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(VENICE COMMISSION)

EXCHANGE OF VIEWS BETWEEN THE SOUTHERN AFRICAN JUDGES COMMISSION AND THE VENICE COMMISSION ON CONSTITUTIONAL REVIEW IN COMMON LAW COUNTRIES AND COUNTRIES WITH SPECIALISED CONSTITUTIONAL COURTS (VENICE, 17 MARCH 2006)

THE EUROPEAN MODEL OF CONSTITUTIONAL REVIEW OF LEGISLATION [1]

Report by

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A. Shortly on the history of a centralised constitutional review
B. ***The structural features of a centralised constitutional review***
C. ***Advantages of a centralised model of constitutional review***
D. ***The major disadvantages of a centralised model of constitutional review***
E. ***Final remarks***

Ad A.

The centralised model of constitutional review was born in Europe after World War I. Former Czechoslovakia and Austria in 1920, Liechtenstein in 1921, and Spain in 1931 were the first countries to adopt it. H. Kelsen was the scholar who did the most to develop and popularize this model and defend it against the American alternative. Kelsen´s model **- a special tribunal outside the regular judiciary to provide a "constitutional defence" against unconstitutional legislative actions** was the preferred form.

This institution became the model for almost everything that came after World War II Austria re-establishing its pre-war Constitutional Court in 1945. Germany, however, was the most influential, adopting express provisions in Basic Law (1949) for constitutional review and a Kelsen style constitutional court. The specific situation raised in Italy where they established judicial review in 1947, following the American model. It was not too successful thus Italy adopted the European model in general sense. Greece, Spain, Portugal, Belgium, France and other countries soon followed suit.

Some of the former Communist countries tried to settle judicial review. Yugoslavia established a constitutional court in 1963 and Poland instituted the Constitutional Tribunal (1982) working from 1986 to 1997 when they constituted the new type (more powerful) Constitutional Tribunal (2).

Most European countries have established special constitutional courts that are uniquely empowered to set aside legislation that runs counter to their constitutions. Such constitutional courts review legislation in the abstract, with no connection to an actual controversy. Today it is the prevailing model in Europe, particularly among the member states of the European Union. Of the remaining countries Denmark, Sweden, Finland follow the "American" model but in those countries courts very rarely find a statute unconstitutional. The rest of the countries Ireland and Greece have a so called "mixed model" of constitutional review and the Netherlands and the United Kingdom have no system of constitutional review of legislation (3).

Ad B.

The structural features of the European model are centralisation and abstract review.

Centralisation means that only the constitutional court is empowered to hold that a statute or a piece of ordinary law is unconstitutional. We can see one exception: Portugal.

The Portuguese Constitution allows also ordinary courts to set aside legislation on the basis of their competence.

According to **abstract review** the court may examine a statute or a piece of ordinary legislation in the abstract and invalidate them with general effects if they contravene the constitution. There are three examples in which the constitutional court's ruling on unconstitutionality of a statute has no general effects and the statute in question is not deleted from the legal order if the constitutional court had ruled upon that on the question raised by an ordinary judge (Luxemburg, Belgium and Portugal).

There are basically three ways of initiating the proceedings before the constitutional courts by which the courts can review legislation:

a) **A constitutional challenge** is a motion brought by public or constitutional institutions, predominantly the president, a group of members of a parliament (a qualified minority of the parliament), the government, the general prosecutor, the ombudsman (the public defender). Their challenges entail an abstract attack against the piece of ordinary legislation. At the same time there is no specific case that triggers the procedure.

b) **A constitutional question (preliminary request or concrete control)** is a tool for raising the problem of unconstitutionality of a statute by ordinary judges when they have to decide a particular case. If they believe that the statute concerned is not in compliance with the constitution, they can, or for certain circumstances, must refer the case (the question) to the constitutional court. The possibility of raising the constitutional questions exists for instance in Austria, Germany, Slovenia, Slovakia, the Czech Republic, Belgium, Spain, Italy and others but does not exist in Portugal (an ordinary judge can aside a piece of legislation on his own power) and France (statutes can only be reviewed before their promulgation). This procedure has both an abstract dimension (the constitutional court must rule on the constitutionality of a law, not on an individual claim), and a concrete dimension (since the court's ruling will ultimately determine the outcome of the individual proceeding which the judge referred to the constitutional court).

