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A Comparative Perspective on Direct Access to Constitutional and Supreme Courts in Africa, Asia, Europe and Latin America: Assessing Advantages for the Italian Constitutional 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 control,1 as a

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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...
result of the expansive force of 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 Europe, 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 access to constitutional and supreme courts (also called systems of "individual constitutional focus on the protection of fundamental rights. The aspects are, of course, interrelated: 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 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 goal they aim to achieve. See Rubio Llorente F., Seis tesis sobre la jurisdicción constitucional en Europa [Six theses on the constitutional jurisdiction in Europe], 12 REVISTA ESPALONÀ DE DERECHO CONSTITUCIONAL (1992) available at http://www.cepc.es/es/Publicaciones/revistas/revistas.aspx?IDR=6&IDN=337&IDA=250 68; Tendances actuelles de la juridiction constitutionnelle en Europe [Current trends of the constitutional jurisdiction in Europe], in ANNUAIRE INTERNATIONAL DE JUSTICE CONSTITUTIONNELLE 9 (1996). For a thorough 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 MAURO CAPPELLETTI, JUDICIAL REVIEW IN THE CONTEMPORARY WORLD 45 (Bobbs-Merrill Co., Inc. 1971); Louis Favoreau, Constitutionel Review in Europe, in CONSTITUTIONALISM AND RIGHTS: THE INFLUENCE OF THE UNITED STATES CONSTITUTION ABROAD 38 (Louis Henkin and Albert J. Rosenthal eds., Columbia University Press 1990); VICKI C. JACKSON & MARK TUSHNET, COMPARATIVE CONSTITUTIONAL LAW 464 (Foundation Press, 2d ed. 1999); NORMAN DORSEN, MICHAEL ROSENFELD, ANDRAS SÁJO & SUSANNE BAER, COMPARATIVE CONSTITUTIONALISM: CASES AND MATERIALS 113 (West Publishing Company 2003).

2. One indicator of this development is the entry into force, in March 2010, of 2008 CONST. 724 (Fr.) (amending the 1958 French Constitution to introduce for the first time in France an "a posteriori", concrete system of judicial review). For an account of the reform, see MARTIN A. ROGOFF, FRENCH CONSTITUTIONAL LAW: CASES AND MATERIALS (Carolina Academic Press 2010).

complaint,' hereinafter "ICC"). 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 act(s) or action(s) violating their rights (whether with *erga omnes* or *inter partes* effects).

The Italian Constitution, a product of the constitution-making wave that took place after the Second World War, 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 in which 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 Europe considers positively the adoption of such systems—provided

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

5. Conversely, in systems of indirect individual access, the constitutionality of an act or action can be challenged only through the action of state bodies.


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

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 lodged. 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 lodged.  

Part I of this article will provide a comparative overview of the origins, structure and functioning of the systems of direct access to constitutional and supreme courts adopted worldwide, addressing Latin American, European, Asian and African jurisdictions, 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 therefore include both systems which have 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 omissions of public powers, statutory laws and 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 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. THE ORIGINS AND DEVELOPMENT OF THE INDIVIDUAL CONSTITUTIONAL COMPLAINT IN COMPARATIVE PERSPECTIVE

A. Latin America

The first modern system of direct access to courts for the protection of fundamental rights from unconstitutional acts or actions is identified in the so-called “juicio de amparo” or “writ of amparo,” a distinguishable feature of the Latin American constitutional tradition.10 The writ, action, recourse or suit of amparo is defined as an extraordinary judicial proceeding established for the protection of constitutional rights and freedoms from infringement by the State or even—in some cases—by private individuals, which normally concludes with a judicial order or writ of protection.11 In Latin American countries, the amparo

10. The word “amparo” means “protection” in Spanish. For an account of the philosophical origins and historical antecedents of the writ of amparo, see Ignacio Burgos, El Juicio de Amparo [The Amparo Procedure] (Porrúa 18th ed. 2001); José Luis Soberanes Fernández & Faustino José Martínez Martínez, Apuntes Para la Historia del Juicio de Amparo [Notes for a History of the Amparo Procedure] (Porrúa, 2002).

supplements the existing ordinary types of remedy available in the codes of procedure.12

From a theoretical and philosophical standpoint, the writ’s origin is associated with the inclusion in Latin American constitutions of extensive declarations of civil, political, social, cultural, economic, environmental and indigenous rights, together with their frequent violation by public powers.13 Historically, the writ of amparo was first included in the Constitution for the State of Yucatan of 184114 and subsequently adopted in the 1857 Constitution of Mexico.15 The system then spread throughout Latin America and was included—in a variety of forms and structures—in the constitutions drafted in former Spanish colonies and in Spanish-speaking countries, to be finally incorporated also into the 1969 American Convention on Human Rights.16

It is worth noting, though, that in Latin America, the amparo procedure is only one of the procedures adopted for the protection of

12. This means that protection of fundamental rights can be achieved in two ways: first, by means of the general established suits prescribed in the codes of civil and criminal procedures; secondly, and in addition to the abovementioned means, through specific and separate judicial proceedings specifically established for the protection of some or all of the rights entrenched in the constitution.

13. The Latin American tradition of adopting declarations of rights dates back as far as 1811, with the adoption of the Declaration of Rights of the People by the Supreme Congress of Venezuela.


15. However, the writ of amparo was present in Mexico since 1847, when it was introduced under art. 25 of the 1847 Acts of Constitutional Reform as the duty of federal courts to provide protection to citizens against State actions. Mexican constitutional scholars acknowledge the influence of the United States system of judicial review—known through Alexis de Tocqueville’s “Democracy in America”—in the development of the writ of amparo. For a thorough account of the different typologies of the recourse of amparo in Mexico—where it has developed in its most complex and articulated form—see HECTOR FIX-ZAMUDIO & EDUARDO FERRER MAC-GRIGOR, EL DERECHO DE AMPARO EN MÉXICO (Porrua 2006). For present purposes, the type of amparo relevant to our analysis is the so-called “amparo contra leyes,” a judicial recourse directed to challenge self-executing statutes that violate the constitution.

16. Article 25, clause 1 (“Right to Judicial Protection”) of the American Convention on Human Rights (Pacto de San José) provides:

Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.

Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123. The Inter-American Court of Human Rights has defined this article of the Convention as a “general provision that gives expression to the procedural institution known as amparo, which is a simple and prompt remedy designated for the protection of all of the rights recognized in the constitution and laws of the member States and by the Convention,” see Advisory Opinion OC-8/87, Inter-Am. Ct. H.R. (ser. A) No. 8, ¶ 32 (Jan. 30, 1987).
fundamental rights, which procedures allow direct access to a judicial body. From a purely theoretical standpoint, fundamental rights can indeed be guaranteed with up to three different avenues of direct judicial recourse: the amparo proceeding, the habeas corpus appeal and the habeas data claim.

All these proceedings allow an individual to apply directly to a judicial body (not just the supreme or constitutional court) and activate a fast-track judicial recourse for the protection of various fundamental rights. With few exceptions, the habeas corpus appeal is usually directed to protect personal freedom and integrity; the habeas data is directed towards protection of rights involved in the handling and storing of personal information in databanks or registries; the amparo proceeding is directed towards protection of the remaining fundamental rights (the majority) entrenched in the constitution.17

Today, the writ of amparo is included and regulated in Latin American constitutions and in those statutes enacted to implement the constitutional provisions and provide procedural guidelines on how to activate the recourse. Habeas corpus and habeas data procedures also find their discipline in constitutions and/or statutes.18

Interestingly, the amparo recourse and the habeas corpus and habeas data guarantees (when available) have been adopted in Latin America both in countries with a centralized system of judicial review (Bolivia,19 Chile,20 Costa Rica,21 El Salvador,22 Honduras,23 Panama,24 Paraguay,25

17. Only a minority of Latin American countries have adopted all three types of recourses. In the majority of them only one or two of these recourses have been established. In these cases, the recourse(s) available can be activated also for protection of the rights usually associated with a different type of recourse. For example, Guatemala and Mexico have adopted only the amparo procedure, and therefore the amparo is designed to protect all constitutional rights and freedoms, including personal liberty and personal data. Bolivia, Colombia, Costa Rica, Chile, El Salvador, Nicaragua and Uruguay have adopted both the amparo and habeas corpus proceedings; Venezuela has adopted the amparo and the habeas data procedures; finally, Argentina, Brazil, the Dominican Republic, Ecuador, Honduras, Panama, Paraguay and Peru have adopted all three types of recourses: amparo, habeas corpus and habeas data. While the amparo is conceived to protect all fundamental rights entrenched in a country’s constitution, some constitutions have limited the number of rights that can be protected through the amparo procedure, as in the case of Colombia, Chile and Mexico. One of the most often excluded rights from the amparo recourse is the right to property.

