JUDICIAL REVIEW IN ITALY

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Abstract: This article addresses the issue of Italian judicial review. An institutional characterization of the Italian Constitutional Court instituted by the Constitution of 1948 is carried out; the incidental and concentrated modalities of judicial review in Italy are dealt with and the evolutionary tendencies of the Italian system are pointed out in the sense of a combination of institutional elements from the American and European Kelsenian models of constitutionality control.

Keywords: Judicial Review; Italy; Constitutional Court

1. THE CONSTITUTIONAL COURT

A constitutional guarantee body provided for in the Italian Constitution of 1948 and installed in 1956 with the prerogative of concentrating the exercise of constitutional review in the Italian Republic, the *Corte Costituzionale* is the body charged with deciding disputes regarding the constitutional legitimacy of laws and acts with the force of law of the State and Regions; concerning conflicts of attribution between the powers of the State, those between the State and the Regions, and between the Regions.

> Article 134 - The Constitutional Court judges:
> all disputes concerning the constitutional legitimacy of laws and acts with the force of law, of the State and Regions; the conflict of attributions between the State powers, between the State and the Regions, and between the Regions; the charges against the President of the Republic, according to with the Constitution (ITALIA, COSTITUZIONE, 1948, author translation).

According to Gianfranco Pasquino, the Constitutional Court

> therefore plays, at the same time, the role of arbitrator between the powers of the State, of the judge who decides on laws, and of guarantor of democracy regarding crimes committed by ministers and the President of the Republic. (PASQUINO, 2011, p. 110, author translation).

Installed in Rome, the Court is located in the Palazzo della Consulta, next to the Palazzo del Quirinale (official residence of the Head of State). Even its geographical location and its vicinity have been remembered as indicative of the position occupied by the Constitutional Court in the Italian political system:

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> A good choice for the central office, not only because the building of the 19th century is an architectural work of beauty but also because its location symbolically expresses the position of the Constitutional Court: on the highest hill in Rome, face-to-face with the Palazzo del Quirinale, the seat of the President of the Republic, the highest representative institution, and, in turn, especially - as a Court - with the function of guarantee; however, relatively far from the palaces of the "political" Rome (Montecitorio and the Palazzo Madama, seats of both Houses, the Palazzo Chigi, seat of the Presidency of the Council of Ministers, which is the very top of the Government, the many ministries), and the "judicial" Rome (for example, the "Palazzaccio", seat of the Court of Cassation, that is, to the summit of the judiciary) (CORTE CONSTITUZIONALE, 2016, p. 16, author translation).

The Court consists of 15 judges serving a term of nine years: five elected by Parliament; five elected by the Head of State; and five elected by the supreme ordinary and administrative judiciary, of which three come from the Corte Suprema Di Cassazione (Supreme Court of Cassation), one from the Consiglio di Stato (Council of State), and one from the Corte dei Conti (Court of Accounts), as established in article 135 of the Constitution of the Italian Republic in conjunction with Law nº 87 of March 11th, 1953 and the Constitutional Law n. 2 of November 22nd, 1967.

Introduced into the constitutional system of the Italian State in the transition from fascist dictatorship to democracy at the end of World War II, the Constitutional Court finds no parallel in any Italian institution prior to the Constitution of 1948.

Before the entry into force of the Constitution of 1948 in Italy, the Statute of the Kingdom, denominated the Fundamental Statute of the Monarchy of Savoy, of March 4th, 1848, known as the Albertino Statute (Statuto Albertino) – because it was enacted by Carlo Alberto di Savoia, King of Sardinia. The Albertine Statute defined a form of government embodied in a constitutional monarchy, characterized by having been a flexible Constitution, subject to modifications through ordinary laws. Additionally, the Albertine Statute did not provide for a constitutional control of laws and normative acts, so that a court could not refuse to apply a law for considering it unconstitutional, which would be interpreted as a violation of the principle of separation of powers.

According to Carlo Guarnieri,

> Italy, like the rest of the countries of continental Europe, did not know a judicial constitutional control. According to the Albertino Statute, in the Constitution in force in our country before 1948, a court could not refuse to apply a law for considering it unconstitutional, contradicting the Constitution, nor declare it as such and therefore cancel it from the scope of legal norms. Such an attempt would have been interpreted as a serious violation of the principle of separation of powers. (GUARNIERI, 2011, p. 28, author translation).

It is important to consider, in any attempt to understand the reasons that led to the creation of the Constitutional Court in Italy, certain characteristics of the Italian Judiciary Branch at the time of the introduction of concentrated constitutional control. According to Carlo Guarnieri,

unlike what happens in countries of common law, the Italian courts were not – and are not - obliged to respect jurisprudential precedents. At least in theory, there could be differences in guidelines between the Court of Cassation - the top body of the Italian Judiciary Branch - and the lower courts; differences that could have strongly negative consequences. Moreover, the Italian courts did not even possess the moral authority and prestige of the courts of common law, especially of the US federal judiciary. Furthermore, it was unlikely that the judges of that time could interpret the anti-fascist constitution in the spirit of the Founding Fathers since they were educated, recruited, and even promoted during the fascist period. And yet, it was expected to obtain from the ordinary magistracy the traditional subordination to laws when entrusting the prerogative of declaring the unconstitutionality of a law to a separate court (GUARNIERI, 2011, p. 29).

