single, non-renewable term. They are granted immunity for their votes and opinions. Their salaries are equiva-

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<sup>21</sup> Vittoria Barsotti -Vincenzo Varano, *supra*, p. 603.

<sup>22</sup> According to Mary L. Volcansek the "super-majority" was designed to prevent any judgeship from going to the Communists

<sup>23</sup> Mary L. Volcansek, *supra*, p. 23.

lent to those of the judges of the highest ordinary courts and they are prohibited from practicing their professions and from accepting any other positions during their tenure.

## THE JURISDICTION OF THE CONSTITUTIONAL COURT

There are four main competences of the Court:

I The first one is the competence to solve disputes over which body is entitled to exercise a certain power.

- a) The Italian Republic is a decentralized state. There is a distribution of state powers in the vertical sense, over territorially autonomous units called Regions. So the conflict may arise between the State and Regions, or between Regions, when the State invades the sphere of regional authority or if a Region exceeds its own sphere. In such cases the conflict arises as a consequence of an administrative act. When rendering a decision the Court decides not only to which level of state powers the challenged attribution belongs, but also has the power to annul the administrative act<sup>24</sup>.
- b) Conflicts may also arise between the various national constitutional organs. In this case the Court must determine to which organ the challenged power belongs. When an act which infringes a constitutional norm is produced the Court must annul it. The most of the disputes in this jurisdiction during the Court's history were between executive and legislative branch over the use of decree laws by executive branch.

II The second general competence of the Court refers to cases of charges against the President of the Republic (impeachment). Until constitutional statute 16 of 1989 the Court had also jurisdiction in cases of impeachment of Ministers<sup>25</sup>. The President is not responsible for acts performed in the exercise of his functions and can be prosecuted only for treason or offence against the Constitution. In these cases, the accusation can only be brought before the Court by an absolute majority of members of Parliament in a joint session sitting, and the composition of the Court is enlarged by 16 lay judges. That kind of proceeding has, of course, a strong political subtext<sup>26</sup>.

III The third jurisdictional power of the Constitutional Court refers to referenda. The Court has jurisdiction to decide on the admissibility of referenda, based on the fact that tax or budgetary laws, laws granting amnesty or pardon, and laws authorizing ratification of international treaties cannot be subject to referendum. There is no actual case of controversy and the Court performs its duties *ex officio*.

IV Finally, the fourth jurisdictional power refers to judicial review of constitutionality of legislation (statutes and other state acts with the same force). This is the most important jurisdiction of all and it will be analyzed in the following part of this paper in more detail.

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<sup>24</sup> A. R. Brewer-Carias, *supra*, p. 217.

<sup>25</sup> Vittoria Barsotti -Vincenzo Varano, *supra*, p. 607.

<sup>26</sup> Mary L. Volcansek, *supra*, p. 73-91.



## THE SCOPE OF THE ITALIAN SYSTEM OF JUDICIAL REVIEW

Judicial review of legislation in Italy is exercised by a single body, the Constitutional Court. The term "legislation" comprises all statutes and other state acts with the force of law. This means that the Court has jurisdiction over the statutes of the State and the Regions, over delegated legislation, over Government's decrees and over the Charters of the Ordinary Regions. The Constitutional laws are also submitted to constitutional review.

According to A. R. Brewer-Carias<sup>27</sup>, a few questions have been raised regarding the scope of judicial review concerning legislative acts.

The first issue refers to whether the Constitutional Court has the power exercise control over laws which were passed before the enactment of the Constitution, and which could be considered repealed by it. This control can only be exercised through incidental method.

The second question would be: is there a possibility to raise the issue of constitutionality with respect to repealed laws which have already lost their force? The Italian Constitutional Court has declared its competence to solve disputes over these repealed laws. The explanation is that these laws could have created situations which justify constitutional control after their repeal.

The third issue is whether the Constitutional Court can only determine statute's consistency with the Constitution in its normative contents or has it also a formal control over the procedures followed for its sanctioning.

Finally, the question has arisen as a consequence of the terms used in article 134 of the Constitution. That article indicates that the court has jurisdiction to settle disputes dealing with "constitutional legitimacy" of laws and state acts with the force of law. Although statute no. 87 of 1953 expressly states that any kind of value judgments of policy nature are excluded, the Court has, since 1960, controlled arbitrariness of the legislator based on the principles of equality and non-discrimination controlling the "rationality" of the distinctions established in legislation.

