Structure and Functions of the Individual Constitutional Complaint

Italy

Individual Constitutional Complaint in Italy: Projects of Introduction and an Assessment of the Real Advantages for the Protection of Fundamental Rights

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The Italian constitutional system does not contemplate that an action seeking constitutional review may be brought directly by a citizen or a group of citizens to the Constitutional Court. The issue of constitutionality – besides those cases in which a direct action can be brought by certain previously defined State bodies – can be raised only in the course of a judicial proceeding 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.

The debate on the introduction of the possibility for an individual to directly apply to the Constitutional Court, claiming the infringement of a constitutionally guaranteed fundamental right, has been nonetheless lively since the foundation of the Italian Republic and the adoption of the 1948 Constitution. After a brief description of some of the peculiarities of the Italian system of judicial review, the paper will address the proposals that, since 1947, have been made for the adoption of the individual constitutional complaint mechanism (hereinafter, ICC) in the Italian system of judicial review. The final part will propose some reflections on the real advantages (if any) that the introduction of such an institution would bring to the Italian legal system, especially in light of the already existing incidental control of constitutionality (“controllo di costituzionalità in via incidentale”).

1. Some general remarks on the Italian system of judicial review.

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The Italian Constitution of 1948 provided for the establishment of a Constitutional Court (Corte Costituzionale)\(^2\) Arts. 134-137\(^3\) of the Constitution define the main features, structure and functions of the Court. Although the Constitution was promulgated in 1948, the Constitutional Court was established only in 1956\(^4\) after the necessary implementing legislation was enacted – mainly through constitutional laws –

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\(^3\) It appears important to cite at least Arts. 134 (functions of the Court) and 137 (enacting laws) of the Italian Constitution:

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

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

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

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

**Art. 137** – “A Constitutional Law shall establish the conditions, forms, terms for proposing judgments on constitutional legitimacy, and guarantees on the independence of constitutional judges.

Ordinary laws shall establish the other provisions necessary for the Constitution and the functioning of the Court.

No appeals are allowed against the decision of the Constitutional Court.”

\(^4\) The Constitutional Court was not established before 1956 due to political difficulties in selecting the judges. After the enactment of the Constitution and before the establishment of the Constitutional Court (1948-1956), Italy experimented with a decentralized system of judicial review, where ordinary courts could refuse to apply those laws they deemed unconstitutional. See Const. Transitory and Final Provisions, Art. VII, par. 2. The experience has been significantly criticized, especially in light of the unwillingness of ordinary and administrative judges to implement the principles of the new Constitution: see Calamandrei P., *La Costituzione e le leggi per attuarla. (Come si fa a disfare una Costituzione)*, in Battaglia A., Calamandrei P., Corbino E., De Rosa G., Lussu E., Sansone M., Valiani L., *Dieci anni dopo: 1945-1955. Saggi sulla vita democratica italiana*, Bari, Laterza, 1955.
in 1948 and 1953. The Court is a special institution acting in a judicial manner for the safeguard of the Constitution and the fundamental rights of the citizens, against infringements originating from the legislature. It is the only institution vested with the power to decide questions regarding the constitutionality of laws. The adoption of a centralized model of judicial review was tempered with some elements taken from the decentralized one, allowing every ordinary and administrative judge to raise a question of constitutional validity of the norms that it had to apply to the case before it. Indeed, questions of constitutionality of legislation can be brought before the 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 on the court’s own initiative (so called “incidenter” review). If the ad hoc judge deems the issue of constitutionality “not manifestly unfounded” (“non manifesta infondatezza”) and the challenged law “relevant” (“rilevanza”) in order to issue a decision, she must put the trial on a stay and refer it to the Constitutional Court, whose decisions, according to Art. 137 Const. are final. With regard to the cases submitted by the ad hoc judge, the Constitutional Court does not decides the merit of the dispute, but, by way of difference, decides on the compatibility of the law with the Constitution. With regard to individuals, access to the Constitutional Court is limited to the way just mentioned. When an individual believes that her fundamental rights entrenched in the Constitution have been violated by a State or Regional law, the only way she can have the Constitutional Court judging on the

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


7 On the difference between “incidenter” and “principaliter” review, see Cappelletti M., Judicial Review, cit., p. 69 et sequitur.
constitutionality of the law, it is to apply to an ordinary or administrative court and have
the question raised before the Court.

Only State and Regional Governments can directly refer issues of
constitutionality to the Court, claiming that its constitutionally guaranteed competences
have been encroached.