Not by chance, other European countries, such as Germany (1949) and France (1958), will adopt similar constitutional solutions at the end of World War II by creating kelsenian-inspired courts in their legal systems. This was the shift from an institutional arrangement based on the principle of the supremacy of Parliament towards another institutional model based on the principle of the supremacy of the Constitution. It occurs in a context marked by a pessimistic view regarding the possibility of assigning the competence to decide on the constitutionality laws exclusively to the Legislative Branch. Such a solution increasingly tends to be seen as unsatisfactory since, as demonstrated by fascism, a legislative branch devoid of control, even following formally legal procedures, can easily lead to the contortion of the democratic regime.

The relatively late nature of the introduction and diffusion of constitutionality control in Europe stemmed in part from an association between the notion of popular sovereignty and the supremacy of Parliament that was asserted from the French Revolution of 1789. Hence a hostility towards any kind of control, especially of constitutionality, exercised by an extra-parliamentary body.

> The European delay in relation to the American system may be linked to the influence of French revolutionary doctrine on the political arrangements of many continental systems, fueling its tendency to concentrate power rather than divide it (...). The emphasis that Jacobin ideology places on popular sovereignty and the institutions that express it leads to the affirmation of the supremacy of assemblies and, ultimately, of majority rule. (...) What is consolidated on the continent is a pyramidal arrangement that formally affirms the primacy of Parliament (...) and also sustains it by subordinating the judge to its will, or rather, to the will of the law. (PEDERZOLI, 2008, p. 21-22, author translation).

The current Constitution, unlike the Albertine Statute, is considered a rigid Constitution. In other words, it is modifiable only through a relatively complex procedure, and some of its provisions cannot be subject to constitutional revision, as established in article 139, ipsis litteris: "The republican form cannot be the subject of constitutional revision." Moreover, the doctrine

almost unanimously understands that the democratic nature of the Constitution, expressed in the rights of freedom of citizens, can be affected and transformed by a constitutional revision.

The complexity of the procedure for revising the Constitution outlined in article 138 is intended to ensure that Parliament expresses itself in a thoughtful manner, not under emotional or acquired urgencies, and that the intervention of a plurality of actors is also possible (PASQUINO, 2011, p.111). According to article 138 of the Italian Constitution

> The laws for the revision of the Constitution and other constitutional laws are adopted by each House with two successive deliberations with an interval of not less than three months, and are approved by an absolute majority of the members of each House on the second vote.
> The laws themselves are subject to a popular referendum when, within three months of their publication, a fifth of the members of a House or five hundred thousand voters or five Regional Councils request it. The law submitted to a referendum is not enacted if it is not approved by a majority of valid votes. No referendum is held if the law was passed on the second vote of each of the Houses by a two-thirds majority of its members (ITALIA, COSTITUZIONE, 1948, author translation).

2. CONSTITUTIONALITY CONTROL

What are the legitimate actors in the Italian legal system to invoke the jurisdiction of the Court? What are the forms to access the Court? When is the constitutional control carried out? These questions are answered both in the text of the Italian Constitution and in the Italian infra-constitutional legislation.

In Italy, the judicial control of constitutional legitimacy of laws and normative acts is characterized as concentrated in the Constitutional Court and has a repressive (later), or preventive (prior) character depending on the time at which it is carried out, whether before or after the entry into force of laws or normative acts subject to control.

2.1 Incidental control

Incidenter tantum constitutional control is always repressive (posterior). It is governed by article 1 of Constitutional Law n.1 of February 9th, 1948, which determines that the question of constitutional legitimacy detected of ex officio or raised by one of the parties in the course of a judicial process shall be referred to the Constitutional Court, provided the judges do not find it manifestly unfounded. The article provides:

> Art. 1 - The question of constitutional legitimacy of a law or a normative act of the Republic, raised ex officio or presented by one of the parties in the course of the process and not considered by the judge as manifestly unfounded, is referred to the Constitutional Court for its decision (Italy, Constitutional Law nº 1, 1948, author translation).

Additionally, article 23 of Law 11 of March 1953, n. 87, allows the Public Prosecutor's Office to present to the judicial authority the question of constitutional legitimacy, in addition to the parties, through a specific request that must indicate the provisions of the Constitution or

constitutional law that were allegedly violated.

> Art. 23 - In the course of a trial before a judicial authority, one of the parties or the Public Prosecutor's Office may present a question of constitutional legitimacy by means of a specific request indicating:
> (...)
> b) the provisions of the Constitution or constitutional laws presumed to have been violated (...) (ITALY, 1953, n.87, author translation).

The Public Prosecutor's Office, from the perspective of the proposition of incidental issues, is not assimilated to the judge but to the parties. Thus, its initiative in the incidental proceedings is not direct but must necessarily undergo the judge's control, before whom the proceedings are conducted (ZAGREBELSKY and MARCENÒ, 2012, p.281).

Once the question of constitutional legitimacy of a law or normative act is argued by the parties, the judge, according to article 1 of the Constitutional Law n. 1 of 1948, shall analyze whether the question raised is not manifestly unfounded, only then to refer it to the Constitutional Court. In other words, the magistrate conducts a kind of judgment on the admissibility of the question of constitutionality.

Therefore, the competent judge shall prevent the continuation of the party's initiative in cases where the question is irrelevant or manifestly unfounded, or, otherwise, open the access road to the Constitutional Court (ZAGREBELSKY and MARCENÒ, 2012, p.295).

In the characterization of the Italian system by Pasquale Pasquino:

> In the Italian constitutional system, sending to the Constitutional Court is almost monopolized by ordinary courts. Judges send cases they have to decide to the specialized body called the during his residency, in Rome, whenever they have a "reasonable doubt" [non manifesta infondatezza] regarding the constitutionality of the law they - the ordinary judges - must apply. More specifically, when they think that applying the law will produce some kind of injustice (not just a contradiction between higher and lower norms, to speak as the kelsenian legal theorists). (PASQUINO, 2001, p. 3, author translation).