18. Details on constitutional provisions and implementing statutes are provided, for each country, in the following footnotes.

19. CONSTITUCION DE LA REPUBLICA DE BOLIVIA (1967), arts. 18, 19, 58 and 120, cl. 7; Law No. 1836, Apr. 1, 1998, GACETA BOLIVIA, (on the Constitutional Tribunal) (amparo and habeas corpus).

and Uruguay\textsuperscript{26} and in countries with either a decentralized (Argentina\textsuperscript{27}) or mixed (Brazil,\textsuperscript{28} Colombia,\textsuperscript{29} the Dominican Republic,\textsuperscript{30} Ecuador,\textsuperscript{31} Guatemala,\textsuperscript{32} Mexico,\textsuperscript{33} Nicaragua,\textsuperscript{34} Peru\textsuperscript{15} and Venezuela\textsuperscript{36}) system of


24. CONSTITUCION POLITICA DE LA REPUBLICA DE PANAMA, Oct. 11, 1972, art. 54; see also CODIGO JUDICIAL DE LA REPUBLICA DE PANAMA, arts. 2615-2632 (Book IV, Instituciones de Garantia) (amparo); CONSTITUCION POLITICA DE LA REPUBLICA DE PANAMA, Oct. 11, 1972, art. 23; see also CODIGO JUDICIAL DE LA REPUBLICA DE PANAMA arts. 2615-2632 (Book IV, Instituciones de Garantia) (habeas corpus); CONSTITUCION POLITICA DE LA REPUBLICA DE PANAMA, Oct. 11, 1972, art. 44 (habeas data).

25. CONSTITUCION POLITICA DE 1992 June 20, 1992, arts. 133 (habeas corpus), 134 (amparo), 135 (habeas data) (Para.); see also CODIGO PROCESAL CIVIL, No. 1337, 1988, arts. 565-588 (Para.).

26. See CONSTITUCION POLITICA DE LA REPUBLICA ORIENTAL DEL URUGUAY, 1967, arts. 7(72), 332, see also Law No. 16011 (amparo) (Urg), Dec. 1, 1988; CONSTITUCION POLITICA DE LA REPUBLICA ORIENTAL DEL URUGUAY, 1967, arts. 17; see also Law No. 16011 (habeas corpus) (Urg.), Dec. 1, 1988 (by judicial interpretation).

27. Art. 43, CONSTITUCION NACIONAL [CONST. NAC.] (Arg.), see also Acción de Amparo (amparo) Law No. 16986, 1966 (Arg.); see also Habeas Corpus Statute Law No. 23098, 1984 (Arg.); see also Personal Data Protection Statute Law No. 25366, 2000 (Arg.).

28. CONSTITUCION FEDERAL [C.F.] [CONSTITUTION] art. 5 (Braz.), see also Mandado de Segurança Decree No. 1533, of 31 de Dezembro de 1951, DIARIO OFICIAL DA UNIÃO [D.O.U.] of 31 de Dezembro de 1951 (Braz.); see also Mandado de Segurança Decree No. 4.348, of 26 de Junho de 1964, DIARIO OFICIAL DA UNIÃO [D.O.U.] of 27 de Junho de 1964 (Braz.) (amparo, habeas corpus, habeas data).


31. CONSTITUCION DE LA REPUBLICA DEL ECUADOR Oct. 20, 2008, arts. 88 (amparo), 89, 90 (habeas corpus), 92 (habeas data); see also Ley de Control Constitucional Law No. 000 RO/99, July 2, 1997 (Ecuador).

control of constitutionality: a clear sign of the versatility of these institutions and their compatibility with both systems of constitutional jurisdiction.

While the amparo system of judicial review can be considered the historical antecedent and the main source of inspiration for European systems of individual constitutional complaint, a significant difference exists between the Latin American and the European version of direct access to courts: through the Latin American amparo, habeas corpus and habeas data, a complaint can be lodged—with few exceptions—with all courts in the legal system and not just with a country’s supreme or constitutional court, irrespective of the fact that the country has adopted a centralized, decentralized or mixed system of judicial review.

In light of this difference, only the systems of amparo adopted in Costa Rica, El Salvador and Nicaragua—granting direct access only to the country’s constitutional and supreme court—can properly be compared to those established in Europe and to a system of individual constitutional complaint.

Despite this significant difference, however, it is worth emphasizing some general features of the Latin American amparo procedure. In Latin America, the amparo can be activated: a) not only against constitutional legislative enactments.

33. CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS [C.P.], Arts. 103, 107, Diario Oficial de la Federación [D.O.] 5 de Febrero de 1917 (Mex.); see also, Ley de Amparo [L.A.] [Legal Protection Law], as amended, Diario Oficial de la Federación [D.O.] 17 de Junio de 2009 (amparo and habeas corpus). In Mexico and Venezuela, the recourse of amparo is designed as a constitutional right enforceable through a variety of recourses, which includes also the recourse for habeas corpus. These recourses are: amparo de la libertad (corresponding to a writ of habeas corpus), amparo judicial (also called amparo de casación), amparo administrativo, amparo agrario, amparo contra leyes (the amparo against unconstitutional legislative enactments).

34. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE NICARAGUA [CN.] arts. 188 (amparo), 189 (habeas corpus), 190, LA GACETA, DIARIO OFICIAL [L.G.] 9 de Enero de 1987; see also, Ley de Amparo, LA GACETA art. 49 (11 de Febrero de 2008) (Nicar).


38. Costa Rica, El Salvador, Nicaragua. See ALLAN R. BREWER-CARIAS, CONSTITUTIONAL PROTECTION, supra note 37, at 140.

39. ALLAN R. BREWER-CARIAS, CONSTITUTIONAL PROTECTION, supra note 37, at 77.
unconstitutional actions but also against omissions,\textsuperscript{40} and b) not only against actions or omissions of the State but also for unconstitutional actions or omissions of other individuals.\textsuperscript{41} Moreover, c) the constitutional rights protected are not just first- and second-generation rights (civil and political) but also third-generation ones (social, environmental, consumers’ and aboriginal rights); d) the amparo requires, generally, the previous exhaustion of all other available legal remedies;\textsuperscript{42} e) in some cases, the amparo can be used also to prevent a violation, when there is reason to believe that a right is in peril of being

\textsuperscript{40} See, e.g., Argentina, Art. 43, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.); Costa Rica, see CONSTITUCION POLITICA DE LA REPUBLICA DE COSTA RICA, art. 48 (1949); El Salvador Constitución, Dec. 20, 1983 art. 24, 247 (El. Salvador); Bolivia, see CONSTITUCION DE LA REPUBLICA DE BOLIVIA (1967), art. 129 (2009); Honduras see CONSTITUCION POLITICA DE LA REPUBLICA DE HONDURAS DE 1982 (Jan. 20, 1989), art. 183; Paraguay see CONSTITUCION POLITICA DE LA REPUBLICA DE PARAGUAY (20 de Junio de 1992), art. 134; Uruguay see Accion de Amapro, [Amparo Law] no. 16.011 (19 de Diciembre de 1988); Brazil see ALLAN R.. BREWER-CARIAS, CONSTITUTIONAL PROTECTION, supra note 37, at 142; Dominican Republic, see Recurso de Amparo [Amparo Law] no. 437-06 (30 de Noviembre de 2006) (Dom. Rep.); Ecuador, see CONSTITUCIÓN POLITICA DE LA REPÚBLICA DEL ECUADOR, (1998) art. 95.

\textsuperscript{41} See, e.g., Argentina, see Art. 43, CONSTITUCIÓN NACIONAL [CONST. NAC.]; Bolivia, see CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DEL BOLIVIA, 2009, art. 129; Dominican Republic, see CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DOMINICANA, 26 de Enero de 2010, art. 72; Guatemala, see CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DEL GUATEMALA, 17 de Noviembre de 1993, art. 265; Nicaragua, see CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE NICARAGUA [CN.] arts. 188 (amparo); Paraguay, see CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE PARAGUAY, 20 de Junio de 1992, art. 134; Peru, see CONSTITUCIÓN POLÍTICA DEL PERÚ, as amended, 12 de Junio de 1995, art. 200; Uruguay, see Accion de Amapro, [Amparo Law] no. 16.011 (19 de Diciembre de 1988); Venezuela, see CONSTITUCIÓN DE LA REPÚBLICA BOLIVARIANA DE VENEZUELA, Diciembre 1999, Art. 27. In Colombia and Ecuador only against individuals exercising “public service,” see CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.], 20 de Julio de 1991, art. 86; see also CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE ECUADOR, 2008 art. 88, while in Costa Rica, Honduras and Ecuador amparo is limited to those subjects exercising “public powers.”

