Strasbourg, 12 May 2014

**CDL-JU(2014)007**
Engl. only

**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**

**(VENICE COMMISSION)**

**IN COOPERATION WITH**
**THE CONSTITUTIONAL COURT**
**OF THE HASHEMITE KINGDOM OF JORDAN**

**CONFERENCE**

**CONSTITUTIONAL COURTS**
**AND THE JUDICIARY:**
**PROTECTING HUMAN RIGHTS TOGETHER**

**Amman, Jordan, 24 April 2014**

# REPORT

# "ENHANCING THE COOPERATION BETWEEN THE CONSTITUTIONAL COURT AND THE JUDICIARY: THE ITALIAN EXPERIENCE"

**by**
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**1. General role and functions of the Italian Constitutional Court**

Before dealing with the specific issue of the Italian system of cooperation between the Constitutional Court and the judiciary, with the intent to enhance the Jordan system of constitutional review, I would like to give some general information about the composition and the functioning of the Italian Constitutional Court. So, the specific issue I have been asked to deal with will be more understandable in the light of the comparison between the Jordanian and the Italian system of constitutional justice.

The Italian Constitutional Court is a relatively recent institution. Nothing similar existed in Italy before the Constitution of 1948, that is to say during the period of the liberal State and afterwards during the fascist regime. The Constituent Assembly, set up in 1946 after the fall of the fascist dictatorship for adopting a democratic Constitution, made the fundamental choice of attributing a "super-legislative" force to the Constitution, so that the ordinary laws could not modify the Constitution or derogate from it.

The fundamental rights and obligations laid down by the Constitution, and the rules that guarantee the balance of power among the Parliament, the Government, and the judiciary were thereby protected even from ordinary laws adopted by the majority of the Parliament.

In this way the traditional absolute supremacy of the laws enacted by the Parliament, expressed in the famous comment that the British Parliament "can do anything but make a man a woman and a woman a man", was replaced in numerous European Constitutions by entrusting a special body – normally called Constitutional Court – with the power of reviewing the constitutionality of ordinary laws and voiding them if deemed unconstitutional. So, the "omnipotence" of the Parliament, as expression of the unquestionable popular supremacy, went to an end. In the wake of the authoritarian political experiences and the repression of democratic institutions between the two World Wars a growing awareness emerged that the safeguard of the fundamental rights established in the constitutions implied a constitutional control also over the Parliament and its laws, admissibility of the popular referendum.

In the European experience after the second World War, in addition to acting as "judges of the laws", the Constitutional Courts are often given other functions, as for instance in Italy conflicts regarding the allocation of power among legislative, executive and judiciary branches of the State, between the State and the Regions, judgments on the charges brought against the President of the Republic in cases of high treason and attacks to the Constitution, admissibility of the popular referendum.

For accomplishing its tasks, the Italian Constitutional court is an independent and impartial body. Its 15 members are appointed, for a non-renewable term of 9 years, for one third by the Parliament with a qualified majority of two-thirds, for one third by the President of the Republic and for the last third by the judges of the higher ordinary and administrative courts. They are selected among law professors, defense lawyers, judges of the superior courts. The Constitutional Court elects the President from among its members for a three-years renewable term of office.

In its first decision number 1 of 1956 the Court ruled that all laws, also enacted during and before the fascist era, could be reviewed and declared invalid if deemed inconsistent with the Constitution. It is worth mentioning that it took eight years before the constitutional court entered in function, mainly because of the opposition and obstruction carried out by the majority of the parliament, the government and the court of cassation.

Anyway that decision paved the way of innumerable judgments which "swept away" hundreds of provisions of old laws incompatible with the new Constitution, in fields where the Parliament had failed to provide on its own.

**2. The Italian system of constitutional review of ordinary laws**

The first and, historically, the most important task of the Italian Constitutional Court is to rule on questions "regarding the constitutional legitimacy of the laws and acts having the force of law issued by the State and the regions". In its role of "judge of the laws" the Court is called on to review whether legislative acts have been enacted in accordance with the parliamentarian procedures stipulated in the Constitution (this is the *formal constitutionality*), and whether their content conforms to constitutional principles (*substantive constitutionality*).

One of the most critical issue regarding the capacity of "judge of the laws" has been the question of "access" to the Court. So, the problem is: who is authorised to refer to the Court questions on the constitutionality of a law? An individual citizen, the Head of State, the Government, parliamentary minorities, the highest ordinary and administrative Court or all the courts?

First of all, the Italian Constitution made the fundamental choice that a law cannot be directly challenged before the Court by an individual citizen or, within a trial, by any party, but the question can only be raised by the judge during a civil, criminal, and administrative proceeding, or before a tax commission, at the request of the parties and also *ex officio* by the court, without being requested by any party.

