3rd Congress of the World Conference on Constitutional Justice
'Constitutional Justice and Social Integration'
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Seoul, Republic of Korea

Questionnaire

Reply by the Constitutional Court of Italy

A. Court description

Unless your Court[1] has already provided a description for the CODICES database (www.CODICES.coe.int), we kindly invite you to prepare a short presentation of your court. This will allow the member courts to get to know each other better. Please briefly set out your Court's composition and competences under the headings below:

Introduction
I. Basic texts
II. Composition, procedure and organisation
III. Jurisdiction / Powers
IV. Nature and effects of judgments
Conclusion

The presentation requested is already available in the CODICES database.

B. Social integration

As concerns the specific sub-topics for the 3rd Congress, please reply to the following questions in a succinct manner, in any of the languages of the conference – but if possible with a translation into English.

1. Challenges of social integration in a globalised world

1.1. What challenges has your Court encountered in the past, for example in the field of asylum law, taxation law or social security law?
*In the Court's first years of activity, it performed a key role in the achievement of gender equality, thus making a vital contribution to the modernization of the legal system. Fundamental judgments were Judgment **N. 33 of 1960** on women's access to public sector jobs, and Judgment **N. 422 of 1995** on equal access to elected public office.*
*In those years, the Court also exerted keen influence on family law, in particular on the legal condition of the socially and economically weaker spouse and on children born out of wedlock (some of the many judgments issued in this regard were Judgments **N. 126 of 1968**, on spousal equality in the context of adultery; Judgments **N.s 79 of 1979 and 335 of 2009** on the protection of natural children's inheritance rights).*

[1] Hereinafter, "your Court" will refer to your institution, be it a Constitutional Court, a Supreme Court, Constitutional Council or a Constitutional Chamber within a Supreme Court.

*Also, the judgments on labour and social security were of great social significance (for example, Judgment **N. 3 of 1966** on workers' right to wages; Judgment **N. 29 of 1960** on the abolition of the crime of striking; Judgment **N. 45 of 1965** on the right to work; Judgment **N. 31 of 1986** on minimum pensions; Judgment **N. 160 of 1974** on unemployment benefits; Judgment **N. 68 of 1969** on collective bargaining in domestic work; Judgment **N. 190 of 2006** on disabled individuals' right to work; Judgment **N. 6 of 1980** on survivor benefits for husbands; Judgment **N. 498 of 1988** on gender equality for entitlement to old age pensions).*
*As for taxation law, we recall Judgment **N. 128 of 1966** on the principle of progressivity of taxation; Judgment **N. 45 of 1963** on "*solve et repete*" (payment under protest) clauses and the general interest of tax collection; Judgment **N. 51 of 1992** on bank secrecy and the fight against tax evasion.*

*Cases concerning immigration and asylum, such prominent issues today, began to be submitted to the Court mainly from the 2000s. Among the first important decisions to bear great social significance is Judgment **N. 252 of 2001**, on the need to recognize the fundamental right to health of foreigners, even illegal immigrants.*

1.2. How were issues of social integration of conflict transformed into legal issues?
The judicial branch has played a crucial role in this respect. Indeed, thanks to ordinary judges' constitutional awareness, mere judicial cases could become an opportunity to submit socially significant issues to the Court's examination.
*In particular, among the most important legal instruments exercised by referring judges as a standard for constitutional review, one can certainly mention the use of Article 3 of the Italian Constitution, which enshrines the principle of formal and substantive equality. This standard, first applied by the Court in cases concerning equality, was later also used as the foundation for its judgments on "*ragionevolezza*" (approximately, reasonableness).*

1.3. Is there a trend towards an increase in cases on legal issues relating to social integration? If so, what were the dominant questions before your Court in the past and what are they at present?
Within the domestic legal system, the Court is the highest organ to ensure the observance of fundamental rights. Therefore, issues connected to social integration and the fulfillment of rights fall by definition within its sphere of activity.
Rather than a trend towards an increase in such cases, it is possible to perceive a change in the type of issues reaching the Court. For example, it is clear that immigration is a field that was previously unknown to the application of fundamental rights.
*However, the great change that society at large – and thus the Court too – must deal with is the economic crisis. The challenge is currently to find a reasonable balance between the practical fulfillment of rights and the scarcity of financial resources. The Court had already briefly examined this issue in the 1990s, with the landmark judgment **N. 455 of 1990** on the subject of social rights and limitations due to financial resources.*