\textsuperscript{42} See, e.g., Argentina, see art. 43, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.); Bolivia, see CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DEL BOLIVIA, 2009, art. 129; Uruguay, see Accion de Amapro, [Amparo Law] no. 16.011 (19 de Diciembre de 1988); Colombia, see CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.], art. 86; Peru, see CONSTITUCIÓN POLÍTICA DEL PERÚ, as amended, 12 de Junio de 1995, art. 200. Venezuela, however, represents an exception to this rule. See CONSTITUCIÓN DE LA REPÚBLICA BOLIVARIANA DE VENEZUELA, Diciembre 1999, art. 27.
violated; finally, a few countries limit the acts that can be challenged through the amparo procedure.

B. Europe

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 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-making which took place after the Second World War and to the same civilian legal tradition; 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 (1831) can be modified to include a system of individual constitutional complaint.

1. 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) form; on the

43. See, e.g., Colombia, see Constitución Política de Colombia [C.P.], art. 86; Dominican Republic, see Constitución de la República Dominicana, 26 de Enero 2010, art. 72; Guatemala, see Constitución Política de la República del Guatemala, 17 de Noviembre de 1993, art. 265; Nicaragua, see Constitución Política de la República de Nicaragua [CN.] tit. X, ch. I, art. 188, La Gaceta Diario Oficial [L.G.] 1987 (“in peril to be violated”); Paraguay. see Constitución Política de la República de Paraguay, 20 de Junio de 1992, art. 134 (“imminent danger”).

44. See, e.g., Argentina, Brazil, Paraguay and Peru, where statutory laws cannot be challenged through the amparo procedure. See Art. 43, Constitución Nacional [Const. Nac.] [Arg.]; see also Constitución Política de la República de Paraguay, 20 de Junio de 1992, art. 134; see also Constitución Política del Perú, as amended, art. 200, 12 de Junio de 1995. Conversely, in Argentina, Colombia, Costa Rica, Ecuador, Paraguay, Peru and Uruguay, judicial decisions are excluded from the possibility of being challenged. See 43, Constitución Nacional [Const. Nac.] [Arg.], Constitución Política de Colombia [C.P.], art. 86; see also Constitución Política de la República de Ecuador, 2008, art. 88; see also Constitución Política de la República de Paraguay, 20 de Junio de 1992, art. 134; see also Constitución Política del Perú, as amended, 12 de Junio de 1995 art. 200.

45. The first European centralized systems of judicial review were established in Czechoslovakia and Austria by, respectively, the Constitution of Czechoslovakia of
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 complaint.\(^{46}\)

The current Constitution of the Republic of Austria (\textit{Bundesverfassungsgesetz}) was adopted in 1920.\(^{47}\) After undergoing revision in 1929, it was suspended in 1933 until the end of the Second World War and then reinstated in 1945.\(^{48}\)

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 (\textit{Verfassungsgerichtshof}) in order to challenge legal acts allegedly violating their fundamental rights.

The first avenue (so-called \textit{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

\footnotesize{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 Justin O. Frosini, \textit{Constitutional Courts in Latin America: A Testing Ground for New Parameters of Classification}, in \textit{Constitutional Courts. A Comparative Study}. JCL Studies in Comparative Law No. 1, 348 (Andrew Harding & Peter Leyland eds., 2009).

46. \textit{STAATSGRUNDGESETZ ÜBER DIE ALLGEMEINEN RECHTE DER STAATSBÜRGER [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 (\textit{Staatsgrundgesetz}) which created a new "Court of the Reich" (\textit{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 \textit{STAATSGRUNDGESETZ ÜBER DIE ALLGEMEINEN RECHTE DER STAATSBÜRGER [StGG] [FEDERAL BILL OF RIGHTS]} RGBI No. 1867/142, as last amended by Bundesgesetz [BG] BGB I No. 100/2003, art. 142 (Austria).

47. \textit{BUNDES-VERFASSUNGSGESETZ DER REPUBLIK ÖSTERREICH [B-VG] [Constitution]} BGBl 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.

48. \textit{Id.}\)
instance may be a subject of the Court’s review. 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 a further type of individual constitutional complaint (called *Individualantrag* or *Individualbeschwerde*). 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 ruling. 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 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).

2. Germany

Together with the incidenter review of legislation, disciplined at article 100, the 1949 German Constitution (*Grundgesetz*) today also disciplines at article 93(4a) a system of individual constitutional complaint (direct individual recourse or *Verfassungsbeschwerde*). The possibility for an individual to directly access the Constitutional Court (*Bundesverfassungsgericht*) for the protection of fundamental rights, in Germany, 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

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51. *Bundes-Verfassungsgesetz der Republik Österreich*, supra note 47, at art. 139 and art. 140 (Austria).
fundamental rights in order to prevent the reoccurrence of the tragic violations of human rights the country had experienced during the war.\textsuperscript{52}

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 Court.\textsuperscript{53} The system was then entrenched in the Constitution with a constitutional amendment in 1969.\textsuperscript{54} The 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 violating civil and political rights entrenched in the Constitution.\textsuperscript{55}

Since its establishment, the direct individual recourse has become the most often used 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 Court.\textsuperscript{56} These conditions are: a) the previous

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\item[52.] \textit{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 states that: “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.”
\item[53.] \textit{Bundesverfassungsgerichts-Gesetz} [Federal Constitutional Court Act], March 12, 1951, BGBl. I at 243 (F.R.G.).
\item[54.] 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 omission of the public authority (including judicial decisions). See \textit{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, \textit{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.
\item[56.] In 2006, for the first time, the applications lodged 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
\end{description}
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exhaustion of all available legal remedies;\(^{57}\) b) the existence of a personal, direct, and current interest in the recourse;\(^{58}\) 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 statute;\(^{59}\) d) the possibility to challenge only self-executing statutes.\(^{60}\) 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 appealable.\(^{61}\) The Court also has the power to issue fines to those who lodge applications lacking the very basic elements for their admissibility.\(^{62}\) 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.”\(^{63}\)

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.”\(^{64}\)

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58. Id.
59. Id.
61. See Werner Heun, THE CONSTITUTION OF GERMANY. A CONTEXTUAL ANALYSIS 175 (Hart Publishing 2011).
62. Fines can be as high as 2,600 Euros.
63. Art. 93a, cl.2 of the Law on the Federal Constitutional Court.
3. Spain

Spain represents a very interesting case 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*, the Spanish “individual appeal for protection” (*recurso de amparo*) or “constitutional amparo” was introduced by article 53, cl. 2 of the 1978 Constitution. The constitutional amparo was then implemented in the Organic Law on the Constitutional Court enacted in 1979.

Today, in Spain, any natural and legal person (not just citizens) with a “legitimate interest” 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 caused by actions or omissions of public powers. More specifically, the constitutional amparo can be exercised to challenge administrative acts, judicial

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66. 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 constitutionality of statutes and to protect fundamental rights by means of a recourse for constitutional protection: see, ALLAN R. BREWER-CARIAS, CONSTITUTIONAL PROTECTION OF HUMAN RIGHTS IN LATIN AMERICA 74 (Cambridge University Press 2009); EDUARDO FERRER MAC-GERGOR, LA ACCION CONSTITUCIONAL DE AMPARO EN MEXICO Y ESPAÑA, ESTUDIO DE DERECHO COMPARADO [THE CONSTITUTIONAL RECOURSE OF AMPARO IN MEXICO AND SPAIN. A STUDY IN COMPARATIVE LAW] (4th ed. 2007).

