

A COMPARISON OF EUROPEAN SYSTEMS OF DIRECT ACCESS TO CONSTITUTIONAL JUDGES: EXPLORING ADVANTAGES FOR THE ITALIAN CONSTITUTIONAL COURT

Gianluca Gentili*

Abstract

As protection of fundamental rights increasingly becomes a defining feature of modern constitutionalism, some countries debate over the opportunity to introduce systems of direct individual access to constitutional judges to increase protection of constitutional rights. Part I of the article provides a comparative overview of the systems of individual constitutional complaint adopted in Europe, focusing on their functioning, structure and admissibility requirements. Part II addresses possible benefits of the introduction of such a system in Italy. After describing the main features of the Italian system of judicial review, the article details proposals that, since 1947, have been presented to introduce a system of direct individual access to the Italian Constitutional Court. Finally, Part III offers reflections on the potential advantages that adoption of such complaint would bring to the Italian legal system, compared to the currently existing avenues of access to the Court.

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Introduction - Defining the object of the analysis

In the past thirty years, the original centralized model of judicial review, adopted in almost all European countries, has progressively developed into a more “subjective” form of constitutional control¹, as a result of the expansive force of

¹ In classifying different systems of judicial review, Spanish constitutional scholar Francisco Rubio Llorente developed a juxtaposition between “objective” and “subjective” systems, based on the systems’ main center of interest. “Objective” systems of judicial review focus on the defense of the authority of the law, which can be preserved only if the statutory laws enacted in the system are consistent with the constitution; this consistency is seen as a value in itself, beneficial to the “purity” of the constitutional system as a whole. Conversely, “subjective” models of judicial review focus on the protection of fundamental rights. These two aspects are, of course, interrelated: to a certain degree, the exercise of a more “objective” type of control also furthers – indirectly – protection of fundamental rights, every time that it expels from the system a law that unconstitutionally limits the exercise of fundamental rights. At the

fundamental rights in modern societies and the adoption of comprehensive charters of rights in central and eastern European countries. Constitutional courts have come to play a central role in the protection of first-, second- and third-generation rights in both consolidated and newly established democracies.

With the assistance of the Council of Europe², several central and eastern European countries that achieved independence after the fall of communist rule have revised their old constitutions or adopted new fundamental charters to include systems of direct individual access to constitutional and supreme courts (also called systems of “individual constitutional complaint,” hereinafter “ICC”)³. These systems grant natural and legal persons direct access to a constitutional or supreme court to claim infringement of fundamental constitutional rights and to request a declaration of the unconstitutionality of the challenged

same time, a declaration of the unconstitutionality of a statute limiting fundamental rights contributes to the general “objective” “purity” of the system, diminishing the number of unconstitutional laws existing in the system. The difference between the two models lies, therefore, in the main goals they seek to achieve. See F.R. Llorente, *Seis tesis sobre la jurisdiccion constitucional en Europa*, 12 *Revista Espanola de Derecho Constitucional* 9 (1992); F.R. Llorente, *Tendances actuelles de la juridiction constitutionnelle en Europe*, in *Annuaire International de Justice Constitutionnelle* 9 (1996). For an analysis of the differences between “centralized” and “decentralized” systems of judicial review, vesting functions of judicial review, respectively, in one single specialized court or, conversely, in all ordinary judges, see M. Cappelletti, *Judicial Review in the Contemporary World* 45 (1971); L. Favoreau, *Constitutional Review in Europe*, in L. Henkin & A.J. Rosenthal (eds.), *Constitutionalism and Rights: The Influence of the United States Constitution Abroad* 38 (1990); V.C. Jackson & M. Tushnet, *Comparative Constitutional Law* 464 2d ed. (1999); N. Dorsen, M. Rosenfel, A. Sajo & S. Baer, *Comparative Constitutionalism: Cases and Materials* 113 (2003).

² The Council of Europe (“CoE”) is a regional human-rights organization established by the Treaty of London on May 5, 1949. The CoE seeks to develop throughout Europe common democratic principles based on the *European Convention on Human Rights* (“ECHR”), an international human-rights treaty signed in Rome on November 4, 1950, see *Convention for the Protection of Human Rights and Fundamental Freedoms*, Nov. 4, 1950, 213 U.N.T.S. 221. The CoE has now forty-seven Member States with a total population of about 800 million people. Respect of the ECHR is guaranteed by a supranational judicial body, the European Court of Human Rights (“ECtHR”), whose interpretation of the ECHR and decisions are binding on Member States.

³ For present purposes, the expressions “individual constitutional complaint” (“ICC”) and “direct individual recourse” to a supreme or constitutional court will be considered synonymous.

act(s) or action(s) violating their rights (whether with *erga omnes* or *inter partes* effects)⁴.

The Italian Constitution, a product of the wave of constitution-drafting that took place after the Second World War⁵, does not envisage the possibility that an action seeking constitutional review may be lodged by a citizen or a group of citizens directly with the Constitutional Court. In the mixed centralized-decentralized system of judicial review adopted in Italy, an issue of the constitutionality of legislation – besides those cases when a direct action can be filed by constitutionally-designated State bodies – can be raised only in the course of ordinary judicial proceedings in which the challenged law should be applied, either upon petition of one of the private parties or of the public prosecutor, or on its own initiative by the court. However, as protection of fundamental rights becomes a defining and predominant feature of modern constitutionalism, the debate over the introduction of the possibility for an individual to directly apply to the Constitutional Court, claiming infringement of a constitutionally-entrenched right by unconstitutional actions of a public power, has been increasingly recurrent in Italy. Yet it is a debate that dates back to the very foundation of the Italian Republic and the adoption of the 1948 Constitution.

Systems of direct access to constitutional and supreme courts are generally considered positively, as they can supplement the existing avenues for access to constitutional or supreme courts and provide protection of fundamental rights in so-called “grey areas” not covered by these types of remedies. Moreover, from a supranational perspective, the European Commission for Democracy through Law of the Council of Europe⁶ considers

⁴ Conversely, in systems of indirect individual access, the constitutionality of an act or action can be challenged only through the action of previously identified state bodies (e.g. courts).

⁵ See J. Elster, *Forces and Mechanisms in the Constitution-Making Process*, 45 Duke L.J. 364, 368-373 (1995) (identifying seven waves of constitution-making). With specific regard to judicial review, Louis Favoreau speaks of four waves of constitutional justice: see L. Favoreau, *Les Cours Constitutionnelles* 1-2, 4, 3d ed. (1996).

⁶ The European Commission for Democracy through Law (also known as “Venice Commission”) is the Council of Europe’s advisory body on constitutional matters. Established in 1990, over the years it has played a leading role in advising on the adoption of constitutions that conform to the standards of Europe’s constitutional heritage. In 2002, it was authorized by the CoE to accept non-European observer members and currently has fifty-seven

positively the adoption of such systems – provided they do not overburden the domestic court vested with power of judicial review – as they represent an effective filter for cases of alleged violations of fundamental rights before they reach the European Court of Human Rights⁷.

However, if not properly designed, these systems are likely to result in the overburdening of a constitutional or supreme court due to the high number of applications lodged⁸. The balance between an effective protection of human rights and an efficient and timely exercise of the high court's functions has been struck differently in different jurisdictions: several States have declined to adopt a system of individual constitutional complaint altogether, while others have established strict accessibility requirements making direct recourse a merely subsidiary mechanism for the protection of constitutional rights and requiring, for example, the previous exhaustion of all other legal remedies or the special "constitutional significance" of the question of constitutionality to be presented.

Part I of this article will provide a comparative overview of the structure and functioning of the systems of direct access to constitutional and supreme courts adopted in Europe, focusing on the structure of the individual constitutional complaint and on admissibility requirements. With regard to this latter aspect, the present analysis will comprise all systems of individual constitutional complaint irrespective of requirements (if any) established for standing to file the claim. The analysis will

Member States and eleven more Associate, Observer and Special-Status States. See Venice Commission, Council of Europe, http://www.venice.coe.int/site/main/Presentation_E.asp (last visited January 2012).

⁷ The Commission underlines that: "the European Court of Human Rights' statistics show that those countries in which such a full constitutional complaint mechanism exists have a lower number of complaints (in proportion to the number of their population) before the Court than others, which do not have such a mechanism. Such complaint mechanisms therefore help to avoid overburdening the European Court of Human Rights". Venice Commission Study no. 538/2009, adopted by the Commission during its 85th Plenary session held in Venice, Italy on 17-18 December 2010 at 4, *available at* [http://www.venice.coe.int/docs/2010/CDL-AD\(2010\)039rev-e.pdf](http://www.venice.coe.int/docs/2010/CDL-AD(2010)039rev-e.pdf) (last visited January 2012). For the final version of the "Study on Individual Access to Constitutional Justice," see 86th Plenary Session of the Commission (Venice), Calendar of Events, Venice Commission, Council of Europe, <http://www.venice.coe.int> (last visited January 2012).

⁸ As it happened, for example, in Croatia and Spain.

therefore include both systems which adopted the so-called “*actio popularis*” (where every person is entitled to challenge an act of the public powers after its enactment, without the need to prove that he or she is affected by the provision: e.g., Croatia and Liechtenstein) and systems where evidence of (probable) harm is required. Also, the analysis will be conducted on several systems of individual constitutional complaint, irrespective of the choice made in the single legal system with regard to the possible object of the challenge: actions and/or omissions of public powers, statutory laws and/or regulations.

Part II will then address possible benefits (if any) of the introduction of such a system in Italy. After presenting the main features of the Italian system of judicial review, the article will describe proposals that, since 1947, have been presented to introduce a system of direct individual access to the Italian Constitutional Court in order to supplement the already existing avenues of access to the Court.

Part III will then offer some reflections on the actual advantages (if any) that adoption of such a system would bring to the Italian legal system, compared to the already existing incidenter control of constitutionality (“*controllo di costituzionalità in via incidentale*”).

I. A Comparative Overview of the European Systems of Individual Constitutional Complaint

In Europe, several countries have adopted a system of individual constitutional complaint, in a variety of structures and forms. A more detailed analysis of a few of these jurisdictions and of the specific systems of individual constitutional complaint adopted therein will provide a general comparative framework for our study and help determine whether Italy too should incorporate such a system to enhance protection of fundamental rights. Austria and Germany have been chosen since their constitutions belong - as the Italian one - to the wave of constitution-drafting which took place after the Second World War; Spain has been chosen to illustrate the possible shortcomings of the adoption of a highly open system of individual constitutional complaint; Switzerland as a country characterized by a tradition of direct popular participation and direct access to institutional bodies; finally, Belgium has been chosen to show how

even a relatively old constitution can be modified to include a system of individual constitutional complaint.

A) Austria

Austria has both historical and contemporary significance for any comparative study of systems of judicial review: on one hand, it represents one of the two European countries to first adopt a system of judicial review in its archetypal centralized (Kelsenian) form⁹; on the other, and more relevantly to this study, Austria represents the jurisdiction that first adopted – among the German-speaking areas of Europe – a system of individual constitutional complaint¹⁰.

The current Constitution of the Republic of Austria (“*Bundesverfassungsgesetz*”) was adopted in 1920¹¹. After undergoing revision in 1929, it was suspended in 1933 until the end of the Second World War and then reinstated in 1945.

⁹ The first European centralized systems of judicial review were established in Czechoslovakia and Austria by, respectively, the Constitution of Czechoslovakia of February 29, 1920, and by the Constitution of Austria of October 1, 1920. The systems were based on the ideas of the Prague-born jurist Hans Kelsen and are universally recognized as the prototypes of the centralized systems of judicial review, and as a counter model to the United States system of judicial review. Some authors note, however, that a form of centralized constitutional review already existed in 1858 in Venezuela, although it did not develop into a prototype: see J.O. Frosini, *Constitutional Courts in Latin America: A Testing Ground for New Parameters of Classification*, in A. Harding & P. Leyland (eds.), *Constitutional Courts. A Comparative Study*, JCL Studies in Comparative Law 1, 348 (2009).

¹⁰ *Staatsgrundgesetz uber die allgemeinen Rechte der Staatsburger* [StGG] [federal bill of rights] RGBI No. 1867/143 (Austria). The individual constitutional complaint was first introduced in Austria by the Fundamental Law of the State (*Staatsgrundgesetz*) which created a new “Court of the Reich” (*Oberstes Reichsgericht*), a forerunner of the current Constitutional Court. One of the functions of the Court was to judge complaints filed by citizens alleging a violation of the political rights – especially fundamental rights and the right to vote – protected in the Fundamental Law of the State on the Rights of the Citizens against administrative acts (legislative acts were excluded from scrutiny); see *Staatsgrundgesetz uber die allgemeinen Rechte der Staatsburger* [StGG] [federal bill of rights] RGBI No. 1867/142, as last amended by *Bundesgesetz* [BG] BGB I No. 100/2003, art. 142 (Austria).

¹¹ *Bundes-Verfassungsgesetz der Republik Osterreich* [B-VG] [Constitution] BGBI No. 1/1920 (Austria). Between 1934 and 1945, Austria was ruled under the 1934 authoritarian Constitution. The activity of the Austrian Constitutional Court was interrupted in May 1933 to resume only in 1946.

In addition to the extant incidenter procedure for the assessment of the constitutionality of legal acts set forth in articles 89 and 129 of the Constitution, the current text of the Austrian Constitution provides two possible avenues for individuals to directly access the Constitutional Court (“*Verfassungsgerichtshof*”) in order to challenge legal acts allegedly violating their fundamental rights.

The first avenue (so-called *Bescheidbeschwerde*) is described at article 144 of the Constitution, which allows direct individual complaints against an administrative decision violating a person’s rights through the application of an illegal general norm. As a precondition to the admissibility of the challenge, the applicant is requested to have previously exhausted all remedies made available by administrative law, so that, in practice, only the ruling of the last (supreme) administrative instance may be a subject of the Court’s review¹². Moreover, a challenge to the last administrative ruling can be filed only within six weeks of its delivery.

The second avenue was created by a 1975 amendment that introduced an additional type of individual constitutional complaint (called *Individualantrag* or *Individualbeschwerde*)¹³. With regard to this second avenue, articles 139 and 140 of the Constitution indicate that the Constitutional Court pronounces on the unconstitutionality of statutes and on the illegality of regulations when the application alleges direct infringement of personal rights through such unconstitutionality or illegality in so far as the law or the regulation has become operative for the applicant without the delivery of a judicial decision or the issue of a ruling¹⁴. Admissibility requirements are therefore quite demanding: in order for the complaint to be admissible, the applicant (either a natural or a legal person) must show that no chance of obtaining another legal remedy is available and that

¹² See A. Gamper, *The Constitutional Court of Austria: Modern Profiles of an Archetype of Constitutional Review*, in A. Harding & P. Leyland (eds.), *Constitutional Courts. A Comparative Study*, JCL Studies in Comparative Law 1, 44 (2009).