2. International standards for social integration

2.1. What are the international influences on the Constitution regarding issues of social integration/social issues?

The current global economic and legal crisis arising from the phenomenon of globalization seriously endangers the protection of human rights and democracy itself. Free market economics and financial speculation bend societies to a logic of individualism, and national institutions and organizations are unable to effectively contrast the adverse impact of cunning, coordinated initiatives aimed at reaping great financial profits to the detriment of individuals and workers.

This is why Italy favours the efforts towards supranational integration that seek to ensure democracy and the observance of human rights. In Europe, such efforts materialize in two major ways: first, in the construction, through the voluntary limitation of national sovereignty, of a common legal and economic space – the European Union – and second, in the treaty-based membership of international Conventions. These political-legal superstructures are implemented and guaranteed by the Court of Justice of the European Union and the European Court of Human Rights (hereinafter, ECtHR), which work with national Constitutional Courts in achieving the common objective of defending democratic values. Therefore, today ordinary and constitutional judges must refer not only to national law, but also to European law and the law of the European Convention of Human Rights (hereinafter, ECHR), as interpreted by, respectively, the Court of Justice of the European Union and the ECtHR.

In solving the cases before them, judges must apply a complex, "multi-level" legal order. In Italy, European law is directly applicable in the national legal system thanks to Article 11 of the Constitution, which allows the limitation of national sovereignty except in relation to supreme principles and inalienable human rights. This opening to supranational law was made more explicit with the introduction, into the Constitution – by means of the reform of Title V in 2001 – of the new Article 117(1), which requires national and regional legislatures to observe the duties deriving from the European legal system and from international obligations. In this way, conventional law too – especially that relating to the ECHR, as interpreted by the ECtHR – enriches and constitutes the national legal system. According to the portrayal of the legal system established by the Italian Constitutional Court in landmark Judgments ***N.s 348 and 349 of 2007****, the ECHR and the ECtHR case law are "*norme interposte*" (namely, provisions that are subordinate to the Constitution, but the breach of which results in a violation of the Constitution), with the crucial consequence that the Constitutional Court is empowered to review the constitutionality of precisely those supranational norms.*

2.2. Does your Court apply specific provisions on social integration that have an international source or background?
By way of example, two recent judgments shall be mentioned. Both judgments concern the legal status of foreigners.

In Judgment ***N. 40 of 2013****, on care allowances and disability pensions, the Court declared that Article 80(3) of Law N. 388 of 2000 was unconstitutional, in so far as it established the condition that foreigners legally residing in Italy could only receive such benefits if they possessed a permanent residence permit. This condition had already been scrutinized in relation to other benefits, such as the monthly disability allowances provided by Article 13, Law N. 118 of 1971 (Judgment* ***N. 187 of 2010****) and the child disability allowances established in Article 1, Law N. 289 of 11 October 1990 (Judgment* ***N. 329 of 2011****). On both occasions, in declaring the unconstitutionality of the legislation involved, it was emphasized that – there where benefits for supporting individuals, and for safeguarding acceptable living conditions for the family of the disabled, are involved – any discrimination between citizens and foreigners legally residing in the State territory that may be based on conditions other than those generally provided, is contrary to the principle of non-discrimination enshrined in Article 14 ECHR, in light of the strict interpretation of this norm given by the ECtHR.*

*The Italian Constitutional Court found that the same considerations applied in the case decided with Judgment N. 40, since the benefits in question were for individuals affected by serious health conditions or seriously disabling handicaps (one of the two judgments even concerns a minor). Granting these benefits involves a set of fundamentally important, constitutional, values, also enshrined in the constitutional provisions cited, especially Article 2 of the Constitution. In light of the various international conventions in this connection, these values deprive of any justification (*ratione temporis*, as well as* ratione census*) the*

application of a restrictive regime towards non-EU citizens who have legally resided on Italian soil for a considerable, non-episodic, amount of time, as was the case of the claimants before the Court.

