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Concrete control of constitutionality

Italy

Concrete Control of Constitutionality in Italy

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1. Preliminary Remarks

In the aftermath of the Second World War, Europe witnessed the establishment in many countries of so-called centralized systems of judicial review, which vested the power to review the constitutionality of norms in a single Court. Italy did not represent an exception, even if the members of the Constituent Assembly designed for Italy a model of judicial review which had no precedents at the time, and that can be defined as a compromise between the centralized and the decentralized system of judicial review².

The Italian Constitutional Court³ was established by the 1948 Constitution. Arts. 134-137 of the Italian Constitution provide for the basic structure, functions and features of the Court. According to Art. 135, the *Corte Costituzionale* is composed by fifteen judges equally appointed by the Parliament in joint session, the President of the Republic and the Supreme ordinary and administrative Courts (the Court of Cassation, the Council of State, and the Court of Accounts). Art. 137 Const. makes explicit

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² For a comprehensive analysis of the differences between centralized and decentralized systems of judicial review, see, among the many, M. CAPPELLETTI, *Judicial Review in the Contemporary World.*, New York, Bobbs-Merrill Co., Inc., 1971, pp. 45 *et sequitur*; FAVOREAU L., *Constitutional Review in Europe*, in HENKIN L., ROSENTHAL A.J. (eds.), *Constitutionalism and Rights: The Influence of the United States Constitution Abroad*, New York, Columbia University press, 1990; JACKSON V.C., TUSHNET M., *Comparative Constitutional Law*, 2nd, New York, Foundation Press, pp. 464 *et sequitur*; DORSEN N., ROSENFELD M., SAJÓ A., BAER S., *Comparative Constitutionalism. Cases and Materials*, St. Paul, MN, West Publishing Company, 2003, pp. 113 *et sequitur*.

³ On the Italian Constitutional Court, see, in English, ADAMS J., BARILE P., *The Italian Constitutional Court in Its First Two Years of Activity*, 7 Buff. L. Rev. 250 (1957-1958); CASSANDRO G., *The Constitutional Court of Italy*, 8 Am. J. Comp. L. 1 (1959); MERRYMAN J.H., VIGORITI V., *When Courts Collide: Constitution and Cassation in Italy*, 15 Am. J. Comp. L. 665 (1967); EVANS M., *The Italian Constitutional Court*, 17 Int'l & Comp. L.Q. 602 (1968); PIZZORUSSO A., *Italian and American Models of the Judiciary and of Judicial Review of Legislation: A Comparison of Recent Tendencies*, 38 Am. J. Comp. L. 373 (1990); BALDASSARRE A., *Structure and Organization of the Italian Constitutional Court*, 40 St. Louis U. L.J. 649 (1995-1996); DENGLER D.S., *The Italian Constitutional Court: Safeguard of the Constitution*, 19 Dick. J. Int'l L. 363 (2000-2001); FERREJOHN J., PASQUINO P., *Constitutional Adjudication: Lessons from Europe*, 82 Tex. L. Rev. 1671 (2003-2004).

reference to subsequent constitutional laws for the implementation of the constitutional provisions, especially with regard to “conditions, forms, terms for proposing judgments on constitutional legitimacy”⁴.

Indeed, despite the Constitutional Court was established directly by the Italian Constitution, it became operative only eight years later, in 1956, after the approval of the required implementing laws in 1948 and 1953⁵. After the enactment of the Constitution and before the establishment of the Constitutional Court (1948-1956), Italy briefly experimented with a decentralized system of judicial review: ordinary courts could refuse to apply those laws they deemed unconstitutional⁶.

According to the Constitution (Art. 134), the Court judges on conflicts of competence between State authorities, between the State and the Regions and between Regions⁷, it also judges over allegations against the President of the Republic, on the admissibility of abrogative referenda and on the constitutional legitimacy of laws and acts with the force of law adopted by the State and the Regions.

2. Judicial review of Legislation: objects and ways of access to the Constitutional Court.

Among those listed in the foregoing, the first area of jurisdiction is by far the most important. Constitutional issues regarding laws are mostly referred to the Court by

⁴ Art. 137, cl. 1 of the Italian Constitution.

