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Executive-Legislative Relations: Decree Laws

A major role of constitutional courts is ensuring constitutional equilibrium by balancing and arbitrating among competing powers within the central government and between the national and regional or local levels. The US Supreme Court is called upon to referee between Congress and the president only when issues of constitutionality are involved, and even then it will seek refuge in the political question doctrine or some other jurisprudential dodge to avoid being drawn into inter-branch disputes. The US Court considers the preferences of Congress and the president in the regular course of its decisions, even when it is not necessary to do so. European constitutional courts are not, however, equally able to skirt power disputes because most are directly charged with resolving conflicts between warring branches or levels of government. This function is a particularly delicate one, for the courts are in treacherous territory when they demarcate the boundaries of other powers. Moreover, because of the nature of their recruitment, most constitutional judges are also ruling in such cases on the prerogatives of those who placed them in office.

The Italian Constitutional Court is, like its counterparts elsewhere in Europe, the umpire in disputes over power. Most such conflicts reach the Court not as Parliament versus government or region against central government, but rather when a private party alleges injury as a consequence of ultra vires exercise of power by one or another branch. That is how the Court was drawn into one of the longest tugs-of-war between the legislative and executive branches - the dispute over executive use of decree laws. The Court trod cautiously around the controversy, even though governments pushed the outer limits of their authority and Parliament periodically rebelled. More than 2000 decree laws were issued, and half of those were then reissued, a controversial practice with no constitutional foundation. Of those, only one decree, a reissued one, was annulled by the Court, until the judges finally drew a line in 1996 and declared the executive practice of reissuing unconverted decrees unconstitutional.

Earlier political choices

Decree laws had been a regular feature of Italian politics under the monarchy, as Statuto Albertino had, in Article 3, enabled Parliament and the King 'to exercise collectively' the legislative power, and executive decree laws evolved as one means of legislating. Pre-republican practices set the tone for how executive decrees might be employed. The number of decree laws was not large initially, numbering only about 70 until after the First World War. There were from time to time isolated attempts by the ordinary judiciary to limit their use, but these were notably unsuccessful. Later, the number of decree laws grew exponentially in an attempt to confront the economic and social problems that the First World War had produced, and 1043 decrees were issued in 1919 alone. Under the Fascist regime decree laws were supposedly regulated by statutes passed in 1926 and again in 1939, but the executive nonetheless frequently bypassed the legislature through the decree device.

The practice was carried over into the republic, and Article 77 of the postwar constitution governed its use. The major difference was the new system's emphasis on the temporary nature of decree laws, calling them 'provisional measures having the force of law' that are invalid retroactively if 'not converted into law within sixty days of their publication'. Parliament can, even so, regulate the extent of the retroactive effects of decrees that were not converted. The executive came progressively to rely on decrees to govern, thus skewing the relationship between legislative and executive bodies. With increasing frequency, the Constitutional Court was called upon to intervene. The Court trod cautiously around the controversy, even though governments pushed the outer limits of their authority and Parliament periodically rebelled. More than 2000 decree laws were issued, and half of those were then reissued, a controversial practice with no constitutional foundation. Of those, only one decree, a reissued one, was annulled by the Court, until the judges finally drew a line in 1996 and declared the executive practice of reissuing unconverted decrees unconstitutional.
exercised legislative power by passing decrees that become priorities on the parliamentary agenda, since they must be enacted or rejected within 60 days from the date on which they are published. The chambers of the legislature have options beyond simply accepting or rejecting the decree; they may change it through amendments. When Parliament did not act within the specified 60 days, the government began in 1964 to ‘reiterate’ or reissue the decrees for another 60 days. Then, one was reissued a second time and eventually the extensions were nearing three years.

Judges’ initial responses

The use of decree laws raised a number of constitutional questions, ranging from their legal character to their validity if not converted. There were also issues relating to the retroactive effects of amended decrees and rejected ones. How was the situation of ‘extraordinary necessity and urgency’ to be assessed, and, of course most central, how much could the executive manipulate or control the legislative process through decrees?

The Constitutional Court's handling of these and other queries is best understood in the larger context of legislative-executive relations. Throughout the Republican era, political parties rather than institutions have been the central actors on the political stage and were the conduits to the institutions of the state. Hence the Italian government has been labeled a partitocrazia or government by the parties. Policies were formulated and negotiated through the parties, with parliamentary composition as the measure of relative party strength. From the early postwar years until roughly 1965, Parliament was the central institution of government. The Constitutional Court came into being only toward the end of that period and, as a consequence, was peripheral to early inter-institutional conflicts.