As a consequence, any judicial authority – from the justice of peace of a small town up to the Supreme Court of Cassation and the Superior State Council – who must resolve a dispute that requires the application of a legal provision whose constitutionality is questionable, has both the power and the duty to refer the question to the Constitutional Court. Thus, there are as many ways of access to the Court as there are judges, at all levels.

This model of constitutional review is referred to as "incidental", insofar the question of a law's constitutionality arises as an "incident" within a judicial proceeding, and it is directly referred to the Court by the judge presiding over the proceeding.

The Italian system does not entrust any other institutional body, such as the Head of the State, the Parliament, the Government with the power to raise questions of constitutionality.

As for the procedural rules, before referring the question to the Constitutional Court the judge must engage in two-steps analysis.

In the first place he or she must offer a reasoned decision as to whether the proposed question is legally relevant in the case; that is, whether the law supposed to be unconstitutional is applicable to decide the case; if the judge realizes that the law must not be applied at the case, the question is deemed not relevant and it is not referred to the Court.

In the second place, the judge must determine whether the challenge has any merit. If the question of constitutionality of the law appears to be clearly without any foundation, the judge rejects the challenge on the grounds that the question is at first sight unfounded (the so called "manifest unfoundedness"). When this is not the case, the judge refers the question directly to the Constitutional Court.

To use a happy expression coined by a famous Italian lawyer who was a member of the Constituent Assembly, ordinary judges serve as “gatekeepers” of constitutional adjudication, since they have the power to open or close the door that allows access to the Court.

At the beginning it was feared that such a power of judges would prevent an easy and broad access to the Court; that is, that the “door” would prove too “narrow” and that it would have been better to provide direct recourse by individual to the Constitutional Court for the protection of fundamental rights. Italian experience has shown, however, that far from keeping the door closed, ordinary judges – above all young judges of first instance court - opened the door with great frequency, so that the real risk was of overwhelming the docket of the Constitutional Court with a deluge of constitutional questions.

**3. The dialogue between ordinary courts and the Constitutional Court**

Far from leaving the Court without work, the judge’s function of filter or gatekeeper gave rise to positive results. Indeed, in judicial proceeding statutes are considered not only in the abstract, but also in relation to their possible applications and consequences in concrete cases. The problems of constitutionality are thus multiplied given the infinite variety of concrete situations to which the laws apply.

Moreover, the constitutions are not a mere compilation of legal provisions; they express the underlying principles that inspire the entire legal system of a country. Thus, the constitutionality of a law is rarely a question of a simple conflict between ordinary laws and constitutional norms, but it is the way in which constitutional principles are applied in real terms in the real world and life of the people.

Besides, we must take into account that the meaning of legislative provisions are often controversial and it is up to all the judges to interpret and apply the laws in the light of constitutional principles. It is not unusual for judges, when they are uncertain as to how to interpret a particular statute, to refer to the Constitutional Court questions that could be avoided by interpreting the law in accordance with constitutional principles. This being the case, it is not unusual for the Court - whose task is not to interpret statutes, but to review their constitutionality – to respond by inviting the judge to try, insofar it is possible, to interpret the law in accordance with the Constitution, or, more rarely, to suggest the interpretation consistent with the Constitution.

This kind of ‘dialogue’ between Constitutional court and judges is always present in the Court’s decisions, starting from the decisions with whom the Court rejects the constitutional challenge because the question is “unfounded” or sustains the challenge and declares the law unconstitutional. The dialogue with the judge also occurs when the Court finds the question “inadmissible” because the judge has not indicated the right reasons of the infringement of the Constitution or the reasons why the application of the challenged law is relevant in the specific case. Sometimes the Court rejects the question not because it is unfounded, but because the judge has interpreted the law in a non-appropriate way, while a right interpretation would render the provision consistent with the Constitution. This occurs in the so-called “interpretative” decisions, when the Court suggests there is a way of interpreting the provision in accordance with the Constitution.

Interpretative decisions are formally binding only for the judge who referred the question. If other judges disagree with the constitutional interpretation the Court, taking into account that the ordinary courts don’t accept the interpretation conform to Constitution, is compelled to declare the provision unconstitutional.

So, there is a permanent 'dialogue' between the Constitutional Court and the thousands of ordinary judges. This 'dialogue', which supplies the greater part of constitutional jurisprudence, is just made possible by the system of incidental review of laws adopted by the Italian Constitution.