67. Article 162 of the Constitution.

68. 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 rights to property, entrenched in art. 33. See DURAN M. CARRASCO, LOS PROCESOS PARA LA TUTELA JUDICIAL DE LOS DERECHOS FUNDAMENTALES [THE RECOURSE FOR JUDICIAL PROTECTION OF FUNDAMENTAL RIGHTS] (Madrid 2002). For an overview of the structure and functions of the *Tribunal Constitucional* in Spain, see Enrique Guillén López, *Judicial Review In Spain: The Constitutional Court, 41 LOY. L.A. L. REV. 529* (2008).
decisions and legislative enactments—with the exclusion of statutory laws—after prior exhaustion of all available legal remedies.\textsuperscript{69}

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 Spanish Constitution: effective protection from judges.\textsuperscript{70} 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 Court.\textsuperscript{71}

The structure of the constitutional amparo underwent therefore significant reform in 2007, focusing on the requirements for accessing the Tribunal Constitucional.\textsuperscript{72} 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

\textsuperscript{69} 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, “[t]hose 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.”

\textsuperscript{70} On this point see Miryam Iacometti, La Spagna, [Spain], in Diritto costituzionale comparato [Comparative Constitutional Law] 264 (Paolo Carrozza, Alfonso Di Giovine & Giuseppe F. Ferrari eds., 2009).

\textsuperscript{71} 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 with the constitutional amparo. Figures are available on the website of the Spanish Tribunal Constitucional: http://www.tribunalconstitucional.es (last visited Apr. 1, 2011). Prof. Tania Groppi referred to this phenomenon as a “crisis of the amparo recourse.” Tania Groppi, Il ricorso di «amparo» in Spagna: caratteri, problemi e prospettive [The Writ of Amparo in Spain: main features, problems and perspectives], 4340, in Giurisprudenza Costituzionale (1997); Encarna CARMONA CUENCA, LA CRISIS DEL RECURSO DE AMPARO: LA PROTECCIÓN DE LOS DERECHOS FUNDAMENTALES ENTRE EL PODER JUDICIAL Y EL TRIBUNAL CONSTITUCIONAL [THE CRISIS OF THE AMPARO RECURSUE: THE PROTECTION OF FUNDAMENTAL RIGHTS BEFORE THE JUDICIAL POWER AND THE CONSTITUTIONAL TRIBUNAL] (Alcalá 2005).

\textsuperscript{72} Organic Law no. 6/2007.
could demonstrate the novelty of the constitutional issues.\textsuperscript{73} The 2007 reform, therefore, introduced an additional accessibility requirement: the applicant needed now demonstrate the “significant constitutional relevance” of the recourse presented.\textsuperscript{74} 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 violation.\textsuperscript{75}

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 approval, a constitutional amparo against judicial decisions must be filed within thirty days from notification of the decision.\textsuperscript{76}

4. 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 Tribunal.\textsuperscript{77} 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

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\textsuperscript{73} Victor Ferreres Comella, \textit{The Spanish Constitutional Court: Time for Reforms, in CONSTITUTIONAL COURTS} 193 (Andrew Harding & Peter Leyland eds., 2009). \\
\textsuperscript{74} 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 significance of fundamental rights.” The Constitutional Court has further specified this requirement in decision STC no. 155/2009. \\
\textsuperscript{75} Comella, \textit{supra} note 73, at 193. \\
\textsuperscript{76} Id. \\
\textsuperscript{77} 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. \textit{See} ANDREAS AUER, GIORGIO MALINVERNI, \& MICHEL HOTTELIER, \textit{DROIT CONSTITUTIONNEL SUISSE [SWISS CONSTITUTIONAL LAW]} 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.
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the right to vote and of regulations on general election and popular voting procedures.\(^7\)

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 acts.\(^8\)

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 systems.\(^9\) The challenged acts can be of a legislative, judicial\(^8\) 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 constitutionality\(^8\) 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.

5. 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 review.\(^8\) In 2007, the original Cour d’Arbitrage—whose activity had increasingly moved from mere policing

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78. See Federal Judicature Act, arts. 82 & 86 (1943).
79. Id. art. 89.
81. Federal Judicature Act, arts. 83 & 90-93 (1943) specify further prerequisites for judicial decisions to be challenged and decisions which are—at the opposite—excluded from the complaint.
82. The Constitutions of the Cantons are, however, excluded. See CONSTITUTION FEDERALE [CST] [CONSTITUTION] Apr. 18, 1999, RO 101 art. 51, cl. 2 (Swit.). 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 Elena Ferioli, La Svizzera [Switzerland], in DIRITTO COSTITUZIONALE COMPARATO 326 (Paolo Carrozza, Alfonso Di Giovine & Giuseppe Franco Ferrari eds., 2009).
83. 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.).
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 Constitution.\(^4\)

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).\(^5\) A declaration of unconstitutionality has the effect of annulling the challenged acts and—generally—acts retroactively.\(^6\) Similarly, a rejection of the constitutional challenge binds all judges to the interpretation of the challenged norm given by the Court.\(^7\)

6. 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 review.\(^8\) The adoption of such systems was the 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

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84. See Elena Ferioli, Il Belgio [Belgium], in Diritto Costituzionale Comparato [Comparative Constitutional Law] 355 (Paolo Carrozza, Alfonso Di Giovine & Giuseppe Franco Ferrari eds., 2009).
85. Const. art. 142 (Belg.).
88. According by 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 of the constitution.” Andrew Harding, Preface, in Constitutional Courts, I (Andrew Harding & Peter Leyland eds., 2009).
proximity, but also due to the role played by the Council of Europe in processes of the revision of constitutional documents and constitution-drafting. 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 law.

In these countries the creation of Constitutional Courts occurred, in most cases, 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 Albania, Armenia, Croatia, Czech Republic, Estonia, Georgia, Hungary, Latvia, Montenegro,

89. The German and Austrian models of constitutional justice have been so influential that some commentators stated that “the establishing of constitutional review was a clear case of constitutional borrowing.” Kasia Lach & Wojciech Sadurski, Constitutional Courts of Central and Eastern Europe: Between Adolescence and Maturity, in CONSTITUTIONAL COURTS: A COMPARATIVE STUDY 58 (Andrew Harding & Peter Leyland eds., 2009).

90. See Venice 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 László Sólyom’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.” László Sólyom, 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 generally WOJCIECH SADURSKI, RIGHTS BEFORE COURTS: A STUDY OF CONSTITUTIONAL COURTS IN POSTCOMMUNIST STATES OF CENTRAL AND EASTERN EUROPE (2d ed. 2007)

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


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

Poland, Serbia, Slovak Republic, Slovenia, the Former Yugoslav Republic of Macedonia, and Ukraine. Other eastern European countries which did not adopt the ICC system when their constitutions were drafted have subsequently considered its adoption.

The systems of individual constitutional complaints adopted in these countries drew inspiration from the model provided 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:...


98. See Constitution, Art. 32/1 (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.).

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

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


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


105. 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.


107. This is the case, for example, in the Republic of Lithuania, whose Constitution, adopted in 1992, did not contemplate a system of direct access to the Constitutional Court. However, the adoption of such a system has recently received serious consideration: see Vitalija Tamavičiūtė, Individual Constitutional Complaint: Lithuanian Perspective, Co.Co.A. (Comparing Constitutional Adjudication) (2008), http://www.jus.unitn.it/cocoa/papers/PAPERS%203RD%20PDF/ICC%20Lithuania%20edit%20ook.pdf (last visited Apr. 1, 2011)
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 Court.  

Finally, of the main shared features of the ICC systems adopted in these countries, the following should be noted and will be explored further below: a) the requirement that an aggrieved party exhaust all available legal remedies before filing a complaint with the Constitutional Court; 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); c) the challengeability of not only statutes but also regulations, administrative acts, and more rarely, judicial decisions; 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 natural persons, to file an ICC with the Court; f) the practice of allowing an ICC only for actions of public powers that have already occurred or legal enactments already in effect; 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 ICC.

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109. 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.
110. For example, Croatia (“legal person exercising public authority”); Montenegro (“legal person vested with public powers”); Serbia (“organizations exercising delegated public powers”); the FYRM.
111. Judicial decisions can be challenged in Czech Republic, Poland, Serbia, Slovak Republic, and Slovenia.
112. 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”).
113. Conversely, Georgia also allows challenge of an act which could infringe the fundamental rights of a person.
114. 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).
7. 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 address briefly these two jurisdictions under this ‘European’ section, in Part I of the article.

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 Constitution. 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 with the Constitutional Court; 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 remedies.”


116. 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.

Law No. 5982.