In Judgment ***N. 202 of 2013****, on enhanced protection for foreigners having family relations within Italy, the Court declared that Article 5(5) of Legislative Decree N. 286 of 1998 was unconstitutional. That Article established an enhanced form of protection from measures that could compromise foreigners' stay in Italy, which measures would apply if the individuals in question were declared guilty of the crimes enumerated in Article 4(3) of the* Testo Unico *on immigration. Indeed, Article 5(5) required administrative authorities to concretely evaluate the overall circumstances of the individual(s) involved, taking into account the danger that he/she may pose to public safety and order, as well as the duration of his/her stay and his/her family and social ties. However, as provided in Article 5(5) itself, this enhanced protection did not extend to those who, although in the substantive conditions to request family reunification, had not requested the relevant formal order and had not therefore "exercised their right to family reunification" for the purposes of the challenged legislation.*
*The Constitutional Court highlighted that this omitted extension, as submitted by the referring judge, gives rise to an unreasonable disparity of treatment in similar situations. Therefore, there was an illegal infringement of fundamental rights protecting the family and minors, in violation of Articles 2, 3, 29 and 30 of the Italian Constitution and, pursuant to Article 117(1) of the Italian Constitution, of Article 8 ECHR as applied by the ECtHR. In particular, the violation arises from the unreasonableness and lack of proportionality in the lawmakers' balancing of the constitutional interests and rights involved; not only do these flaws violate the abovementioned constitutional norms, but they also conflict with Article 8 ECHR as applied by the ECtHR, which was adduced as an "intermediate standard" ("*parametro interposto*") on the basis of Article 117(1) of the Constitution (see e.g. ECtHR Judgment of 7 April 2009, Cherif and Others v. Italy).*

2.3. Does your Court directly apply international instruments in the field of social integration?
The Court's decisions can be directly determined by sources external to the domestic legal order. On issues relating to social integration, two decisions will now be examined in which the Court ordered the case documents to be returned to the referring parties pursuant to a change in the relevant legislative framework; the first case concerns European law, while the second ECHR law.

With Order ***N. 124 of 2012****, the Court adopted an interlocutory decision to return the case to the referring judge due to the changes in the relevant legal framework. Indeed, according to well-established principles on the subject, it is for the referring judge to evaluate the effects of the enactment of successive legislative measures upon the actual case before him/her. The case at hand concerned the constitutionality of Article 13(13)(3) of Legislative Decree N. 286 of 25 July 1998 (the* Testo unico *of the provisions concerning the regulation of immigration and measures on the condition of foreigners), which requires compulsory arrest for the crimes enumerated in subsections 13 and 13(2) of that same Article (undue re-entry in State territory of a foreigner who has already received an expulsion order). The referring judge believed that Article 13(13)(3) could be unconstitutional in light of Article 3 of the Italian Constitution, due to the inherent* irragionevolezza *(unreasonableness), in a system based on the predominance of administrative procedures for immediate expulsion, or detention in a center for identification and expulsion of illegal immigrants, of a less effective (pre)cautionary penal measure, that was actually detrimental to the swift opening of the abovementioned procedures. The referring judge also perceived the unconstitutionality of the measures in light of Article 13 of the Constitution, as the condition of necessity, which the law must meet when enabling coercive measures of the judicial police, was not fulfilled: the provision of compulsory arrest was made futile (and even harmful) by the combination of administrative procedures aimed at immediate expulsion.*

The Court highlighted the far-reaching changes that affected the legal framework of the subject-matter in question, changes introduced especially by Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals. The deadline for the implementation of this measure was 24 December 2010, and therefore it had become directly applicable in the national legal system.