The only exception to the rule that an individual is generally forbidden to
challenge a law, applying directly to the Constitutional Court, can be found in the
Special Statute for the Trentino-Alto Adige Region\textsuperscript{8}. Indeed, Art. 98 of the Special
Statute\textsuperscript{9} allows the President of the Region or of one of the two Provinces of Trento and
Bolzano (following a resolution of the Regional or Provincial Parliament) to directly
raise an issue of constitutionality before the Constitutional Court challenging a law or
an act with the force of law issued by the State on grounds of violation of the Trentino-
Alto Adige Statute (which has constitutional status) or of the principle of protection of
the German and Ladin minorities. The nature of the action, the single individual
legitimated to raise an issue of constitutionality of the law and the possibility to
challenge the law not only on grounds of an encroachment of the competences, but also
for protection of fundamental rights (protection of German and Ladin minorities)
underline the differences between this institution and the incidental control of
constitutionality. It should be noted, however, that this exception does not in any way

\textsuperscript{8} Enacted with Constitutional Law n. 5/1948 of February 26, 1948.
\textsuperscript{9} Art. 98 of the Special Statute for the Trentino-Alto Adige Region (available at: http://www.landtag-
.bz.org/it/banche-dati-raccolte/opuscoli.asp):

“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.

3. The appeal shall be lodged by the president of the Region or that of the province, following a resolution
by the respective Government. […]”
diminish the efficacy of the general rule that an individual is forbidden to apply directly to the Court.

2) The projects for the introduction of a system of individual constitutional complaint in Italy: The first fifty years: 1947-1997

While 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 to introduce a mechanism of individual constitutional complaint. Indeed, 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 – within one year from the enactment – a law before the Constitutional Court on grounds of unconstitutionality. The provision, at that stage, was drafted at a quite general level, without specification to the acts that could have been challenged (the text generically refers to “laws”, without explaining if the term was intended to include both State and Regional laws and also acts with the force of law), or the reasons allowing the recourse (no reference was made to the infringement of fundamental rights, 

10 For an account of the projects addressing the introduction of the ICC and presented during the work of the Constituent Assembly, see the first part of Groppi T., Il ricorso di «amparo» in Spagna: caratteri, problemi e prospettive, in Giurisprudenza Costituzionale, 1997, p. 4340, 4340 et sequitur.

11 The approved text stated: “Anybody, within the term of one year [from the enactment] can challenge a law before the Constitutional Court on the ground of its unconstitutionality. A rejected claim of unconstitutionality will be banned from being again lodged”. 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

but only to the alleged unconstitutionality of the law). Any reference to the ICC was eventually excluded by the Editorial Committee in the text of the article that had to be submitted to the Constituent Assembly for approval.

Only on December 2, 1947, reference was made again to the ICC, this time before the Constituent Assembly. The text of the proposed amendments was more carefully drafted and some additional elements were introduced with regard to the reasons granting access to the Constitutional Court. Indeed, Giuseppe Codacci Pisanelli, one of the members of the Constituent Assembly, presented an amendment to the text under scrutiny by the Constituent Assembly, 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 a harm inflicted to her constitutionally guaranteed rights or interests”\(^\text{12}\).

On the same day, another amendment was presented by Costantino Mortati, proposing that “a recourse for constitutional illegitimacy c[ould] be lodged directly with the Constitutional Court within the term of prescription that will be established by law, by those who claim a direct harm to a right or a legitimate interest deriving from a norm […]”\(^\text{13}\).

The Constituent Assembly eventually decided to leave the determination of the “conditions, forms and terms for proposing judgments on constitutional legitimacy”\(^\text{14}\) to

\(^{12}\) 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 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».

\(^{13}\) In original: “Il ricorso per illegittimità costituzionale può essere prodotto direttamente innanzi alla Corte costituzionale nel termine che sarà fissato dalla legge, da chi pretendendo 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 Art. 137 Const.

\(^{14}\) Art. 137 of the Italian Constitution.
a following constitutional law, without excluding the possibility to adopt the ICC. Indeed, the Editorial Committee of the Constituent Assembly, drafted a tentative text of the Art. 137 Const. including the ICC, in case the Assembly eventually decided to vote on its introduction.\(^\text{15}\)

When the implementing law was eventually enacted, in 1948, no reference was made to the ICC, which therefore remained excluded from the circumstances granting access to the Court.\(^\text{16}\)

According to some commentators,\(^\text{17}\) the establishment in 1947 of an ICC mechanism allowing an individual to challenge a decision issued by a court, would have helped shaping the jurisprudence of the highest ordinary courts according to the values and principles embodied in the new Italian Constitution in a more timely fashion.