⁵ The laws that implemented Art. 137 Const. are Constitutional Law n. 1/1948, enacted on February 9, 1948 and Constitutional Law n. 1/1953, enacted on March 11, 1953; finally, Law n. 87/1953, enacted on March 11, 1953: Arts. 23-24 of the Law describe the ways of access to the Court.

⁶ See Const. Transitory and Final Provisions, Art. VII, par. 2.

⁷ It appears important to write here at least Arts. 134 (functions of the Court) of the Italian Constitution:

Art. 134 – “The Constitutional Court shall pass judgment on:

Controversies on the constitutional legitimacy of laws and enactments having the force of law adopted by the State and the Regions;

Conflicts arising from allocation of powers within the State, the allocation between the State and the Regions and the allocation between the Regions;

Accusation made against the President of the Republic, according to the provisions of the Constitution.

ordinary civil, criminal and administrative courts which should have applied those very laws in order to adjudicate the case before them.

The term “law” is used to address a category broader than that of laws in a formal sense, that is, voted by Parliament and promulgated by the President of the Republic. As expressly stated in the Constitution, also Regional Laws are subject to judicial scrutiny by the Constitutional Court. Sources of law which find themselves in a lower position than Statutes in the hierarchy of norms (e.g. secondary sources like regulations, or norms holding an even lower level in the hierarchy of sources, e.g. customs and usages), according to Art. 134 Const. are not reviewable for constitutionality by the Constitutional Court.

Acts with the force of law are, for example, those issued by the Government either on the basis of delegation by Parliament or on its own initiative in extraordinary cases of urgency and necessity according to the guidelines established by the Constitution under, respectively, Arts. 76 and 77 Const.

The basic option made by the Constituents in 1947 in favor of the adoption of a centralized system of judicial review, vesting the power to decide questions of constitutionality of laws with one single specialized Court, was eventually tempered introducing in the system some elements taken from the decentralized or American one⁸, basically allowing every ordinary and administrative judge to raise a question of constitutional validity of the norms that it had to apply to the case before it.

Indeed, issues related to the constitutionality of legislation can be raised and lodged with the Court in two ways: through incidental action or, at the opposite, direct

⁸ For an account of this discussion within the Constituent Assembly, see *La Costituzione della Repubblica negli atti preparatori dell'Assemblea Costituente*, published by the Italian Chamber of Deputies, Rome, 1970, Vol. V, pp. 3657 *et sequitur*. For a recent comment on this debate, see ROMBOLI R., *Riforma della giustizia costituzionale e ruolo della magistratura*, in *Questione giustizia*, 1998, p. 134. For a thorough analysis of the differences between centralized and decentralized systems of judicial review, see M. CAPPELLETTI, *Judicial Review in the Contemporary World.*, New York, Bobbs-Merrill Co., Inc., 1971, pp. 45 *et sequitur*; JACKSON V.C., TUSHNET M., *Comparative Constitutional Law*, 2nd, New York, Foundation Press, pp. 464 *et sequitur*.

action, giving rise, respectively to an “incidenter” or “principaliter” review⁹. For the purposes of the present study – addressing mainly the relationship between ordinary judges and the Constitutional Court – the following paragraphs will focus mostly on the incidental system of judicial review, only addressing the “review “principaliter” when necessary in order to provide a full account of the structure of judicial review in Italy.

3. Incidental System of Judicial Review (review “incidenter”)

In a centralized system of judicial review ordinary judges (civil, criminal, and administrative) are forbidden to review the constitutionality of legislation. This function is reserved exclusively to the Constitutional Court. However, since the Italian Constitutional Court began its activity, all ordinary judges, even the lower ones, has not been passively bound to apply any law they considered unconstitutional. Rather, they have exercised the power and the duty to place issues of constitutionality before the Constitutional Court so as to obtain a binding decision from that body. Issues arising in the course of civil, criminal, or administrative proceedings, may be lodged with the Court upon petition of either party or on the *ad hoc* judge’s own initiative (so called “incidenter” review). If the court, either ordinary or administrative, grants the request or on its own initiative finds that an issue of constitutional legality of a law is present, it puts the trial on a stay and through an order (*ordinanza di rimessione*) sends the records to the Court. The *ad hoc* trial will be suspended until the Constitutional Court will have decided the issue of constitutionality, preliminary to the adjudication of the concrete case. In order to do so, the *ad hoc* judge must deem (and prove) the issue of