The Court noted that, pursuant to the remanding orders, the Court of Justice of the European Union, in Judgment C-61-11 PPU of 28 April 2011, had established that the Directive in question (in particular, Articles 15 and 16 thereof) were not compatible with national legislation that assigned detention sentences upon foreigners whose stay was illegal for the sole reason that these foreigners had remained in the territory in question in violation of an order to leave that territory within a specified period of time. The Italian Court also recalled that in Judgment C-329/11 of 6 December 2011, the Court of Justice (Grand Chamber) established that Directive 2008/115/EC prevented the establishment of detention sentences for expelled foreigners who were unwilling to voluntarily leave the territory of the State in question, before the coercive procedures established in Article 8 of the Directive were exhausted.

Finally, the Italian Constitutional Court emphasized that while its judgments in the cases at hand were pending, Decree-Law N. 89 of 23 June 2011 had been issued (Urgent provisions for completing the implementation of Directive 2004/38/EC on the free movement of European Community citizens and for the transposition of Directive 2008/115/EC on the repatriation of illegally staying third country nationals), and had been converted, with amendments, into law by Article 1(1) of Law N. 129 of 2 August 2011. The Court stated that this measure left unaltered the procedural law that had been challenged (Article 13(13)(3) of Legislative Decree N. 286 of 1998); however, the new provision had fundamentally amended Article 13(14) in relation to the duration of the ban on re-entry, the criteria for the relevant ascertainment on part of the proceeding authorities, and the conditions for the revocation of the measure imposed. This modified the very administrative order relating to the conduct referred to in the substantive penal norms, the violation of which require the arrest of the foreigner involved. Thus, in light of the substantive modification of the legal framework in question, the need arises for the referring judge to evaluate the effects of such a modification on the law applicable to the case before him/her.

With Order ***N. 150 of 2012*** *on medically assisted procreation, the Court ordered the case to be remanded to the referring judges for a fresh examination of the issues. The referring judges had raised doubts as to the constitutionality of Article 4(3) of Law N. 20 of 2004 in light of Article 117(1) of the Constitution, in relation to Articles 8 and 14 ECHR. The judges deemed that they were required to apply the ECHR articles in accordance with the interpretation given by the ECtHR, First Chamber, in Judgment S.H. and others v. Austria, of 1 April 2010. However, after the referring orders had been delivered to the Constitutional Court, the Grand Chamber of the European Court of Human Rights issued Judgment S.H. and Others v. Austria, of 3 November 2011, in which it diverged from the aforementioned decision given by the First Chamber. Ordinary judges must consider ECHR provisions as interpreted by the ECtHR; therefore, the different conclusion reached by the Grand Chamber did impact the meaning of the ECHR provisions considered by the referring judges, and constituted a novelty that directly affects the question of constitutionality referred to the Constitutional Court.*

The Constitutional Court affirmed that remanding the case to the referring judges was necessary: first, because it is the inexorable logical-legal corollary of the relevance of ECtHR case law for the ECHR norms, which the referring judges had rightly taken into consideration; second, because evaluating the impact of the Grand Chamber judgment on

questions of constitutionality is primarily within the remit of referring judges – otherwise, the system of incidental review for constitutionality would be modified.

2.4. Does your Court implicitly take account of international instruments or expressly refer to them in the application of constitutional law?

*In Judgment **N. 7 of 2013**, the Court held that in cases involving the crime of destroying documentary evidence of civil status, the automatic application of the supplementary penalty of loss of parental responsibility is contrary to the interest of the minor involved. Therefore, Article 569 of the Penal Code was declared partially unconstitutional.*
Indeed, this supplementary penalty affects an authority that concerns not only the individual holding it, but, necessarily, his/her minor child too; therefore, the interruption of that relationship (on the legal, if not natural, level) can be justified in so far as the very relationship in question is justified by the aim of protecting the interests of the minor. The Court thus affirmed that this unreasonable legal automatism must be replaced with a judicial evaluation; the judicial ascertainment of the crime was given a value of mere "indicator" of the parent's suitability for exercising his/her authority.

The Judgment expressly declared that the protection of the interests of the minor is not only a value of firm constitutional significance, but also one that is widely recognized at the international level. Indeed, Article 3(1) of the New York Convention on the Rights of the Child of 20 November 1980 states that "[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration." The European Convention on the Exercise of Children's Rights of 25 January 1996 is equally significant: in regulating the decision-making process in cases concerning minors, Article 6 establishes the process that judicial authorities must follow "before taking a decision", stating that it must "consider whether it has sufficient information at its disposal in order to take a decision in the best interests of the child".