In 1957, the Court considered the time limits for parliamentary conversion of a decree law. Its decision demonstrated that early inclinations of the Court were to allow the executive-legislative process to find its own equilibrium. The case involved decree law No. 1227, issued on 17 December 1955, governing conversion of real estate into hotels or pensions. The decree was not converted into law until 30 April 1956, well beyond the constitutionally prescribed time. The Court dismissed as a mere technicality that more than 60 days had lapsed between the decree and its conversion. What was important was that the decree had, in fact, been converted.

The Court's strategy in its second decade was simply to avoid the issue of executive use of decree laws when possible. In 1967 it declared the policy that would dominate its jurisprudence thereafter: decree laws have only limited effects without legislative conversion; therefore, only the constitutionality of the converted decree law merits judicial scrutiny. Notably, the Court showed absolutely no restraint about reviewing converted decree laws and no hesitation about invalidating offensive ones.

Some decrees were actually motivated by the Court. In 1970, for example, the Court invalidated one element of a law governing preventive detention, and the government responded with a corrective decree law. Another was prompted in 1974 to adjust the law on radio-televisiun pluralism to conform with a pair of decisions by the Court. Other decrees were reactions to international necessities, as when an adjustment was necessary in the Italian laws involving export of objects of art and antiquities to achieve compliance with the Treaty of Rome as interpreted by the European Court of Justice.

The Italian Parliament had moved from a position of centrality to one of marginality, becoming an ‘empty legislature’. The Court was an accomplice in this shift since its acceptance of government decree laws as constitutional further diminished parliamentary prerogatives. Parliament reacted in 1971 by rewriting its rules to expedite its processes. That coincided with a progressive weakening of executive influence, such that in Parliament VI (1972–6) less than 70 per cent of government sponsored legislation was passed. Governmental stability simultaneously became elusive, but the number of decree laws escalated. In the 16 years and five legislatures that had preceded Parliament VI, a total of 282 decree laws had been issued, of which only six had been allowed to lapse and four had been rejected. However, in the span between 1972 and 1976, 124 decree laws were issued by the executive and accounted for more than 10 per cent of all laws passed. That trend persisted and even accelerated, Parliament became resistant, and the Court was approached more and more often with charges that the government was pre-empting Parliament's law-making power.

Non-intervention: the Court on the sidelines

Neither Parliament nor the Court reacted boldly to the increasing use of executive decrees, but by 1976 major changes were occurring in Italian politics. Parliamentary elections that June saw the Communist Party garner close to 13 million votes, trailing the Christian Democrats...
by a mere 4 per cent. More importantly, the distinctions between government and opposition became blurred when all parties supported the government under a non-confidence agreement. Parliament VII's (1976–9) legislative record was largely a consequence of that agreement which collapsed in 1979 and brought early parliamentary elections. The Court stood on the sidelines as executive decrees became more numerous, accounting for one-fifth of all laws passed.

In March of 1977 the Court again refused to hear a challenge to a decree law, when an ordinary court judge questioned a 1974 decree that made failure to have insurance coverage for automobiles a criminal act. The referring judge specifically questioned the constitutionality of decree law No. 99 of 1974 on the grounds of the absence of urgency or emergency to justify executive action. The Court responded consistently with its earlier pronouncements: the question was irrelevant, since the decree had ultimately been converted.

The government's use of decree laws and the consequences of that practice grew. Subjects of decree laws shifted away from minor, sectional or local topics to ones of general interest. Parliament emerged, however, as a more equal partner, since minority governments could not presume support for any program without considerable consultation. During Parliament VII (1976–9), 167 decree laws came from the executive, and 136 were passed by Parliament, but 99 of those were amended in the process. When the so-called grand coalition collapsed in 1979, parliamentary subordination resumed.

The 1980s have been described as the era of decisionismo, or toughness, as more decisive executive action became the norm. That stylistic change was reflected in parliamentary activity, and Parliament VIII (1979–83) witnessed the introduction of 275 decree laws, of which 169 or 61 per cent were converted, even though more than three-quarters of them were altered through amendments. The government and the legislature adjusted to a new mode of operations, while the Court refused to hear cases involving decrees that had not been converted by Parliament. The Court's explanation was predictable: decree laws that were not converted were not laws and questions of their constitutional validity were not admissible.