117. See Venice Commission, supra note 8, at 4.

118. See Turk. CONST. art. 148/1.
With regard to the Russian Federation, a system of direct recourse to the Constitutional Court was first introduced in 1991, when the Constitutional Court of Russia was created.119 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 activity) under the 1978 Constitution of the Russian Soviet Federative Socialist Republics ("RSFSR"), as revised in December 1990.120 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, i.e., 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 omissions.121

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 1995.122 A new typology of direct access to the Constitutional Court—significantly different from the previous—was introduced.123 According to the 1994

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120. 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.


122. Angela Di Gregorio, La Corte costituzionale della Russia [The Constitutional Court of Russia], in SISTEMI E MODELLI DI GIUSTIZIA COSTITUZIONALE 447 (Luca Mezzetti ed., 2009).

123. Id.

124. KONSTITUTSHIA RossiiskoI Federatsii [KONST. RF] [CONSTITUTION] art. 125 (Russ.); Federal’nyi Konstitutsionnyi Zakon [FKZ] [Federal Constitutional Law], OKonstitutsionnii Sud Rossiiskoi Federatsii [Konst. Sud RF] [On the Constitutional Court of the Russian Federation], SOBRANIE ZAKONODATEL’STVA ROSSIISKOI FEDERATSII
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)\textsuperscript{125} applied or likely to be applied to a concrete case whose analysis before a judicial body has already been initiated.\textsuperscript{126} This last admissibility requirement changes therefore the new direct constitutional complaint adopted in the Russian federation into a hybrid between an incidenter review system and a pure individual constitutional complaint.\textsuperscript{127}

In order to complete the overview of signatory countries to the ECHR, it is worth mentioning that other relevant European jurisdictions have adopted systems of individual constitutional complaint. These are: the Hellenic Republic (Greece),\textsuperscript{128} the Principality of Andorra,\textsuperscript{129} the Principality of Liechtenstein,\textsuperscript{130} the Republic of Cyprus,\textsuperscript{131} and the Republic of San Marino.\textsuperscript{132}
C. Asia

Latin America and Europe are not the only regions in the world hosting countries that have adopted systems of direct access to constitutional and supreme courts for the protection of fundamental rights. Several Asian countries—under the positive influence exerted by the Austrian, German and Mexican models of judicial review—have introduced systems of individual constitutional complaint.

Among these, the following are worth mentioning: the 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.


134. MINGUO XIANFA [CONSTITUTION] art. 78, 79 (1947) (Taiwan); article 5 of the Law of Procedure. The petition to the Taiwanese Council of Grand Justices (Judicial Yuan, the country's Constitutional Court) for constitutional interpretation can be filed in case of infringement of constitutional rights due to an unconstitutional act or judicial decision, after previous exhaustion of all available legal remedies. If the petition challenges a judicial decision, it must be lodged within three months after the decision has become final, but if the decision becomes final because the losing party failed to propose an appeal, it is deemed that the petitioner did not exhaust all the applicable remedies. See Tom Ginsburg, Judicial Review in New Democracies: Constitutional Courts in Asian Cases 106 (2003).


136. Organic Law no. 24/2003 and Constitutional Court Regulation, No. 06/PMK/2005, On The Procedures of Judicial Review of Law, art. 3 (Indonesia). In Indonesia, the ICC as a means to access the Constitutional Court (Mahkamah Konstitusi) for protection of fundamental rights is reserved only to Indonesian citizens, either individually or as a “group of people having the same interest.”

137. CONSTITUTION OF THE REPUBLIC OF KOREA, July 12, 1948, art. 111, cl. 5; Constitutional Court Act, arts. 2, 41 & 68, available at http://english.ccourt.go.kr/ (follow the “Constitutional Court Act” link) (lasted visited Apr. 1, 2011). The Act links the ICC to a challenge to the constitutionality of an act for violation of the basic rights protected in the Constitution. The complaint can be filed—after previous exhaustion of all legal remedies—for actions or omissions of the public powers (however, court judgments are excluded). See Tom Ginsburg, Judicial Review in New Democracies: Constitutional Courts in Asian Cases 220 (2003); see Tania Groppi, Costituzioni senza costituzionalismo? La codificazione dei diritti in Asia agli inizi del XXI secolo
D. Africa

A complete analysis of all the jurisdictions in the world that have adopted systems of direct access to constitutional and supreme courts is beyond the scope of this work. However, the system of direct access to the Constitutional Court set up in the Republic of South Africa\textsuperscript{140} deserves to be mentioned for the rather strict criteria that the Court has applied to review applications of those citizens seeking direct access.

Under the 1993 Interim Constitution, direct access to the Constitutional Court was regulated by article 100(2) of the Constitution and article 17 of the 1995 Rules of the Constitutional Court, which established a quite strict requirement for the admissibility of the direct recourse. According to article 17 of the 1995 Rules, application for direct access could be made "in exceptional circumstances only, which will..."

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\textsuperscript{138} Art. 66(1) of the 1992 Constitution of the Republic of Mongolia. Citizens can file a petition with the Mongolian Constitutional Court (Tsets, i.e., referee) without needing to show legal injury or previous exhaustion of other legal remedies. This open-standing policy makes up for the impossibility for ordinary courts to apply "incidenter" to the Constitutional Court in the course of ongoing legal proceedings and the consequential impossibility for the Tsets to review the constitutionality of ordinary court decisions. According to Prof. Ginsburg, "these open-standing provisions... meant that the Court provided an easily accessible alternative forum for those political forces that had been defeated in the legislative arena. Unsurprisingly, this would ultimately lead to the politicization of the Court." \textit{Ginsburg, supra} note 137, at 167-68.

\textsuperscript{139} The writ of amparo, together with the writ of habeas data, was introduced in the Philippines in 2007 by the Supreme Court through the adoption of Resolution A.M. No. 07-9-12-SC of September 25, 2007, on the "Rule on the Writ of Amparo" to supplement the already existing writ of habeas corpus disciplined under Rule 102 of the Revised Rules of the Court. The legal basis for introduction of the two writs was article VIII, section 5(5) of the 1987 Constitution, which vests the Supreme Court with the power to "promulgate rules concerning the protection and enforcement of constitutional rights..." Both writs were adopted to help face the extensive extrajudicial killings and forced disappearances that have been occurring in the Philippines since 1989. According to Sec. 1 of the Rule on the Writ of Amparo, the recourse – which covers a limited number of rights – protects the right to life, liberty, and security from violation or threat by an unlawful act or omission of a public official or employee, or of a private individual or entity. The influence of the Mexican and Latin American conception of amparo is clear. The first decision on a writ of Amparo was issued by the Supreme Court on October 7, 2008, in the case \textit{Secretary of National Defense vs. Raymond and Reynaldo Manalo} (G.R. No. 180906).

ordinarily exist only where the matter is of such urgency, or otherwise of such public importance, that the delay necessitated by the use of the ordinary procedures would prejudice the public interest or prejudice the ends of justice and good government.\textsuperscript{141} While such requirements were reproduced in the 1998 Rules of the Constitutional Court, they have not been included in the current 2003 Rules.\textsuperscript{142}

Article 167(6)(a) of the 1996 Constitution of South Africa provides that a petition for direct recourse can be lodged only "in the interest of justice and with leave of the Constitutional Court."\textsuperscript{143} Even in the absence of further specifications in article 18 ("Direct Access") of the 2003 Rules currently in effect,\textsuperscript{144} the Court has nonetheless kept referring to the necessary presence of the "urgency" and "public importance" requirements as conditions for being granted direct access to the Constitutional Court.\textsuperscript{145} Over time, the Court has become increasingly selective in deciding under what circumstances it will grant direct access to the Court. Clear in the Constitutional Court’s approach to the evaluation of the admissibility of a direct recourse is the view that individuals should preferably lodge their claims with ordinary courts first, so that these claims can reach the Constitutional Court only after other courts have pronounced on the dispute. Claims should therefore be argued up through the lower courts and get a full development of the facts and legal arguments before the case reaches the Court.\textsuperscript{146} Moreover, direct access to the Constitutional Court should be reserved only for truly exceptional circumstances.\textsuperscript{147}

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{141} Rules of the Constitutional Court, (Regulation Gazette) no. 5450 art 17 of Jan. 6, 1995.
\item\textsuperscript{142} See Rules of the Constitutional Court, (Regulation Gazette) no. 6199 of May 29, 1998, GN R757. In a number of aspects, the 2003 Rules have simplified the procedures that existed under the 1998 Rules, especially with regard to direct appeals to the Constitutional Court.
\item\textsuperscript{143} S. Afr. Const. 1996 art.167(6)(a).
\item\textsuperscript{145} Christian Education of South Africa v. The Ministry of Justice 1998 (12) BCLR 1449 (CC), 1999 (2) SA 83 (CC) (S. Afr.)
\item\textsuperscript{147} Bruce and Another v. Fleecytex Johannesburg CC and Others 1998 (4) BCLR 415 (CC), 1998 (2) SA 1143 (CC), at 4, 8; (S. Afr.); Mosebenke and Others v. The Minister of the High Court 2001 (2) BCLR 103 (CC), 2001 (2) SA 18 (CC) at 19 (S. Afr.); see also Ziyad Motala & Cyril Ramaphosa, \textit{Constitutional Law: Analysis and Cases} 60 (Oxford University Press 2002).
\end{enumerate}
\end{footnotesize}
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 branch. 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 one. Members of the Constituent Assembly 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”). The idea of

148. 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 Roberto Romboli & Rolando Tarchi, Giustizia Costituzionale in Spagna [Constitutional Justice in Spain] in 2 ESPERIENZE DI GIUSTIZIA 290 n.15 (Jeorg Luther, Roberto Romboli & Rolando Tarchi eds., 2000).