Since then, proposals for the adoption of the ICC tool have been recurrent over time,\(^\text{18}\) and two have been the main reasons weighing in favour of its adoption: on the

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\(^{15}\) As regards the part of the article addressing the ICC, it stated: “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 Art. 137 Const., 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 statement made by the President of the Committee for the Constitution, Meuccio Ruini, on December 22, 1947, with regard to Art. 137 Const.

\(^{16}\) See, for example, Mezzanotte C., Il giudizio sulle leggi. I. Le ideologie del Costituente, Giuffré Milano, 1979; Carlassare L., I diritti davanti alla Corte costituzionale: ricorso individuale o rilettura dell’art. 27 L. n. 87/1953?, in Dir. e Società1997, 443.

\(^{17}\) See Crivelli E., La tutela dei diritti fondamentali e l’accesso alla giustizia costituzionale, Padova, CEDAM, 2003, p. 12. The author explicitly cites the Post-Franco Spain and Germany in the aftermath of the Second World War, where it the author’s perspective – the individual constitutional complaint helped making the citizens more aware of the new rights entrenched in the Constitution and the transition to a whole new constitutional system.

\(^{18}\) See for example Scavone A., Appunti sulle proposte di introduzione del ricorso costituzionale diretto in Italia, in Rivista trimestrale di diritto e procedura civile, 1981, p. 1241; Mezzanotte C., Il problema della
one hand, to provide for a more efficient mechanism of protection of fundamental rights; on the other hand, to answer to the need to plug some gaps highlighted by the application of the incidental control of constitutionality.

Before the establishment of the Constitutional Court in 1956, a proposal for the introduction of an individual constitutional complaint was made by Mauro Cappelletti\(^\text{19}\) and then debated again by constitutional scholars in the mid-1960s, in a round table held in Florence on December 9-10, 1965\(^\text{20}\).

The doctrine has since long recognised that the incidental control 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 its purpose to broaden the protection granted to fundamental rights. The Court itself and constitutional law scholars, however, have realized that in some circumstances the protection granted is not complete. This recognition has led citizens, in many circumstances, to the establishment of a so called *lis ficta* (fictitious case) before a court in order to have their rights protected from an unconstitutional law. Indeed, the introduction of the ICC in the Italian legal system have always been intended to supplement the already existing system of incidental control of constitutionality, addressing its shortcomings, rather than substituting it.

Some other efforts aiming at the introduction of the ICC are worth mentioning. The projects that follow have been all presented before the establishment of the Bicameral Commission for Constitutional Reforms during the XIII Legislature that will be analyzed in detail below.


In 1989, an amendment bill was presented in the Italian Parliament which would have introduced the possibility for a citizen to directly apply to the Constitutional Court challenging laws, acts with the force of laws, decisions and acts issued by the public administration for infringement of a fundamental right guaranteed by the Constitution\(^{21}\).

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

The text of the proposed amendment went on stating:

“Recourses are admissible only after the exhaustion of all instances of ordinary and administrative jurisdiction. However, the Constitutional Court can nonetheless decide on 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 courts\(^{22}\).

Despite an initial consideration, none of these two attempts provided to be, in the end, successful.


\(^{22}\) The Studying Committee was established by President of the Council of Ministers Decree of July 14, 1994. 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](http://www.camera.it/parlam/bicam/rifcost/dossier/prec08.htm)

A more detailed analysis deserves 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) and approved in 1997 by the Parliamentary Commission for Constitutional Reform (“Commissione parlamentare per le riforme costituzionali”).

The Commission, also referred to as “Bicameral Commission”, was composed by 35 members of the Chamber of Deputies and 35 members of the Senate, appointed by the Presidents of the two Houses of Parliament, and started its activity in February 1997, after it was officially established with Constitutional Law n. 1/1997. The purpose of the Bicameral Commission was to draft a comprehensive reform of the Second Part of the Italian Constitution.