⁹ On the difference between “incidenter” and “principaliter” review, see CAPPELLETTI M., *Judicial Review, cit.*, p. 47 *et sequitur*, and pp. 69 *et sequitur* where it is stated that “[...] while the decentralized system encourages private parties to introduce constitutional issues before ordinary tribunals in connection with regular judicial proceedings (review “incidenter”), the centralized approach tends, at least in its archetypal form, to emphasize presentation of constitutional issues before special constitutional courts via special actions initiated by various governmental authorities (review “principaliter”).”

constitutionality “not manifestly unfounded” and the challenged law “relevant” in order to issue a decision.¹⁰

Indeed, these are the two main conditions that must be satisfied in order for the *a quo* judge to apply to the Constitutional Court. In order for the issue before the ordinary court to be “relevant” to the case, the *ad hoc* judge must show that the lawsuit cannot be adjudicated without the application of the challenged law. Moreover, upon summary examination, the issue on the constitutionality of the provision(s) must prove to be “not manifestly unfounded”; this last examination is also called “*prima facie* foundation” and this determination is not appealable, though it may be raised again when the case will be filed with the a court of later instance. At this stage, the *a quo* judge is competent to decide the existence of both conditions.

If the Constitutional Court agrees that that the challenge is relevant to the litigation and not manifestly unfounded, it is obliged to rule upon the constitutionality of the challenged law.

With regard to the cases submitted by the *ad hoc* judge, the Constitutional Court does not decide the merit of the dispute, but, by way of difference, decides on the compatibility of the law with the Constitution. The Constitutional Court cannot therefore decide the other factual and legal issues of the case, which will have to be

¹⁰ Art. 1 of Constitutional Law n. 1/1948 states: “The question of constitutional legitimacy of a law or of an act with the force of law of the Republic, either upon petition of either party or on the court’s own initiative, in the course of a case before a court and not deemed by the judge manifestly unfounded, is sent to the Constitutional Court for its decision.”

Art. 23 of Law n. 87/1953 so provides: “In the course of the proceedings of a case before a judicial authority, one of the parties or the Public Prosecutor can raise a question of constitutional legitimacy through an appropriate petition, by identifying:

a) the provisions of the law or of the act with the force of law of the State or of a Region, allegedly affected by constitutional illegitimacy;

b) the provisions of the Constitution claimed to be violated.

The judicial authority, in case the controversy can not be solved without a decision on the question of constitutional legitimacy or does not deem the question manifestly unfounded, issues an ordinance by which, making reference to the terms and the reasons of the petition which originally raised the question, provides for the immediate sending of the records to the Constitutional Court and put the trial on a stay.

The question of constitutional legitimacy can also be raised *ex officio* (on its own initiative) by the judicial authority the controversy is filed with, by the issuance of an ordinance containing the elements listed at a) and b) and according to the procedure listed in the previous clause.”

decided in the proceedings stayed pending the decision on the constitutional question. Decisions of the Constitutional Court, according to Art. 137 Const. are final.

The Italian incidental system of judicial review is also defined as “concrete” because it occurs in the course of ordinary litigation, when the challenged law has been already approved and has to be applied to a case, even if the constitutionality can not be assessed by ordinary judges¹¹. The opposite system is usually referred to as “abstract,” and occurs outside of a case or controversy, that is, either before the law is passed by the Parliament or when certain political organs have the right to bring a direct action, independent of any concrete case, by instituting an ad hoc proceeding before the Constitutional Court¹².

4. The evolution in the typology of Court’s decisions: from a rigid dichotomy to the development of more sophisticated interpretive tools

¹¹ On the difference between “concrete” and “abstract” judicial review, it appears useful to quote STONE SWEET A., *Governing with Judges: Constitutional Politics in Europe*, Oxford, Oxford University Press, 2000, pp. 44-45: “[t]here are three basic types of review jurisdiction: abstract review, concrete review and the individual constitutional complaint procedure. Abstract review is ‘abstract’ because the review of legislation takes place in the absence of litigation, in the American parlance, in the absence of a concrete case and controversy. Concrete review is ‘concrete’ because the review of legislation, or other public act, constitutes a separate stage in an ongoing judicial process (litigation in ordinary courts). In individual complaints, a private individual alleges the violation of a constitutional right by a public act or governmental official, and requests redress from the court for this violation. Abstract review processes result in decision’s on the constitutionality of legislation that has been adopted by parliament but has not yet entered into force (France), or that has been adopted and promulgated, but not yet applied (Germany, Italy, Spain).”