¹³ *Bundesverfassungsgesetz* [BVG] [Amendment of the Federal Constitution, as amended in 1929, provisions for the extension of the States of the Board Administrative Court and the Constitutional Court] *Bundesgesetzblatt* [BGBl] No. 302/1975 (Austria).

¹⁴ *Bundes-Verfassungsgesetz der Republik Österreich*, supra note 47, at art. 139 and art. 140 (Austria).

neither a judgment nor an administrative ruling has been delivered in the case. Moreover, the alleged harm to the applicant's rights must be personal, direct and actual.

Both types of individual constitutional complaints clearly have a subsidiary character and are designed only to supplement the other avenues available to an individual to challenge the constitutionality of normative enactments (mainly the incidenter proceedings).

B) Germany

Together with the incidenter review of legislation regulated at article 100, the 1949 German Constitution ("*Grundgesetz*") today also establishes at article 93(4a) a system of individual constitutional complaint (direct individual recourse or *Verfassungsbeschwerde*). In Germany, the possibility for an individual to directly access the Constitutional Court ("*Bundesverfassungsgericht*") for the protection of fundamental rights, is consistent with the general spirit of the German Constitution, which – adopted in the aftermath of the Second World War – strongly reaffirmed the central role of human dignity and fundamental rights in order to prevent the reoccurrence of the tragic violations of human rights the country had experienced during the war¹⁵.

The original text of the Constitution did not establish a system of individual constitutional complaint. This system was first introduced in 1951 with the enactment of the Law on the Federal Constitutional Court, which also marked the beginning of the activities of that Court¹⁶. The system was then entrenched in the Constitution with a constitutional amendment in 1969¹⁷. The

¹⁵ *Grundgesetz für die Bundesrepublik Deutschland* [Federal Constitution] [GG] art. 1 (F.R.G.). This commitment to protection of human dignity and fundamental rights is celebrated in article 1 of the German Constitution, which famously asserts: "Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority... . The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world. The following basic rights shall bind the legislature, the executive and the judiciary as directly applicable law."

¹⁶ *Bundesverfassungsgerichts-Gesetz* [Federal Constitutional Court Act], March 12, 1951, BGBl. I at 243 (F.R.G.).

¹⁷ Article 93(4a) of the German Constitution now states that the Federal Constitutional Court has jurisdiction over constitutional complaints filed by any person alleging that one of his or her basic rights has been infringed by an act or

recourse can be lodged – without cost and with few formal requirements – by every person (both citizens and foreign nationals, legal and natural persons) against an action or omission of the public powers allegedly violating civil and political rights entrenched in the Constitution¹⁸.

Since its establishment, the direct individual recourse has become the most frequently resorted-to avenue to access the Court, which, over the years, has developed in its jurisprudence some admissibility criteria in order to limit use of the individual-constitutional-complaint system and avoid the overburdening of the Court¹⁹. These conditions are: a) the previous exhaustion of all available legal remedies²⁰; b) the existence of a personal, direct, and current interest in the recourse²¹; c) filing within a statute of limitation: the recourse can be lodged with the Court only within one month from the date the administrative act or the judicial decision has been issued, or one year from the entry into force of the challenged statute²²; d) the possibility to challenge only self-

action or omission of the public authority (including judicial decisions). See *Grundgesetz für die Bundesrepublik Deutschland* [Federal Constitution] [GG] art. 93(4) (F.R.G.). A complaint can be lodged against the unconstitutional violation of articles 1-19, 20(2), 33, 38, 101, 102, 103 and 104 of the Constitution. See, *Bundesverfassungsgerichts-Gesetz* [Federal Constitutional Court Act] arts. 13, 90 & 95, as last amended July 16, 1998, BGBl. I at 1473 (F.R.G.). Over the years, the Constitutional Court has adopted a generous interpretation of the right to a “free development of [one’s own] personality” of article 2, cl. 1 Cont. and has therefore broadened the protection offered and the possibility to lodge a recourse.

¹⁸ See *Bundesverfassungsgerichts-Gesetz* [Federal Constitutional Court Act] art. 93, as last amended July 16, 1998, BGBl. I at 1473 (F.R.G.). See also D.P. Kommers, *Das Bundesverfassungsgericht: Procedure, Practice and Policy of the German Federal Constitutional Court*, in A. Harding & P. Leyland (eds.), *Constitutional Courts. A Comparative Study*, JCL Studies in Comparative Law 1, 113 (2009).

¹⁹ In 2006, for the first time, the applications filed with the Constitutional Court within the year were more than 6,000. In the average, the Court receives around 5,000 applications each year: 98% of them are individual constitutional complaints. Notwithstanding these high figures, 70% of the direct individual recourses are taken care of within a year. The percentage of successful recourses is low, around 2.5%. See F. Palermo, *La Giustizia Costituzionale in Germania*, in L. Mezzetti (ed.), *Sistemi e modelli di giustizia costituzionale* 152 (2009). Figures are available, in English, on the website of the German Constitutional Court: <http://www.bverfg.de> (last visited, January 2012).

²⁰ Art. 93 of the Law on the Federal Constitutional Court.

²¹ *Id.*

²² *Id.*

executing statutes²³. The screening of the petitions is entrusted to special three-judge panels of the Court, the so-called “*Kammer*” (chambers) during a prehearing stage, and the decision is not appealable²⁴. The Court also has the power to issue fines to those who lodge applications lacking the very basic elements for their admissibility²⁵. In addition to these conditions, the Law on the Federal Constitutional Court states that a constitutional complaint will be admitted to consideration only if it has “fundamental constitutional significance” (i.e. the issue has not already been addressed by the Court), and the complainant may suffer “especially grave disadvantage as a result of refusal to decide on the complaint.”²⁶

As of today, the Court reviews in full about one percent of all the individual constitutional complaints lodged, but according to some commentators, “such complaints result in some of its most significant decisions and make up more than fifty percent of its published opinions.”²⁷

C) Spain

Spain represents a very interesting country study in the analysis of the general effects that adoption of the ICC can have on a country’s system of judicial review. Influenced by the example of the German *Verfassungsbeschwerde*²⁸, the Spanish “individual appeal for protection” (“*recurso de amparo*”) or “constitutional amparo” was introduced by article 53, cl. 2 of the 1978 Constitution²⁹. The constitutional amparo was then implemented in the Organic Law on the Constitutional Court enacted in 1979.

²³ See K. Schlaich, *Procedures and techniques de protection des droit fondamentaux. Tribunal Constitutionnel Federal allemand*, in L. Favoreu (ed.), *Cours constitutionnelles europeennes et droits fondamentaux* 105-164 (1982).

²⁴ See W. Heun, *The Constitution of Germany. A Contextual Analysis* 175 (2011).

²⁵ Fines can be as high as 2,600 Euros.

²⁶ Art. 93a, cl.2 of the Law on the Federal Constitutional Court.

²⁷ D.P. Kommers & R.A. Miller, *Das Bundesverfassungsgericht: Procedure, Practice and Policy of the German Federal Constitutional Court*, 3 J. COMP. L. 194-211 (2008).

²⁸ On the influence exerted by the German system of judicial review on the Spanish Constitution, see F.R. Llorente, *La jurisdiccion constitucional en Espana*, in R.F. Llorente & J.J. Campo (eds.), *Estudios sobre la jurisdiccion constitucional* (1997).

²⁹ However, a “*recurso de amparo*” had been originally established in Spain by the 1931 Constitution of the Spanish Second Republic, at that time influenced by both the Austrian model of individual constitutional complaint adopted in 1920 and the Mexican model. The 1931 Constitution created a Tribunal of Constitutional Guaranties vested with the power to judge upon the

Today, in Spain, any natural and legal person (not just citizens) with a “legitimate interest”³⁰ can apply to the *Tribunal Constitucional* by means of the constitutional amparo to challenge violations of the rights protected in articles 14-30 of the 1978 Constitution allegedly caused by actions or omissions of public powers³¹. More specifically, the constitutional amparo can be exercised to challenge administrative acts, judicial decisions and legislative enactments – with the exclusion of statutory laws – after prior exhaustion of all available legal remedies³².

Since the enactment of the Constitution and the introduction of the ICC, an increasing number of appeals for protection have reached the Constitutional Court, most of them claiming violations of the rights granted under article 24 of the

constitutionality of statutes and to protect fundamental rights by means of a recourse for constitutional protection: *see*, A.R. Brewer-Carias, *Constitutional protection of Human Rights in Latin America* 74 (2009); E.F. Mac-Gregor, *La accion constitucional de amparo en Mexico y Espana, Estudio de Derecho Comparado* 4th ed. (2007).

³⁰ Article 162 of the Constitution.

³¹ See articles 53(2) and 161 of the 1978 Constitution of Spain and articles 41-47 and 50 of Organic Law on the Constitutional Court no. 2/1979 of Oct. 3, 1979 (last amended in 2007). Provisions of the original 1979 Organic Law concerning the constitutional amparo have been amended a few times: Organic Law no. 8/1984 amended article 45 concerning use of the amparo for protection of the right to conscientious objection; Organic Law of June 9, 1988, amended articles 50 and 86 concerning admissibility criteria for the amparo; Organic Law no. 6/2007 introduced the requirement of the “significant constitutional relevance” of the issue for the recourse to be declared admissible. The rights protected are so-called “first” and “second” generation rights (that is, civil and political), while “third” generation rights (social) cannot be protected through the constitutional amparo, since they are listed at arts. 39 through 52; the same exclusion applies to the right to property, entrenched in art. 33. *See* D.M. Carrasco, *Los procesos para la tutela judicial de los derechos fundamentales* (2002). For an overview of the structure and functions of the *Tribunal Constitucional* in Spain, *see* E.G. Lopez, *Judicial Review In Spain: The Constitutional Court*, 41 *Loy. L.A. L. REV.* 529 (2008).

³² Article 41 of the Organic law on the Constitutional Court states: “provisions, legal enactments, omissions or flagrantly illegal actions by the public authorities of the State, the Autonomous Communities and other territorial, corporate or institutional public bodies, as well as their officials or agents.” Article 47 of the Organic Law states that, in cases in which a judicial decision is challenged, “those who benefited by the decision, act or fact that led to the appeal or persons with a legitimate interest therein may appear in the proceedings for constitutional protection as a defendant or additional party.”

Spanish Constitution: effective protection from judges³³. As a consequence of the high number of individual complaints filed with the *Tribunal Constitucional*, the functionality of the body was significantly affected: most of the activity of the Tribunal was devoted to deciding the appeals for constitutional amparo and, over the years, the average time needed for the Court to perform all its functions significantly increased, almost creating a real “crisis” for the functionality of the Court³⁴.

The structure of the constitutional amparo underwent therefore significant reform in 2007, focusing on the requirements for accessing the *Tribunal Constitucional*³⁵. The purpose of the reform was to limit the possibility for individuals to directly access the Constitutional Court, on the assumption that fundamental rights could and should be protected – first and foremost – by ordinary judges and only afterward by the Constitutional Court and exclusively in cases in which the plaintiff could demonstrate the novelty of the constitutional issues³⁶. The 2007 reform, therefore, introduced an additional accessibility requirement: the applicant needed now demonstrate the “significant constitutional relevance” of the recourse presented³⁷.

³³ On this point see M. Iacometti, *La Spagna*, in P. Carrozza, A. Di Giovine & G.F. Ferrari (eds.), *Diritto costituzionale comparato* (2009).

³⁴ Between 1980 and 1998, about 48,000 appeals for constitutional protection were filed, with the number gradually increasing over the years. More specifically, in 1980 the appeals were 218; in 1981, they were 393; 1982 (438); 1983 (834); 1984 (807); 1985 (970); 1986 (1.229); 1987 (1.659); 1988 (2.129); 1989 (2.604); 1990 (2.910); 1991 (2.707); 1992 (3.229); 1993 (3.877); 1994 (4.173); 1995 (4.369); 1996 (4.689); 1997 (5.391); 1998 (5.441). Of the 9.708 applications filed with the *Tribunal Constitucional* in 2005, 9.476 of them were individual appeals lodged through the constitutional amparo. Figures are available on the website of the Spanish *Tribunal Constitucional*: <http://www.tribunalconstitucional.es> (last visited January 2012). Prof. Tania Groppi referred to this phenomenon as a “crisis of the amparo recourse.” T. Groppi, *Il ricorso di amparo in Spagna: caratteri, problemi e prospettive*, 4340 in *Giurisprudenza Costituzionale* (1997); E.C. Cuenca, *La crisis del recurso de amparo: la proteccion de los derechos fundamentales entre el Poder judicial y el Tribunal constitucional* (2005).

³⁵ Organic Law no. 6/2007.

³⁶ V.F. Comella, *The Spanish Constitutional Court: Time for Reforms*, in A. Harding & P. Leyland (eds.), *Constitutional Courts* 193 (2009).

³⁷ In the original Spanish “*trascendencia constitucional*.” See article 50(1)(b) of the Organic law as amended in 2007. According to article 50(1) of the Organic Law, in order for the recourse to have “significant relevance,” the issue must be significant for the “importance for the interpretation, application and general efficacy of the Constitution and for a determination of the content and

Today, the vast majority of applications lodged with the Court are declared inadmissible due to the very lack of the constitutional nature of the alleged violation³⁸.

A different statute of limitations applies to the various acts that can be challenged: while legislative enactments can be challenged only within three months from their enactment approval, a constitutional amparo against judicial decisions must be filed within thirty days from notification of the decision³⁹.

D) Switzerland

The so-called “recourse in cases of public law” finds its basic regulation in article 189 of the 1999 Federal Constitution of the Swiss Confederation and in article 82 of the Law on the Federal Tribunal⁴⁰. According to these provisions, the Federal Supreme Court (the highest Court of the system, vested with powers of judicial review in Switzerland) has jurisdiction over complaints about violations of constitutional rights prompted by judicial decisions issued in public-law cases and by normative acts enacted by the administrative and legislative bodies of the Cantons (i.e. the sub-national units of the federation). It also has competence over applications filed by citizens for violations of the right to vote and of regulations on general election and popular voting procedures⁴¹.

significance of fundamental rights.” The Constitutional Court has further specified this requirement in decision STC no. 155/2009.

³⁸ V.F. Comella, *The Spanish Constitutional Court: Time for Reforms*, cit. at 36, 193.

³⁹ *Id.*

⁴⁰ The current Constitution of the Confederation of Switzerland was adopted by popular vote on April 18, 1999. The Constitution replaces the prior 1874 Federal Constitution after a total revision intended to update the previous document without changing its substance. The 1999 Constitution describes the Swiss Confederation as a full-fledged federal republic composed of 26 Cantons (sub-national units). It also includes a catalogue of individual and popular rights (including rights to call for popular referenda on federal laws and constitutional amendments, in analogy to constitutional-initiatives mechanisms included in several United States state constitutions) and indicates the competences of the Cantons and the Federal Government. See A. Auer, G. Malinverni, & J. Hottelier, *Droit constitutionnel suisse 2* (2006). Together with article 189 of the Constitution, articles 82, 86, 89, 113, 115 and 116 of the Law on the Federal Tribunal of June 17, 2005 detail the procedure for lodging an individual constitutional complaint.