In the words of Patrizia Pederzoli:

> Incidental control imposes strict restrictions on the individual, who can only challenge the law by judicial means, provided he/she is part of a process (...). The doubts of constitutionality that may be presented here must therefore have some basis and not be, for example, an excuse and employ only useful legislative provisions to resolve the dispute. The common judge assesses these two requirements, the "unclear lack of basis" and the "relevance". If persuaded, he/she must suspend the proceedings and motivate them by sending it to activate the Court. Therefore, the opportunity for individuals to obtain a judgment on the law to be applied to the dispute depends on their discretionary decision. More importantly, the judge can promote a question of constitutional legitimacy ex officio, without being asked by the parties, explaining its relevance and rationale. If in the first case he/she selects the issues that will come to the Court, exercising a power of veto and, in any case, filtering the arguments presented in court, in the second, he/she poses as an actor who intervenes with full autonomy and own initiative. Therefore, it is a function of particular importance, which leads him/her to define the agenda of

> constitutional justice and be its "gatekeeper" (...) at least within the framework of that procedure. (PEDERZOLI, 2008, p. 52-53, author translation).

The relevance of the question of constitutional legitimacy able to be referred to the Court expresses an objective connection between the question and the process a quo. This relationship concerns the fact that the issue must be directly connected with the concrete case. In other words, its resolution must depend on the judgment of the legitimacy of the constitutional question that was detected by the judge or argued by the party.

It is noted that the decision denying the exception of constitutional illegitimacy understanding it as manifestly irrelevant or unfounded, must be duly motivated, and the exception may be proposed again in each subsequent degree of jurisdiction, according to article 24 of the Constitutional Law n.87 of March 11th, 1953:

> Art. 24 - The act that rejects the exception of constitutional illegitimacy for manifest irrelevance or lack of grounds must be adequately motivated. The exception may be proposed again at the beginning of each subsequent grade of the procedure (Italy, LEGGE CONSTITUZIONALE 11 marzo 1953, n.87, author translation).

The question of constitutionality does not exist for itself in the establishment process of the judgment of constitutional in the incidental or exception pathways but is, in fact, a procedural event or exception in the course of judicial proceedings; the procedure is concrete because the law is considered in the moment and during its application; it is in general for considering all the applicable laws at the time of their application; and, finally, it is unavailable since the judge must promote it when the conditions are met (ZAGREBELSKY; MARCENÒ, 2012, p. 268).

Concerning the incidental initiative of instituting a judgment of constitutional control, first, the question of constitutionality must arise in the course of a proceeding before a judicial authority (article 1 of Constitutional Law n.1 of 1948 and article 23 of Law n.87 of 1953), and the parties shall raise it to the judge or the judge shall detect it ex officio.

There is a fundamental difference between the two initiatives: the power of the parties is indirect, and that of the judge is direct. The parties to the proceedings, in fact, only raise the question before the judge of the case, and the latter, verifying that the question is not manifestly unfounded, transmits it to the Constitutional Court; the judge, on the contrary, when faced with a question of constitutional legitimacy, promotes it directly before the Court (ZAGREBELSKY and MARCENÒ, 2012).

It is precisely because of the impossibility for the parties to appeal directly to the Court that it is often said that the initiative in the incidental proceedings is always and only for the judge of the case, ex officio or provoked by the parties.

Gustavo Zagrebelsky and Valeria Marcenò (2012, p. 279, 280) state that this perspective is valid only when the establishment of the constitutionality judgment is analyzed from an angle external to the initiative of the quo judgment: from the perspective of the Court, the act of impulse

of the constitutionality judgment is the judge's, and only the judge's. If, however, the events of the case are examined dall'interno, it is clear that the two initiatives (of the parties and the judge) cannot be confused. Double legitimization corresponds to a double *ratio*:

a) for the parties, the issue is configured as an instrument of defense of constitutionally-protected rights and interests, in accordance with the right of action provided for in article 24 of the Italian Constitution. Such a right of action is direct in relation to the judge a quo and indirect (through him/her) before the Constitutional Court. With the question of constitutionality, the parties seek the protection of their own *iura*, against *lex* (considered) unconstitutional;

b) for the judge, his/her subjective considerations are not in discussion; he/she is interested in defending his/her institutional position, the position of intermediation between law and Constitution. By presenting the question of constitutionality ex officio, the judge not only cares about an abstract coherence of the legal system but defends a position that is guaranteed to him/her, not as a bureaucratic executor of the law but as an interpreter and guarantor of a deeper meaning of the law, in a state governed by a rigid Constitution.

The separation of legitimations is necessary, as argued by Zagrebelsky and Marcenò (2012, p. 80) because the judicial defense of individual rights entrusted paternalistically to diverse subjects would not be admissible, although operating in view of objective institutional requirements: the right of action is guaranteed by article 24 of the Constitution as a right to personal and direct exercise.

> Art. 24 - All can act in court for the protection of their own rights and legitimate interests.
> Defense is an inviolable right in all stages and degrees of the procedure.
> The means to act and defend oneself before any jurisdiction are assured to the needy, with appropriate institutes.
> The law determines the conditions and methods for redress of judicial errors (ITALIA, COSTITUZIONE, 1948, author translation).