Increasingly the executive seemed to have no way of governing without resorting to decrees. The two Cossiga governments during 1980 (Cossiga I - January to March 1980 and Cossiga II - March to September 1980) issued 63 decrees laws, and Cossiga II met its demise in Parliament as a result. In fact, three decrees presented by the Cossiga government were rejected by Parliament specifically on the grounds that they interfered with the legislative will. The rate of conversion of decree laws then became inverse to the number of decrees issued by the government.

General consensus blamed the problem on Parliament and its ponderously slow and cumbersome procedures. Governments had no alternative but to rely on decrees to have their programs considered, with the result that Italy experienced a period of 'government by decree'. The conflict between the legislative and executive branches sharpened, and the number of decrees either not converted or amended in the process increased along with the rhetoric. Yet, there was another side to the decree law questions. The opposition and, more particularly, parties of the executive coalition were able to control the government through threats not to convert decrees, which enabled them to negotiate changes or modifications in reissued versions. Indeed, the theory on which parliamentary systems rests assumes that Parliament and the government are closely connected and are not designed to check one another. 'Political power is unitary and divided only by formal competencies and procedures' and power is stabilized by merging political-legislative-government into a single continuum.

The assumption that, in parliamentary democracies, the government of the day is consistent with the legislative majority did not hold in the years when executive use of decrees became abusive. In the slightly over five years from March 1978 until August 1983, there were eight different governments: Andreotti IV (March 1978–January 1979, 9 months), Andreotti V (January–August 1979, 8 months), Cossiga I (August 1979–March 1980, 8 months), Cossiga II (March–September 1980, 7 months), Forlani (September 1980–July 1981, 10 months), Spadolini I (July 1981–August 1982, 13 months), Spadolini II (August–December 1982, 5 months) and Fanfani V (December 1982–August 1983, 9 months). Not only were each of these governments short-lived, but also only one time, Spadolini I and II, reconstructed the same parliamentary coalition following the fall of one government and the investiture of the next. Connections of a parliamentary majority to the government were merely tangential. The distortions existing in legislative and executive relations raised myriad constitutional questions, but the Court declined to hear cases raising the issue.

The turbulent 1980s

Both the Chamber of Deputies and the Senate revamped their procedures to receive and dispose of decree laws more expeditiously, but
Italian politics changed in the 1980s, particularly after Socialist Bettino Craxi became Prime Minister in August 1983. Craxi personified decisionismo, and his combative style enabled him to remain in that position longer than anyone had previously. For three years a stable coalition of five parties governed.

Finally, after having absented itself from the decree law controversy for more than a decade, the Court was presented in 1983 with a voluminous challenge to multiple decree laws regulating the finances of regional governments. The governments of the regions of Lombardy, Liguria and Emilia Romana jointly raised 21 questions about regulations, most of which had their origins in four decree laws that had eventually been converted by Parliament. The general questions raised focused on constitutional encroachments on the financial autonomy of the regions, but some others were challenges brought under Article 77 of the Constitution. Two of the challenged laws were decrees that had been converted by Parliament, but in an amended fashion, and one that had been allowed to lapse without passage, but was then reissued and finally converted. The Court responded consistently with all of its previous decisions and rejected the challenges as unfounded since the decrees had, in fact, been converted; had the decrees not been converted, their effects would have been obliterated. Applying that rationale, even though one of the contested elements was a provision in a decree law that was not carried over into the converted law, the Court found that portion of the decree was irrelevant. The Court's sympathies were clearly with the executive, since the opinion characterized decree laws as a 'necessary and automatic consequence of the inertia of Parliament'.

The battle over executive decree laws escalated during Parliament XI (1983–7). The government issued a record number of 302, but the legislature converted less than half (136), and most of those (129) were passed in an amended form. More remarkably, Craxi's government reissued 134 of the decrees that had not been passed. Various explanations were offered for the staggering increases. The fragmentation of Parliament, persistent legislative paralysis and growing social problems that required specific and immediate action were all cited as causes of the decree phenomenon. Alternatively, decree laws were depicted as a consequence of a weak government, incapable of presenting coherent programs and without a parliamentary consensus that could ensure passage of any government initiative. Clearly there were some peculiar conditions that required immediate government responses, such as staving off speculators by quickly altering prices or tariffs. That might explain some decrees, but not the total lack of connection between the two political powers.