Finally, the Court recalled the Guidelines of the Committee of Ministers of the Council of Europe on child friendly justice, adopted on 17 November 2010. These expressly state that "Member states should guarantee the effective implementation of the right of children to have their best interests be a primary consideration in all matters involving or affecting them."

*Judgment **N. 301 of 2012** is also noteworthy. In that case, the Court highlighted the relevance of ECtHR case law on Articles 8 and 12 ECHR in relation to the emotional and sexual lives of prisoners, to establish the unfoundedness, due to the multiplicity of possible solutions, of the question on the constitutionality of Article 18(2) of Law N. 354 of 1975 (Prison Law). The original reference only cited internal norms (Articles 2, 3(1) and 3(2), 27(3), 29, 31, 32(1) and 32(2) of the Italian Constitution).*

2.5. Has your Court ever encountered conflicts between the standards applicable on the national and on the international level? If so, how were these conflicts solved?
*In this connection, Judgment **N. 264 of 2012** is significant, as the Court first departed from the ECtHR case law on the "non-conventionality" of national measures in light of the relevant ECHR provisions. The question of constitutionality, raised on the basis of Article 117(1) of the Constitution and Article 6(1) ECHR concerned a provision of Italian law on pension payments made abroad and later transferred to Italy (Article 1(777) of Law N. 296 of 2006). The provision of genuine interpretation established that in calculating pensionable remuneration, the lesser rate of payments applicable while working abroad had to be subjected to the rate of contribution that was in force in Italy during the time period in question. The ECtHR had condemned Italy for legislative interference with justice (Maggio and others v. Italy).*

The Constitutional Court, called upon to resolve the alleged non-conventionality of the Italian provision in question, declared that the question referred was unfounded. It applied the principles of the national margin of discretion and of the need to balance this interest with other constitutionally protected interests. Indeed, the Court found that there was a pre-eminent general interest in maintaining a sustainable and balanced pension system, and that this justified resort to retroactive legislation.

3. Constitutional instruments enhancing/dealing with/for social integration

3.1. What kind of constitutional law does your Court apply in cases of social integration – e.g. fundamental rights, principles of the Constitution ("social state"), "objective law", *Staatszielbestimmungen…*?

*When the Italian Constitutional Court is called upon to issue a judgment of constitutionality, it considers the case in light of the norms enshrined in the Constitution or in Constitutional Laws; and if these constitutional provisions refer to other legal sources, it also takes into account European and international laws and norms ("*parametri interposti*", or "intermediate parameters").*
On the issue of social integration, the following provisions of the Constitution are particularly important: Articles 1 to 11 on fundamental principles; Title II on "Ethical-Social Relations" and Title III on "Economic Relations"; and Article 53, according to which "all must contribute to public expenditure according to their contributive capacity" and "the taxation system is informed by criteria of progressivity".

3.2. In cases where there is access of individuals to the Constitutional Court: to what extent can the various types of constitutional law provisions be invoked by individuals?
The Italian legal system does not provide for direct appeal to the Constitutional Court.

3.3. Does your Court have direct competence to deal with social groups in conflict (possible mediated by individuals as claimants/applicants)?
The Italian legal system does not provide for direct appeal to the Constitutional Court. In incidental judgments, parties to ordinary judicial proceedings (referred case) can stand in the judgment of constitutionality. Third parties can intervene as long as they have legal standing (a personal interest that is directly inherent in the substantive relation involved in the proceedings).

3.4. How does your Court settle social conflicts, when such cases are brought before it (e.g. by annulling legal provisions or by not applying the when they contradict the principle of equality and non-discrimination)?

When the Italian Constitutional Court deems that the norm submitted for review conflicts with a constitutional provision, it declares the unconstitutionality of the norm. By virtue of this declaration, the norm ceases being effective from the day after the Court's decision is published "in the Italian Official Gazette".
Over the years, constitutional case law has modulated declarations of unconstitutionality, adapting to the requirements of the case before it. Therefore, other than declarations of unconstitutionality of an entire provision, there are declarations targeted at only a part thereof, or that substitute a part thereof; declarations of unconstitutionality that add new content to the legal measure or that introduce a principle to be implemented; declarations of unconstitutionality that prohibit a certain interpretation from being applied to the challenged provision; and declarations of unconstitutionality having temporary effect.