⁴¹ See Federal Judicature Act, arts. 82 & 86 (1943).

According to article 89 of the Federal Judicature Act, the recourse can be lodged with the Federal Supreme Court by those subjects who were parties in a case (in case of judicial decisions) and by everyone who is “significantly affected by the challenged decision or act” and who can demonstrate a significant interest in the annulment of the acts⁴².

The main purpose of the constitutional complaint is therefore to protect citizens from the action of public powers; only indirectly does it guarantee that unconstitutional laws are not kept in effect within the legal systems⁴³. The challenged acts can be of a legislative, judicial⁴⁴ or administrative nature. However, an important limit to the system of individual constitutional complaint, here, is determined by the fact that only Cantonal acts – and not those of the Federation – can be challenged for constitutionality⁴⁵ and only provided the absence at the Cantonal level of any other legal remedy against the act.

The recourse must be lodged within thirty days from the judicial decision or the entry into force of the act.

E) Belgium

The original 1831 Constitution of the Kingdom of Belgium has undergone significant revision in recent years. The possibility for a legal or natural person to lodge an individual constitutional complaint with the Belgian Constitutional Court was introduced in 1988 to supplement the already existing incidenter review⁴⁶. In 2007, the original *Cour d'Arbitrage* – whose activity had

⁴² *Id.* art. 89.

⁴³ See E. Ferioli, *La Giustizia Costituzionale in Svizzera*, in L. Mezzetti (ed.), *Sistemi e Modelli di Giustizia Costituzionale* (2009).

⁴⁴ Federal Judicature Act, arts. 83 & 90-93 (1943) specify further prerequisites for judicial decisions to be challenged and also a few typologies of decisions which are – at the opposite – excluded from the complaint.

⁴⁵ The Constitutions of the Cantons are, however, excluded. See Constitution Federale [Cst] [Constitution] Apr. 18, 1999, RO 101 art. 51, cl. 2 (Switz.). Article 190 of the 1999 Federal Constitution has been consistently interpreted by the Federal Tribunal as precluding the Tribunal from judging on the constitutionality of Federal acts. Article 190 of the Federal Constitution states: “The Federal Supreme Court and the other judicial authorities shall apply the federal acts and international law.” This exclusion, however, has recently been subject to significant exceptions. See E. Ferioli, *La Svizzera*, in P. Carrozza, A. Di Giovine & G.F. Ferrari (eds.), *Diritto costituzionale comparato* 326 (2009).

⁴⁶ See 1831 Const. art. 142 (Belg.); Special Act Law of Jan. 6, 1989, *Moniteur Belge* [M.B.] [Official Gazette of Belgium], Jan. 7, 1989, art. 2 (Belg.).

increasingly shifted from mere policing of the areas of competence of the federal government and the federated units, towards a role akin to a judge protecting the rights and liberties entrenched in the Constitution – formally changed into a full-fledged Constitutional Court (“*Cour Constitutionnelle*”) which now protects and enforces the constitutional rights listed under Title II (arts. 8-32) and at arts. 170, 172 and 191 of the Constitution⁴⁷.

The individual constitutional complaint can be lodged by a legal or natural person to obtain a declaration of unconstitutionality within six months of the enactment of the challenged normative act (generally, federal statutes – ordinary and special – regional decrees, ordinances of the Bruxelles Region and acts with the force of law issued by the Executive)⁴⁸. A declaration of unconstitutionality has the effect of annulling the challenged acts and – generally – acts retroactively⁴⁹. Similarly, a rejection of the constitutional challenge binds all judges to the interpretation of the challenged norm given by the Court⁵⁰.

F) Central and Eastern European States

The fall of the communist regimes in central and eastern Europe and the resulting need to establish new constitutional foundations for the emerging democracies prompted a wave of constitution-making and democracy-building characterized by the establishment, in the newly independent states, of centralized systems of judicial review⁵¹. The adoption of such systems was the

⁴⁷ See E. Ferioli, *Il Belgio*, in P. Carrozza, A. Di Giovine & G.F. Ferrari (eds.), *Diritto costituzionale comparato* 326 (2009).

⁴⁸ Const. art. 142 (Belg.).

⁴⁹ See N. Vizioli, *La giustizia costituzionale in Belgio*, in J. Luther, R. Romboli & R. Tarchi (eds.), *Esperienze di giustizia costituzionale* 491 (2000); P. Carrozza, *La Cour d'Arbitrage belge*, in G.F. Ferrari & A. Gambaro (eds.), *Corti nazionali e comparazione giuridica* 105 (2006).

⁵⁰ Special Act Law of Jan. 6, 1989, *Moniteur Belge* [M.B.] [Official Gazette of Belgium], Jan. 7, 1989, art. 9 (Belg.).

⁵¹ According to Prof. Andrew Harding, constitutional courts have become a key element of constitutional design since, in addition to upholding values of legality and constitutionalism, “[they] might be conceived as a device to counter-balance the otherwise potentially overwhelming capacity of the elected majority to achieve domination at the expense of any opposition” and “defending provisions intended to protect human rights and minority rights.” Moreover, “in many developing nations negotiating a hazardous path to democracy, the constitutional court has come to be regarded as a vital guarding

product of an intense circulation of models of constitutional justice. The German and Austrian models were particularly influential not only for reasons of geographical and cultural proximity, but also due to the role played by the Council of Europe in the processes of revision of constitutional documents and constitution-drafting⁵². The Council of Europe's special constitutional advisory body, the European Commission for Democracy Through Law (Venice Commission), indeed stressed the importance of the creation of constitutional courts as a fundamental element to recognize a country's achieved democratic status and its adherence to the rule of law⁵³.

In these countries the creation of Constitutional Courts occurred, in most cases⁵⁴, in conjunction with the introduction of systems of individual constitutional complaint, designed to supplement the already existing systems of incidenter review to access the Constitutional Court vested with functions of judicial review. Moreover, the ICC system was almost always introduced with the requirement of the previous exhaustion of all available judicial remedies.

The individual constitutional complaint has been adopted in the following countries: Republic of Albania⁵⁵, Armenia⁵⁶,

of the constitution." A. Harding, *Preface*, in A. Harding & P. Leyland (eds.), *Constitutional Courts: A Comparative Study* 1 (2009).

⁵² The German and Austrian models of constitutional justice have been considered so influential that some commentators were drawn to state that "the establishing of constitutional review was a clear case of constitutional borrowing." K. Lach & W. Sadurski, *Constitutional Courts of Central and Eastern Europe: Between Adolescence and Maturity*, in A. Harding & P. Leyland (eds.), *Constitutional Courts: A Comparative Study* 58 (2009).

⁵³ See V. Commission, *The Role of the Constitutional Court in the Consolidation of the Rule of Law*, in 10 *Science and Techniques of Democracy* (1994). This follows Laszlo Solyom's belief that "the very existence of these courts obviously served as a 'trade mark,' or as a proof, of the democratic character of the respective country." L. Solyom, *The Role of Constitutional Courts in the Transition to Democracy: With Special Reference to Hungary*, 18 *Int'l Soc.* 133, 134 (2003). For more information on the Council of Europe's role in these processes and in the establishment of constitutional courts, see W. Sadurski, *Rights Before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe* 2d ed. (2007).

⁵⁴ With the exception of Bulgaria, Bosnia and Herzegovina, Lithuania, Moldova, Romania.

⁵⁵ See Const., arts. 131 & 134 (1998) (Alb.).

⁵⁶ For a description of individual appeals, see Constitution, Art. 101(6) (2005) (Arm.); see also Law on the Constitutional Court, arts. 25 & 69 (2006) (Arm.). In addition to natural persons, legal persons are also eligible to apply directly to

Croatia⁵⁷, Czech Republic⁵⁸, Estonia⁵⁹, Georgia⁶⁰, Hungary⁶¹, Latvia⁶², Montenegro⁶³, Poland⁶⁴, Serbia⁶⁵, Slovak Republic⁶⁶, Slovenia⁶⁷, the Former Yugoslav Republic of Macedonia⁶⁸, and Ukraine⁶⁹. Other eastern European countries which did not adopt

the Constitutional Court. *See* Constitution, art. 42.1 (2005) (Arm.); *see also* Constitutional Ct. Act, art. 25 (2006).

⁵⁷ *See* Constitution, art. 128 (1990) (Croat.). *See also* Constitutional Act on the Constitutional Ct., arts. 30, 40, & 62 (Official Gazette No. 49/2002) (Croat.).

⁵⁸ *See* Constitution, art. 87 (1992) (Czech.); *see also* Constitutional Ct. Act, arts. 64, 72, & 74 (1993) (Czech.).

⁵⁹ *See* Constitution, art. 152 (1992) (Est.); *see also* Law on the Constitutional Review Ct. Procedure Act, arts. 16 & 18 (Est.).

⁶⁰ *See* Constitution, art. 89 (1995) (Geor.); *see also* Law on the Constitutional Legal Proceedings, art. 1 (1996) (Geor.); *see also* Organic Law on the Constitutional Ct., art. 39 (amended 2004) (Geor.).

⁶¹ *See* Constitution, Art. 32/A (1949) (Hung.); *see also* Act. No. XXXII on the Constitutional Ct., Arts. 1, 21, 38, & 48 (1989) (Hung.). *See also* Constitution, Art. 24 (enacted on April 25, 2011) (Hung.).

⁶² *See* Constitution, art. 85 (amended 2007) (Lat.); *see also* Law on the Constitutional Ct., art. 19(2) (Lat.).

⁶³ *See* Constitution, art. 149 (2007) (Montenegro); *see also* Law on the Constitutional Ct. of Montenegro, arts. 48-59 (Official Gazette 64/2008) (Montenegro).

⁶⁴ *See* Constitution, art. 79 (1997) (Pol.); *see also* Constitutional Trib. Act, arts. 27 & 46 (1997) (Pol.)

⁶⁵ The Constitution of 2006 introduced a system of constitutional complaint in Serbia for the first time. *See* Constitution, arts. 168-170 (Serb.); *see also* Law on the Constitutional Ct., arts. 82-90 (2007) (Serb.). For an overview of the ICC system in Serbia, *see* N. Plavsic, *Individual Constitutional Complaint: Serbian Model* (2008) (unpublished dissertation for the Comparing Constitutional Adjudication Summer School (Co.Co.A.) at the University of Trento, Italy) available at <http://www.jus.unitn.it/cocoa/papers/papers.html> (last visited January 2012).

⁶⁶ *See* Constitution, arts. 127, 127(a), & 130 (1992) (Slovk.); *see also* Law on the Organization of the Constitutional Ct., arts. 18 & 49 (Slovk.).

⁶⁷ *See* Constitution, arts. 160 & 162 (1991) (Slovn.); *see also* Constitutional Court Act, arts. 24 & 50 (1994) (Slovn.). On the Slovenian ICC system, *see* T. Melart, L. Zore, *The Individual Constitutional Complaint in Slovenia* (2008) (unpublished dissertation for Co.Co.A. at the University of Trento, Italy) available at <http://www.jus.unitn.it/cocoa/papers/papers.html> (last visited January 2012). The paper also describes in detail the strict criteria recently adopted to determine admissibility of the recourses to promote judicial economy.

⁶⁸ Article 110 of the 1991 Constitution of the former Yugoslav Republic of Macedonia and articles 11, 12, 28 and 51 of the Rules of Procedure were adopted by the Constitutional Court of the Republic of Macedonia on October 7, 1992.

⁶⁹ Ukr. Const. of 1996, ch. 2, arts. 55, 150; Law on the Constitutional Court of Ukraine (promulgated by the Verkhovna Rada of Ukr., Oct. 16, 1996, effective

the ICC system when their constitutions were drafted have subsequently considered its adoption⁷⁰.

The systems of individual constitutional complaint (ICC) adopted in these countries drew inspiration from the model outlined by the guidelines of the Venice Commission. Indeed, as we have seen, the Venice Commission favors the adoption of such a system for a variety of reasons, including that direct recourse to a constitutional court can operate as filter for cases of alleged violations of fundamental rights before they are lodged with the European Court of Human Rights, helping to avoid overburdening of the Strasbourg Court⁷¹.

Due to this influence, the ICC systems adopted in these countries share several common features, of which the following should be noted: a) the requirement that an aggrieved party exhaust all available legal remedies before filing a complaint with the Constitutional Court⁷²; b) the right of an individual (in some jurisdictions) to file for recourse against acts or actions of private entities (natural and legal persons), provided they exercise public authority (generally, the acts that can be challenged for violation of constitutionally protected rights are those of public powers)⁷³; c) the challengeability of not only statutes but also regulations, administrative acts, and less frequently, judicial decisions⁷⁴; d) the ICC's use for challenging solely acts, and not omissions, of public powers; e) the right (now in most countries) of legal persons, like

Oct. 22, 1996) 1996, No. 422/96-vr, arts. 42-43, *available at* <http://zakon.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=422%2F96%2D%2E%2F0> (last visited January 2012).

⁷⁰ This is the case, for example, in the Republic of Lithuania, whose Constitution, adopted in 1992, did not envisage a system of direct access to the Constitutional Court. However, the adoption of such a system has received serious consideration: *see* Vitalija Tamaviciute, *Individual Constitutional Complaint: Lithuanian Perspective*, Co.Co.A. (Comparing Constitutional Adjudication) (2008), *available at*: www.jus.unitn.it/cocoa/papers/PAPERS%203RD%20PDF/ICC%20Lithuania%20edit%20ok.pdf (last visited January 2012).

⁷¹ *See* Venice Commission, *supra* note 7, at 4.

⁷² In Serbia, the ICC can be utilized without the previous exhaustion of all other legal remedies in those cases in which a plaintiff's right to a trial within a reasonable time has been violated.

⁷³ For example, Croatia ("legal person exercising public authority"); Montenegro ("legal person vested with public powers"); Serbia ("organizations exercising delegated public powers"); the FYRM.

⁷⁴ Judicial decisions can be challenged in Czech Republic, Poland, Serbia, Slovak Republic, and Slovenia.

natural persons, to file an ICC with the Court⁷⁵; f) the practice of allowing an ICC only for actions of public powers that have already occurred or legal enactments already in effect⁷⁶; g) the declaration by the Constitutional Court that a constitutional right has been violated with declarations of unconstitutionality of the act or action at issue with *erga omnes* effects; h) the establishment (in some countries) of statutes of limitations for the exercise of the ICC⁷⁷.

G) Other ECHR Signatory States

Because of the membership of the Republic of Turkey and the Russian Federation in the regional system of human-rights protection established by the Council of Europe, it is appropriate we also address briefly these two jurisdictions, in Part I of this study.