Parliament became more resistant to passing government decree laws, and the executive began to make conversion of the decrees a matter of confidence, thus preventing the chambers from amending the laws and shortening the time between issuance and passage. Even that technique could be and often was undermined by the secret ballot. For confidence votes, an open roll call is used, but that vote may be followed by another one on the identical legislative text, but with a secret ballot. The government may win the former, but the decree can be defeated in the second vote. That fate befell Francesco Cossiga when he was Prime Minister in 1980, and one of his successors, Giovanni Spadolini, just two years later. In both cases, the governments resigned. In 1986, Craxi I also fell, after winning a vote of confidence by a margin of 100 and then losing a vote in a secret ballot on the decree law that had been the matter of confidence.

The legislative and executive branches appeared to be in stalemate, when a third institutional party, the President of the Republic, intervened. President Sandro Pertini refused in 1980 to sign a government decree that would alter the method of verifying signatures on petitions requesting a referendum, and, in 1985, Cossiga, then President of the Republic, used his power of persuasion to prevent the government from issuing a decree to change radio-television industry regulations and again in 1987 to block a budget regulation. Presidents are expected to be aloof from politics, but Pertini and Cossiga said that their actions were part of their obligation to guarantee the equilibrium between the powers of government and between the majority and the opposition.

**Judicial intervention**

The Constitutional Court re-entered the dispute in 1985, when it considered a decree law that had not been converted in full. The decree lessened the penalties for erecting certain kinds of buildings without the required licenses. When it was converted, the portion on penalties for lack of the necessary permits was not included. The omitted portion was, in the view of the Court, an unconverted decree law. That created a peculiar difficulty, since the decree had intended to change part of the criminal code and not recognizing its effects amounted to allowing ex post facto penalties. The Court's jurisprudence had always granted priority to any law that was 'more favorable to the accused' to avoid retroactive criminality or increased punishment. Moreover, as
the Court itself noted, the prohibition on ex post facto laws was an
exalted principle, found in the 1789 French Declaration of the Rights
of Man and Citizen, in the 1948 United Nations Universal Declaration
of Human Rights, in the 1950 European Convention on Human Rights
and Fundamental Liberties and, closest to home, in Article 25 of the
Italian Constitution. Not recognizing the unconverted portion of the
challenged decree law would run counter to that principle. Never­
theless, the Court chose to defer to other constitutional values; the
unconverted portion of the decree law had no effect, application of it
was unconstitutional, and criminal punishments could be imposed.48
Decree laws are by definition provisional, and any citizen choosing
to act on them in advance of parliamentary action places himself
in a 'risks and dangerous position'. Indeed, had the Court decided dif­
ferently, a government could arbitrarily issue decree laws favoring
its patrons by decriminalizing certain acts or lowering penalties for
some crimes. Only the scrutiny of Parliament was a check on that
possibility.49

In 1988, the Court made a more dramatic statement on the use
of decree laws. Governments had become progressively more blatant
in their abuse of the decree device and, in particular, in their will­ing­
ness to reissue unconverted decrees repeatedly. Only four decrees
had been reissued in Parliament V (1968–72) and Parliament VI
(1972–6), and during Parliament VII (1976–9), nine were reissued.
Then a torrent followed: 71 were reissued in Parliament VIII (1979–83),
another form as decree laws were reissued not once or even twice, but
up to six times.51

In March 1988, the Constitutional Court added its voice to the
chorus already condemning the government's use of decree laws and
particularly its reissuing them. The Court's decision was not a con­
demnation of the system of reproducing unconverted decree laws per se,
but its intent as an admonition was clear. The dispute reached the Court
in via principale from the Region of Tuscany, that complained that a
decree affecting its authority was initially issued in 1986 and was reissued
eight times, before being converted in a modified form by Parliament in
1988. That constituted, according to the regional government, an un­
constitutional infringement on the powers of the regional governments.
The law in question concerned regulations controlling sanctions, recovery
and rectification in cases of abuses in urban construction.