¹² State and Regional laws may be challenged directly before the Court by a Region or by the State, respectively, whenever a Region deems that a law, or an act having the force of law “invades the sphere of authority attributed to it by the Constitution” or whenever a State regards a Regional law as exceeding the authority of the Region.

The action can be brought by:

- a) The State against the Region Laws or the laws enacted by the autonomous Provinces of Trento and Bolzano.
- b) The Regions against laws enacted by the national Parliament or by another Region.
- c) The autonomous Provinces of Trento and Bolzano against laws enacted by the State, the Region of Trentino-Alto Adige or the other autonomous Province.
- d) The Trentino-Alto Adige Region against laws enacted by the autonomous provinces of Trento and Bolzano.

With respect to judicial review, Art. 136 of the Italian Constitution provides the Constitutional Court with only one power: to declare null and void unconstitutional laws¹³. These decisions are known as “*sentenze di accoglimento*” or decisions that “accept” a constitutional challenge. Only these judgments that strike down a law are technically binding because article 136 of the Italian Constitution provides only for declarations of unconstitutionality. Once the Constitutional Court issues its decision, the proceedings resume in the lower court. If the Constitutional Court has struck down the law, the ordinary judge will have to take its decision without reference to the law declared void.

By way of contrast, when the Constitutional Court declines to strike down a law, its decision lack formal binding authority, because neither the text of the Constitution nor the implementing legislation mentions any certification of constitutionality. The judgments refusing to annul a statute, known as “*sentenze di rigetto*” because they reject a challenge to the law, only have the consequence of obliging the *ad hoc* judge to apply the challenged statute in the case before the court.

The distinction between binding and not binding decisions is of particular relevance especially considering that lower courts, in subsequent cases, should be allowed to ask again to the Constitutional Court to decide on the constitutionality of a law that it declined to strike down in previous challenges.

Especially with regard to the relationship between the Constitutional Court and ordinary judges, it is interesting, for the purposes of the present contribution, to underline the developments which have taken place in the past decades with regard to

¹³Art. 136 provides that

“[w]hen the Court declares the constitutional illegitimacy of a norm of a law or of an act having the force of law, the norm ceases to be effective on the day after the publication of the decision.

The decision of the Court shall be published and communicated to Parliament and the Regional Councils concerned, so that, wherever they deem it necessary, they shall act in conformity with constitutional procedures.”

the typology of the Court's decisions¹⁴. Indeed, the Constitutional Court of Italy soon found that the strict dichotomy between constitutional and unconstitutional laws, designed by the 1948 Constitution, was not taking into account the possibility to interpret a law in different ways, only some of whom inconsistent with the Constitution itself. In all those cases, a declaration of unconstitutionality, also in light of the lateness of the legislator in responding to Court's decisions and admonitions, would have left a void in an area of activity which was previously disciplined (even though by an unconstitutional law). The Court, therefore, developed – in the silence of the text of the Constitution and through its own case law – a new typology of decisions: the so called “*sentenze interpretative*” (interpretive decisions). With those decisions, the Constitutional Court initially explicitly endorsed one – among the several available – interpretation of a challenged law (or of the single provisions challenged) which it deemed to be consistent with the Constitution (“*sentenze interpretative di rigetto*”, interpretive decisions in which the question of constitutionality is rejected, and the Court points out to the ordinary judge the only interpretation consistent with the Constitution). The interpretation offered by the Court in these decisions, however, had no *erga omnes* effects: indeed, it was legally binding only for the *ad hoc* judge and, technically, had only persuasive authority with regard to all the others. In light of the many cases in which other ordinary judges (different from the *ad hoc* judge) decided to disregard the Constitutional Court's interpretation, the Court developed a new type of interpretive decisions, that is, the so called “*sentenze interpretative di accoglimento*”. In those decisions the Court started to point out the only unconstitutional interpretation of a law, leaving ordinary courts free to adopt all others possible meanings, except the one addressed by the Court. The effects of those decisions were significantly different, since this time the interpretation of the Court – at the same time providing for a declaration of