With regard to the Republic of Turkey, a system of individual constitutional complaint was introduced in September 2010 as the result of approval by referendum of a package of amendments to the 1982 Turkish Constitution⁷⁸. The recourse has been designed so that individuals claiming that a public authority has infringed “rights within the scope of the ECHR which are guaranteed by the Constitution” can directly lodge an application

⁷⁵ Specifically: Armenia, Croatia, Czech Republic, Georgia, Hungary, Latvia, Montenegro, Serbia, Slovak Republic, and Ukraine. A few countries also allow collective action: E.g., the Slovak Republic (“bodies of the territorial self-administration”).

⁷⁶ Conversely, Georgia also allows challenge of an act which *could* infringe the fundamental rights of a person.

⁷⁷ For example: FYRM (within two months from entry into force of the act); Montenegro (two months from act), Slovenia (two months from act); Poland (within three months from judicial decision); Croatia (one year from entry into force of the challenged act); and Albania (two years from act).

⁷⁸ See Law No. 5982 of July 7, 2010, Resmi Gazete [R.G.] No. 27580 (May. 13, 2010) (Turk.) [hereinafter Law No. 5982], available at <http://rega.basbakanlik.gov.tr/Eskiler/2001/10/20011017M1.htm>. Official English translation available at The Republic of Turkey Prime Ministry: Secretariat General for European Union Affairs, http://www.abgs.gov.tr/files/Bas%C4%B1nMusavirlik/haberler/constituional_amendments.pdf (last visited January 2012). The referendum, which confirmed the package of amendments to the Constitution originally submitted to the Turkish Grand National Assembly on March 30, 2010, was held on September 12, 2010, adopted by the Assembly on May 7, 2010, and published in the Official Gazette on May 13, 2010.

with the Constitutional Court⁷⁹; a recourse, therefore, seems limited only to those rights or freedoms guaranteed by the ECHR that are also enumerated in the Constitution. By establishing a domestic filter for cases of violations of fundamental rights before they are lodged with the Strasbourg Court, this requirement seems to respond to the Venice Commission's previously noted concern of the overburdening of the ECtHR. The Constitution also mandates the exhaustion of all available legal remedies as a further admissibility requirement and expressly notes that in cases of individual constitutional complaints, judicial review "shall not be made for matters which would be taken into account during the process of recourse to legal remedies⁸⁰."

With regard to the Russian Federation, a system of direct recourse to the Constitutional Court was first introduced in 1991, when the first Constitutional Court of Russia was created⁸¹. This Court, whose design drew inspiration from the systems of judicial review adopted in Austria, Germany and Italy, operated until 1993 (when then-President Boris Yeltsin suspended its activity⁸²)

⁷⁹ The revised text of article 148 prescribes in relevant part that: "Everyone may apply to the Constitutional Court on the grounds that one of the fundamental rights and freedoms within the scope of the European Convention on Human Rights which are guaranteed by the Constitution has been violated by public authorities. In order to make an application, ordinary legal remedies must be exhausted. In the individual application, judicial review shall not be made for matters which would be taken into account during the process of recourse to legal remedies. Procedures and principles concerning the individual application shall be laid down in law [then Law No. 5982]."

⁸⁰ See Turk. Const. art. 148/1 (Turkey).

⁸¹ The Constitutional Court of Russia was established in 1991 with the Law "On the Constitutional Court of the Russian Soviet Federated Socialist Republic." *Vedomosti S'yezda Narodnykh Deputatov i Verkhovnogo Soveta RSFSR* [The Bulletin of the Congress of People's Deputies and of the Supreme Soviet of the RSFSR], July 25, 1991, No. 30, Art. 1017. The Court initiated its activity at the end of October 1991. In December 1991, the former USSR was dissolved, leaving its constituents as independent states. For a thorough analysis of the history, structure and functions of the Russian Constitutional Court, see A. Trochev, *Judging Russia: Constitutional Court in Russian politics 1990-2006* (2008); J. Henderson, *The Constitution of the Russian Federation: A Contextual Analysis* (2011).

⁸² The suspension was announced after the opinion issued by the Court on September 21, 1993, which declared unconstitutional the act with which President Boris Yeltsin had dissolved the country's legislature. Finding No. 2-Z of Sept. 21, 1993, (On Conformity of the Actions and Decisions of the Russian President with the Constitution), *Vestnik Konstitutsionnogo Suda RF* (Bulletin of the RF Constitutional Court) 1994, No. 6, p. 40.

under the 1978 Constitution of the Russian Soviet Federative Socialist Republics ("RSFSR"), as revised in December 1990⁸³. Under this first system of individual constitutional complaint, citizens claiming a violation of constitutionally protected rights could apply directly to the Constitutional Court and challenge every "application of law" by a public power, after the previous exhaustion of all available legal remedies. Citizens were therefore allowed to challenge not only statutory laws but also other normative acts and legislative omissions⁸⁴.

After the new Constitution for the Russian Federation had been adopted by national referendum on December 12, 1993, a new federal constitutional law on the Constitutional Court was enacted in 1994, and the Court eventually resumed its activity in February 1995. A new typology of direct access to the Constitutional Court - significantly different from the previous - was introduced⁸⁵. According to the 1994 Federal Constitutional Law, the application can be lodged with the Court by natural persons (citizens as well as foreign nationals and stateless), groups, legal persons and associations for an alleged violation of constitutional rights. The violation must have been determined by legislation (only statutory law)⁸⁶ applied or likely to be applied to a concrete case whose analysis before a judicial body has already been initiated⁸⁷. This last admissibility requirement changes therefore the new direct constitutional complaint adopted in the

⁸³ See Law on the Improvement of the System of State Management, 1990. On the influence of the Austrian, German and Italian models of judicial review see H. Hausmaninger, *From the Soviet Committee of Constitutional Supervision to the Russian Constitutional Court*, 25 *Cornell Int'l L.J.* 305, 332 (1992).

⁸⁴ A. Di Gregorio, *La Corte costituzionale della Russia*, in L. Mezzetti (ed.), *Sistemi e Modelli di Giustizia Costituzionale* 447 (2009).

⁸⁵ *Konstitutsiia Rossiiskoi Federatsii* [Konst. RF] [Constitution] art. 125 (Russ.); *Federal'nyi Konstitutsionnyi Zakon* [FKZ] [Federal Constitutional Law], *OKonstitutsionnyi Sud Rossiiskoi Federatsii* [Konst. Sud RF] [On the Constitutional Court of the Russian Federation], *Sobranie Zakonodatel'stva Rossiiskoi Federatsii* [SZ RF] [Russian Federation Collection of Legislation] 1994, No. 13, Item 1447, art. 3, 96-100.

⁸⁶ It is no longer possible to challenge a legislative omission.

⁸⁷ *Federal'nyi Konstitutsionnyi Zakon* [FKZ] [Federal Constitutional Law], *OKonstitutsionnyi Sud Rossiiskoi Federatsii* [Konst. Sud RF] [On the Constitutional Court of the Russian Federation], *Sobranie Zakonodatel'stva Rossiiskoi Federatsii* [SZ RF] [Russian Federation Collection of Legislation] 1994, No. 13, Item 1447, art. 97.

Russian federation into a hybrid between an incidenter review system and a pure individual constitutional complaint⁸⁸.

Finally, without any claim to comprehensiveness but in order to complete the overview of signatory countries to the ECHR, it is worth mentioning that other relevant jurisdictions have adopted systems of individual constitutional complaint. These are: the Hellenic Republic (Greece)⁸⁹, the Principality of Andorra⁹⁰, the Principality of Liechtenstein⁹¹, the Republic of Cyprus⁹², and the Republic of San Marino⁹³.

H) A Common European Frame of Reference for the Individual Constitutional Complain

From the overview presented in the previous paragraphs, it is possible to draw a few tentative conclusions. It is this author's view that, considering the common, recurring features of the systems of individual constitutional complaint presented, it is possible to identify a common European frame of reference for direct access to constitutional judges, or, in other words, a

⁸⁸ See A. Di Gregorio, *La Corte costituzionale della Russia*, cit. at 84, 460-61.

⁸⁹ 1975 Syntagma [Syn.] [Constitution] art. 100. (Gr.) and art. 48 of Law no. 345 establishes the Special Highest Court and states that "where conflicting judgments have been delivered by the Council of State, the Supreme Court or the Controllers Council as to the assessment of the constitutionality of a law or its interpretation, the Special Highest Court shall resolve the conflict at the request of: ... b. any person having a lawful interest."

⁹⁰ La Constitucio del Principat d'Andorra [Constitution] Apr. 28, 1993, arts. 41.1, 102 (Andorra) and Llei Qualificada de la Justícia [Qualified Law on the Constitutional Court] Titles V-VI, art. 85-96 (Andorra), which describe the so-called "*empara*" appeal, also called "appeal for constitutional protection." Interestingly, the *empara* appeal is excluded for the rights protected in article 22 of the Constitution: denial of residence permit renewal and expulsion of a lawful resident.

⁹¹ Constitution of the Principality of Liechtenstein Oct. 5, 1921, LR 101, art. 43, 104); *uber den Staatsgerichtshof (StGHG)* [The Constitutional Court Act], Liechtensteinsches Landesgesetzblatt, Nr. 32, Jan. 20, 2004, arts. 15 & 20 (Liech.).

⁹² Cyprus, CMND. 1093 [Constitution] 1960, art. 146. Here the ICC can also be activated to challenge an omission of the public powers.

⁹³ Declaration of Citizens' Rights and of the Fundamental Principles of the San Marinese Legal Order, Albo del Pubblico Palazzo, no. 59, art. 16, July 8, 1974 (allowing "a number of citizens entitled to vote representing a minimum of 1.5% of the electorate" to lodge a direct question of constitutionality of "laws and normative acts" with the Collegio Garante in order to determine their compatibility with the fundamental principles expressed in the Declaration and in the laws referred to in the Declaration itself).

distinctive “European model of individual constitutional complaint”⁹⁴.

Generally, this model is characterized by the following features: i) the system of direct access to supreme and constitutional courts usually supplements the extant systems of *incidenter* review of constitutionality, which remains the main avenue to access the court vested with power of judicial review; ii) it requires the previous exhaustion of all available legal remedies before the complaint can be lodged; iii) it allows complaints to be filed against actions (and in some cases omissions) of public powers, including primary and secondary sources of law, administrative acts and, in some cases, judicial decisions; iv) foresees a statute of limitations for the filing of the complaint, which ranges from 30 days to 2 years since the enactment of the challenged act or decision; v) requires either the novelty or the fundamental constitutional significance of the question presented with the recourse, in addition to vi) a showing of personal, direct and actual interest in the recourse or an harm suffered from enactment of the act(s) or decision(s); vii) the applicants are usually natural and (less frequently) legal persons, residing on the territory of the State; viii) the complaint is allowed for both actions and omissions of public powers and ix) it usually protects a limited and well-identified number of first- and second-generation rights entrenched in the national constitution, usually leaving outside of its protection more modern, third-generation rights.

As anticipated, the Italian Constitution does not currently envision the possibility for a private individual to apply directly to the Constitutional Court claiming infringement of fundamental constitutional rights. The question whether Italy should adopt a system of individual constitutional complaint and with what characteristics, can only be answered after careful consideration of the distinctive features of the Italian system of judicial review as designed by the Constituent Assembly in 1948 and its subsequent developments.

⁹⁴ Our research shows that several other world jurisdictions have adopted systems of direct access to constitutional judges, among which it is possible to include, without claim of completeness: in Latin America, Costa Rica, El Salvador and Nicaragua; in Asia, Republic of Azerbaijan, the Republic of China (Taiwan), the Republic of India, the Republic of Indonesia, the Republic of Korea (South Korea), the Republic of Mongolia, and the Republic of the Philippines; in Africa, the Republic of South Africa.

II. Individual Constitutional Complaint and the Italian System of Judicial Review

A) Overview of the Italian System of Judicial Review

In the aftermath of the Second World War, Europe witnessed the establishment in some European States of so-called “centralized” systems of judicial review, which vested the power to review the constitutionality of norms or actions in a single specialized Court situated outside of the traditional structure of the judicial branch⁹⁵. At the time when the Italian Constituent Assembly started working on the draft of a new constitution for the newly established Republic of Italy, two models of judicial review were widely known: the Austrian (or Kelsenian) centralized model and the United States decentralized one⁹⁶. Members of the Constituent Assembly⁹⁷ designed for Italy a model of judicial review that had no precedent at that time and that can be defined as a compromise between the centralized and the decentralized systems of judicial review. This special model made the Italian system of judicial review stand out among the Western systems of constitutional control.

The 1948 Constitution of the Italian Republic provided for the establishment – for the first time in the Italian constitutional history – of a Constitutional Court (“*Corte Costituzionale*”)⁹⁸. The

⁹⁵ This is the so-called “second generation” of constitutional courts. According to this classification, “first generation” constitutional courts are those established in Europe in the 1920s and 1930s (Austria, Czechoslovakia, II Republic Spain). “Second generation” are the constitutional courts established in Italy and Germany in the mid-1940s while the “third generation” include constitutional courts established in countries that achieved full democracy only in the 1970s, like Greece, Spain and Portugal. Finally, the “fourth generation” would be represented by those established in former socialist countries in central and eastern Europe at the beginning of the 1990s: see J. Luther, R. Romboli & R. Tarchi, *Giustizia Costituzionale in Spagna*, cit. at. 49, vol. II, 290.

⁹⁶ See H. Kelsen, *Judicial Review of Legislation: A Comparative Study of the Austrian and the American Constitution*, 4 J. Pol. 183, 185-86 (1942), explaining that Austria’s 1920 Constitution prohibited ordinary courts from reviewing the constitutionality of statutes; this task was left to a special Constitutional Court.

⁹⁷ The Constituent Assembly was elected at the same time the constitutional referendum was held on June 2, 1946, in which Italian citizens chose a republican form of government for Italy over the previous monarchic regime under the House of Savoy. The constitutional referendum marked the first time in Italy that women were allowed to vote. The Assembly conducted its activities from June 25, 1946, until January 31, 1948.

⁹⁸ For recent, English materials on the Italian Constitutional Court, see A. Pizzorusso, *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); A.

idea of entrusting the constitutional control of legislation to an ad hoc body was indeed unknown to the previous Italian constitutional experience under the 1848 “flexible” Constitution: the Albertine Statute (“*Statuto Albertino*”)⁹⁹.