Finally, for the control carried out through the incidental pathway, the constitutional procedure is instituted when the order of remittance (article 23 of Law n. 87 of 1953) reaches the Court and after being subjected to a preliminary control of regularity carried out by its President, fully developing without any interference of the judgment a quo. The original procedural relationship does not stand in front of the constitutionality judgment, addressing judgments highly diverse in their objects, characters, and subjects. As already mentioned, the procedure before the Court is of objective law, where the principle of officiality prevails and the need to establish a procedural relationship between the party and the judge is waived. However, it is noted that having begun the incident of unconstitutionality, one can carry out an adversary proceeding with the recognition of procedural rights to subjects who, in various qualities, intervene in the case.

2.2 Primary pathway control

Such a constitutional control procedure, provided for directly in the Italian Constitution, is promoted through the primary or action pathway since the question of the constitutionality occurs as an ad hoc process; it is abstract since the law or contested acts are considered by their prescribing, regardless of their practical application; it is specific, with the operating control not incident on the unconstitutionality of laws and acts in general but on the incompetence of the entities responsible for their issuance; and, finally, it is available since the entities involved can (a power) or not use its powers of appeal to the Court.

> Much of what has been said regarding the effectiveness or object of the judgment also applies to abstract control or primary pathway, thus defined because it is requested by specific authorities, without being mediated by the common judge and, therefore, referred to rules not yet contested in a proceeding (PEDERZOLI, 2008, p. 61, author translation).

There are three hypotheses of constitutionality control in the Italian system that are exercised in the primary or action pathway.

The first is inserted in the Italian legal system through Constitutional Law n.1 of November 22nd, 1999, which amended article 123 of the Italian Constitution and allowed the Italian Government to argue, before the Constitutional Court, the constitutional illegitimacy of regional statutes (which determines the form of government and the fundamental principles of organization and functioning of each region) within thirty days after its publication. The preventive character was understood as such by the Constitutional Court with sentence n. 304 of 2002. Article 123 of the Italian Constitution provides:

> Art. 123 - Each region has a statute in harmony with the Constitution that establishes the form of government and its fundamental principles of organization and functioning.
> The statute regulates the exercise of the right of initiative and the referendum on the laws and administrative provisions of the region and the publication of regional laws and regulations.
> The statute is approved and modified by the Regional Council with a law approved by the absolute majority of its members in two successive deliberations adopted at intervals of not less than two months.
> For this law, it is unnecessary to affix the view by the Government Commissioner.
> The Government of the Republic may bring the question of constitutional legitimacy on the regional statutes before the Constitutional Court within thirty days after its publication.
> The statute is submitted to a popular referendum when, within three months of its publication, it is requested by a fiftieth of the voters of the region or a fifth of the members of the Regional Council. The law submitted to a referendum is not enacted if it is not approved by a majority of valid votes (...) (ITALIA, 1948, author translation).

In the midst of the controversy regarding the repressive or preventive character of the Constitutional Control sanctioned by article 123 of the Italian Constitution, Gustavo Zagrebelsky and Valeria Marcenò (2012, p. 334-335) state:

> Since the entry into force of the new constitutional provision, the question has been raised regarding the preventive or subsequent character of control over the regional statutes. This occurs because article 123 of the Constitution sets the deadline for the presentation of the government's appeal "of the publication" of the statutes. What "publication"? The question was not trivial, involving the relationship between the aggravated procedure for the formation of statutory law and the procedure for controlling its constitutional legitimacy. Both procedures refer to terms that occur "since the publication" of the act (within three months of publication, a popular referendum may be requested, and within thirty days of publication, a government appeal may be filed). However, in the first case, even by analogy with the process provided for the formation of constitutional laws (article 138 Const.), this is certainly a "news" publication, which is made before the consummation of the procedure to allow the initiative of the referendum; however, nothing is explicitly said in the second case. The result of this is that, concerning the publication-news, the control of the constitutionality of the statutory law is prior to the holding of the referendum (and, therefore, the outcome is not likely to collide with a possible will to the contrary expressed by the public); Referring to the effect of the publication, constitutional control becomes subsequent to the referendum, with the possibility of a contradiction between the results of one and the other. (...) The interpretative question (...) was resolved by the Court (...). It stated that "the deadline to promote the control of constitutional legitimacy begins from the "news" advertising of the statutory resolution and not from that subsequent to the enactment, which is a condition for entry into force" (...) The control is therefore preventive: it precedes the occasional referendum (author translation).

The second hypothesis of primary pathway constitutional control by the Constitutional Court is of a repressive (later) type and is provided for in article 127 of the Italian Constitution, which addresses the possibility of the Government promoting the issue of constitutionality before the Constitutional Court within a period of sixty (60) days of its publication when it deems that a regional law exceeded the jurisdiction of the Region; and the regions can also promote a question of constitutionality before the Constitutional Court within a period of sixty (60) days of the publication of the law or act when they believe such law or normative act of the State or another Region interferes in its sphere of jurisdiction:

> Art. 127 - The Government may raise the issue of constitutional legitimacy before the Constitutional Court within sixty days of its publication when it considers that a regional law exceeds the jurisdiction of the region.
> When a Region considers that a law or normative act of the State or another Region offends its sphere of jurisdiction, it can promote the issue of constitutional legitimacy before the Constitutional Court within sixty days of the publication of the law or normative act (ITALIA, 1948, author translation).

Regarding the constitutional appeals of the State against the Regions and of the Regions against the State, Gustavo Zagrebelsky and Valeria Marcenò (2012, p. 321) state:

> The control instituted after the appeal is a subsequent control, as is clearly deduced from the formulation of the constitutional provision, which is carried out in laws, state or regional, after they have entered into force.

In turn, the constitutionality judgment exercised in primary pathway is considered instituted when the appeal is filed with the secretariat of the Constitutional Court and exceeds the

preliminary control of regularity, in accordance with article 23 of the Integrative Rules for Trials before the Constitutional Court, of March 16th, 1956.