A litany of constitutional improprieties were asserted by the region,
but the Court side-stepped ones it deemed merely symbolic and those
challenging the absence of extraordinary urgency or emergency. Instead,
the Court pinpointed the fact of multiple reiterations. Repeatedly reissuing decrees laws raised, according to the Court, 'grave doubts rel­
ative to constitutional equilibrium and constitutional principles', since
such decrees are 'practically irreversible (as, for example, when they
infringe on the personal liberties of citizens) or when the same effects
are accomplished, despite the fact that the decree was not converted'.
The Court noted that not all reissued decree laws were unconstitu­
tional, but, in this specific case, the challenged decree had 'created
undoubted interference in the regional administration', by shifting
conditions and starting points for the law. Reissuance of the decree
had, consequently, 'rendered the regional powers enumerated in
Articles 117 and 118 of the Constitution empty'.52

The Court's reliance on Articles 117 and 118 that govern regional
authority, in lieu of Article 77, governing decree laws, muted the
impact of the decision. Ambiguity also resulted from the invalidation
of only one reissued decree, but not all of them. Could decrees be
reissued two or three times, or more, but less than eight? Though the
decision offered no standard and no criteria,53 the political arena read
it as a call for reform and, indeed, the Court itself later cited its 1988
decision as the stimulus for the far-reaching parliamentary reforms that
followed.54 In October 1988, a reform law passed, entitled 'Discipline
of the Activity of Government', that intended to usher in a new era of
legislative-executive relations.55 It addressed a long list of sticking
points in relations between the two national powers and was a com­
promise document that gave something to both the executive and the
legislature. Since secret ballots had so long been a source of executive
complaint, their use was curtailed and was to be permitted only for
constitutional and electoral questions or for votes involving personal
morality and family. Secret ballots had defeated much of the two
Craxi governments' programs (1983–7) and that of the Goria govern­
ment (1987–8).56 That part of the reform law was welcomed by the
government.

Article 15 of the reform law attempted to rationalize decree laws and
required that they carry in their preambles an explanation of the extra­
ordinary circumstances of necessity and urgency that justified their pro­
mulgation. It further provided that the government could not: (1) treat a
decree law as though it were a delegation of authority from Parliament;
(2) use decrees to address constitutional or electoral matters or ratifica­
tion of international treaties or budgetary issues; (3) reintroduce via a
decree a regulation that had previously been the subject of a defeated
decree law or of a law that had been invalidated by the Constitutional Court. The reform legislation further required that decree laws must be ‘specific, homogenous and correspond to their titles’.57

The 1988 reform law was greeted with skepticism, but Enzo Cheli defended it with a reminder that ‘everyone says they want reforms but they are rarely translated into reality’, and this is one ‘that I wish well’.58 Unfortunately, the law was found wanting as it applied to decree laws, and its first test, conversion of decree law No. 522 of 10 December 1988, illustrated the problems. First, the Chamber of Deputies did not pass the law and refer it to the Senate until 58 of the 60 days had lapsed. The Senate committee that reviewed the text of the decree concluded that it violated the required homogeneity, since it addressed a series of unrelated provisions ranging from the state radio-television system, artisans and universities to health, public works and civil protection. An amended version of the decree law was ultimately passed, long after the 60-day limit had expired.59 Parliament’s failure to meet its own mandates in a timely fashion reinforced the longstanding claim of governments that decree laws were essential ‘safety valves’ in times of parliamentary inaction and necessary to move programs through the cumbersome parliamentary maze.60

Despite the Court’s one-time invalidation of a reissued decree law and the legislature’s reform to regularize and limit government use of decree laws, nothing changed. In fact, the reverse happened: the government exercised its decree law prerogative with greater and greater frequency and, as can be seen in Table 3.1, reissued unconverted decrees more often and with seeming impunity. The number of decree laws steadily increased from 1987 through 1995. In the first two years of Parliament XII, 514 decree laws were issued and 348 of them, reissued; one was reissued 13 times and never converted.61

Parliament also resumed its habit of allowing decrees to lapse and of changing them through amendments. The only checks were Parliament’s occasional (only 32 times from 1987–95) refusal to convert the decrees and sporadic attempts by the President of the Republic to block executive abuses. President Oscar Luigi Scalfaro had, in fact, refused to promulgate a decree law already reissued four times that would have set a mandatory retirement age of 70 for members of the judiciary. He refused to promulgate another on financing political parties that was already the subject of a referendum. Twice in 1994, Scalfaro returned conversion laws to Parliament for reconsideration in light of their questionable constitutionality.62