Italian legal scholars have identified three main reasons for the introduction of a system of constitutional justice in Italy in 1948: a) the need to guarantee the “rigidity” of the new

Baldassarre, *Structure and Organization of the Italian Constitutional Court*, 40 St. Louis U. L.J. 649 (1996); P. Pasquino, *Constitutional Adjudication and Democracy. Comparative Perspectives: USA, France, Italy*, 11 Ratio Juris 38 (1998); W. J. Nardini, *Passive Activism and the Limits of Judicial Self-Restraint: Lessons for America from the Italian Constitutional Court*, 30 Seton Hall L. Rev. 1 (1999); M. L. Volcansek, *Constitutional Politics in Italy: The Constitutional Court* (2000); D. S. Dengler, *The Italian Constitutional Court: Safeguard of the Constitution*, 19 Dick. J. Int'l L. 363 (2001); T. Groppi, *The Italian Constitutional Court: Towards a “Multilevel System” of Constitutional Review?* 23 J. Comp. L. 100 (2008); J. O. Frosini, *Constitutional Justice*, in G.F. Ferrari (ed.), *Introduction to Italian Public Law* 183 (2008); L.F. Del Duca, *Introduction of Judicial Review in Italy - Transition from Decentralized to Centralized Review (1948-1956) - A Successful Transplant Case Study*, 28 Penn St. Int'l L. Rev. 357 (2010); G.F. Ferrari & A. Gambaro, *The Italian Constitutional Court and Comparative Law. A Premise*, 1 Comp. L. Rev. 1 (2010), available at <http://www.comparativelawreview.com> (last visited January 2012); E. Lamarque, *Interpreting Statutes in Conformity with the Constitution: The Role of the Constitutional Court and Ordinary Judges*, 2 IJPL 91 (2010), available at <http://www.ijpl.eu> (last visited January 2012). An overview of the most important decisions of the Italian Constitutional Court is available in French: see T. Groppi, *Les grandes décisions de la Cour constitutionnelle italienne*, in P. Bon & D. Maus (eds.), *Les grandes décisions des Cours constitutionnelles européennes* (2008). An English translation of a selection of the most important decisions of the Italian Constitutional Court is available on the website of the Court at http://www.cortecostituzionale.it/ActionPagina_325.do (last visited January 2012). Finally, in 1972, current Associate Justice of the United States Supreme Court Samuel Alito conducted a comprehensive study on the Italian Constitutional Court in order to draft his senior thesis at the Woodrow Wilson School of Public and International Affairs. The study is currently available for download from the website of the Seeley G. Mudd Manuscript Library of the University of Princeton: see S.A. Alito, *An Introduction to the Italian Constitutional Court* (May 31, 1972) (unpublished senior thesis, Woodrow Wilson School of Public and International Affairs), available at [http://www.princeton.edu/\[#x7E\]mudd/news/Alito_thesis.pdf](http://www.princeton.edu/[#x7E]mudd/news/Alito_thesis.pdf) (last visited January 2012).

⁹⁹ The Albertine Statute (*Statuto Albertino*) was the Constitution that King Vittorio Emanuele conceded to the Kingdom of Sardinia on March 4, 1848. In 1861, the *Statuto* became the Constitution of the now unified Kingdom of Italy and remained in force until 1947. It is conventionally qualified as a “flexible constitution” since it did not require any special procedure – that is, different from the ordinary legislative procedure – nor any parliamentary supermajority to be amended.

Republican Constitution, protecting it against infringements in the form of statutory law inconsistent with the Constitution enacted by a transient political majority in the Parliament; b) the need to establish a “judge of freedoms” to whom the protection of the fundamental rights entrenched in the new Republican Constitution could be entrusted and c) the need to identify an institutional body that could adjudicate controversies between different organs of the State and between the State and the sub-national units (the Regions) of the newly created regional State¹⁰⁰.

The Court is therefore a special body acting in a judicial manner for the safeguarding of the Constitution and the fundamental rights of the citizens against infringements originating from the legislative body in the form of unconstitutional statutory laws or acts with the force of law. It is the only institution vested with the power to decide questions regarding the constitutionality of laws¹⁰¹.

Articles 134-137 of the 1948 Constitution¹⁰² define the main features, structure and functions of the Court¹⁰³. Although the Constitution became effective in 1948, the Constitutional Court was actually established only in 1956¹⁰⁴, after the necessary

¹⁰⁰ See E. Cheli & F. Donati, *Methods and Criteria of Judgment on the Question of Rights to Freedom in Italy*, in D.M. Beatty (ed.), *Human Rights and Judicial Review: A Comparative Perspective* 227, 228-29 (1994).

¹⁰¹ See Art. 134 Costituzione (It.). Primary sources of law (statutes and acts with the force of law) are the only two types of sources of law that the Constitutional Court can review for constitutionality. Regulations and other secondary sources of law are excluded from its scrutiny.

¹⁰² The English text of the Italian Constitution is available on the website of the Italian Senate at http://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf (last visited January 2012).

¹⁰³ The *Corte Costituzionale* is composed of fifteen judges, 1/3 appointed by the Parliament in joint session, 1/3 by the President of the Republic and 1/3 by the Supreme, ordinary, and administrative Courts (the Court of Cassation, the Council of State, and the Court of Accounts). See Art. 135 Cost. (It.).

¹⁰⁴ The Constitutional Court was not established until 1956 due to political difficulties in selecting its judges. After the enactment of the Constitution and before the establishment of the Constitutional Court (i.e. between 1948 and 1956), Italy experimented with a decentralized system of judicial review, where ordinary courts could refuse to apply those statutes they deemed unconstitutional. See Transitory and Final Provisions of the Constitution no. VII, *supra* note 102, for availability. The experience has been criticized, due to the resistance of the judges to implement the innovative provisions and principles of the new Constitution: see P. Calamandrei, *La Costituzione e le leggi per attuarla. (Come si fa a disfare una Costituzione)*, in A. Battaglia et al. (eds.), *Dieci anni dopo:*

implementing legislation was enacted - mainly through constitutional laws - in 1948 and 1953¹⁰⁵. The adoption of a centralized - or Kelsenian - model of judicial review was tempered with some elements taken from the decentralized model vesting every ordinary and administrative judge with the power to raise a question of the constitutional validity of the norms he or she had to apply in the case before him or her¹⁰⁶. Therefore, while the system was, on one hand, marked by an "abstract" review of the constitutionality of the challenged statutory law or act with the force of law, on the other hand it was also "concrete" in the sense that it was triggered by a real controversy that had arisen before an ad hoc judge called to apply the challenged norm in the adjudication of a specific case.

Besides those cases in which a claim of unconstitutionality can be lodged directly with the Constitutional Court by the Central Government or the Regions (so-called "*principaliter*" proceedings)¹⁰⁷, questions of the constitutionality of legislation usually reach the Court through "*incidenter*" proceedings. Through these "*incidenter*" proceedings, claims can be brought before the Constitutional Court in two ways: issues arising in the course of civil, criminal, or administrative proceedings may come before the Court upon petition of either party or upon the *ad hoc* judge's own initiative (so called "*incidenter*" review). If the ad hoc judge considers the issue of constitutionality "not manifestly

1945-1955: *Saggi sulla vita democratica italiana* (1955). See also J.H. Merryman & V. Vigoriti, *When Courts Collide: Constitution and Cassation in Italy*, 15 Am. J. Comp. L. 665 (1966-1967).

¹⁰⁵ The laws that implemented art. 137 Cost. (It.) are Constitutional Law no. 1/1948, enacted on February 9, 1948; Constitutional Law no. 1/1953, enacted on March 11, 1953; and Law no. 87/1953, enacted on March 11, 1953. Arts. 23-24 of the Law define procedures to access the Constitutional Court.

¹⁰⁶ For an account of this discussion in the Constituent Assembly, see Italian Chamber of Deputies, 5 *La Costituzione della Repubblica negli atti preparatori dell'Assemblea Costituente*, 3657 (1970). For a recent comment on this debate, see R. Romboli, *Riforma della giustizia costituzionale e ruolo della magistratura*, 1 *Questione Giustizia* 122 (1998).

¹⁰⁷ The *principaliter* proceeding is regulated by article 127 of the Italian Constitution, last amended in 2001. Art. 127 Costituzione (It.). This proceeding can be used by the State to lodge a claim against a regional law and by the Regions to file a complaint against a state law. According to article 127 of the Constitution, both the State and the Regions have sixty days following publication of the regional or state law in the Official Gazette to file a claim with the Constitutional Court. *Id.* A Region may also take action against a law approved by another Region. See Frosini, *supra* note 98, at 198.

unfounded” (*“giudizio di non manifesta infondatezza”*) and the challenged statutory law “relevant” (*“giudizio di rilevanza”*) – that is, necessary in order to issue a decision – then the judge is bound to stay the trial and refer the matter with a “certification order” to the Constitutional Court, whose decisions, according to article 137 of the Constitution, are final¹⁰⁸. In order for the question of constitutionality to be admissible, the ad hoc judge is requested to indicate in the certification order – together with the relevance and plausibility of the question – the law challenged and the constitutional provisions allegedly violated by the law.

With regard to the cases submitted by the ad hoc judge, the Constitutional Court does not decide on the merits of the dispute but, instead, only on the compatibility of the law with the Constitution. With regard to individuals, this is the only way to access the Constitutional Court. When an individual believes that one of his or her fundamental constitutional rights has been violated by a State or a Regional statutory law, the only way he or she can request the Constitutional Court to judge the constitutionality of the law is to file a case before an ordinary or administrative court and have the question of constitutionality raised before the Constitutional Court by the ad hoc judge. Only State and Regional Governments can directly refer issues of constitutionality to the Court, claiming that the area of reserved competences the Constitution assigns them has been encroached.

The only exception to the rule that an individual generally lacks the power to challenge a law by lodging an application directly with the Constitutional Court can be found in the Special Statute for the Trentino-Alto Adige Region¹⁰⁹. Indeed, Article 98 of the Special Statute¹¹⁰ allows the President of the Region or of one

¹⁰⁸ See Article 1 of Constitutional Law no. 1/1948 (It.) and Article 23 of Law no. 87/1953 (It.).

¹⁰⁹ Enacted with Constitutional Law no. 5/1948 (It.) of Feb. 26, 1948.

¹¹⁰ Art. 98 of the Special Statute for the Trentino-Alto Adige Region (1972), available at: www.gfbv.it/3dossier/diritto/statutoit.html#r14 (last visited January 2012), so provides:

“1. Laws and acts having the force of law of the Republic can be contested by the President of the Region or of the Province following a resolution of the respective Parliament, for violation of the present Statute or of the principle of protection of the German and Ladin linguistic minorities.

2. Should an Act by the State encroach upon the sphere of competence assigned by the present Statute to the Region or the Provinces, the Region or the respective Province may appeal to the Constitutional Court for a ruling in regard to the matter of competence.

of the two Provinces of Trento and Bolzano (following resolution of the Regional or Provincial legislative body) to directly raise an issue of constitutionality before the Constitutional Court, challenging a law or an act with the force of law adopted by the State and claiming a violation of the Trentino-Alto Adige Statute (which enjoys constitutional status) or the principle of protection of German and Ladin minorities. The special nature of the action, the category of individuals authorized to raise an issue of constitutionality of the law, and the possibility to challenge the law – not only on grounds of encroachment of the competences, but also for protection of fundamental rights (protection of German and Ladin minorities) – are all elements underlining the difference between this mechanism and the incidenter control of constitutionality. It should be noted, however, that this narrow exception does not in any way diminish the validity of the general rule that an individual does not normally have the right to apply directly to the Court.

B) Proposals of Introduction of a System of Individual Constitutional Complaint in Italy. The First Fifty Years: 1947-1997

When the Italian Constituent Assembly, back in 1947, was in the process of drafting the Constitution and deciding on the adoption of a centralized model of judicial review, it also considered the possibility of introducing a mechanism of individual constitutional complaint¹¹¹. According to the text approved by the second section of the second subcommittee of the Constituent Assembly on January 24, 1947, every citizen could have challenged a law – within one year from the law's enactment – before the Constitutional Court on grounds of unconstitutionality¹¹². The text of the provision, intended to be

3. The appeal shall be lodged by the President of the Region or that of the Province, following a resolution by the respective Government.”

¹¹¹ For an account of the projects addressing the introduction of the ICC and presented during the work of the Constituent Assembly, see C. Mezzanotte, *Il giudizio sulle leggi. Le Ideologie del Costituente*, Vol. 1 (1979); T. Groppi, *Il ricorso di amparo in Spagna*, cit. at 34, 4340; G. Volpe, *L'accesso alla giustizia costituzionale: le origini di un modello*, in R. Romboli (ed.), *L'accesso alla giustizia costituzionale: caratteri, limiti, prospettive di un modello* 3 (2006).

¹¹² The approved text stated: “Everyone, within the term of one year [from the enactment] can challenge a law before the Constitutional Court on ground of its unconstitutionality. A rejected application of unconstitutionality will be banned

incorporated into the Second Part of the Constitution, was drafted at that stage in a broad fashion, without any further information on the acts that could have been challenged (the text refers generically to “laws,” without further explaining if the term includes both State and Regional laws and also acts with the force of law), or on the circumstances allowing recourse (no reference was made to the infringement of fundamental rights, but only to the alleged unconstitutionality of a law). Any reference to the ICC, however, was eventually excluded by the Editorial Committee of the Constituent Assembly from the text of the draft Constitution submitted to the Constituent Assembly for approval¹¹³.

On December 2, 1947, reference to the ICC was made again in two proposed amendments to the draft Constitution, both presented during the debate before the Constituent Assembly. The text of the proposed amendments was more carefully drafted, and some additional elements were introduced with regard to the circumstances granting access to the Constitutional Court¹¹⁴. Indeed, Giuseppe Codacci Pisanelli, one of the members of the Constituent Assembly, presented a first amendment to the text under scrutiny, which vested the power to raise a question of constitutionality before the Constitutional Court with “every citizen who could demonstrate to have an interest [in raising the question] due to a harm inflicted to his constitutionally guaranteed rights or interests¹¹⁵.”

from being lodged again.” The transcript of the proceedings of the second section of the second subcommittee are available at <http://www.nascitacostituzione.it/05appendici/06p2/06p2t6/03/01/index.htm?001.htm&2> (last visited January 2012). The original Italian: “Chiunque, entro il termine di un anno, può impugnare una legge avanti la Corte per incostituzionalità. Una domanda di incostituzionalità respinta non può essere più riproposta.” Available at <http://www.nascitacostituzione.it/05appendici/06p2/06p2t6/03/01/index.htm?001.htm&2> at the bottom (last visited January 2012). See also F. Rigano, *Costituzione e Potere Giudiziario: Ricerca sulla formazione delle norme costituzionali* 240 (1982); R. Romboli, *Il giudizio costituzionale incidentale come processo senza parti* 17 (1985); C. Mezzanotte, *Il giudizio sulle leggi*, cit. at 111; L. Carlassare, *I diritti davanti alla Corte costituzionale: ricorso individuale o rilettura dell'art. 27 L. n. 87/1953?*, in *Diritto e Società* 443 (1997).

¹¹³ See *La Costituzione della Repubblica negli atti preparatori dell'Assemblea Costituente*, cit. at 106.