¹⁴ A comprehensive analysis of those developments can be found in GROPPI T., *Corte costituzionale e principio di effettività*, in *Rassegna parlamentare*, 2004, n.1, p. 189, also published in Catania A.(ed.), *Dimensioni dell'effettività. Tra teoria generale e politica del diritto. Atti del Convegno. Salerno, 2-4 ottobre 2003*, Milano, Giuffrè, 2005. *Id.*, *Verso una giustizia costituzionale «mite»? Recenti tendenze dei rapporti tra Corte costituzionale e giudici comuni*, in *Politica del diritto*, Vol. XXXIII, June 2002, p. 217.

unconstitutionality – had *erga omnes* effect and the meaning declared unconstitutional by the Court could not have been adopted by ordinary courts any more. The challenged law was kept in effect, but its unconstitutional interpretation could no longer be used by the judges.

This was the beginning of a long path which would have eventually led the Court to affirm the importance of a “constitutionally-oriented” or “constitutionally adequate” interpretation of laws, even in cases in which this interpretation was contrasting a consolidated jurisprudence issued by ordinary courts (Court of Cassation included), that is, the so called “*diritto vivente*” (living law)¹⁵.

5. Latest development: towards a more decentralized system of judicial review?

Notwithstanding centralization of judicial review in one single Court, in recent times, the Italian system of judicial review has witnessed a new phenomenon: Instead of asking ordinary judges to just apply a principle developed by the Court itself, the Italian Constitutional Court in several decisions has called upon the judges to directly address the issue of constitutionality of laws and decide cases applying constitutional norms, with the only limit of the impossibility for them to cease to apply laws even when those are deemed unconstitutional: this latter task is left to the Constitutional Court. Indeed, more and more often, the Constitutional Court decides to not endorse one of the several possible interpretations of a challenged law, declaring instead the inadmissibility of the question of constitutional legitimacy proposed by the *ad hoc* judge. While declaring the inadmissibility, however, the Court asks at the same time to the *ad hoc* judge to put forward a “constitutionally adequate” interpretation¹⁶. It is pretty clear then, that to the

¹⁵ See Decisions ns. 232/1998 and 419/1999. On the “constitutionally adequate” interpretation see AMOROSO G., *L'interpretazione «adeguatrice» nella giurisprudenza costituzionale tra canone ermeneutico e tecnica di sindacato di costituzionalità*, in *Foro italiano*, Vol. V, 1998, pp. 89 *et sequitur*.

¹⁶ In the words of the Constitutional Court (Decision n. 356/1990): “in principle, laws are not declared unconstitutional when it is theoretically possible to interpret them in unconstitutional ways, but, by way of difference, when it is impossible to interpret them in a way which is consistent with the Constitution.”

two elements that the *ad hoc* judge must verify in order for the case to be declared admissible by the Constitutional Court (“relevance” of the challenged law and the fact that the issue of constitutionality is “not manifestly unfounded”), *de facto*, the Court has now added a new requirement: the *ad hoc* judge must now show that she tried to perform a constitutionally adequate interpretation and that this interpretation was not possible¹⁷.

It appears therefore clear that these latest developments are ever more assigning greater importance to the – already relevant – role that ordinary judges play in the process of constitutional adjudication. A role which increasingly resembles the one played by ordinary judges in decentralized systems of judicial review and that would have been unconceivable in the first years after the establishment of the system of judicial review by the Italian Constitution; years indeed dominated by a distrust towards ordinary judges, seen as conservative actors unwilling to implement the new Constitution and, more generally speaking, traditionally unsuited for performing this kind of functions¹⁸.

See also Ordinance n. 147/1998 and Decisions ns. 232/1998, 65/1999, 174/1999, 200/1999 and 319/2000. Indeed, in Decision n. 232/1998 the Court states: “However, the analysis of the normative system endorsed by the *ad hoc* judge is not the only one possible: before choosing an interpretation which would necessarily lead to the recognition of the unconstitutionality of the norms, the judge must verify the possibility to put forward a different interpretation, this one consistent with the text [of the Constitution] and the whole system, so as to avoid the consequences of a declaration of constitutional illegitimacy [by the Constitutional Court]; when such different interpretation is possible, the *ad hoc* judge must perform it directly, according to the principle – constantly affirmed by this Court – of a constitutionally adequate interpretation.”