## METHODS OF JUDICIAL REVIEW

### I The Direct (Principal) Method

The direct method plays a minor role in the Italian system of judicial review at least from statistical point of view<sup>28</sup>. It is a procedure which is considered abstract in the sense that constitutionality of the statutes is challenged *per se*. This method can be demonstrated in two ways:

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<sup>27</sup> A. R. Brewer-Carias, *supra*, p. 219-220.

<sup>28</sup> See table, Mary L. Volcansek, *supra*, p. 28-29.

The first situation is when a region brings a direct action against national or another region's statute or another act with the force of law<sup>29</sup>.

The second way of demonstrating this method is a preventive one. The Council of Ministers can bring a direct action against regional statutes before their enactment<sup>30</sup>. The enactment of the challenged regional statute must be suspended until a decision is brought. The statute won't be promulgated if it is found to be unconstitutional.

## II The Incidental Method

The Incidental method of Judicial Review is undoubtedly the most important method for keeping statutes within the framework of the Constitution. This is expressly regulated in article 1 of constitutional statute no. 1 of 1948. The incidental method is regulated in detail by statute no. 87 of 1953.

In this method the ordinary judge has the power and a duty to raise issues of constitutionality before the Constitutional Court so as to obtain a binding decision from that body. So the question must be raised by a judge in the course of a judicial proceeding. The proceeding is then suspended until the Court decides the preliminary issue of constitutionality. The constitutional question alleged by the parties to the process or by the Public Prosecutor can be rejected by the judge *a quo* when he considers that it has no relevance or no due foundation. Since the "judge" has all these powers it is very important to see who can be considered a judge in this special meaning.

According to the various sources that regulate this method, there are various terms and norms of relevance to it. The constitutional question must be raised "in the course of a judicial proceeding" by a "judge"<sup>31</sup>, "in the course of a judgment before a judicial authority"<sup>32</sup>. Interpretation of the relevant statute hasn't always been consistent. "In some occasions the opinions, through a broad reading of the notion of 'judge', favored access to the Court, and consequently the abstract and general interest in the legitimacy of the legal order prevailed; in other occasions, the word 'judge' was given a more strict sense, reducing the accessibility to the Court"<sup>33</sup>. According to Vittoria Barsotti and Vincenzo Varano<sup>34</sup>, two different periods can be identified in the Court's case law regarding this issue.

During the first period (1956-1971) in order to annul the great number of fascist laws access to the court was favored and the notion of a "judge" was interpreted in a broad sense. An authority who could raise the issues of constitutionality before the court had to be permanent part of the judiciary and capable of deciding a case. Following this notion of a "judge", the Court gave the right of standing to various bodies such as National Bar Association and Patent and Trademark Commission. A Court also allowed ref-

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<sup>29</sup> Article 2 of constitutional statute no. 1 of 1948.

<sup>30</sup> Article 127 of the Constitution

<sup>31</sup> Constitutional statute no. 1 of 1948, article 1.

<sup>32</sup> Statute 87 of 1953, article 23.

<sup>33</sup> Vittoria Barsotti -Vincenzo Varano, *supra*, p. 614.

<sup>34</sup> Vittoria Barsotti -Vincenzo Varano, *supra*, p. 614-617.

ferals from non-contentious proceedings. Finally, the Court gave itself the right to raise the questions of constitutionality.

From the early seventies, the Court gave the notion of a "judge" a more narrow meaning, requiring not only that the referring authority has to be a part of the judiciary and capable of bringing a final decision over the case, but also that it has to exercise jurisdictional and not administrative functions. The reason for this was the changed position of the Constitutional Court after first twenty years from its constituting. The Court was no longer a new body in a search for its authority. It has been a body so important that it can regulate and limit its jurisdiction. Of course, there was no more need for promoting and encouraging judicial control of legislation.

Besides this, there are two more conditions which are necessary for starting the procedure before the Constitutional Court successfully: the judge *a quo* must verify that the question is relevant for deciding the case and not manifestly unfounded.

The first condition makes an objective connection between the original proceeding and the process before the Constitutional Court. The question of constitutionality can reach the Constitutional Court only if there is a "case or controversy". It is very important to mention that this leads to a way of deciding where constitutionality of statutes is not in doubt *per se*, but in concrete application to an actual case.

The judge *a quo* has also to verify that the constitutional question is not manifestly unfounded. So, he has to play an active role. In the last two decades the Court suggested that judges were abusing and misusing their power by an excessive use. This might lead to the idea of "case selection" which is not accepted, at least formally.