### Table 3.1 Government decree laws by legislature (number of decree laws)

<table>
<thead>
<tr>
<th>Legislature</th>
<th>Presented</th>
<th>Converted</th>
<th>Convered Rejected</th>
<th>Lapsed</th>
<th>Reissued</th>
<th>Success of gov’t bills (%)</th>
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<tr>
<td>I 1948–53</td>
<td>29</td>
<td>28</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>89.9</td>
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<td>II 1953–8</td>
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<td>60</td>
<td>35</td>
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<td>28</td>
<td>11</td>
<td>2</td>
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<tr>
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<td>89</td>
<td>50</td>
<td>2</td>
<td>3</td>
<td>79.2</td>
</tr>
<tr>
<td>V 1968–72</td>
<td>69</td>
<td>66</td>
<td>44</td>
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<td>3</td>
<td>71.8</td>
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<tr>
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<td>108</td>
<td>68</td>
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<td>136</td>
<td>99</td>
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<td>15</td>
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<tr>
<td>VIII 1979–83</td>
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<td>169</td>
<td>129</td>
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<td>71</td>
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<td>136</td>
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<td>148</td>
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<td>119</td>
<td>84</td>
<td>0</td>
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<td>328</td>
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<tr>
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<td>97</td>
<td>75</td>
<td>0</td>
<td>408</td>
<td>348</td>
</tr>
<tr>
<td>XIII 1996–***</td>
<td>447</td>
<td>87</td>
<td>13</td>
<td>0</td>
<td>277</td>
<td>83</td>
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### Judicial retreat

The Constitutional Court was nowhere to be found during this renewed abuse of decree laws, and though many challenges to them reached it, the Court demurred on all. The Region of Sardinia objected to a decree law that presumed to regulate another unconverted decree involving the correctness of the government’s work in light of provisions of Article 77.63 It again refused to hear a case in 1994 when approached by the Region of Sicily regarding a new regime of preventive control for the Court of Accounts. The Court acknowledged the implications of the decrees in question and their successive reissues, but emphasized that the decrees were finally converted and therefore had the imprimatur of the legislature.64 Similarly, when six questions regarding
A 1993 decree law that altered the land registry for urban buildings were referred, the Court rejected all as either unfounded or inadmissible. The Court repeated that even though the decree had been reissued multiple times, the decree law was irrelevant: ‘how many times must this Court affirm that, after conversion, the relevance of the decree law is gone and with it, the constitutionality of the government’s power to issue decree laws?’ With that strong language, the Court made clear that it had no intention of acting on the legitimacy of executive decrees. That inclination was underscored by its refusal to hear a similar question about a decree regulating the Court Accounts that was raised by four other regions in 1995.

A change of course came in October 1996, when the Constitutional Court finally invalidated a reissued decree law on the broad ground that all reissued decree laws were unconstitutional. That dramatic about face came with reference to a decree that governed recycling and imposed criminal sanctions on violators. The decree had been issued initially in January 1994 and was repeatedly reissued, without ever being converted by Parliament, until September 1996—a total of 32 months. The Court argued that, first, the constitutional requirements of extraordinary urgency are lost when a measure is reiterated. Second, legal certainty is jeopardized when, as a consequence of repeated reissuance ‘it becomes impossible to predict how long the decree law will be in effect [because] there is no fixed end point for conversion’. This uncertainty, the judges added, is even more serious when, as in this case, criminal sanctions are involved. And, lastly, the Court focused on distortions that decree laws introduced into the constitutionally prescribed distribution of powers. The opinion concluded with a strong warning that the Court would be more rigorous in requiring that decree laws meet the requirements of urgency and emergency and in expecting the government to respect the role of Parliament.

Assessing the Court’s reluctant intervention

A decree law had first been reiterated in 1964, and even though no part of the constitutional text sanctioned the practice, the Constitutional Court stood on the sidelines as the practice was transformed into a clear abuse of power. Multiple appeals to the Court challenged the validity of decree laws and particularly of reissued ones. Yet, in over three decades the Court invalidated only one on the very narrow and specific grounds that it had changed the terms of the original version. The result was that, with the ‘exception of one isolated episode’, the Court had ‘substantially abandoned the field [and] recognized its impotency in the sector’.

Until 1996, the Court was wholly consistent in its treatment of all decree laws. It had fashioned a legal policy to justify its non-interference. First, decree laws are by their nature provisional. Therefore, whatever flaws may inher in the decree law that are absorbed into the converted version can be judged when that law is challenged. Finally, Parliament is the judge of the conditions of urgency and emergency that give rise to a decree law and, if it converts the decree into law, it must have concurred in the assumptions of extraordinary circumstances. Notably, the reiteration of decrees is not directly addressed by any element of that jurisprudence, except by implication.