¹⁷ GROPPI T., *Corte Costituzionale, cit.*, p. 213. See also Constitutional Court’s Ordinances ns. 158/2000, 367/2001 and 3/2002. See for example Decision n. 343/2006: “The jurisprudence of this [Constitutional] Court is constant in stating that the *ad hoc* judge [...] has the duty to choose, among several possible interpretation of a provision, the one which can dispel any doubt of constitutional illegitimacy, raising an issue of constitutionality only when the text of the provision precludes any possibility to interpret it in a constitutionally-consistent way. From this very obligation springs the power and the duty of this [Constitutional] Court to verify if the *ad hoc* judge, in raising the question of constitutional legitimacy, has previously fulfilled this duty and if the reasons given for the exclusion of a constitutionally-oriented interpretation derive from an appropriate interpretative effort.”

¹⁸ See, among many, CAPPELLETTI M., *cit.*, at p. 62: “the bulk of Europe’s judiciary [belonging to a civil law tradition] seems psychologically incapable of value-oriented, quasi-political functions involved in judicial review. [...] Continental judges are usually “career judges” who enter the judiciary at a very early age and are promoted to the higher courts largely on the basis of seniority. Their professional training

As mentioned, the only limit that still applies to ordinary judges regards the impossibility to directly cease to apply a law deemed unconstitutional without first raising an issue of constitutionality of legislation before the Constitutional Court.

On a different note, and more specifically, with regard to some areas of activity not yet regulated by specific legislation (it was the case for example of artificial insemination, euthanasia etc.), the Constitutional Court has refused to declare unconstitutional the gap and state a principle or a rule to be applied in the absence of any other legislation (another tool the Constitutional Court had developed in its case law, through the so called “*sentenze additive di principio*”). In those cases the Court has invited ordinary judges to find the principle to be applied to the case directly in the text of the Constitution, without referring to the Constitutional Court¹⁹.

Finally, in other circumstances, the Constitutional Court has declared unconstitutional general laws because they could not be derogated by ordinary judges in single cases, especially when a balancing between different constitutional interests was needed in order to decide the case before the court²⁰.

develops skills in technical rather than policy-oriented application of statutes. The exercise of judicial review, however, is rather different from the usual judicial function of applying the law.”

¹⁹ See e.g. Constitutional Court decision n. 347/1998. In this decision dealing with a disclaimer of paternity towards a child born by artificial insemination, the Court stated: “The task of striking a reasonable balance between the many constitutional interests involved in this case, is a task which belongs to the legislator, which in performing this activity will have to take into account respect for human dignity. However, considering the absence of any legislation in the field addressing the issue at stake, it is up to ordinary judges to look for a suitable interpretation which will grant protection to the interests involved, considering the principles deriving from the constitutional system as a whole.”

²⁰ See e.g. Constitutional Court decisions ns. 349/1998, 283/1999 (cases dealing with adopted children); Constitutional Court decisions ns. 436/1999, 450/1998 and 418/1998. In Decision n. 283/1999, the Court addressed the issue of an abandoned child who had “temporarily” lived in an house for an extended period of time while waiting to be assigned to a family and developed a special affection for the persons now asking for adoption. The Court recognized that judges can allow the adoption in the only interest of the minor even when the difference in the age between the person willing to adopt the child and the child itself is higher than the 40 years indicated by the Law as maximum limit, when grave and otherwise unavoidable harm to the minor might occur from respect of the law. In the words of the Court: “The legislator can establish, using its own discretionality, the limits (maximum and minimum) in the age gap allowing for the adoption of a child [...]. This determination, however, can not be so strict as to absolutely ban the application of any exception by ordinary judges, especially when the exception is required in the very interest of avoiding a great harm to the minor, springing from the failed assignment to a specific adoptive family, which only could satisfy such need.”

The current system of judicial review of legislation in Italy is therefore different from the one originally conceived by the members of the Constituent Assembly in 1947, even if it maintains its original basic structure. The shift from a centralized system of judicial review, towards a more decentralized one – with the important limit underlined in the foregoing – also brings with it an important consequence: the shift from a judicial review of legislation based exclusively on decisions with *erga omnes* effects, to one which increasingly relies on decision issued by ordinary judges with *inter partes* effects.