### THE EFFECTS OF THE DECISIONS OF THE CONSTITUTIONAL COURT

The decisions are brought in the following manner: the majority of judges must vote for a decision in order for it to be brought and in a case of tie, president's vote carries the decision. The reporter judge votes first and he is followed by other judges according to age, beginning with the youngest and ending with the president, who votes after the oldest judge. Voting is secret and the prescribed form of the decision is unitary, with neither dissents nor concurrences. A single, undivided form of the decision protects the independence of the Court and insulates judges from political and other pressures<sup>35</sup>.

The decisions can be either judgments (*sentenze*) or decrees (*ordinanze*), with the former constituting a final order that concludes the case, while the latter decides only on procedure or a question, but doesn't settle the case. The decisions of the Constitutional Court have *erga omnes* effect and the act cannot be applied onwards from the day the decision is published<sup>36</sup>. So, the decisions have *ex nunc* effect. The decisions' character is

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<sup>35</sup> Judges voted against Court's rules, and made their positions public at least on two occasions (1980 and 1994), according to Mary L. Volcansek, *supra*, p. 27.

<sup>36</sup> A. R. Brewer-Carias, *supra*, p. 223.

constitutive in a sense that they annul the laws. Although it has *pro-futuro* effect, it produces effect on juridical situations not yet exhausted, when they can still be regulated in a different manner as a consequence of the decision. The decisions can have retroactive effects only when applied in criminal cases or when annulling the statutes already repealed.

This *erga omnes* effect, in our opinion, cannot be applied when the Constitutional Court is rejecting the question of unconstitutionality for relevance to the concrete case and lack of foundation. Although in the latter case it might be said that if the question is manifestly unfounded then it would also be unfounded in the future, *pro futuro* and *erga omnes* effects would be a barrier for possible future challenges. Also, because *erga omnes* effects of courts' decisions are an exception in Italian law and must not be interpreted extensively.

### METHODS OF BROADENING THE CONTROL OF CONSTITUTIONALITY

Every system of judicial review, once the provisions are made for its functioning, moves away from the limits deriving from the original model through the case law. There are a few limits that can be identified in the Italian system of judicial review. The initial model according to Enzo Cheli and Filippo Donati<sup>37</sup> had these limits:

- a) The decision of the Court is abstract and refers to laws that are in conflict with constitutional rules. Judgement on constitutionality should not exceed these limits of just comparing the norms of statutes with the Constitution, without involving the values and interests underlying those norms.
- b) The model excludes the initiative power of the Constitutional Court. All the activities of the Court depend on external factors (especially other judicial bodies).
- c) The judgments of the Italian Constitutional Court have to remain within certain alternatives: they can admit a question and annul the statute or reject it, leaving the statute unchanged.
- d) Within the Court's control of legality the evaluations of political nature are excluded and so is any control of use of discretionary powers of the Parliament.

The same authors<sup>38</sup> state that the Court has, through the case law, moved away from this original set-by-norms model:

- a) In practice, the judgments changed from being judgments on rules to be judgments on principles. The contents of the Italian Constitution are not treated as absolute rules, but rather as principles. The aim is the protection of certain interests or the expression of certain values.

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<sup>37</sup> Enzo Cheli and Filippo Donati, *Methods and Criteria of Judgement on the Question of Rights to Freedom in Italy, Human Rights and Judicial Review*, ed. David M. Beatty, Kluwer Academic Publishers, Netherlands, 1994, p. 232-233.

<sup>38</sup> Enzo Cheli and Filippo Donati, *supra*, p. 233-241.

- b) Trying to overcome the fact that constitutional issues cannot be raised independently, the Court has tended to interpret the terms of the questions proposed. In that way, the Court frequently tried to widen its room for manoeuvre. Sometimes, the Court becomes its own judge *a quo* by raising the preliminary question in the course of its own proceeding. Also, it happens that when the Court already accepts the question of constitutionality, it extends the scope of the annulment, defining which the other rules are whose unconstitutionality follows as a result of the decision.
- c) The Court adopts in many cases "interpretive" decisions: 1) The "judgments of interpretive rejection", which refuse the question as unfounded interpreting it in terms different from those advanced by the judge *a quo* in his referral. These decisions are binding only for the judge who raised the question. 2) The "manipulative judgments" that lead to the formation of a new norm. The effect of this judgment imposes upon judges the application of a norm defined by the Court instead of the one which had been declared unconstitutional.
- d) Although it is against the rules, constitutional review in Italy frequently effects the sphere of discretion of the legislator. Such control regards aims, internal coherence, consistency of laws and other aspects connected to their "reasonableness".