¹¹⁴ *Id.*

¹¹⁵ The original Italian text of the amendment stated: “L'annullamento di una legge ordinaria invalida da parte della Corte costituzionale avrà efficacia oggettiva e potrà, inoltre, essere promosso in via principale dal Governo, da

The second proposed amendment was introduced, on that same day, by Costantino Mortati, recommending that “a recourse for constitutional illegitimacy c[ould] be lodged directly with the Constitutional Court within the term of prescription established by law, by those subjects who claim a direct harm to a right or to a legitimate interest deriving from a statutory provision... .¹¹⁶”

The Constituent Assembly eventually decided to leave the determination of the “conditions, forms and terms for proposing judgments on constitutional legitimacy¹¹⁷” to a subsequent constitutional law, without excluding the possibility of introducing the ICC. Openness to reception of the ICC is also evident in the fact that the Editorial Committee of the Constituent Assembly, in addition to the text submitted to and finally adopted by the Assembly, drafted a tentative text of Article 137 of the Constitution including a provision introducing the ICC, in case the Assembly had decided to vote on its establishment¹¹⁸.

When the implementing law was enacted in 1948, no reference was made to the ICC, which therefore remained excluded from the circumstances granting access to the Court.

cinquanta deputati, da un Consiglio regionale, da non meno di diecimila elettori, o da qualsiasi cittadino che dimostri di avervi interesse per la lesione di un suo diritto o interesse costituzionalmente garantito” (emphasis added).

¹¹⁶ In original: “Il ricorso per illegittimità costituzionale può essere prodotto direttamente innanzi alla Corte costituzionale nel termine che sarà fissato dalla legge, da chi pretenda direttamente leso dalla norma un suo diritto o interesse legittimo... .” Reference to the ICC was also made on December 3, 1947, by Francesco Dominedò in the debate over the proposed text of Article 137 of the Constitution. Remarks of Francesco Dominedò, Deb. (Dec. 3, 1947).

¹¹⁷ Art. 137 Costituzione [Cost.] (It.).

¹¹⁸ In regards to the part of the article addressing the ICC, it stated that, “the citizen or the body which claims a direct and current harm to a right or to a legitimate interest can lodge directly with the Court an issue of constitutionality.” The full Italian text of Article 137 of the Constitution, in the version including the ICC, stated: “La questione di legittimità costituzionale, che nel corso d'un giudizio sia rilevata d'ufficio o sollevata da una delle parti e non ritenute dal giudice manifestamente infondata, è rimessa alla Corte costituzionale per la sua decisione. Il cittadino o l'ente che ritenga leso in modo diretto ed attuale un suo diritto o interesse legittimo può promuovere direttamente il giudizio di legittimità costituzionale davanti alla Corte. Tale giudizio può essere altresì promosso, nell'interesse generale, dal Governo o da un quinto dei componenti d'una Camera o da tre Consigli regionali.” See Meuccio Ruini, President, Committee for the Constitution, Statement Regarding Article 137 of the Constitution (Dec. 22, 1947).

According to some commentators¹¹⁹, had the ICC been introduced in 1947-1948, allowing an individual to challenge decisions issued by courts, the jurisprudence of the highest ordinary and administrative courts would have been influenced by the values and principles embodied in the new Italian Constitution and made consistent with them in a more timely manner.

Since 1947-1948, in Italy, proposals for introduction of a system of individual constitutional complaint have recurred¹²⁰. Generally, there have been two main reasons weighing in support of its adoption: first, the need to develop a more comprehensive system for the protection of fundamental rights; second, the need to correct some of the shortcomings that have supposedly arisen in the application of the incidenter control of constitutionality¹²¹. Before the establishment of the Constitutional Court in 1956, a proposal for the introduction of a system of individual constitutional complaint was first presented by Mauro Cappelletti¹²². Another proposal in support of the introduction of a system of individual constitutional complaint was later presented by several Italian constitutional-law scholars in a roundtable held in Florence on December 9-10, 1965¹²³. That same

¹¹⁹ See E. Crivelli, *La tutela dei diritti fondamentali e l'accesso alla giustizia costituzionale* 12 (2003). The author explicitly cites the Post-Franco Spain and Germany in the aftermath of the Second World War, where – in the author's perspective – the individual constitutional complaint helped making citizens more readily aware of the new rights entrenched in the Constitution and of the occurred transition to a whole new constitutional system. *Id.*

¹²⁰ See also A. Scavone, *Appunti sulle proposte di introduzione del ricorso costituzionale diretto in Italia*, in *Rivista trimestrale di diritto e procedura civile* 1241 (1981). C. Mezzanotte, *Il problema della fungibilità tra eccezione di incostituzionalità e ricorso diretto alla Corte costituzionale*, in *Giustizia e Costituzione* 77 (1997).

¹²¹ *Id.*

¹²² M. Cappelletti, *La giurisdizione costituzionale delle libertà* (1955).

¹²³ It was on this occasion that Italian constitutional scholars underlined for the first time the existence of so-called “grey areas” (i.e., normative acts not challengeable for constitutionality before the Court) in the protection provided by the Constitutional Court against unconstitutional acts of the State. See G. Maranini (ed.), *La giustizia costituzionale* (1966) (proceedings of the roundtable with Italian constitutional scholars). See also P. Carrozza, R. Romboli & E. Rossi, *I limiti all'accesso al giudizio sulle leggi e le prospettive per il loro superamento*, in R. Romboli (ed.), *L'accesso alla giustizia Costituzionale: caratteri, limiti, prospettive di un modello* 679 (2006); see also A. Sandulli, *Rapporti tra giustizia comune e giustizia costituzionale in Italia* (1968). Participants in the roundtable drafted a constitutional amendment for the introduction of a system granting direct

year, a draft constitutional amendment was introduced into the Parliament on December 15¹²⁴. Despite arousing the interest and partial support of constitutional scholars and practitioners, these proposals were not further pursued and, as a result, were eventually abandoned.

Scholars have long since recognized that the incidenter control of constitutionality represents an adequate means to protect the fundamental rights of the citizens. Moreover, the Constitutional Court, in the past twenty years, has increasingly interpreted the rules regulating the procedure before the Court and the provisions of the Constitution in light of the Court's purpose to broaden protection of fundamental rights. The Court itself and constitutional-law scholars, however, have come to realize that in some circumstances the protection provided through this mechanism may not be complete. This recognition has led some citizens, in several circumstances, to set up so-called *lites fictae* (i.e., fictitious cases) before an ordinary court in order to have access to the Constitutional Court and have their rights protected from an unconstitutional law¹²⁵. Indeed, the introduction of the ICC in the Italian legal system has always been intended to supplement - rather than substitute for - the extant system of incidenter control of constitutionality, in order to address its shortcomings.

Subsequent initiatives aimed at introducing an individual constitutional complaint are worth mentioning¹²⁶. In 1989, a proposal for an amendment to the Italian Constitution was introduced into the Parliament¹²⁷. The proposed amendment

access to the Constitutional Court not to mere individuals but, conversely, to a certain number of citizens (so-called "popular action"): "all citizens, within one year from the entry into force of a law or an act with the force of law, can challenge it directly before the Constitutional Court": U. Spagnoli, *I problemi della Corte. Appunti di giustizia costituzionale* 104 (1996).

¹²⁴ Draft Constitutional law no. 2870, introduced into the Italian Chamber of Deputy on December 15, 1965. The constitutional law, if approved, would have allowed direct recourse to the Constitutional Court against decisions of the highest ordinary and administrative Courts (Court of Cassation and Council of State) in case of incorrect application of constitutional provisions.

¹²⁵ See, generally, E. Crivelli, *La tutela dei diritti fondamentali*, cit. at 119.

¹²⁶ The following projects have been presented before the establishment of the Bicameral Commission for Constitutional Reforms in the XIII Legislature whose role and functions will be detailed further infra.

¹²⁷ See Records of the Italian Parliament (Atti Parlamentari), Chamber of Deputies, n. 4168, Aug. 3, 1989, signatories Andò, Cappiello, et al.

would have introduced the possibility for a citizen to apply directly to the Constitutional Court to challenge statutes, acts with the force of law, judicial decisions, and acts issued by the public administration whenever a fundamental right guaranteed by the Constitution had been violated. The same year, a seminar was also organized at the Constitutional Court to address the possibility of adopting a system of individual constitutional complaint¹²⁸.

During the XII Legislature of the Italian Parliament (April 1994-May 1996), a Studying Committee for the Institutional, Electoral and Constitutional Reforms was set up by then-President of the Council of Ministers, Silvio Berlusconi¹²⁹. The Committee drafted a project aimed at increasing the competences of the Constitutional Court, including the possibility of judging on “recourses presented by anyone claiming to have been harmed by an act of the public authority in one of the inviolable rights recognized and guaranteed by the Constitution¹³⁰.”

The text of the proposed amendment went on, stating:

“Recourses are admissible only after exhaustion of all remedies of the ordinary and administrative jurisdictions. However, the Constitutional Court can nonetheless judge upon those constitutional recourses already lodged and deemed to be of an important and general interest or when serious, immediate and irreparable harm can be suffered by the applicant due to the time required to receive protection from ordinary and administrative courts¹³¹.”

Despite initial consideration, none of these attempts proved, in the end, successful.

¹²⁸ The seminar was held on November 13-14, 1989. The proceedings have been published in AA.VV., *Giudizio “a quo” e promuovimento del processo costituzionale* (1990).

¹²⁹ The Studying Committee was established by President of the Council of Ministers Decree of July 14, 1994.

¹³⁰ The final report of the Committee, presented on December 21, 1994, was published by the Department for Constitutional Reform under the Presidency of the Council of Ministers in 1995. An account of the Committee’s aims and of the content of its final report can be found at <http://www.camera.it/parlam/bicam/rifcost/dossier/prec08.htm> (last visited January 2012).

¹³¹ *Id.*

C). 1997: The Parliamentary Commission for Constitutional Reforms and the Revision of the Italian Constitution

In 1997, a new Congress on the subject was organized in Ferrara, on the occasion of the celebration for the 200 years since the establishment of the first Constitutional Law chair in Europe at the University of Ferrara¹³². Also in 1997, the newly established Parliamentary Commission for Constitutional Reform (“*Commissione Parlamentare per le Riforme Costituzionali*”) preliminarily approved the project for a comprehensive reform of the Italian Constitution drafted within the XIII Legislature of the Italian Parliament (May 9, 1996 - May 29, 2001)¹³³. This project deserves a more detailed consideration.

The Commission, also referred to as “Bicameral Commission,” was composed of thirty-five members of the Chamber of Deputies and thirty-five members of the Senate, appointed by the Presidents of the two Houses of Parliament. The Bicameral Commission started its activity in February 1997 with the purpose of drafting a comprehensive reform of the Second Part of the Italian Constitution.

Even though the project drafted by the Commission was eventually rejected by the Parliament and never came into effect, it nonetheless represents, to date, the most comprehensive attempt to revise the Second Part of the Italian Constitution, attempting to introduce – among other institutions – a system of individual constitutional complaint in the Italian legal system. The projected revision of the Constitution, in the part addressing the

¹³² L. Carlassare (ed.), *Il diritto costituzionale a duecento anni dalla prima cattedra in Europa* (1998). The first chair in Constitutional Law in Europe was indeed established at the University of Ferrara in 1797. The Congress was held on May 2-3, 1997); see also V. Onida, *La Corte e i diritti: tutela dei diritti fondamentali e accesso alla giustizia costituzionale*, in A. Pace (ed.), *Studi in Onore di Leopoldo Elia, Tomo II* (1999). During the Congress, then-Constitutional Court Judge Valerio Onida expressed the opinion that the introduction of a system of direct access to the Court for appeal of judicial decisions violating fundamental constitutional rights would have been desirable. The majority of the other participants, however, expressed a more cautious stance on the advisability of introducing such a system, especially for fear of developing a conflicting relationship between the Constitutional Court and ordinary judges.

¹³³ Legge Costituzionale 24 gennaio 1997, n. 1 (It.) (The Bicameral Commission was established with Constitutional Law no. 1/1997 titled “Establishment of a Parliamentary Commission for Constitutional Reforms”), available at <http://www.camera.it/parlam/bicam/rifcost/legist/legge.htm> (last visited January 2012).

Constitutional Court, aimed at increasing its competences and functions, introducing new circumstances providing for the possibility of lodging an application with the Constitutional Court¹³⁴. Among those new competences, the text of Article 134 would have been amended in order to include, under letter g), the power to judge on “recourses lodged with the Court in order to protect, against all public powers, the fundamental rights guaranteed by the Constitution, according to the conditions, forms and statutes of limitations established through [a subsequent] constitutional law.”¹³⁵

The Report on the System of Guarantees¹³⁶, drafted within the Commission by Marco Boato, explicitly identifies the reasons for introduction of the individual constitutional complaint in the purpose of supplementing the protection of fundamental rights already provided through the *incidenter* system of judicial review, in order to provide protection to those cases falling outside of the Court’s existing competences. The Report also shows that the members of the Commission were aware of the application that this mechanism had found in several foreign jurisdiction¹³⁷, as

¹³⁴ The project would have modified articles 59, 134, and 137 of the Constitution of the Italian Republic.

¹³⁵ The final draft of the proposed new art. 134, approved by the Bicameral Commission, in relevant part, read as follows: “The Constitutional Court shall pass judgments on: ...

- (g) Recourses lodged with the Court in order to protect, against all public powers, the fundamental rights guaranteed by the Constitution, according to the conditions, forms and statutes of limitations established through [a subsequent] constitutional law.” (Original Italian wording of letter g): “sui ricorsi per la tutela, nei confronti dei pubblici poteri, dei diritti fondamentali garantiti dalla Costituzione, secondo condizioni, forme e termini di proponibilità stabiliti con legge costituzionale.” Commissione parlamentare per le riforme costituzionali, Progetto di legge costituzionale (1997), available at <http://www.camera.it/parlam/bicam/rifcost/docapp/rel7.htm> (last visited January 2012).

¹³⁶ Commissione parlamentare per le riforme costituzionali, Relazione sul sistema delle garanzie del deputato Marco Boato (Parliamentary Committee on Constitutional Reform, Report on the system of guarantees by Member Marco Boato) (2008), available at <http://www.camera.it/parlam/bicam/rifcost/docapp/rel6.htm> (last visited October 2011).

¹³⁷ *Id.* In the Report, express reference was made to the Spanish *recurso de amparo*, the German *Verfassungsbeschwerde*, and the Austrian *Individualbeschwerde* or *Individualantrag*. All three models were considered; specifically highlighted were the differences between these three models with regard to the acts reviewable for constitutionality.

well as the increased workload for foreign constitutional courts deriving from its adoption. Despite this significant disadvantage, however, the ICC system was deemed worth introducing. In the Commission's view, the complaint should have been designed as an exceptional means for protection of fundamental rights and should have avoided compromising the Court's functionality. This latter purpose would have been achieved through the establishment of clear admissibility requirements. On the other hand, the purpose of the Commission was to achieve a protection as broad as possible for the fundamental rights entrenched in the Constitution¹³⁸, making them protectable by the Constitutional Court even in the absence of a controversy. The Report was eventually sent to the Parliament together with the final draft of the proposed amendment.