149. See Hans 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.

150. 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.

151. For recent English materials on the Italian Constitutional Court, see Alessandro 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); Antonio Baldessarre, Structure and Organization of the Italian Constitutional Court, 40 ST. LOUIS U. L.J. 649 (1996); Pasquale Pasquino, Constitutional Adjudication and
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”).

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 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

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152. 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.
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 State.\textsuperscript{153}

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 laws.\textsuperscript{154}

Articles 134-137\textsuperscript{155} of the 1948 Constitution define the main features, structure and functions of the Court.\textsuperscript{156} Although the Constitution became effective in 1948, the Constitutional Court was actually established only in 1956,\textsuperscript{157} after the necessary implementing legislation was enacted—mainly through constitutional laws—in 1948 and 1953.\textsuperscript{158} The adoption of a centralized—or Kelsenian—model of judicial review was tempered with some elements taken from the

\begin{itemize}
\item \textsuperscript{154} 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.
\item \textsuperscript{155} 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 Apr. 1, 2011).
\item \textsuperscript{156} The \textit{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.).
\item \textsuperscript{157} 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 (1948-1956), Italy experimented with a decentralized system of judicial review, where ordinary courts could refuse to apply those laws they deemed unconstitutional. \textit{See} Transitory and Final Provisions of the Constitution no. VII, \textit{supra} note 153, 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 Piero Calamandrei, \textit{La Costituzione e le leggi per attuarla. (Come si fa a disfare una Costituzione) [The Constitution and implementing laws (How to unmake a Constitution)]}, in \textit{DIECI ANNI DOPO: 1945-1955: SAGGI SULLA VITA DEMOCRATICA ITALIANA [Ten Years Later: 1945-1955. Essays on the Italian Democracy]} (Achille Battaglia et al. eds., 1955). \textit{See also} John Henry Merryman & Vincenzo Vigoriti, \textit{When Courts Collide: Constitution and Cassation in Italy}, 15 Am. J. Comp. L. 665 (1966-1967).
\item \textsuperscript{158} 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.
\end{itemize}
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 her. 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), 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 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

159. For an account of this discussion in the Constituent Assembly, see 5 LA COSTITUZIONE DELLA REPUBBLICA NEGLI ATTI PREPARATORI DELL’ASSEMBLEA COSTITUENTE [THE CONSTITUTION OF THE REPUBLIC IN THE PROCEEDINGS OF THE CONSTITUENT ASSEMBLY], 3657 (Italian Chamber of Deputies 1970). For a recent comment on this debate, see Roberto Romboli, Riforma della giustizia costituzionale e ruolo della magistratura [Reform of the Justice System and Role of the Judges], 1 QUESTIONE GIUSTIZIA 122 (1998).

160. 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 151, at 198.

161. On the difference between “incidenter” and “principaliter” review, see MAURO CAPPELLETTI, JUDICIAL REVIEW IN THE CONTEMPORARY WORLD 69 (1971), where the author states that “while the decentralized system encourages private parties to introduce constitutional issues before ordinary tribunals in connection with regular judicial proceedings (review “incidenter”), the centralized approach tends, at least in its archetypal form, to emphasize presentation of constitutional issues before special constitutional courts via special actions initiated by various governmental authorities (review “principaliter”).” See id. at 47 for information on centralized and decentralized power structures.
Constitution, are final. In order for the question of constitutionality to be admissible, the a quo 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 Region. Indeed, Article 98 of the Special Statute allows the President of the Region or of one 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

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

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.
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 that show the differences between this mechanism and the incidenter control of constitutionality. It should be noted, however, that this 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 complaint.165 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 unconstitutionality.166 The text of the provision, intended to be


166. The approved text stated: “Anybody, within the term of one year [from the enactment] can challenge a law before the Constitutional Court on 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 (last visited Apr. 1, 2011). 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 Apr. 1, 2011). See also FRANCESCO RIGANO, COSTITUZIONE E POTERE GIUDIZIARIO: RICERCA SULLA FORMAZIONE DELLE NORME COSTITUZIONALI [THE CONSTITUTION AND POWER OF THE JUDICIARY. STUDY ON THE DEVELOPMENT OF CONSTITUTIONAL LAWS] 240 (1982); ROBERTO ROMBOLI, IL GIUDIZIO COSTITUZIONALE INCIDENTALE COME PROCESSO SENZA PARTI [INCIDENTER JUDICIAL REVIEW AS A TRIAL WITHOUT PARTIES] 17 (1985); CARLO MEZZANOTTE, IL GIUDIZIO SULLE LEGGI, cit.; Lorenza Carlassare, I diritti davanti alla Corte costituzionale: ricorso individuale o rilettura dell’art. 27 L. n. 87/1953? [Rights before the Constitutional Court: Individual
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 approval.\(^{167}\)

On December 2, 1947, reference to the ICC was made again in two 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 Court.\(^{168}\) Indeed, Giuseppe Codacci Pisanelli, one of the members of the Constituent Assembly, presented an 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 interests."\(^{169}\)

This second amendment was introduced, on that same day, by Costantino Mortati, proposing that "a recourse for constitutional illegitimacy can 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."\(^{170}\)

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167. See La Costituzione della Repubblica negli atti preparatori dell'Assemblea Costituente, supra note 159.
168. See id.
169. 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. (emphasis added)
170. 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).
The Constituent Assembly eventually decided to leave the determination of the “conditions, forms and terms for proposing judgments on constitutional legitimacy”171 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 establishment.172

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.173

According to some commentators,174 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 fashion.

Since 1947-1948, proposals for introduction of a system of individual constitutional complaint have recurred.175 Generally, there

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171. Art. 137 Costituzione [Cost.] (It.).
172. In regards to the part of the article addressing the ICC, it stated that, “[t]he 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” (emphasis added).

See Meuccio Ruini, President, Committee for the Constitution, Statement Regarding Article 137 of the Constitution (Dec. 22, 1947).

173. See also CARLO MEZZANOTTE, IL GIUDIZIO SULLE LEGGI, supra note 165.

174. See ELISABETTA CRIVELLI, LA TUTELA DEI DIRITTI FONDAMENTALI E L’ACCESSO ALLA GIUSTIZIA COSTITUZIONALE [PROTECTION OF FUNDAMENTAL RIGHTS AND ACCESS TO CONSTITUTIONAL JUSTICE] 12 (2003) (It.). 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 the citizens more aware of the new rights entrenched in the Constitution and the transition to a whole new constitutional system. Id.