It is worth mentioning that the Court's permanent dialogue is not only with the judiciary, but also with the legislative power. At time in its reasoning the Court addresses itself to the Parliament in a form of a "warning" which contains suggestions and guidance for resolving at the legislative level in accordance with the Constitution critical questions of constitutionality raised during a judicial proceeding.

**4. The Jordanian system of constitutional review**

Coming to a short comparison between Jordan and Italy, we can say that the Jordanian system of constitutional review set forth in Article 60 of the Constitution and in the 2012 law number 15 on the Constitutional Court, is quite different from the Italian model.

First of all the Jordanian system entrusts the Senate, the Lower House of the Parliament, and the Council of Ministers with the power to challenge directly before the Constitutional Court the constitutionality of a given law or regulation. It is difficult for the Italian tradition to understand the reasons of this kind of direct access to the Constitutional Court: in fact, if the Senate and the Lower House of the Parliament hold that a law is unconstitutional, they may exercise the direct power to enact another law in accordance with the Constitution; as for the Council of Ministers, it could take the initiative to propose before the Parliament a draft law consistent with the Constitution.

Moreover, the decision of the Constitutional Court should have an indisputable political meaning, contrary to its nature of an impartial and independent body. The Constitutional Court should play the role of a third legislative chamber, to which other state powers can petition to contest or amend legislative choices by an abstract point of view, not related to an actual question of constitutionality raised during a judicial proceeding.

Anyway, this is not the main problem of the Jordanian system of access to the Constitutional Court. The most critical issue deals with the mechanism provided for by Article 11 of the 2012 law. It provides that the judge, also when deems justified the challenge of constitutionality raised during a judicial proceeding by the parties, cannot refer directly the question to the Constitutional Court, but she or he must refer the case to the Court of Cassation which is the only judicial body entrusted with the exclusive power to raise the question of constitutionality. Moreover, it seems that Article 11 does not provide that the judge can refer *ex officio* the question of constitutionality to the Court of Cassation, but she or he must be requested beforehand by the parties.

While in the Italian system the power of referring questions of constitutionality is widespread among all courts, and the judge can also take *ex officio* the initiative to raise the question, the Jordanian law adopted a rigid and centralized system of control on the lower courts, which does not favour the access to the Constitutional Court. I know that during the first year of functioning of the Constitutional Court, 14 questions of constitutionality have been referred by lower courts to the Court of Cassation, 8 have been accepted and 3 rejected by the Constitutional Court, 3 are pending. Taking into account the Jordanian model of constitutional review, I suppose that the main reason why so few cases have been referred to the Constitutional Court rests on the system that does not give to all the judges the chance to have a permanent and direct 'dialogue' with the Constitutional Court. Perhaps lower judges don't like to be submitted to the control of the Court of Cassation.

**5. Other forms of access to the Constitutional Court**

The positive experience of the “incidental” question of constitutionality is the main reason why the Italian system did never introduce the direct complaint by individual or groups to the Constitutional Court for the protection of fundamental rights, as it is provided for instance in Germany and Spain. The arguments put forward in favour of the direct individual complaint point out the possibility of offering citizens a “residual” remedy before a body like the Constitutional Court when all the ordinary remedies have been exhausted, or when the case cannot be brought before an ordinary judge.

However, until now in Italy the fear prevails that direct individual access will burden the Constitutional court with a mass of unfounded petitions, making the decisions of the Court less prompt and therefore less effective. This risk could be avoided by the introduction of forms of preliminary evaluation regarding the manifest unfounded nature of the petition or preliminary filters of admissibility, even though they would always require a judgement that could significantly burden the work of the Court.

It seems to me that by now a large cooperation between the ordinary judiciary and the new-born Constitutional Court it is not widespread in the Jordanian judicial culture, but it is quite normal that at the beginning the judiciary does not like the role of “judge of the laws” played by the new Constitutional Court. I can say, with regard to the Italian Court of Cassation, that the same situation occurred in Italy during the first years of the functioning of the Constitutional Court.

All that said, perhaps the recourse to the direct individual complaint could favour in the public the knowledge of the role of the Constitutional Court, and enhance in the future a larger access to the Court by the lower courts and individual judges.

Anyway, I would like to conclude by saying that the best model of access to constitutional justice cannot be established in the abstract. The juridical and political traditions and the current needs of every country play an essential role in the framework and the functioning of the system of constitutional review. By a general point of view, and according to my personal experience, I can only say that the fundamental role of “judge of the laws” played by the Constitutional Court needs that all ordinary judges be put in the position to have a direct, continuous, and free ‘dialogue’ with the Court, without any internal, that is to say within the judiciary, or external control.

Amman, April 24, 2014