The Court’s adoption of a legal policy to apply to decree laws does not necessarily mean that there was no political policy involved. Indeed, the Court’s decisions can also be viewed as a series of strategic actions. The Court never enumerated a legal policy akin to that of ‘political questions’. Similarly, it has no court-made standards for jurisdiction or justiciability that allow it to avoid issues on grounds of standing, mootness or concreteness. The Court had, nonetheless, clearly applied some rather stable notions about why it would not interpose itself between the legislature and the government on the issue of decree laws. For example, acting on a decree law could amount to deciding an irrelevant or moot question if the law were never converted. Perhaps more importantly, Article 77 of the Constitution granted Parliament the power to annul any decree law and, thereby, to obliterate its efficacy from the moment of its publication. For the Court to act in advance of a parliamentary decision would have infringed legislative prerogatives. The constitutional text had clearly ascribed the power to accept or reject provisional decrees to the legislature.

Was the Court seeking good policy by perhaps protecting its own institutional position or was good law its only goal? If legal accuracy and legal clarity were the sole motivations, why did the court change its policy so abruptly? Notably, the 1996 decision addressed only the practice of reissued decrees, not all decree laws. With that perspective in mind, the 1996 judgment can be seen as a logical extension of the 1988 decision in which reissued executive decrees were assailed for undercutting legal certainty when there is no fixed point for conversion. Similarly, the 1996 judgment had at its core that legal certainty is jeopardized when a decree law is reproduced, even in identical terms, over a three-year period without legislative conversion. The other points cited in the decision — loss of urgency and the
executive-legislative imbalance – have at their base the principle of legal certainty.

All other elements of executive decree law practices remained intact, and the Court did not say that it would examine executive motives or rule on the validity of decree laws not converted. The Court directed its aim squarely at the most abusive aspect of the decree phenomenon, the practice of reissuance. The decision left, however, unanswered questions of the force of decree laws pending conversion and responded solely to the often posed query of the status of repeatedly reissued ones. Jurisprudential consistency argues, it would seem, in favor of a legal policy explanation.

The fact that Parliament had apparently been incapable of checking executive abuse in a global fashion, on the other hand, offers an alternative view. Parliament's inability to stem the tide of decree laws would argue that, from a strategic perspective, a judicial action might also be ineffective. Parliament attempted to block executive invocation of emergency and urgency when there were no objective justifications by passing Law No. 400 of 1988. That law had also intended to limit the scope of decree laws to a single, homogenous issue. It was thought to have corrected the practice, but quickly proved to be insubstantial and neither the reissuance of decree laws nor the limitations of real emergency situation were respected by the executive. Pizzorusso went so far as to say that 'many (and perhaps all) of the limitations introduced by Article 15 [of Law No. 400] have...not changed the nature of the decree law.'

Parliament succeeded merely in rejecting specific decree laws, amending some and allowing others to lapse, only to be reintroduced again. Its single overarching effort to redesign the relationship between Parliament and the executive failed, due in large part to its own inability to enforce the restrictions. Interventions by the President of the Republic were successful in the most limited way, blocking a single decree Law here and there. The Court could have rightly calculated that confronting the executive on the issue of decree laws would likely be futile. Perhaps even more importantly, the Court would win nothing if it succeeded only in upsetting already strained and fragile institutional relationships. Siding with a weak legislature was not going to bolster the Court's standing nor was it likely to win an effective protector. The so-called 'ungovernability' of Italy is legendary, and various proposals for institutional reform had not altered the political stalemates that frequently blocked coherent government programs and parliamentary majorities. The Court's only foray into the decree law thicket had been its very narrow decision in 1988 to abrogate a single reissued decree law. The identical line of reasoning, that of loss of legal certainty, was followed in the broader 1996 judgment that invalidated all reissued decree laws.