When deciding the merits of the question of constitutional legitimacy, the Court can adopt two positions: the rejection, (*rigetto*) or the reception, through the so-called *sentenza de accoglimento*. In the first case, nothing changes and the law remains in force, but in the second, the law is eliminated. The sentence declaring the law unconstitutional can be considered as a decision that finds and removes a state of doubt, definitively and officially sanctioning a pre-existing defect.

The effect of the decision declaring the constitutional illegitimacy of a law or normative act is established in article 136 of the Constitution of the Italian Republic, according to which the declaration of unconstitutionality causes the loss of effectiveness of the law or act contrary to the Constitution.

> Art. 136. When the Court declares the constitutional illegitimacy of a law or normative act, the law ceases to have effect from the day following the publication of the decision.
> The Court decision is published and communicated to the Regional Houses and Councils concerned, so that they proceed in accordance with the constitutional forms when they deem it necessary (ITALY 1948, author translation).

The Court is not expected to rule on the consequences of the declaration of unconstitutionality: the Court addresses the declaration of illegitimacy of a provision but cannot manage the effects resulting from this declaration (ZAGREBELSKY; MARCENÒ, 2012, p. 346).

The law or act declared unconstitutional loses its effectiveness from the day after the publication of the decision that declared its unconstitutionality, and no event subsequent to the publication is suitable to confer new effectiveness to the law declared unconstitutional (article 136 of the Italian Constitution), which suggests a general effect for the future, i.e., *ex nunc*, since the declaration of unconstitutionality influences the situations and legal relations after the publication of the decision but not those that arose previously. This was certainly and unequivocally the intention of the Constituent (ZAGREBELSKY and MARCENÒ, 2012, p.346).

It happens that, when analyzing the effect provided for in article 136 of the Italian Constitution regarding the aspect of the judgment a *quo*, if the unconstitutionality decision through the primary pathway could only effect after its publication, surely nor the judge or the parties would have an interest in promoting the issue of the constitutionality, given that, regardless of the decision made by the Constitutional Court, the judgment a quo would apply in the case of the law in force at the time of the judgment.

This incongruity was considered by article 30 of Law nº 87 of 1953, which established that, from the day following publication, the law declared unconstitutional may not have application.

As Gustavo Zagrebelsky and Valeria Marcenò assert (2012, p. 350, 351), both formulas (cessation of effectiveness and non-application of the law declared unconstitutional) are not equivalent; in fact, they are expressions of two different understandings: the Constituent aimed to limit the effect of the declaration of unconstitutionality with article 136 to situations after the decision of the Court; and the legislator sought to avoid, as far as possible, the application of the law recognized as unconstitutional with article 30. Although they are not equivalent, both norms are not contradictory. There is an integration relationship between them. Article 136 – with the expression "cessation of effectiveness" – regulates the future and abstract effects of the decision of unconstitutionality on the validity of the law in general; article 30 – with the expression "non – application" - regulates the effects on past and concrete relations in specific judgments that concern it.

The effect of the decision of the Constitutional Court is, therefore, for the future, a substantial effect analogous to abrogation, and for the past, a procedural effect that is naturally reflected on the plane of the substantial relationships in progress. This reflection opens the road to the considered retroactivity of the effects of the declaration of unconstitutionality on the control of Italian constitutionality.

However, it is noted that, although the retroactive effects of the decision of unconstitutionality operate, as a rule, on the procedural relations in progress, that is, pending, article 30 of Law n.87 of 1953 opens an exception that allows these retroactive effects to reach exhausted legal relationships, which is retroactivity in criminal matters. Thus, convictions, even if res judicata, cease their execution and production of effects when the law that gave rise to the conviction sentence was declared unconstitutional.

This is what article 30 of Law n. 87 of 1953 provides:

> Art. 30. The sentence declaring the illegitimacy of the constitutional law or normative act of a State or a Region within a period of two days from its filing in the Secretariat is transmitted ex officio to the Minister of Justice or the President of the Regional Council to proceed immediately and within a maximum of ten days, with the publication of the provision in the same manner prescribed for the publication of the act declared unconstitutional.
> The sentence, within two days from the date of filing, shall also be communicated to the Regional Houses and Councils concerned, so that they adopt the measures within their jurisdiction when they deem it necessary.
> The rules declared unconstitutional cannot be applied from the day following the publication of the decision.
> Where an irrevocable conviction sentence has been rendered in accordance with the provision declared unconstitutional, its execution and all its criminal effects cease (ITALIA 1953, author translation).

Finally, a third distinct form of control by the primary pathway occurs regarding the constitutional control exercised, preventively, in the case of the hypothesis provided for in article 75 of the Italian Constitution and governed by the Constitutional Law n. 1 of March 11th, 1953; and by the Law of May 25th, 1970, n. 352, regarding the figure of the abrogative referendum

(*referendum abrogativo).*

According to the legal provisions, a popular referendum will be held to decide on the total or partial abrogation of a law or a normative act, when requested by five hundred thousand voters or five Regional Councils. The Constitutional Court (after communication from the competent body of the *Corte di cassazione* regarding the legitimacy of the referendum request, that is, that it meets the legal and procedural requirements listed in the Law May 25th, 1970, n. 352) shall decide whether the request for a *repeal referendum* is admissible under the second command of article 75 of the Constitution, which prohibits this type of referendum for tax and budget laws, amnesty and pardon, and authorization to ratify international treaties.