Even if 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 modify the Second Part of the Italian Constitution, introducing – among other institutions – the ICC in the Italian legal system. The projected revision of the Constitution, in the part addressing the Constitutional Court, would have generally increased its competences and functions introducing new circumstances allowing a recourse to be lodged with the Constitutional Court\(^{23}\). Among those new competences, the new text of Art. 134\(^{24}\) would have been amended in order to include, under lett. g), the competence to judge on:

\[^{23}\text{The project would have modified Arts. 59, 134 and 137 Const.}\]
\[^{24}\text{The final draft of the proposed new Art. 134, approved by the Bicameral Commission, read as follows:}\]

The Constitutional Court shall pass judgments on:

- a) Controversies on the constitutional legitimacy of laws and enactments having force of law issued by the State and Regions;
“recourses lodged with the Court in order to protect, against all public powers, fundamental rights guaranteed by the Constitution, according to the conditions, forms and prescriptive periods to be established by constitutional law.”

The Report on the System of Guarantees\(^{25}\), drafted within the Commission by Marco Boato, explicitly identifies the reasons for the introduction of the individual constitutional complaint in the purpose to supplement the protection of fundamental rights already provided through the “incidenter” system of judicial review, in order to cover all those circumstances not protected by the Court. The Report also shows that members of the Commission were aware of the application that this mechanism had found in several foreign experiences, as well as the increased workload for Constitutional Courts deriving as a consequence of its adoption. Despite this significant disadvantage, however, the mechanism was deemed worth introducing. In the Commission’s intention, the complaint should have been shaped as an exceptional means for the protection of fundamental rights and should have avoided compromising

\(^{25}\) The final report can be found at: [http://www.camera.it/parlam/bicam/rifcost/docapp/rel6.htm](http://www.camera.it/parlam/bicam/rifcost/docapp/rel6.htm)
the functionality of the Court. This latter aim would have been achieved through the establishment of clear requirements to be met for citizens to apply. On the other hand, the purpose of the Commission was to achieve a protection as broad as possible for those fundamental rights\(^{26}\) entrenched in the Constitution, making them immediately enforceable by the Constitutional Court even in the absence of a controversy. The Report was eventually sent to the Parliament along with the final draft of the proposed amendment.

In the Report, reference was made to the Spanish *Recurso de Amparo*, the German *Verfassungsbeschwerde*, and the Austrian *Individualantrag*. All three models were analyzed and considered in detail, underlining the differences with regard to the acts which could be reviewed for constitutionality.

All along the drafting process, constitutional scholars provided reflections and comments on the different options available and the choices made by the Commission. When the project was approved, and the final text was ready to be introduced into the Parliament for final approval, criticism was expressed with regard to several choices made by the Commission.

While the project acknowledged the residual character of the individual constitutional complain in the protection of fundamental rights, it eventually opted for its adoption in the widest form. Indeed, according to the proposed new text of Art. 134 Const. the complaint could have been proposed against any act issued by a public power, judicial decisions included. Moreover, in the text of the final draft any mention

\(^{26}\) Generally recognised as those listed in Arts. 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. While some scholars have sustained a perfect coincidence between the category of “fundamental right” and those listed in the Constitution (See Pace A., *Diritti fondamentali al di là della Costituzione*, in *Politica del Diritto*, 1993, p. 3), 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 considered by the Constitution: see, for example, Baldassare A., *Diritti Inviolabili*, in *Enciclopedia Giuridica*, Vol. XI, 1989, Roma, p. 18. For a detailed account of all the theories, see Spadaro A., *Il problema del «fondamento» dei diritti «fondamentali»*, in *I diritti fondamentali oggi*, Padova, 1995, p. 64.
to the previous exhaustion of judicial remedies, which was present in earlier tentative drafts, was omitted\textsuperscript{27}. The Report itself underlines how the final draft of the proposed amendment to Art. 134 Const. significantly differed from the first one, which stated:

“The Constitutional Court shall pass judgment:

[...]

g) On complaints lodged by anyone claiming an harm to one of the fundamental rights guaranteed by the Constitution inflicted by an act Public Power, in case no other judicial remedy is provided\textsuperscript{28}.

The first draft was then clear in limiting access to the Court only when a subject could not access any other jurisdictional remedy. The Committee, then, rephrased the final part of the article making reference to the previous exhaustion of judicial remedies, but eventually omitted any reference.

The legitimacy to leave to a subsequent constitutional law the identification of the fundamental rights, whose infringement could have been claimed by an individual, was also overtly debated. The explanatory Report suggested to leave to the Constitutional Court some leeway in the determination of the category of “fundamental rights” at issue, but this aspect was already marking a clear difference between the Italian project and, for example, the Spanish experience, where the Constitution directly identifies the rights which can be protected through the Recurso de Amparo.