#### **IV CONCLUSION – IS THE ITALIAN SYSTEM OF JUDICIAL REVIEW THE CONCENTRATED OR THE DIFFUSE SYSTEM?**

The answer to this question is far more complicated than it seems. Something has already been implied in the previous parts of this paper, but to determine which system does the Italian system belong to, it is necessary to overview the elements of the two systems and compare them with the Italian.

From the aspect of the main characteristic which divides the two systems, and that is whether there is one single organ empowered to review the legislation or all of the courts have that kind of jurisdiction, the Italian system is the centralized one. Only the Constitutional Court has this power in Italy.

In the centralized systems, the institute of judicial review must be established and regulated by the Constitution. In Italy, the Constitutional Court is established by the Constitution but its work is not entirely regulated by the Constitution. So, this condition is only partly fulfilled. Nevertheless, the establishment of the Constitutional Court by the Constitution is the essence of this characteristic, because only a legislative body can empower a non legislative body to annul the laws and therefore it can be said that the Italian system is the concentrated system from this standpoint.

In the Italian system, the Constitutional Court's judgments have constitutive and *pro-futuro* effects, like in other centralized systems. The laws are annulable and when the court annuls them, they are not valid and effective *ex nunc*. Only in a small number of cases, which were mentioned above, the judgment can have retroactive effect like in many other countries of the centralized system of judicial review.

Regarding the power to initiate judicial review, the Italian system is different from other centralized systems. In the countries that belong to the centralized system the Constitutional Court cannot raise the question of constitutionality. In the Italian system, this question can be raised by the Constitutional Court. This rule is not established by constitutional provisions or provisions of any other kind, but as we have seen, the Constitutional Court has found the ways of initiating judicial review. Also, unlike the countries of the centralized system, where the court can consider questions other than the ones that are already raised, and where this kind of jurisdiction is regulated by law, in the Italian system this jurisdiction is not regulated by law, but it is established through case law. From the aspect of the power to initiate judicial review, it cannot be said that the Italian system is a pure centralized system.

When comparing the Italian system with the centralized (and the diffuse) systems, with taking into consideration whether the character of judicial review is direct or incidental, the most ambiguities of the Italian system can be seen. The traditional distinction between the centralized and the diffuse systems is no longer sufficient. In Italy, the most important way of accessing the Constitutional Court is not direct, but incidental. The decision making process is centralized but the initiative is diffuse. Therefore, the situation is opposite from the majority of centralized systems, where the direct access is a normal way of starting the judicial review and the incidental method is an exception. Despite this, the Italian system could be considered centralized if the next characteristic didn't exist.

Legislative character of the decisions and their *erga omnes* effects is not a rule without an exception in the Italian system of judicial review. When the decisions have legislative character, the question to be decided upon is whether there is a logical compatibility between the statute and the Constitution, or not. The decision is strictly abstract. The law is valid or it is annulled by the judgment. In the Italian system this is not always the case. In some occasions, when the access to the court is incidental, there is an intense relation between the decision of the Court and the concrete case in which the question of the constitutionality occurred. The laws whose constitutionality is doubtful are not examined *per se*, but in their concrete application to an actual controversy. There must be a "case or controversy". The other case of non legislative character of the Court's judgment is when it is making the "interpretive" decisions. In this case, there is no annulment of laws. The "interpretive" decisions have also an influence on *erga omnes* effects of decisions because they are sometimes an exception to this rule. They can sometimes be binding only for the judge *a quo* (for the case in which the question of constitutionality occurred). Also, the decisions don't have *erga omnes* effects when the Constitutional Court is rejecting the question of constitutionality for a lack of relevance to the concrete case and for no foundation.

This comparison of the Italian system of judicial review with the centralized and the diffuse systems leads us to a conclusion: undoubtedly, the Italian system is not a pure centralized system. Although its characteristics at first glance seem to be characteristics of a pure centralized system, when a deeper research is made, many of the characteristics of the diffuse system occur. That especially goes for recent case law developments regarding "interpretive" decisions. Also, it is important to mention once again that the

situation which exists in Italy is not much different than the situation in other European systems of continental law, where it is nowadays very hard to find a pure centralized system. So, the practice has shown that the distinction between the two systems can only be theoretical.

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