175. See also Angelo Seavone, Appunti sulle proposte di introduzione del ricorso costituzionale diretto in Italia [Notes on the proposals of introduction of the individual constitutional complaint in Italy] RIVISTA TRIMESTRALE DI Diritto e PROCEDURA CIVILE 1241 (1981) (It.). Carlo Mezzanotte, Il problema della fungibilità tra eccezione di incostituzionalità e ricorso diretto alla Corte costituzionale [The problem of fungibility
have been two main reasons weighing in support of its adoption: first, the need to provide 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 constitutionality.\footnote{Id.} 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 Cappelletti.\footnote{MAURO CAPPELLETTI, LA GIURISDIZIONE COSTITUZIONALE DELLE LIBERTÀ [THE CONSTITUTIONAL JURISDICTION ON FREEDOMS] (1955) (It.).} 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, 1965.\footnote{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. \textit{See} LA GIUSTIZIA COSTITUZIONALE [CONSTITUTIONAL JUSTICE] (Giuseppe Maranini ed., 1966) (proceedings of the roundtable with Italian constitutional scholars). \textit{See also} Paolo Carrozza, Roberto Romboli & Emanuele Rossi, \textit{I limiti all’accesso al giudizio sulle leggi e le prospettive per il loro superamento} [Limits in the access to judicial review of legislation and perspectives on their overcoming], in \textit{L’ACCESSO ALLA GIUSTIZIA COSTITUZIONALE: CARATTERI, LIMITI, PROSPETTIVE DI UN MODELLO} 679 (Roberto Romboli ed., 2006); \textit{see also} Aldo Sandulli, \textit{RAPPORTI TRA GIUSTIZIA COMUNE E GIUSTIZIA COSTITUZIONALE IN ITALIA [ON THE RELATIONSHIP BETWEEN ORDINARY AND CONSTITUTIONAL JUSTICE IN ITALY]} (1968). Participants in the roundtable drafted a constitutional amendment for the introduction of a system granting direct 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”: UGO SPAGNOLI, \textit{I PROBLEMI DELLA CORTE} \textit{APPUNTI DI GIUSTIZIA COSTITUZIONALE} 104 (1996).} Despite arousing the interest and partial support of constitutional scholars and practitioners, these proposals were not 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 issue of constitutionality.
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 *litis fictae* (fictitious cases) before an ordinary court in order to have access to the Constitutional Court and have their rights protected from an unconstitutional law. 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 mentioning. In 1989, a proposal for an amendment to the Italian Constitution was introduced into the Parliament. The proposed amendment would have introduced the possibility for a citizen to apply directly to the Constitutional Court to challenge laws, 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 complaint.

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 Berlusconi. 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 Constitution.”

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181. 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 in the text.
183. *Id.*
184. The seminar was held on November 13-14, 1989. The proceedings have been published in *AA.VV., Giudizio “A QUO” e promovimento del processo costituzionale [*“A QUO”* judgment and procedures to activate a constitutional recourse] (Giuffrè, 1990).
185. The Studying Committee was established by President of the Council of Ministers Decree of July 14, 1994.
186. The final report of the Committee, presented on December 21, 1994, was published by the Department for Constitutional Reform under the Presidency of the
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 courts.\textsuperscript{187}

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


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 Ferrara.\textsuperscript{188}

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).\textsuperscript{189} This project deserves more detailed consideration.

\textsuperscript{187} 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 Apr. 1, 2011).

\textsuperscript{188} Id.

\textsuperscript{189} IL DIRITTO COSTITUZIONALE A DUECENTO ANNI DALLA PRIMA CATTEDRA IN EUROPA ("CONSTITUTIONAL LAW AFTER 200 YEARS FROM THE FIRST CHAIR IN EUROPE") (Lorenza Carlassare ed., 1998). The first chair in Constitutional Law in Europe was established at the University of Ferrara in 1797. The Congress was held on May 2-3, 1997); see also Valerio Onida, \textit{La Corte e i diritti: tutela dei diritti fondamentali e accesso alla giustizia costituzionale [The Court and rights: protection of fundamental rights and access to constitutional justice]}, in \textsc{Studi in onore di Leopoldo Elia—Tomo 2} (Giuffrè Editore ed., 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.

The Commission, also referred to as the “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.\textsuperscript{190} 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.\textsuperscript{191}

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, introducing—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 Constitutional Court, aimed at increasing its competences and functions, introducing new circumstances providing for the possibility of lodging an application with the Constitutional Court.\textsuperscript{192} Among those new competences, the new text of Article 134\textsuperscript{193} 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, fundamental

\begin{itemize}
\item Controversies on the constitutional legitimacy of laws and enactments having force of law issued by the State and Regions;
\item Controversies on the constitutional legitimacy of regulations, in cases established by the Constitution;
\item Conflicts arising from allocation of powers between powers of the State; conflicts arising from allocation of powers to State and Regions and between Regions, Provinces and Municipalities;
\item Charges brought against the President of the Republic, according to the Constitution;
\item Claims filed with regard to the elections of the President of the Republic;
\item Admissibility of abrogative referenda.
\item \textit{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.}
\end{itemize}

\textsuperscript{190.} See id.
\textsuperscript{191.} Id.
\textsuperscript{192.} The project would have modified articles 59, 134, and 137 of the Constitution of the Italian Republic.
\textsuperscript{193.} The final draft of the proposed new art. 134, approved by the Bicameral Commission, read as follows:

\begin{itemize}
\item The Constitutional Court shall pass judgments on:
\item \textit{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.}
\end{itemize}

(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.”

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,\textsuperscript{194} drafted within the Commission by Marco Boato, explicitly identifies the reasons for the introduction of the individual constitutional complaint for the purpose of supplementing the protection of fundamental rights already provided through the “incidenter” system of judicial review, in order to cover all of the circumstances not protected by existing competences of the Court. The Report also shows that the members of the Commission were aware of the application that this mechanism had found in several foreign experiences,\textsuperscript{195} as 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 of protection for fundamental rights and should have avoided compromising the Court’s functionality. This latter aim would have been achieved through the establishment of clear requirements for citizens to be granted the possibility to apply. On the other hand, the purpose of the Commission was to achieve a protection as broad as possible for those fundamental rights\textsuperscript{196} entrenched in the Constitution, making them protectable before 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.


\textsuperscript{195} 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 analyzed and considered in detail; specifically highlighted were the differences with regard to the acts that could be reviewed for their constitutionality.

\textsuperscript{196} 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., Alessandro Pace, Diritti fondamentali al di là della Costituzione [Fundamental Rights beyond the Constitution], 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 Antonio Baldassare, Diritti Inviolabili [Inviolable Rights], in Enciclopedia Giuridica 18 (Vol. 11, 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 considered by the Constitution. For a detailed account of these theories, see Antonino Spadaro Il problema dei “fondamenti” dei diritti “fondamentali” [The problem of the “foundative” element of “fundamental” rights], I Diritti Fondamentali Oggi 64 (1993).
Throughout the drafting process, constitutional scholars provided reflections and comments on the different options available and 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 final approval, criticism was expressed with regard to several of the choices made.\textsuperscript{197}

While the project acknowledged the residual character of the individual constitutional complaint in the protection of fundamental rights, it eventually opted for adoption of a system of individual constitutional complaint with 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 draft, the reference to the necessary previous exhaustion of judicial remedies, present in earlier drafts, was omitted. The Report itself underlines how the final draft of the proposed amendment significantly differed from the first, which stated:

\begin{quote}
The Constitutional Court shall pass judgment: \ldots
\end{quote}

\begin{itemize}
\item 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.\textsuperscript{198}
\end{itemize}

This first draft was clear in providing access to the Court only when a subject could not access any other jurisdictional remedy. The Committee first rephrased the final part of the article, requiring the previous exhaustion of judicial remedies, eventually omitting any such reference.\textsuperscript{199}

The legitimacy and opportunity to leave to a subsequent constitutional law the identification of those fundamental rights whose infringement could have been claimed by an individual was also significantly debated. The explanatory Report suggested that the

\begin{itemize}
\item 198. \textit{The original text of the first draft, in Italian, provided: \textquoteright\textquoteright 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\textquoteright\textquoteright.}
\end{itemize}
Constitutional Court be given some leeway in determining the category of “fundamental rights” at issue, but this aspect was already marking a clear difference between the Italian project and, for instance, the Spanish experience, where the Constitution directly identifies the rights protected under the recurso de amparo.\textsuperscript{200}

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 complaint.\textsuperscript{201}

As previously noted, the project was not adopted by the Parliament and was eventually abandoned.\textsuperscript{202}

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 in a Conference organized in Florence\textsuperscript{203} and has been addressed periodically by various Presidents of the Italian Constitutional Court in their annual press conferences.\textsuperscript{204}