The more intriguing question is why the Court chose to alter its strategy and intervene so boldly in 1996. Extra-legal factors are the only viable means of explaining that dramatic shift in the Court's law and policy. Three things had changed: the Italian political environment and, directly related to that, the formula for naming judges to the Constitutional Court and the system that could reward judges at the conclusion of their terms. After the 'Clean Hands' investigations began in 1992, the six political parties that had controlled the allocation of government offices slowly self-destructed or reinvented themselves. The Communist Party split into the hardline Refounded Communists and a social democrat version, the Democratic Party of the Left. What had been the dominant Christian Democrats splintered into the Popular Party on the center-left and two incarnations on the center-right. The old Social Democrats and Socialists were obliterated, and neither the Liberal Party nor the Republican Party retained any meaning outside larger coalitions of the center-right or center-left. For judges on the Constitutional Court, this translated into a type of enhanced independence, for their appointers and their potential patrons for future political careers were largely irrelevant. The judicial independence-judicial authority combination was altered.

emphasized the temporary nature of decree laws and deferred to parliamentary authority to judge the urgency behind a decree and, more importantly, to modify or reject it. The Court retained the authority to evaluate any converted decree law for constitutional validity. Thus, each of the three national powers retained a measure of autonomy within its own sphere.
My supposition can be illustrated by the actual composition of the Court at the time of the 1996 decree law decision. President of the Court Mauro Ferri and Judge Enzo Cheli had been appointed by former President of the Republic Francesco Cossiga and were identified with the broad area of socialists. Luigi Mengoni, also a Cossiga appointee, was associated with the Catholic political area. All three were at the end of their nine-year terms on the Court at the time of the October 1996 decision. Cheli has, notably, been cited frequently in this chapter, for as a constitutional law scholar he was a critic of the government’s use of decree laws. Five others (Renato Granata, Fernando Santossusso, Massimo Vari, Riccardo Chieppa and Cesare Ruperto) had obtained their positions through election by their fellow judges where partisan politics are irrelevant. The five parliamentary appointees could no longer be linked to a specific party. Rather, they were loosely tied to ideological clusters – Giuliano Vassalli and Francesco Guizzi are regarded as of the socialist area; Carlo Mezzanotte, to the center-right II Polo; Cesare Mirabelli, with the Catholics; and Valerio Onida, to the center-left coalition, the Progressives.\textsuperscript{74} Political ties and patronage expectations were lessened, and judicial independence enhanced.

Another element that cannot be ignored is the policy goal of institutional self-preservation, for the Court’s standing and prestige in the political scheme. Since the Constitutional Court’s inception in 1956, it has struggled with the ordinary and administrative courts for power. In the early years the ordinary and administrative judiciaries were hesitant to relinquish prerogatives to the new body. While the Court refused to act and where parliamentary and presidential attempts proved futile, another actor had mounted the stage. Judges on the ordinary courts dealing with criminal matters began tackling aspects of decree laws that had not been converted and those that were repeatedly reissued. Specifically, the criminal section of the highest ordinary court, Corte di Cassazione, concluded that a reissued decree law that affected criminal sanctions loses effect from the moment when first issued, if reissued successively. Otherwise, it would be retroactive and thereby violate Article 25 of the Constitution’s prohibition on ex post facto laws.\textsuperscript{75} In tracing this approach to the validity of decree laws, or at least those that were reissued, Alfonso Celotta cited 120 cases before ordinary judges in 12 months during 1994 and 1995 where decree laws of this genre were questioned. That could have promised a flood of references to the Constitutional Court or, worse from the standpoint of institutional standing, have allowed ordinary judges on criminal courts to act unilaterally, without direction on the issue from the Constitutional Court.\textsuperscript{76}

The Constitutional Court followed a strategic route of self-protection from the political powers of government when confronted with questions of the constitutionality of decree laws for decades. A coherent, clearly articulated legal policy was formed that was consistent with that strategy. A point was reached, however, when if the Court had chosen to remain on the sidelines while the executive and the legislative branches sparred over dominance, its standing in the political scheme might have been pre-empted by the ordinary judiciary. The Court conceivably calculated that to remain peripheral in the dispute over reissued decree laws could result in a forfeiture to the ordinary judiciary.

Notably, the Court’s status was sufficiently respected by 1996 that its dictates were followed. The Prodi government, a broad center-left coalition, had assumed office in June 1996. It issued 447 decree laws from its investiture until March 1998, and had reissued eight at the time the Court struck down the practice. Even though only 87 of its decrees had been converted, not one was reissued following the Court’s decision.\textsuperscript{77} That absolute, unquestioning compliance might not have been assured in earlier times. Whether the Court will, as it threatened, extend its reach on supervision of executive decree laws depends on the resulting configurations of power among the parties and party coalitions and on the ability of Parliament to use responsibly the prerogatives that the Court restored to it.