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Experience of the Constitutional Court of Italy

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Referral of cases to the Constitutional Council by ordinary courts
The Italian model

1. A brief account of the main systems of access to the Constitutional Court.
2. The three requirements for a judge to raise a case before the Constitutional Court in the Italian system.
3. The parameter and the object of the constitutionality question.
4. The incidenter mechanism and the creation of a triangular model.

1. While treating the issue of referral of cases to the Constitutional Court by ordinary judges, a brief account is firstly needed of the main systems of access to the Constitutional Court as provided in the aftermath of World War II.

In Germany, where the formal conception of Rechtstaat had been discredited since the Nazi regime, and supplanted by the longing for a substantive conception of legality, access before the Bundesverfassungsgericht was given to the individuals, and the pervasive influence of fundamental rights further reduced the practical significance of the principle of Rechtstaat as a separate legal concept. Elements such as the requirement of legal certainty, or the ban on retroactive legislation, were closely linked to the effective protection of fundamental rights, helping to secure a stable legal environment where these rights could be enjoyed in security.

Constitutional courts were elsewhere called to exert functions differing from those provided for in the German system. In particular, the establishment of the Conseil Constitutionnel under the 1958 French Constitution was not intended to remove the 1789 tradition, according to which judges had no right to set aside the legislative will of parliament. The main original function of the Conseil consisted simply in ascertaining whether statutory law exceeded the bounds reserved to Parliament by Article 34, thus encroaching on the governmental power of regulation. The judicial features of the Conseil emerged rather from the development of its jurisprudence after a creative decision of 1971 on freedom of association, followed by constitutional reforms that gradually enlarged the possibility of protecting fundamental rights before that court.

In turn, the provisions concerning the Italian Constitutional Court were close to the Kelsenian model. Contrary to the German and, later on, to the Spanish system, access before the Court was denied to individuals and reserved to ordinary judges whenever they doubted the law's compatibility with the Constitution, or to the State or the Regions whenever complying for an encroachment of the respective legislative competences. In both cases, constitutional adjudication was meant to submit the legislation to a superior legal order, not to protect individuals from legislative infringements of their own rights.

2. Under Italian law (Article 1 constitutional law n°1/1948; Article 1 constitutional law n°1/1953; Article 23 law n. 87/1953), the question of constitutionality may be raised

either directly by the State and a Region with respect to a violation of their respective legislative competences, or incidenter, namely parenthetically, by a judge in the course of a judicial scrutiny. Most part of the Court's work (more than a half in the year 2019 (171/291)) consists in scrutinizing questions issued by a judge. For issuing a question before the Court, he has to meet three requirements:

1) The question must be raised by the judge of a judicial controversy either directly (ex officio), or indirectly by one of the parties (including the public prosecutor), that may ask the judge to raise the question before the Constitutional Court. This means that the parties cannot file their claim directly with the Constitutional Court. There must be instead a judge (subjective requirement), and a judicial case (objective requirement). The judge may be part of the judiciary power, or recognised as such by the Constitutional Court in certain cases, provided that it is considered a third party vis-à-vis the parties of the controversy with the aim of raising the question before the Court: he is called judge a quo. In turn, the judicial case may not be a controversy between two parties, but also a control procedure, such as that of the Audit Court with respect to an act of the executive.

This is why, in the caselaw of the Constitutional Court, certain authorities have been qualified judges a quo because they were considered as having the locus standi to refer a question of unconstitutionality to the Court: the disciplinary benches of the National Bar Association (decision n° 114/1970) and of the Superior Council of the Judiciary (decision n° 12/1971); the Appellate Committee of the Italian Patents and Trademarks Office (decisions n° 37/1957 and n° 236/1996); Tax Commissions (decision n° 287/1974); Arbitration Tribunal (Decision n° 376/2001). Furthermore, even the Constitutional Court itself can occasionally be a judge a quo, with the aim of raising before itself a question of constitutionality, as it occurred during impeachment procedures (decision n° 125/1977), and when resolving a dispute between branches of government (decision n° 68/1978).

2) The question must be relevant for the case, which means that the provision that is object of the claim is essential for the judge to deliver a decision in a concrete case. If it can be solved without applying the disputed provision, the question of constitutionality is deemed irrelevant, even if the provision might clearly violate the Constitution. The fact that the question must be relevant to the case exhibits thus clearly the incidental nature of the access before the Constitutional Court, namely that that access can be realized only during a judicial controversy.