\section*{D. Incidenter Review: An Already Effective System?}

Recurrently over the past twenty years, several constitutional-law scholars have expressed the idea that a more comprehensive and efficient

\begin{itemize}
  \item \textsuperscript{200} \textit{Id.}
  \item \textsuperscript{201} See e.g., Saulle Panizza, Il ricorso diretto dei singoli [The direct recourse of individuals], in \textit{Perspettive di accesso alla giustizia costituzionale (Atti del Convegno di Firenze del 28-29 Maggio 1999) [Perspectives on access to constitutional justice (Proceedings of the Florence Congress of 28-29 May 1999)]} 81 (Adele Anzon, Paolo Caretti & Stefano Grassi eds., 2000).
  \item \textsuperscript{202} See Riforme, la fine della Bicamerale [Constitutional Reforms: the end of the Bicameral Commission], \textit{Corriere della Sera}, June 3, 1998.
  \item \textsuperscript{203} \textit{Perspettive di accesso alla giustizia costituzionale [Perspectives on the access to the Constitutional Court]} (Adele Anzon, Paolo Caretti & Stefano Grassi eds., 2000). The Congress was organized by the so-called “Gruppo di Pisa” and held in Florence on May 28-29, 1999.
  \item \textsuperscript{204} See La giustizia costituzionale nel 1997 [Constitutional justice in 1997], \textit{Foro Italiano}, Feb. 11, 1998, 133: transcript of the annual press conference of the President of the Constitutional Court, Judge Renato Granata. \textit{See also} Annual press conference of the President of the Constitutional Court, Judge Valerio Onida, Jan. 20, 2005, available at \url{www.cortecostituzionale.it} (last visited Apr. 1, 2011). See also Paolo Passaglia, Sull’inopportunità di introdurre il ricorso diretto individuale: qualche riflessione (ed una provocazione) [On the inopportunity to introduce an individual direct recourse: some reflections and a provocative statement], available at \url{http://joomla.ddp.unipi.it/documenti/persdoc/contributi/Ricorso_diretto_individuale.pdf} (last visited Apr. 1, 2011), 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.
\end{itemize}
protection of fundamental rights in Italy can 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 existence. 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 constitutionality. 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.

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 “incidenter” review would grant when law-decrees or election laws would be involved. However, it is this author’s opinion that the introduction of a system of individual constitutional complaint 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 “incidenter” 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 intervention in the hearings before the Constitutional Court, thus overruling its own

205. See Mauro Cappelletti, La giurisdizione costituzionale delle libertà, supra note, 177. See also Valerio Onida, La Corte e i diritti, supra note 188. See also Adele Anzon, Per una più ampia garanzia dei diritti costituzionali dinanzi alla Corte: il ricorso individuale diretto [For a broader protection of constitutional rights before the Court: direct individual recourse], in Libertà e giurisprudenza costituzionale [Liberty and constitutional jurisprudence] (Vittorio Angiolini ed., 1992).


207. See Elisabetta Crivelli, La tutela dei diritti fondamentali, supra note 174, at 18.
previous strict interpretation, which had categorically excluded any third-party intervention. This broader interpretation has spurred 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." 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 legislation. Indeed, the Constitutional Court has repeatedly urged ordinary judges to directly solve 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 available. 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 the 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


210. See Mauro Cappelletti, Questioni nuove (e vecchie) sulla giustizia costituzionale [New (and old) views on constitutional justice], in GIURISPRUDENZA COSTITUZIONALE 857 (1990).

should be assessed timely and without delay.\textsuperscript{212} 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 (so called decrees-law).\textsuperscript{213} 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 take place within sixty days of enactment).\textsuperscript{214} Only in 1995 did the Court, realizing the gap that its own jurisprudence had created, overruled 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 measure.\textsuperscript{215}

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 a question of constitutionality could be referred to and resolved by the Constitutional Court, for example, election laws.\textsuperscript{216}

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

\textsuperscript{212} See Elisabetta Crivelli, La tutela dei diritti fondamentali, supra note 174, at 47.

\textsuperscript{213} See Republic of Italy Const. art. 77, which states that:

\begin{quote}
The Government may not, without delegation from the Houses, issue decrees having the force of law. 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. The Houses can however regulate through laws the legal relations arising out of decrees not converted.
\end{quote}

\textsuperscript{214} See generally Corte cost. Decision no. 108/1986.

\textsuperscript{215} The Constitutional Court overruled its previous case law to affirm its competence to judge on already converter law-decrees in decision no. 29/1995. For an account of the development of the Court's jurisprudence on the constitutionality of decree-laws see Roberto Romboli, Decreto-legge e giurisprudenza della Corte costituzionale [Decree-law and Constitutional Jurisprudence], in L'EMERGENZA INFINITA. LA DECRETAZIONE D'URGENZA IN ITALIA 107 (Andrea Simoncini ed., 2006).

\textsuperscript{216} See Crivelli, supra note 174, at 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 Piero Calamandrei, Corte costituzionale e autorità giudiziaria [The Constitutional Court and the Judicial Power], in RIVISTA DI DIRITTO PROCESSUALE 16 (1956).
constitutionality of secondary sources, such as regulations.\textsuperscript{217} 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 delegification,\textsuperscript{218} and cannot, 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. CONCLUDING REMARKS ON THE ADVISABILITY TO ADOPT THE INDIVIDUAL CONSTITUTIONAL COMPLAINT IN ITALY

While adoption of the individual constitutional complaint in new democracies may enhance legitimacy and acceptance of a newly established constitutional or supreme court in the system, it is this author's view that different considerations should apply with regard to a system of judicial review—as the Italian—that has already achieved full legitimacy, acceptance and support in a legal system and that has 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 the Italian legal system 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


\textsuperscript{218} 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 Tommaso Giovannetti, Delegificazione, regolamenti e atti amministrativi [Delegification, regulations, and administrative acts], in L'ACCESSO ALLA GIUSTIZIA COSTITUZIONALE 467 (Roberto Romboli ed., 2006).
original ways. Ordinary judges are seen as the “door keepers”\textsuperscript{219} of the Court, in a “bottom-up” process activated through the “incidendere” 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).\textsuperscript{220}

Increasingly often, the Constitutional Court has declared inadmissible the questions of constitutional legitimacy presented and has asked ad hoc judges to directly provide a “constitutionally oriented” interpretation of the challenged statutory law.\textsuperscript{221} 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 validity\textsuperscript{222} and show—together with the two abovementioned requirements—that a constitutionally adequate

\textsuperscript{219} The expression was originally created by Piero Calamandrei.

\textsuperscript{220} It is worth remembering, though, that ordinary judges already disapply—in Italy as in all the other member States of the European Union—statutory laws which they deem are inconsistent with European Union law, probably furthering the general level of decentralization of the system.

\textsuperscript{221} 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.

\textsuperscript{222} While in Spain this is explicitly required by art. 5.3 of the Ley Orgánica del Poder Judicial (1985), the Constitutional Court of Italy developed this requirement through case law: see Corte Cost. no. 356/1990. See Tania Groppi, The Italian Constitutional Court: Towards a ‘Multilevel System’ of Constitutional Review? 2 J. Comp. L. 100, 116 (2008).
As a consequence of this evolution, the protection of constitutional rights against unconstitutional legislation is enhanced and can be addressed before ordinary judges.

This “virtuous nexus” between the Constitutional Court and ordinary courts has dispelled 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 review. 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 directly before the Constitutional Court, would run the risk of breaking this “virtuous nexus,” 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 system, others—whose opinion we share—look favorably at the introduction of a constitutional complaint on condition that judicial decisions cannot be challenged.

On a different note, it is this author’s opinion that the advisability (or lack thereof) of the introduction of the ICC in Italy should also 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 Convention, 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 decisions, in light of the amended text of article 117 of the Constitution has recognized infra-constitutional status to the ECHR, defining it as “norma interposta.” 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 legislation.

It is beyond doubt that the ICC has the capacity to highly affect the system of judicial review adopted in a country, especially considering its

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227. According to the individual application procedure set up in article 34 of the Convention. On this topic, see Cappelletti, supra, note 210, at 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 Crivelli, supra note 174, at 150.


229. 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.

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

231. 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.

Philipp Cede, Report on Austria and Germany, in THE NATIONAL JUDICIAL TREATMENT OF THE ECHR AND EU LAWS 55 (Giuseppe Martinico & Oreste Pollicino eds., 2010) (comparing the approaches followed by the Constitutional Courts in Austria and Germany).
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 ICC 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 incidenter 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 direct recourse in a way that would not affect the existing “virtuous nexus” 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 this author’s view that adoption of a general and broad system of ICC would ultimately bring about more disadvantages than advantages.

It is our view that a more narrowly designed system, introducing very specific 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 in one of its decisions—seems to be more compatible with the current status of the Italian system of judicial review. On this point, we share a leading Italian legal scholar’s view 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 scale.

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232. 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.

233. See Mauro Cappelletti, Intervento [Speech], in LA GIUSTIZIA COSTITUZIONALE 399-400 (Giuseppe Maranini ed., 1966).