> Article 75 - The popular plebiscite is held to deliberate on the repeal, in whole or in part, of a law or an act that has the force of law, when five hundred thousand voters or five Regional Councils request it.
> The referendum on tax and budget laws, amnesty and pardon, and authorization to ratify international treaties are not allowed. All citizens called to elect the Chamber of Deputies have the right to participate in the referendum (ITALIA, 1948, author translation).

In turn, Constitutional Law n. 1 of March 11th, 1953, provides that

> Art. 2 - The Constitutional Court shall judge whether plebiscite requests submitted pursuant to article 75 of the Constitution are admissible pursuant to the second paragraph of the same article. The modalities of this judgment shall be established by the law that will govern the holding of the popular referendum (ITALIA 1953, author translation).

The specific control of constitutional legitimacy of *repeal referendum* is carried out mainly in the primary pathway since, in this case, the Constitutional Court shall analyze the admissibility of the instrument of popular sovereignty, which must comply with article 75 of the Italian Constitution.

3. ITALY: A KELSENIAN-TYPE CONSTITUTIONAL COURT?

When one examines the different contemporary democratic systems from a comparative perspective, one of the most important institutional variations perceived concerns the distinction between, on the one hand, those systems based on the principle of the sovereignty of Parliament, and on the other hand, those systems based on the principle of the sovereignty of the Constitution. In the first, the parliament is sovereign in its decisions, while in the latter, the Constitution is sovereign (SWEET, 2008; MENDES; BRANCO, 2012).

What is observed is the existence of different constitutional models, and the systems founded on the principle of the sovereignty of the Constitution present substantial restrictions on the exercise of public authority - in the form of constitutional rights - and establish an independent judicial means of enforcing rights, even against the legislative. Legislative sovereignty is expressly rejected.

In the systems founded on the supremacy of the Constitution, faced with an antinomy of legal norms that oppose the Constitution to any other norm, the conflict must always be resolved in favor of the prevalence of a hierarchically higher constitutional norm. In this consists the so-called constitutional control. It remains to be seen which institution, and under what conditions, such a prerogative will be vested in.

In response to this question, the bipolar opposition American system vs. European-kelsenian system of constitutional control is recurrent and widely known. In terms of the opposition, the American system is characterized as being diffuse, incidental, with *inter-parties* and declarative (*ex tunc*). The European-kelsenian system, on the other hand, is concentrated, in the primary pathway, with *erga omnes* and constituent (*ex nunc*) effects.

Notwithstanding its didactic character, as a facilitator of the mapping of institutional diversity that characterizes the phenomenon of constitutionality control in the various political systems in which it is present, the American system x European-kelsenian system dichotomy has been questioned in the light of the evolutionary conformation of the different bodies responsible for constitutional jurisdiction in those systems founded on the principle of the supremacy of the Constitution.

In Europe, there is a convergent tendency among the constitutionality control bodies of different countries towards the conjugation of elements that were a constitutive part of the original conception of one or the other of both (American and European-kelsenian) constitutionality control systems. In the synthesis of Segado,

> La enorme expansión de la justicia constitucional ha propiciado uma mixtura e hibridación de modelos, que se ha unido al proceso preexistente de progresiva convergencia entre los elementos, supuestamente contrapuestos antaño, de los dos tradicionales sistemas de control de la constitucionalidad de los actos del poder.
> La resultante de todo ello es la pérdida de gran parte de su utilidad analítica de la tan generalmente asumida bipolaridad "modelo americano versus modelo europeo-kelseniano". Como dice Rubio Llorente, hablar hoy de un sistema europeo carece de sentido porque hay más diferencias entre lós sistemas de justicia constitucional existentes en Europa que entre algunos de ellos y el norteamericano. (SEGADO, 2003, p. 58).

Something similar is also observed in Brazil throughout the evolution of our constitutionality control. The Constitution of 1891 enshrines the adoption of the diffuse and incidental model imported from the United States that will remain to this day, while the primary pathway concentrated control (kelsenian European model) will be incorporated into our system of constitutional control with Constitutional Amendment nº 16/65 to the Constitution of 1946.

Although it has maintained such a hybrid system, the Constitution of 1988 has brought important innovations in our constitutional control system that allow us to identify a clear evolutionary tendency towards the extension of abstract and concentrated constitutional jurisdiction exercised by the Supreme Court. Some of the innovations contained in the

Constitution of 1988 increased the centrality and especially promoted the expansion of the prerogatives of the Supreme Court, such as the expansion of the role of those allowed to propose direct action of unconstitutionality (article 103); the introduction of unconstitutionality control mechanisms by omission (article 103, paragraph 2, and article 5, LXXI); the provision of a mechanism for arguing non-compliance with a fundamental precept (article 102, paragraph 1); and the Supreme Court was granted the possibility of producing binding precedents (article 103-A) that strengthen the authority of court decisions before the lower instances of the Judiciary Branch (BARROSO, 2012; Mendes; White, 2014). In this sense,

> Therefore, the Constitution of 1988 no longer gave emphasis to the diffuse or incident system but to the concentrated model since practically all the relevant constitutional controversies began to be submitted to the Supreme Court through a process of abstract control of norms. The broad legitimation, the promptness, and speed of this procedural model, including the possibility of immediately suspending the effectiveness of the normative act questioned, upon request for precautionary measures, constitute an explanatory element of this tendency (MENDES and BRANCO, 2014, p. 995).

I - In the Italian case, a first institutional feature that distances its constitutional jurisdiction from the model proposed by Kelsen, without, however, equating it with the American model concerns the mitigation of the monopoly of the exercise of concentrated constitutional control by the Constitutional Court. After Austria (1929), Italy (1948), and Germany (1949) in the post-Second World War and Spain (1978), there was an evolution in the direction of mitigating the contrast between the American system and the European-kelsenian system of constitutional control (SEGADO, 2003; FAVOREAU, 2004).