According to the prevailing opinion, a constitutional issue is relevant when the provision whose constitutionality is questioned is applicable to a fact deduced from the dispute, and the constitutional issue is thus prejudicial to the matter to be decided by the judge a quo. The notion of relevance has however been the subject of much discussion and of different views in the Court's caselaw. A particularly debated issue is whether the Court can control the subsistence of the relevance, since this implies a judgement on the applicability of the provision whose constitutionality is doubted to the facts deduced from the a quo proceedings, which is unquestionably the task of the judge a quo. The Court and most scholars excluded in the first period of the Court's activity its control over the question's relevance, arguing that it would involve interference with the judge a quo competence. Later on, the Court began to control whether the judge had sufficiently exposed the grounds

for pronouncing an issue relevant, and declared inadmissible issues it did not consider relevant for the a quo proceedings.
Faced with criticism from scholars, who remarked the stalemate occurring if the judge a quo insisted in considering the provision applicable to the dispute before him, the Court finally granted that a decision of inadmissibility for irrelevance of the question does not preclude that the issue could be raised again even during the same proceeding.

At any rate, the relevance of the question appears the most important requirement for having an incidenter system, namely an access to the Constitutional Court subject to the condition that the judge may raise the question of constitutionality of the law to the extent that he is likely to apply that law in the case at stake.

3) The question must appear "not clearly unfounded" to the judge. It means that the judge carries out a sort of preliminary review of the provision that he is likely to enforce in the case, regarding whether the question of its unconstitutionality is, or is not, clearly unfounded. In the former case, he will simply continue his judgement and enforce the provision. If instead he has the slightest doubt as to whether the provision is in pursuance of the Constitution, he will deem the question as not clearly unfounded and will then suspend the case and refer it to the Constitutional Court. It is worth noting that the judge does not have to be convinced that the law is unconstitutional: in that case he would not need to put the question before the Court and would convert himself into a constitutional judge, with the effect of contradicting the whole system of constitutional justice, which is founded on a sole and specialised court.

3. The order with which the judge a quo suspends the case and refers the question of unconstitutionality must contain the judge's reasons for taking this decision and should indicate: a) the constitutional provision that he presumes has been violated; b) the statute law that is alleged to be unconstitutional; c) the reasons why the question is considered relevant; d) the reasons why the question is considered not clearly unfounded.

Reasons under letters c) and d) have already been treated (see § 2, 2) and 3)).

As for a), concerning the constitutional standing of the allegedly violated provisions, or parameters of the judgement, apart of course from the Constitution itself, the Court admits challenges regarding the violation of 'interposed norms', namely of those norms having statutory standing but backed by a constitutional rule prescribing their observance, even by other statutes. Delegation statutes have been recognized as interposed norms in view of the constitutional review of delegated legislation, as well as State framework legislation in view of controlling regional legislation adopted in overlapping fields of competence, and rules regulating the legislative process, to allow a control of the formal constitutionality of statutes.

As for b), Art. 134 of the Constitution requires that the provision contested, namely the object of the judgement, must be "a statute" or "an act having statutory effect". The Court has declared admissible challenges to constitutional provisions allegedly violating the Constitution's "supreme principles" (such as democracy, liberty,

equality, regional autonomy), delegated legislation, emergency decrees (decreti legge), and norms implementing the statutes of the special autonomy Regions, and inadmissible issues contesting parliamentary standing orders, statutory instruments, EEC regulations.

4. The above reported account might have demonstrated that access to the constitutional review requirements, as well as the judgement's parameter and object, are previously established by the Constitution or at least by law, but also, on the other hand, that much room is left to the Court's interpretation of such requirements and conditions.

This room is crucial for understanding the effective functioning of the incidenter mechanism, which creates as such a triangle between ordinary judges, entrusted with the task of submitting the question of constitutionality to the Court, Parliament, whose acts are subjected to constitutional scrutiny, and the Constitutional Court itself. The latter's interpretative power appears crucial for that end, because it is upon the Court to decide to what extent its own scrutiny can be "opened":

1) to judges different from those pertaining to the judiciary power, in certain cases;
2) through a control over the relevance of a certain question;
3) through a control over whether a certain question is "clearly unfounded";
4) with respect to the object of the judgement, in particular to normative acts whose possibility to fall under the label 'an act having statutory effect' (Article 134 of the Constitution) is doubtful;
5) with respect to the parameter of the judgement, in particular to norms whose equivalence with the Constitution is disputable.

Clearly, the more the Constitutional Court interprets broadly these elements, the more it increases its "generosity" in opening access to scrutiny, and vice versa. Since 1956, when the Court began its activity, this correspondence has never been denied. Significantly, even in the 2019 CC Report the President Marta Cartabia noted "the Court's move to become less formalistic in vetting the prerequisites for admissibility of matters brought through the incidental method of review – leading to a decrease in rulings of inadmissibility, and a corresponding increase of decisions on the merits" (Summary of the Report on the Work of the Constitutional Court in 2019).
The Court's interpretative tools play a crucial role in light of the very premises of the incidenter system, where the Court's role is constantly related both to the judiciary and to Parliament, due to constitutional and legislative provisions but also to the devices that are from time to time needed beyond the legal texts for avoiding dangerous conflicts among these institutions and enhancing their mutual co-operation. In other words, for maintaining operative the triangle.