\textsuperscript{27} The original text in Italian provided: “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.”

\textsuperscript{28} The original text in Italian provided: “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.”
Finally, the new provision made no reference to the acts that could be challenged, and the criteria for the Court to select among the applications. The indeterminacy of the provision led some commentators to state that the project, far from leaving to the subsequent constitutional law the mere implementation of an already defined mechanism, left to the law the definition of the very core features of the constitutional complaint itself\textsuperscript{29}.

As we have anticipated in the foregoing, the project was not adopted by the Parliament and was eventually abandoned.

\textbf{4) “Controllo in via incidentale”: An already efficient system which does not need to be supplemented?}

According to a recurring theory, a complete and efficient protection of fundamental rights in a legal system could only be achieved with the introduction of one of the various forms of ICC, which would complete the protection of fundamental rights already in existence in the system. Indeed, what has been repeatedly underlined, it is the fact that through the ICC a subject would be allowed to raise an issue of constitutionality before the Court without being bound to challenge a law in a case before an ordinary or administrative court. With specific reference to the Italian legal system, the recurring interest in the establishment of this kind of recourse to the Court can be explained with the intent to grant protection to all those situations and areas which are not covered by the incidental control of constitutionality. It is worth asking, anyway, if the introduction of the ICC would really help overcoming some of the shortcomings of the Italian system of judicial review.

\textsuperscript{29} See e.g. S. PANIZZA, Il ricorso diretto dei singoli, in AA.VV., Prospettive di accesso alla giustizia costituzionale (Atti del Convegno di Firenze del 28-29 maggio 1999), Torino, Giappichelli, 2000, p. 81 et sequitur.
Among those shortcomings are often included the impossibility for the Constitutional Court to judge on the constitutionality of secondary sources (e.g. regulations), administrative acts and judicial decisions and the supposed untimely protection that the “incidenter” review would grant when law-decrees or election laws are involved\textsuperscript{30}. According to some authors, the introduction of a system of individual constitutional complaint offers uncertain advantages and some risks. The protection of fundamental rights should find its preferred place in courts, and the existence of such a remedy could be considered as a safety valve granting citizens a further possibility to protect their “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 make use of all the potentials of the incidental control. One of the mechanisms used by the Court to broaden the protection of rights has been a progressive and generous interpretation of the rules regulating third-party intervention in the hearings taking place before the Constitutional Court itself, overcoming its own strict interpretation that had originally categorically excluded any third-party intervention\textsuperscript{31}. This broader interpretation has furthered 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 on the constitutionality of legislation). According to some authors, with this shift, the Court has increasingly become “a rights Court”\textsuperscript{32}.

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\textsuperscript{30} See Crivelli E., \textit{La tutela dei diritti fondamentali}, cit., p. 18.


Moreover, the Court has also used its power to decide on the “relevance” and the “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 legislation. Indeed, the Constitutional Court has repeatedly urged ordinary judges to directly further an “adapting interpretation” (“interpretazione adeguatrice”), i.e. directly solve an issue of constitutionality of legislation without raising a question before the Constitutional Court when – among the many – a constitutionally-oriented interpretation of the applicable law is available. While this practice brings with it the risk that ordinary judges will avoid applying to the Constitutional Court even in cases when it would be necessary and appropriate, it also has the advantage of bringing about a more concrete (i.e. closer to the facts of the case) analysis of the constitutionality of legislation in a decision which only has inter partes effect (by way of difference with what happens with decisions issued by the Constitutional Court declaring the unconstitutionality of a Statute, which have erga omnes effect). The protection of fundamental rights in this case is also enhanced.

The “incidenter” system of judicial review also leaves some areas of law out of 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 can be assessed only in a very short period of time. Until recently, this was the case, for example, of all those acts with the force of law adopted by the Government according to the procedure under Art. 77 of the Italian Constitution (Law Decrees). According to the original perspective adopted by the Constitutional Court, the constitutionality of those acts with regard to the requirements of urgency and

33 See Cappelletti M., Questioni nuove (e vecchie) sulla giustizia costituzionale, in Giurisprudenza Costituzionale, 1990, p. 857
35 Art. 77 of the Italian Constitution so provides: “The Government may not, without delegation from the Houses, issue decrees having the force of law.”
necessity could no longer be assessed after they had been converted into law by the Parliament (the conversion must take place within 60 days from their enactment). Only in 1995 the Court, realizing the gap that its own jurisprudence had created, overruled its previous decisions, affirming the possibility to judge on the constitutionality of already converted Law-Decrees (and also the converting Law, accordingly) with regard to the necessity and urgency requirements that originated the measure.