Throughout the drafting process, constitutional-law scholars provided advice and comments on the different options available and on the choices made by the Commission. When the Commission approved the project, and the final text was ready to be introduced into the Parliament for a final vote, criticism was expressed over several of the choices that had been made¹³⁹.

Criticism focused, on one hand, on the fact that, while the project had acknowledged the residual character of the individual constitutional complaint in the protection of fundamental rights, it eventually established quite broad admissibility criteria. Indeed, according to the proposed new text of Article 134 Const., the complaint could have been proposed against any act issued by a public power, including judicial decisions. Moreover, in the final

¹³⁸ Generally recognized as those listed in Articles 1-11 of the Italian Constitution. However, the category of "fundamental rights" is far from being unanimously recognized in its content and has been variously defined by the doctrine. See, e.g., A. Pace, *Diritti fondamentali al di là della Costituzione*, in *Politica del Diritto* 3 (1993). Some scholars have sustained a perfect coincidence between the category of "fundamental right" and those listed in the Constitution; but see A. Baldassare, *Diritti Inviolabili*, in 11 *Enciclopedia Giuridica* 18 (1989). Some others have stated that the two categories should be kept separated, the category of "fundamental rights" being, on one hand, narrower than that of the rights entrenched in the Italian Constitution, and at the same time, on the other hand, wider, including some rights which are only implicitly addressed by the Constitution. For a detailed account of these theories, see A. Spadaro, *Il problema del "fondamento" dei diritti "fondamentali"*, in *I Diritti Fondamentali Oggi* 64 (1995).

¹³⁹ See L. Paladin, *Corte costituzionale: aumentano le funzioni ma il futuro potrebbe portare la paralisi*, in *Guida al Diritto* 43, 65 (1997). See also M. Carducci, *Ipotesi di accesso diretto alla Corte costituzionale*, in 2 *Quaderni Cost.* 315 (1998).

draft, the requirement of previous exhaustion of judicial remedies, present in earlier drafts, was eventually omitted. The Report itself underlines how the final draft of the proposed amendment significantly differed from the first. This first draft was clear in providing access to the Court only when a subject could not resort to any other jurisdictional remedy¹⁴⁰. The Committee first rephrased the final part of the article, requiring the previous exhaustion of judicial remedies, and then, eventually, omitted any such reference altogether¹⁴¹.

On the other hand, further criticism focused over the legitimacy and opportunity to leave to a subsequent constitutional law the identification of the fundamental rights whose infringement could be claimed by an individual. The explanatory Report suggested that the Constitutional Court be given some leeway in determining the category of “fundamental rights” at issue.

Finally, the new provision referenced neither the acts that could be challenged nor the criteria to be applied by the Court in selecting applications. The indeterminacy of the provision led some commentators to state that the project, far from leaving to a subsequent constitutional law the mere implementation of an already defined mechanism, left to that law the definition of the very core features of the constitutional complaint¹⁴².

As previously noted, the project was not adopted by the Parliament and was eventually abandoned¹⁴³.

Additional structured proposals for the introduction of a system of individual constitutional complaint have not been advanced since 1997, but the issue was raised again in 1999 during

¹⁴⁰ The first draft stated: “The Constitutional Court shall pass judgment: ... g) On complaints lodged by anyone claiming a harm to one of the fundamental rights guaranteed by the Constitution inflicted by an act of a Public Power, in case no other judicial remedy is provided.” The original text, in Italian, provided: “g) ricorsi presentati da chiunque ritenga di essere stato leso in uno dei diritti fondamentali garantiti dalla Costituzione da un atto dei pubblici poteri avverso il quale non sia dato rimedio giurisdizionale.”

¹⁴¹ See *Relazione Sul Sistema Delle Garanzie del Deputato Marco Boato*, www.camera.it/parlam/bicam/rifcost/docapp/rel6.htm (last visited January 2012) (It.).

¹⁴² See e.g., S. Panizza, *Il ricorso diretto dei singoli*, in A. Anzon, P. Caretti & S. Grassi (eds.), *Prospettive di accesso alla giustizia costituzionale (Atti del Convegno di Firenze del 28-29 maggio 1999)* 81 (2000).

¹⁴³ See *Riforme, la fine della Bicamerale*, *Corriere della Sera*, June 3, 1998.

a Conference organized in Florence¹⁴⁴ and has been addressed periodically by various Presidents of the Italian Constitutional Court in their annual press conferences¹⁴⁵.

D). Incidenter Review: An Already Effective System?

Recurrently over the past forty years, several constitutional-law scholars have expressed the view that a more comprehensive and efficient protection of fundamental rights in Italy could be achieved with the introduction of a system of individual constitutional complaint in one of its various forms, to supplement and enhance the protection of fundamental rights already in existence¹⁴⁶. The recurring interest in the establishment of this type of recourse to the Constitutional Court can be explained with the desire of legal scholars and practitioners to achieve protection for those legal situations and areas of law that are not already covered by the incidenter control of constitutionality¹⁴⁷. It is worth asking, however, if – and to what degree – introduction of an individual constitutional complaint into the system would be really useful in overcoming some of the supposed shortcomings and the so-called “grey areas” of the Italian system of judicial review.

¹⁴⁴ A. Anzon, P. Caretti & S. Grassi (eds.), *Prospettive di accesso alla giustizia costituzionale (Atti del Convegno di Firenze del 28-29 maggio 1999)* 81 (2000). The Congress was organized by the so-called “Gruppo di Pisa” and held in Florence on May 28-29, 1999.

¹⁴⁵ See *La giustizia costituzionale nel 1997*, in *Foro italiano*, Feb. 11, 1998, 133: transcript of the annual press conference of the President of the Constitutional Court, Judge Renato Granata. See also Annual press conference of the President of the Constitutional Court, Judge Valerio Onida, Jan. 20, 2005, available at www.cortecostituzionale.it (last visited January 2012). See also P. Passaglia, *Sull'inopportunità di introdurre il ricorso diretto individuale: qualche riflessione (ed una provocazione)*, available at http://joomla.ddp.unipi.it/documenti/persdoc/contributi/Ricorso_diretto_in_dividuale.pdf (last visited January 2012), offering reflections on the (in)opportunity to adopt a system of ICC in Italy after consideration and comparison of the statements of the two Presidents.

¹⁴⁶ See M. Cappelletti, *La giurisdizione costituzionale delle libertà*, cit. at 122. See also V. Onida, *La Corte e i diritti*, cit. at 132. See also A. Anzon, *Per una più ampia garanzia dei diritti costituzionali dinanzi alla Corte: il ricorso individuale diretto*, in V. Angiolini (ed.), *Libertà e giurisprudenza costituzionale* (1992); R. Caponi, «Ciò che non fa la legge, lo fa il giudice, se capace»: *l'impatto costituzionale della giurisprudenza della Corte di cassazione italiana*, in AA.VV., *Annuario di Diritto Comparato e di Studi Legislativi* (2011).

¹⁴⁷ See generally, R. Balduzzi & P. Costanzo (eds.), *Le zone d'ombra della giustizia costituzionale. I giudizi sulle leggi* (2007).

Often included amongst these shortcomings is the impossibility for the Italian Constitutional Court to judge the constitutionality of secondary sources (e.g. regulations), administrative acts and judicial decisions, and the supposed untimely protection that the “incidental” review would grant when law-decrees or election laws would be involved¹⁴⁸. However, it is this author’s opinion that the introduction of a system of direct individual access offers uncertain advantages and some clear risks. The protection of fundamental rights should, therefore, preferably be addressed by ordinary courts, and a system of individual constitutional complaint – if introduced – should be designed in order to become a merely residual recourse providing citizens an additional avenue to access the Court for protection of “rights or interests” from an unconstitutional encroachment originating from public powers.

Consistent with this approach, the Italian Constitutional Court, through its jurisprudence, has tried to develop all the potentialities of the *incidental* system of judicial review to provide a broad and comprehensive protection of fundamental rights. One of the mechanisms the Court has used to enhance rights protection has been a progressive interpretation of the rules regulating third-party participation to the hearings before the Constitutional Court, thus overruling its own previous strict interpretation, which had categorically excluded any third-party intervention¹⁴⁹. This broader interpretation has prompted a shift from a so called “objective interest” in the judicial review of the constitutionality of legislation (i.e. a general interest of the whole legal system in the constitutionality of legislation), to a more “subjective” one (i.e. a specific interest in the protection of the subjective fundamental rights at stake in the decision of constitutionality). According to some authors, with this shift, the Court has increasingly become “a rights Court¹⁵⁰.”

Moreover, the Court has also used its power to decide on the “relevant” and “not manifestly unfounded” character of the question of constitutionality raised by the ad hoc judge, in order to move toward a “more decentralized system” of judicial review of

¹⁴⁸ See E. Crivelli, *La tutela dei diritti fondamentali*, cit. at 119, 18.

¹⁴⁹ See Corte cost., decisions no. 20/1982, no. 421/1991, nos. 314 and 315/1992 and no. 176/1996.

¹⁵⁰ V. Onida, & M. D’Amico, *Il giudizio di costituzionalità delle leggi*, *Materiali di diritto costituzionale. Il giudizio in via incidentale*, Vol. I, 247 (1997).

legislation¹⁵¹. Indeed, the Constitutional Court has repeatedly urged ordinary judges to directly further an “adapting interpretation” (“*interpretazione adeguatrice*”), that is, to directly address an issue of constitutionality of legislation without raising a question before the Constitutional Court when – among the many possible scenarios – a constitutionally oriented interpretation of the applicable law is available¹⁵². While this practice brings with it the risk that ordinary judges will avoid referring questions of constitutional legitimacy to the Constitutional Court, even in cases when this would be necessary, it also has the advantage of determining a more concrete (i.e. closer to the facts of the case) and more tailored analysis of the constitutionality of legislation which eventually results in a decision with only *inter partes* effect. Conversely, decisions of the Constitutional Court that declare the unconstitutionality of a statute have *erga omnes* effect. The protection of fundamental rights in this case is therefore also enhanced.

The “incidenter” system of judicial review also leaves certain types of laws outside the protection provided by the Constitutional Court. The system is deemed to be inadequate, for example, to evaluate the constitutional legitimacy of laws whose alleged unconstitutionality should be ascertained timely and without delay¹⁵³. Until recently, this was the case, for example, of those acts with the force of law adopted by the Government according to the procedure established by Article 77 of the Italian Constitution (decrees-law)¹⁵⁴. According to the original stance of the Constitutional Court, the constitutionality of these acts with specific regard to the existence of the requirements of urgency and necessity for their adoption could no longer be assessed after they had been converted into law by the Parliament (conversion must

¹⁵¹ See M. Cappelletti, *Questioni nuove (e vecchie) sulla giustizia costituzionale*, in *Giurisprudenza Costituzionale* 857 (1990).

¹⁵² See generally Corte cost. decisions nos. 347/1998, 349/1998, 418/1998, 450/1998, 283/1999 and 436/1999.

¹⁵³ See E. Crivelli, *La tutela dei diritti fondamentali*, cit. at 119, 47.

¹⁵⁴ See Republic of Italy Cost. art. 77, which states that, in relevant part: “When in extraordinary cases of necessity and urgency the Government adopts under its own responsibility provisional measures having the force of law, it must on the same day present them for conversion into law to the Houses that, even if dissolved, shall be especially summoned and shall be assembled within five days. The decrees lose effect from their inception if they are not converted into law within sixty days from their publication”.

take place within sixty days of enactment)¹⁵⁵. Only in 1995 did the Court, realizing the gap that its own jurisprudence had created, overrule its previous decisions and affirmed its competence to judge the constitutionality of already converted decrees-law (together with the converting Law) with regard to the necessity and urgency requirements that justified the measure¹⁵⁶.

Other problems are usually deemed to arise with regard to those statutory laws – fundamental for the functioning of the whole democratic system – whose first application could take place well before a question of constitutionality could be referred to and resolved by the Constitutional Court, for example, election laws¹⁵⁷.

With regard to the category of acts that the Court can scrutinize for consistency with the Constitution, article 134 Const., as interpreted by the Constitutional Court, precludes the Court from considering the constitutionality of secondary sources, such as regulations¹⁵⁸. The Court has consistently stated that it is allowed to review the constitutionality of only primary sources of law, that is, statutory laws and acts with the force of law (namely, decrees-law and legislative decrees). Secondary sources, however, and more specifically regulations, in many cases represent the only source of law regulating a whole area of human activities as a consequence of recurring efforts of delegification¹⁵⁹, and cannot,

¹⁵⁵ See generally Corte cost. Decision no. 108/1986.

¹⁵⁶ The Constitutional Court overruled its previous jurisprudence to affirm its competence to judge on already converted decrees-law in decision no. 29/1995. For an account of the development of the Court's jurisprudence on the constitutionality of decrees-law, see R. Romboli, *Decreto-legge e giurisprudenza della Corte costituzionale*, in A. Simoncini (ed.), *L'emergenza infinita. La decretazione d'urgenza in Italia* 107 (2006).

¹⁵⁷ See E. Crivelli, *La tutela dei diritti fondamentali*, cit. at 119, 47. With regard to election laws, the author recalls how, back in 1956, Piero Calamandrei had already highlighted the possible shortcoming of the incidenter system of judicial review, especially with regard to election laws infringing upon the principle of equal suffrage or that modify, in violation of the Constitution, the age for franchise and eligibility: see P. Calamandrei, *Corte costituzionale e autorità giudiziaria*, in *Rivista di diritto processuale* 16 (1956).

¹⁵⁸ See Corte Cost. no. 23/1989 and no. 456/1994.

¹⁵⁹ Through processes of "delegification" the Parliament authorizes administrative authorities to adopt regulations in areas previously governed by statutory law, for efficiency purposes. For a treatment of this phenomenon, in connection with access to the Constitutional Court, see T. Giovannetti, *Delegificazione, regolamenti e atti amministrativi*, in R. Romboli, *L'accesso alla giustizia costituzionale* 467 (2006).

therefore, be scrutinized either by the Constitutional Court or by ordinary judges for consistency with a law or with an act having the force of law, since these latter are missing. In all those cases, introduction of the possibility for an individual to apply directly to the Constitutional Court would provide protection to rights otherwise left without guarantees.

III. Final Remarks on the Advisability to Adopt the Individual Constitutional Complaint in Italy

The examples provided by several of the European countries analyzed in the Part I of the article show that a system of individual constitutional complaint can be introduced in a constitution even at a subsequent stage in the development of the constitutional system.