This phenomenon is the result of a combination between the incidental control technique (American system) and the concentrated control technique (European-kelsenian system) through the institute of *pregiudizialità*. According to Cappelletti:

> It is clear that, in this way, the Italian and German systems put into practice a notable approximation of the American judicial review system under the "modal" aspect we are examining, because, while, in Italy, and Germany not all judges are competent to perform the constitutional control like in the United States, all are, at least, entitled to request such a control from the Constitutional Court on the occasion of the concrete cases they must judge (CAPPELLETTI, 1992, p. 110-111).

In the Italian case, this occurs, as seen previously, by virtue of the constitutional control *incidenter tantum*. In this hypothesis, the question of constitutional legitimacy detected ex officio or raised by one of the parties or by the Public Prosecutor in the course of a judicial process is referred to the Constitutional Court for decision, provided it is not understood by the judge as manifestly unfounded. According to Groppi:

> Por lo tanto, también en los sistemas de justicia constitucional concentrada como los europeos, los jueces comunes están desvinculados de la obligación

> de aplicar siempre y en todo caso la ley cuando la consideren inconstitucional: cierto, no pueden desaplicarla, como sucede en los sistemas de control difuso, pero se establece una tercera vía, intermedia entre la obligación de aplicarla y la posibilidad de no aplicarla, que permite al juez suspender el proceso y remitir la cuestión de inconstitucionalidad, en vía incidental, al juez especial. (GROPPI, 2005).

It is important to note that European systems do not accept the diffuse nature of the exercise of constitutional jurisdiction characteristic of the American experience. In the name of the "legislator privilege", the common judge cannot fail to apply the law, which is a product of Parliament subject to a special judge.

> Más allá de las clasificaciones, siempre opinables, debe subrayarse que el modelo europeo de justicia constitucional, a pesar de la presencia en él de elementos propios del modelo estadounidense a causa de la introducción del control concreto, continúa negando a los jueces comunes la posibilidad de desaplicar las leyes contrarias a la Constitución: en otros términos, continúa existiendo un sistema "de privilegio del legislador". Lo que se introduce con la experiencia alemana e italiana, mediante el control concreto, es la posibilidad, para los jueces comunes, de "rebelarse" contra las leyes inconstitucionales, dirigiéndose al juez especial del legislador. Esta posibilidad hoy está presente, con la única excepción de Francia, en todos los sistemas europeos y puede por tanto ser considerada justamente una característica del modelo europeo de justicia constitucional (GROPPI, 2005).

In this case, the question of constitutional legitimacy always implies a double judgment of constitutionality: a provisional and negative one formulated by the court that refers the question to the Constitutional Court, and a definitive one, formulated by the Constitutional Court, which may or may not coincide with that first judgment. Thus, there is the introduction of a diffuse component in the Italian constitutional control, alien to the original kelsenian formulation.

In terms put by Gustavo Zagrebelsky and Valeria Marcenò:

> [...] the choice in favor of the introduction of incidental judgment on the laws has put in crisis, in some important aspects, the "purity", so to speak, of the characters of the concentrated system, and the judgment can be promoted by "diffuse" initiatives originating from judgments pending before ordinary judges. This graft made some characteristics of the abstractly considered concentrated model no longer sustainable and inserted into it some aspects of diffuse control (...)
> These aspects of the system adopted in Italy certainly shortened the distances between the "concentrated" system as originally conceived and the diffuse system, but did not eliminate them completely (ZAGREBELSKY and MARCENÒ, 2012, p. 264, author translation).

II - As a consequence of the mitigation of the concentrated constitutional control by the Constitutional Court, a second aspect of the Italian constitutional control that places it halfway between the American model and the original kelsenian formulation relates to the incidental or main character of the constitutional control by the Constitutional Court.

In this case, the institute of *pregiudizialità* in the Italian system of constitutional control introduces an incidental element that contradicts Kelsen's formulations concerning the differences

between the American system and the new model of whose formulation he, Kelsen, would become the main architect.

> (...) the establishment of constitutional judgment and, therefore, the implementation of an objective mechanism of guarantee, with a general meaning (the control of the constitutional legitimacy of the law as such), are subordinate to a specific condition, which coincides with the usefulness of the issue for resolving a specific dispute (the guarantee of subjective legal positions, discussed in court). The concrete matrix of the issue manifests here (that is, its origin in a singular controversy), s does its specific purpose (that is, its destination toward resolving the controversy) (...) (ZAGREBELSKY; MARCENÒ, 2012, p. 283-284, author translation).

As mentioned earlier, in the context of a specific case, the judge a quo controls the possibility of access to the Constitutional Court insofar as it is up to him/her to decide on the formulation and send the question of constitutionality to the Constitutional Court. With this, there is something that can be qualified as a process of achieving the constitutional control in that the Constitutional Court is called to decide preliminary questions raised in the context of concrete cases, which causes such preliminary questions to affect Court decisions, based on how the questions are formulated (GROPPI, 2010).

In the assessment of Pizzorusso:

> If one views the evolution that constitutional control has received in Italy since its introduction, it seems indisputable that the rate of "concreteness" it has assumed is overall higher than what could be expected based on the preparatory work of the Constitution and the laws that implemented constitutional justice. This is the case not only due to the clear prevalence that incidental judgment in practice has assumed in relation to the main judgment (which is limited to state-region controversies) but also by the conformation given by the Court to the incidental judgment (and, surprisingly, even for judgments on conflicts of attributions). Although the Constitutional Court has sometimes oscillated between a rigorous conception of the "relevance" of the question regarding the judgment a quo (in any case clearly prevailing, both in jurisprudence and doctrine) and a more open conception, its configuration as a condition of admissibility of the question proposed to the Court made - in my opinion, correctly – of the incidental judgment a concentrated but concrete judgment (PIZZORUSSO, 2006, P. 8, author translation).