Other problems are usually deemed to arise with regard to those laws – fundamental for the functioning of the whole democratic system – whose first application could take place well before the possibility to apply to the Constitutional Court (e.g. election laws)\textsuperscript{36}.

With regard to the category of acts that the Court can scrutinize for consistency with the Constitution, Art. 134 Const., as interpreted by the Constitutional Court, excludes the possibility for the Court to consider the constitutionality of secondary sources, such as regulations\textsuperscript{37}. The Court has always stated to be only allowed to review the constitutionality of primary sources of law, i.e. Laws and acts with the force of law (Law Decrees and Legislative Decrees). Secondary sources, however, and more specifically regulations, in many cases, represent the only source of law disciplining a whole field as a consequence of an effort of de-legification of some areas of activities, and cannot therefore be scrutinized neither by the Constitutional Court, nor by ordinary judges for consistency with a law or with an act having the force of law.

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\textsuperscript{36} For the examples stated in the text, see Crivelli E., \textit{La tutela dei diritti fondamentali, cit.}, p. 47. With regard to election laws, the author recalls how, back in 1956, Piero Calamandrei was already warning on the shortcoming of the incidental 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 Calamandrei P., \textit{Corte costituzionale e autorità giudiziaria}, in \textit{Rivista di diritto processuale}, 1956, p.16.

5) Some final remarks on the advisability of the adoption of the individual constitutional complaint in Italy.

The debate over the introduction of the individual constitutional complaint in a legal system like the Italian one is deeply linked – intertwined, one could actually say – to the efficiency of the already existing system of “incidenter” and concrete judicial review of legislation, with regard to the protection of fundamental rights. In other words, the willingness to adopt a system of individual constitutional complaint will most probably increase as a consequence of the impossibility – through the incidental control of constitutionality –, in growing number of circumstances, to protect an individual’s fundamental rights. In Italy, the decision of the Constituent Assembly to not include an individual constitutional complaint among the ways to access the Constitutional Court, has led to the enhancement of the “incidenter” judicial review of legislation as a way to protect fundamental rights. Ordinary judges are seen as the “door keepers” of the Court and the role that the Italian Constitutional Court has played has been directly proportional to and relying on the sensitivity of ordinary judges with regard to the protection of fundamental rights and the implementation of the principles entrenched in the Constitution. Indeed, it is up to ordinary and administrative judges to decide when and if to raise an issue of constitutionality of law before the Constitutional Court. This link between the Constitutional Court and ordinary judges has been defined a “virtuous link”. The distrust towards ordinary judges that used to characterize the early years following the enactment of the Constitution and that led to the adoption of a centralized system of judicial review, seems now to have been dispelled. The introduction of a system of individual constitutional complaint, especially in cases in which a decision issued by ordinary or administrative judges could be directly challenged before the Constitutional Court, would run the risk of breaking this “virtuous link,” implicitly putting ordinary judges on trial – before the Constitutional Court and citizens – on charges of a non efficient protection of rights. Therefore, according to this reflections, some authors suggest the introduction of a constitutional complaint, only
under condition of exclusion of the possibility to challenge judicial decisions. On a different note, the advisability of the introduction of the ICC in Italy should be assessed also taking into account the already existing possibility for an individual to apply to the European Court of Human Rights for violation of fundamental rights entrenched in the Convention, according to the individual constitutional complaint procedure under Art. 34 of the Convention.

In conclusion, when considering the possibility to introduce in a legal system the individual constitutional complaint, it should be taken into account the deep impact that such a mechanism would most likely bring about. It is beyond any doubt that the ICC has the capacity to deeply affect the system of judicial review adopted in a country, especially considering its main side-effects: a significant increase in the docket of a Constitutional Court, most likely affecting its functionality; a possible de-legitimation of ordinary judges, especially when the ICC allows applications against decisions issued by ordinary and administrative courts. In deciding whether to introduce or not the ICC in the Italian legal system, all those arguments should be carefully considered, in order to design the complaint in a way which would avoid breaking that “virtuous link” now existing between the Constitutional Court and ordinary judges, and increasing the workload of the Court up to the point of making its decisions untimely and – ultimately – ineffective.


39 On topic, see M. Cappelletti, Questioni Nuove, cit., p. 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. On the same line, Crivelli E., La tutela dei diritti, cit., pp. 150 et sequitur.