3.5. Can your Court act preventively to avoid social conflict, e.g. by providing a specific interpretation, which has to be applied by all state bodies?
The Italian Constitutional Court does not act preventively.

In cases of review for constitutionality, the Court decides only questions submitted to it incidentally by a judge exercising his/her jurisdictional functions, or questions submitted to it directly by the State and the Regions and autonomous Provinces.
Also, since the Court exercises its functions in a jurisdictional form, it must act in accordance with the rules of constitutional proceedings: therefore, it must adhere to the principle of the "correspondence between the question and the decision" and cannot broaden the subject remitted for its consideration.
Finally, it must be recalled that the Court's judgment is a judgment on the legitimacy of a norm – that is, on its conformity to a constitutional standard – and not a judgment on the merits of the norm. Such an evaluation is reserved to the political discretion of the legislature.

3.6. Has your Court ever encountered difficulties in applying these tools?
The difficulties arising from the application of the abovementioned instruments are connected especially to the incorrect submission of the question of constitutionality, by the parties that have standing to lodge an appeal with the Court.
In these cases, the Court declares that the question is inadmissible.

3.7. Are there limitations in the access to your Court (for example only by State powers), which prevent it from settling social conflicts?
As mentioned in the answer to question 3.5. above, the Italian Constitutional Court can be called upon to resolve questions of constitutionality according to the incidental procedure – that is, by judges in the exercise of his/her jurisdictional functions; it can also be addressed directly, by States and by the Regions and Autonomous Provinces.
The Court can also be seised of conflicts between the branches of the State, and between State entities (State, Regions, Autonomous Provinces). In these cases, the parties that have standing are only the entities that hold the power or attribution in question.

4. The role of constitutional justice in social integration

4.1. Does your Constitution enable your Court to act effectively in settling or avoiding social conflict?
The Italian Constitutional Court is an organ that ensures the observance of the Constitution. With particular regard to its function as "judge" of laws, it guarantees the constitutionality of the legal order and of the norms that compose it.
In this sense, and taking into consideration the restrictions relating to its role, it can be said that the Constitutional Court does determine social conflict.

4.2. Does your Court *de facto* act as 'social mediator', or/and has such a role been attributed to it?
The Constitutional Court performs its function of protection of the legal order according to a jurisdictional procedure, and from a position of independence and impartiality.
Furthermore, it cannot discuss the political merits of the issues submitted for its consideration, because the discretionary choices in this regard pertain to the legislature.
However, even when the Court must step back to avoid invading the spheres of competences constitutionally attributed to the legislature, it sometimes expresses warnings and hopes so as to orient the Parliament's action in a constitutionally compatible direction.
Due to the Court's special position, these expressions are particularly authoritative and contribute to guide not only institutions, but also interpreters and society in general.
Also, the Court's interpretations of the Constitution in its case law are a point of reference for all parties who perform activities of interpretation, in any role.

4.3. Have there been cases, when social actors, political parties could not find any agreement, they would 'send' the issue to your Court which had to find a 'legal' solution, which normally should have been found in the political arena?

Questions reach the Court in accordance with the procedures and forms established by law. However, formal aspects aside, the Court can be seised of cases for a wide variety of reasons. Indeed, the Court has sometimes found itself in the position of supplementing the operation of the political organs. This occurred, for example, in the case of the recent Judgment ***N. 1 of 2014*** *on the electoral law for the* Camera dei deputati *and the* Senato della Repubblica *(respectively, the lower and upper chambers of the Italian Parliament). Although all Parliamentary parties had expressed the will to change this law, they encountered severe difficulties in reaching agreement and thus failed to achieve their intentions. Thanks to the Court's intervention, the electoral law was "purified" of its unconstitutional elements and the political parties received new impetus and indications for their next action: the drafting of a new electoral law.*