III - The nature of the effects of the Italian Constitutional Court decisions also refer to a relative departure from the Italian experience of the kelsenian model of constitutional justice. In the Italian legal system, as it happens in many other countries such as Germany, Spain, and Portugal, rather than absolute adherence to the theory of the annulability of constitutive character and with *ex nunc* effects of the norm considered unconstitutional (kelsenian model), the nullity of a declaratory character with *ex tunc* effects is admitted of the unconstitutional norm (American model).

> La introducción del juicio concreto en sistemas concentrados determina relevantes efectos también sobre las sentencias de inconstitucionalidad, que adquieren carácter anulativo, manteniendo eficacia erga omnes, pero

> retroactiva. Elementos del sistema difuso, por tanto (el carácter concreto del proceso, los efectos retroactivos de las sentencias), penetran en los sistemas concentrados, obligando a la doctrina a hablar de una superación de la distinción entre sistemas con control difuso/sistemas con control concentrado para clasificar los sistemas en sistemas concretos/abstractos de justicia constitucional (GROPPI, 2005).

As mentioned, the acceptance decisions, which are those with which the Constitutional Court declares the unconstitutionality of the contested norm, produce *ex nunc* effects under the terms of article 136 of the Italian Constitution. However, such an understanding would imply denying that the judgments of the Constitutional Court produced any effect regarding the incident of constitutionality raised in the ordinary court responsible for sending the question to the Constitutional Court for a preliminary ruling. If so, the sentences of the Constitutional Court would not reach the still pending legal relations and situations that should continue to be disciplined by the norm declared constitutionally illegitimate:

Therefore, the Court has decided, by a systematic interpretation combining article 136 with article 1 of the Constitutional Law n.1/48, that the ineffectiveness of the law declared illegitimate has a retroactive effect to the time of referral of the question of legitimacy to the Constitutional Court. Thus, the contested law cannot be applied in the ongoing proceedings since, by declaring the rule unconstitutional, the Constitutional Court promotes procedural interference in the context of the ongoing proceedings that disallows its use by the judge *a quo*.

> The non-application of the law declared unconstitutional in common judgments, in relation to situations prior to the Court's decision, allows the configuration of a form of retroactivity of the effects of decisions of unconstitutionality: retroactivity which is the indirect reflection of procedural situations in which judges are prohibited from applying unconstitutional laws in relation to pre-existing substantial situations. This prohibition consists of "retroactivity": not in the emanation of a new rule concerning previous relations but in the "procedural interference" arising from new norms usable by judges to define old judgments. In short, there is no legislative qualification, at the moment, of previous situations and relations governed by another substantive norm. The "retroactive" consequences are only indirect. Speaking of retroactivity, it is necessary to clarify that this is a particular case, in which there is no succession of norms: there is the consequence in the process of certifying the nullity of the norm, based on which it would otherwise (in the absence of the relative declaration) have been defined (ZAGREBELSKY; MARCENÒ, 2012, p. 351, author translation).

As a rule, the retroactivity of the Constitutional Court sentences reaches those situations and relations prior to the pronunciation of the Court not yet exhausted, not yet definitively regulated, in such a way that the res judicata, the definitive administrative acts, and the situations affected by the course of time (prescription, decadence, and foreclosure) remain outside the scope of the contested norm.

> In general, there are limits to retroactivity, such as all the prohibitions that – with the aim of consolidating legal situations and thus ensuring their safety – the law disposes of regarding the challenge of certain legal situations

(ZAGREBELSKY; MARCENÒ, 2012, p. 352, author translation).

It is important to note that the limits of the retroactivity of the Constitutional Court sentences are given not by the constitutional text but by the legislative norms that configure the exhaustion of legal situations. It is not a question of constitutional procedural law but rather the limits provided for in the legislation on the possibility of reviewing legal situations and relations.

In criminal matters, the execution and effects of the unappealable conviction resulting from the application of the contested rule shall be extinguished.

> When pronounced a sentence of irrevocable conviction based on the application of the norm declared unconstitutional, its execution and all criminal effects cease (ITALIA 1953, author translation).

4. FINAL CONSIDERATIONS

Introduced into the institutional system of the Italian Republic by the Constitution of 1948, the Italian Constitutional Court has its constitutional normalization defined in articles 134 to 137 in its own Title (Title VI – Constitutional Guarantees) unlike that dedicated to the Judiciary Branch (Title V - The Magistracy). Thus, the constitutional framework of the Constitutional Court is clear as an institution not belonging to the Italian Judiciary Branch whose top body is the Supreme Court of Cassation (Italy, 1941, art. 65). This is what makes many identify the Constitutional Court as a kelsenian-type Court since an institution outside the Judiciary Branch concentrates the exercise of constitutionality control in Italy.

However, the previous observations lead to the assessment that the Italian case is somewhere between the American and kelsenian models of constitutionality control. As seen, the existing constitutionality control system is characterized by a combination of concentrated control and diffuse control; concrete and abstract control; and constitutional sentences that generally have *ex nunc* effects but which also produce retroactive (*ex tunc*) effects in the criminal sphere and in those legally pending situations. These characteristics, if they do not make the Constitutional Court an exemple of the American constitutionality control model, do not allow an absolute identification with the kelsenian formulations for constitutional justice.

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