In this respect, while adoption of a broad system of individual constitutional complaint in new democracies may enhance legitimacy and acceptance of a newly established constitutional or supreme court in the system, and offer the opportunity to subject to constitutional scrutiny legislation enacted during the previous – often undemocratic – regime, it is our view that different considerations should apply with regard to those constitutional systems and systems of judicial review – as the Italian – that have already achieved full legitimacy, acceptance and support and that have also developed a considerable line of decisions. In this latter case, only a truly compelling need to address important “grey areas” in the protections of fundamental rights should mandate adoption of a system of direct access to the Constitutional Court. The debate on the introduction of the individual constitutional complaint in Italy is, therefore, deeply linked to the achieved effectiveness of the already existing system of *incidenter* and concrete judicial review of legislation chosen by the Constituent Assembly and as further developed by the Constitutional Court over the past years of activity.

In Italy, the impossibility of directly resorting to the Constitutional Court for protection of constitutional rights has led, over time, to the enhancement of the *incidenter* review of legislation as a way to protect fundamental rights and to the development of this type of review in original ways. Ordinary judges are seen as the “door keepers”¹⁶⁰ of the Court, in a

¹⁶⁰ The expression was originally created by Piero Calamandrei.

“bottom-up” process activated through the *incidenter* review. The role that the Italian Constitutional Court has played in the system has relied on and has been directly proportional to the sensitivity of ordinary judges with regard to issues like the protection of fundamental rights and the implementation of the principles entrenched in the Constitution. Indeed, as we have seen, it is up to ordinary and administrative judges to decide when – and if – to raise an issue of constitutionality of a law before the Constitutional Court when some prerequisites (“*non manifesta infondatezza*” e “*rilevanza*”) are present.

The Constitutional Court, in the past years, however, through its case law, has reversed this process, making it a “top-down” one. The Court has recognized that all judges have an important role, not only in applying its decisions, but also, and more importantly, in directly conducting a limited control of the constitutionality of statutory laws (including those affecting fundamental rights), with the only limit represented by the impossibility for ordinary judges to refuse to apply directly (i.e. without first resorting to the Constitutional Court) those laws they considered unconstitutional (a role that is still reserved exclusively to the Constitutional Court)¹⁶¹.

Increasingly often, the Constitutional Court has declared inadmissible the questions of constitutional legitimacy presented and has asked the ad hoc judges to directly provide a “constitutionally oriented” interpretation of the challenged statutory law¹⁶². Before referring a question to the Constitutional Court, an ordinary judge is now expected to look for an interpretation of the statute at issue that would preserve its constitutional validity¹⁶³ and show – together with the two

¹⁶¹ It is worth remembering, though, that ordinary judges can already decide to not apply – in Italy as in all the other Member States of the European Union – national statutory laws which they deem are inconsistent with European Union law, probably furthering the general level of decentralization of the system.

¹⁶² See, e.g., Corte Cost. no. 356/1990: “in principle, laws are not declared unconstitutional when it is theoretically possible to interpret them in unconstitutional ways, but when it is impossible to interpret them in a way which is consistent with the Constitution.” See also Corte Cost. nos. 347/1998, 349/1998, 418/1998, 450/1998, 283/1999 and 436/1999.

¹⁶³ While in Spain this is explicitly required by art. 5.3 of the Ley Organica del Poder Judicial (1985), the Constitutional Court of Italy developed this requirement through case law: see Corte Cost. no. 356/1990. See T. Groppi, *The Italian Constitutional Court: Towards a ‘Multilevel System’ of Constitutional Review?* 2 J. Comp. L. 100, 116 (2008).

abovementioned requirements – that a constitutionally adequate interpretation is impossible¹⁶⁴. As a consequence of this evolution, the protection of constitutional rights against unconstitutional legislation is enhanced and can be addressed directly before ordinary judges.

This “virtuous connection” between the Constitutional Court and ordinary courts has contributed to dispel the original distrust towards ordinary judges that characterized the early years following the enactment of the 1948 Constitution and that represented the main reason for the adoption of a centralized system of judicial review¹⁶⁵. It is this author’s view that the introduction of a system of direct constitutional recourse, especially in cases in which a decision issued by ordinary or administrative judges could be challenged before the Constitutional Court, would run the risk of breaking this “virtuous connection,” implicitly accusing ordinary judges of providing an ineffective protection of rights. This is the reason why, while some Italian scholars support the introduction of a broad ICC system¹⁶⁶, others – whose opinion we share – look favorably at the introduction of a constitutional complaint on condition that judicial decisions cannot be challenged¹⁶⁷.

¹⁶⁴ T. Groppi, *Corte costituzionale e principio di effettività*, 1 Rassegna Parlamentare 189, 213 (2004). See, e.g., Corte Cost. no. 343/2006: “the ad hoc judge ... has the duty to choose, among the several possible interpretations of a provision, the one which can dispel doubts of constitutional illegitimacy, raising an issue of constitutionality only when the text of the provision precludes any possibility to interpret it in a constitutionally-oriented way.”

¹⁶⁵ See E. Lamarque, *Interpreting Statutes in Conformity with the Constitution: The Role of the Constitutional Court and Ordinary Judges*, 1 It. J. Pub. L. 91, 105 (2010), quoting P. Calamandrei, *Corte Costituzionale e autorità giudiziaria*, 1 Rivista di diritto processuale 8, 9 & 53 (1956) (discussing the importance of an “active collaboration” between the Constitutional Court and ordinary judges “working together like two complementary and inseparable gears of a single procedural mechanism” for the correct functioning of constitutional review in Italy), available at http://www.ijpl.eu/assets/files/pdf/2010_volume_1/IJPL%20volume%201_2010.pdf (last visited January 2012).

¹⁶⁶ See A. Anzon, *Per una più ampia garanzia dei diritti costituzionali*, cit. at 146, 24; R. Caponi, «Ciò che non fa la legge, lo fa il giudice, se capace», cit. at 146. In fact, this is actually the case in Czech Republic, Germany, Poland, Serbia, Slovak Republic, Slovenia, Spain and Switzerland where judicial decisions are among the acts that may be challenged through direct recourse.

¹⁶⁷ See R. Romboli, *Ampliamento dell'accesso alla Corte costituzionale e introduzione di un ricorso diretto a tutela dei diritti fondamentali*, in A. Anzon, P. Caretti & S. Grassi (eds.), *Prospettive di accesso alla giustizia costituzionale (Atti del Convegno di*

On a different note, it is our opinion that the advisability (or lack thereof) of the introduction of the ICC in Italy should also – and more properly – be assessed in light of the possibility for an individual to receive supranational protection of rights by applying to the European Court of Human Rights for violation of the rights entrenched in the Convention¹⁶⁸; or the possibility – since 2007 – to directly claim infringement of rights protected by the European Convention on Human Rights before Italian ordinary and administrative judges. Indeed, with regard to this latter development, the Constitutional Court, in four pivotal decisions¹⁶⁹, in light of the amended text of article 117 of the Constitution¹⁷⁰, has recognized infra-constitutional (but supra-legislative) status to the ECHR, defining it as “intermediate law”

Firenze del 28-29 maggio 1999) 81 (2000); R. Romboli, “Torniamo alla Costituente”: considerazioni in ordine all'introduzione di un ricorso diretto del singolo e delle minoranze parlamentari alla Corte costituzionale, in 43 RIPE - Revista do Instituto de Pesquisas e Estudos 31 (2008).

¹⁶⁸ According to the individual application procedure set up in article 34 of the Convention. On this topic, see M. Cappelletti, *Questioni nuove (e vecchie) sulla giustizia costituzionale*, cit. at 151, 32, where the author expresses the view that, in light of Italy's participation in the system of the European Convention of Human Rights, the introduction of a national individual constitutional complaint would be, under many aspects, redundant. See also E. Crivelli, *La tutela dei diritti fondamentali*, cit. at 119, 150.

¹⁶⁹ See Corte cost. decisions nos. 348 and 349/2007; Corte cost. decisions nos. 311 and 317/2009 (decisions are available, in English, on the website of the Italian Constitutional Court: http://www.cortecostituzionale.it/ActionPagina_325.do (last visited January 2012). See also Corte Cost. decision no. 80/2011, confirming the status of the ECHR as “intermediate law” (“norma interposta”) after the entry into force of the Lisbon Treaty. On the first four pivotal decisions, see G. Gentili, *The status of the ECHR in the Italian hierarchy of sources as determined by the Italian Constitutional Court (Constitutional Court decisions ns. 348, 349/2007)*, in Palomar, available at http://www.unisi.it/dipec/palomar/italy001_2008.html#3 (last visited January 2012); G. Gentili, *The Italian Constitutional Court and the legal status of the European Convention on Human Rights in the national legal system: positive competition between fundamental rights provisions (Constitutional Court decisions ns. 311, 317/2009)*, PALOMAR, available at http://www.unisi.it/dipec/palomar/italy009_2010.html#5 (last visited January 2012).

¹⁷⁰ Art. 117, cl. 1 Costituzione [Cost.] (It.), indicating that “Legislative powers shall be vested in the State and the Regions in compliance with the Constitution and with the constraints deriving from EU legislation and international obligations” (emphasis provided), with the ECHR being considered by the Court in decisions 348 and 349/2007 as falling within the latter type of constraints.

(*norma interposta*)¹⁷¹." As a consequence of this achieved status, the Convention is now directly applicable in the Italian legal system and is now part of the Constitutional Court's parameter for constitutional review of domestic legislation¹⁷².

It is beyond doubt that the direct individual access has the capacity to highly affect the system of judicial review adopted in a country, especially considering its primary side-effects: a significant increase in the docket of a constitutional court, most likely affecting its ability to provide timely justice for claims falling within the Court's jurisdiction (as happened in Spain before the 2007 reform); as well as a possible delegitimation of ordinary judges, especially when the individual constitutional complaint system allows applications against decisions of ordinary and administrative courts.

The Italian system of judicial review has shown, over the years, the ability to re-define itself to address "grey areas" in fundamental-rights protection through a progressive interpretation of the existing rules on the incidental procedure to access the Constitutional Court. If a system of individual constitutional complaint needs to be adopted, this system also needs to be carefully designed, in order to structure the direct recourse in a way that would not affect the existing "virtuous connection" between the Constitutional Court and ordinary judges, and would not increase the Court's workload to the point of making its decisions untimely and - ultimately - ineffective. Also, in light of the very recent development regarding the infra-constitutional status now accorded to the European Convention on Human Rights in the Italian system of sources of law, it is our view that adoption of a general and broad system of ICC would ultimately bring about more disadvantages than advantages. A more narrowly designed system, introducing only very specific

¹⁷¹ Meaning that the Convention now has supremacy over legislative materials but remains subordinate to the Constitution in the Italian hierarchy of sources of law

¹⁷² However, as highlighted by Philipp Cede: "the ECHR's status does not reach the same level as [EU] law: As opposed to norms of [EU] law - which automatically prevail over contrary domestic legislation in such a way that any court must leave the conflicting domestic norm disapplied, conflicts between ECHR law and domestic legislation may not be resolved by ordinary Courts directly but must be referred to the *Corte Costituzionale*," P. Cede, *Report on Austria and Germany*, in G. Martinico & O. Pollicino (eds.), *The National Judicial Treatment of the ECHR and EU Laws* 55 (2010) (comparing the approaches followed by the Constitutional Courts in Austria and Germany).

and not-generalized cases of direct recourse and granting access to “enumerated and well-defined individuals or state bodies ... and/or for enumerated and well-identified violations” – as emphasized by the Constitutional Court itself in one of its decisions¹⁷³ – seems to be more compatible with the current development of the Italian structure of judicial review.

This system – in our view – should borrow from some of the features of what we have previously defined as the “European model of individual constitutional complaint,” bearing in mind, at the same time, that fundamental rights could and should be protected – first and foremost – by ordinary judges and only afterward by the Constitutional Court (mandating therefore the previous exhaustion of all other available legal remedies), and exclusively in cases in which the applicant could demonstrate the novelty of the constitutional question (i.e. that the issue has not already been addressed by the Constitutional Court) and a personal, direct, and current interest in the annulment of the act(s). The determination on the existence of these two prerequisites should be rather strict and, in any case, be left to the Constitutional Court itself (or to a special panel within the Court specifically created to conduct this review, on the German example), in order to allow the Court to exercise a significant control over its own docket and workload.

On the other hand, for the sake of legal certainty and to safeguard both the principle of separation of powers and the independence of the judiciary, the identification of the rights protected through direct recourse should be left to the legislator rather than to the Constitutional Court, and the complaint should be allowed only in cases of actions (not omissions) by the public powers in the form of legislation and regulations, but in this latter case only in those areas not regulated by primary sources of law¹⁷⁴. Consistent with the same *rationale* (legal certainty) and in

¹⁷³ The issue was indeed addressed by the Constitutional Court in an *obiter dicta* in decision no. 406 of July 14, 1989, par. 3 of the “Conclusions on points of law.” According to the Court, “grey areas” can be addressed by “modifying (through constitutional amendment) the system of judicial review with the introduction of new *principaliter* proceedings (actionable by enumerated and well-defined individuals or state bodies ... and/or for enumerated and well-identified violations).” See Corte cost. decision no. 406/1989

¹⁷⁴ The decision on the admissibility in these cases still falling – as anticipated – within the exclusive purview of the Constitutional Court.

order to further equality of treatment, a clear statute of limitation should also be established.¹⁷⁵

To balance out these rather strict accessibility requirements, the possibility to file a recourse should be granted to both legal and natural persons, and, in this latter case, to both citizens and foreign nationals residing in Italy, with few formal requirements¹⁷⁶.

Structured as a “weaker,” or “narrower” form of individual constitutional complaint (as opposed to the “stronger” or “broader” form, adopted in most eastern European countries and in pre-2007 Spain), the individual constitutional complaint could supplement the already existing and fully-developed Italian *incidenter* system of judicial review without altering the balance between ordinary judges and the Constitutional Court achieved through years of exercise of judicial review. Furthermore, it would also provide effective protection for the “grey areas” currently not covered by the *incidenter* review, without overburdening the Court.

It is indeed our view that, in designing a system of direct individual access to the Italian Constitutional Court, drafters should be guided by a leading Italian legal scholar’s observation that a system of judicial review operating more broadly but less timely (due to the overburdening of the Court) would be less beneficial than one operating promptly but on a narrower scale¹⁷⁷.

¹⁷⁵ In our view, the statute of limitation for filing of the complaint should not exceed one year (as in Germany and Croatia) nor be shorter than two months (as in FYRM, Montenegro, Slovenia) since the enactment of the challenged act(s). The two-year time period adopted in Albania seems indeed too extensive while, conversely, Switzerland’s 30-day time-frame appears rather short. Spain and Belgium have adopted, respectively, a three-months and a six-months statutes of limitation.

¹⁷⁶ But with the possibility, for the Constitutional Court, to issue fines for those individual complaints which are filed and clearly lack one or more basic requirements, in analogy with the system adopted in Germany.

¹⁷⁷ See M. Cappelletti, *Intervento*, in G. Maranini (ed.), *La giustizia costituzionale* 399-400 (1966).