c) In some countries (e.g. Austria, Germany, Spain, the Czech Republic, Slovenia and Slovakia) **a constitutional complaint** is a third type of procedure which allows individuals to submit an application to the constitutional court if they consider that their fundamental rights or freedoms have been violated. In cases in which the complaint is justified, the violation usually rests on an incorrect (unconstitutional) interpretation of the relevant piece of an ordinary legislation. However, in some models if the statute itself is found to be at odds with the constitution, the court will review the statute and pass on its constitutionality in the abstract either in the same procedure or in a specific or separate one.

In addition to that there are **other types of jurisdiction** that vary according to a specific constitutional order. The best example for that is the scope of jurisdiction of the German Federal Constitutional Court. (4) The Constitutional Court's jurisdiction, established by the constitution itself, includes for instance: Forfeiture of basic rights, constitutionality of political parties, review of election results, impeachment of the federal president, disputes between high state organs, federal-state conflicts, removal of judges, intra-state constitutional disputes, public international law actions, state constitutional court references, applicability of federal law and constitutional complaints.

Some constitutional courts are empowered to decide on constitutionality of international treaties, conventions or agreements in preliminary review proceedings.

Ad C

I consider it necessary to underline two basic advantages of a centralised model of constitutional review: Assurance of legal certainty and strengthening of the idea of democracy.

The European model of constitutional review is traditionally perceived as the **assurance of legal certainty** that is highly valued from the very beginning of that model (H. Kelsen was the first who offered this principle as a justification for the model of constitutional review in Austria). If all ordinary courts were empowered to set aside statutes or particular pieces of ordinary laws, **a divergence of judgments** would emerge among them as to the constitutionality of a particular statute or its specific part.

For this reason without more detailed analysis it makes sense to establish a specific court in charge of constitutional review of legislation in order to foster legal certainty since if review is centralized in a constitutional (single) court, the problem of the contradictions among ordinary court judgements upon constitutionality of a statute in question is solved.

The abstract character of constitutional review is also linked to the principle of legal certainty. If the constitutional court reviewed statutes as it decided specific cases, and the consequence of finding a piece of legislation were simply its inapplicability to the present case, the court might contradict itself. In the absence of a doctrine of precedent, the court could give one opinion about the constitutionality of a piece of legislation in one case and a different one in the next case. Such a contradiction is significantly reduced if constitutional review is not linked to a particular dispute or case.

As a rule the statute in question is the product of a parliament, a legislator established by popular voting. It may give rise to a democratic objection relating to the constitutional review of legislation. This objection may be minimized if the members of the constitutional court are selected in ways that are relatively democratic. There are various ways of selecting constitutional judges but what is the most important is that all countries in which a centralized model of constitutional review is applied, establish specific norms for the selection and tenure of judges on the constitutional court (5).

Ad

There is no model of anything without some shortcomings. This is also valid for a centralized model of constitutional review of legislation that has its own operational problems. It seems to me appropriate to stress only the two major disadvantages of a centralised model of constitutional review.

The constitutional court needs time to decide on a case referred to it by an ordinary judge. It opens **the problem of delays** and exerts a significant influence on the willingness of ordinary judges referring the case to the constitutional court. In the context of modern legislation the number of constitutional questions referred to constitutional courts by ordinary courts is bound to increase, thus exacerbating the problem of delays and the necessity of being able to decide the case referred in reasonable time.

The power of a constitutional court to override final decisions passed by ordinary courts usually raises certain **tensions between the ordinary judiciary in particular the supreme court and the constitutional court.** The way to reduce tensions between the two highest courts in a particular country is the comprehension of the different aims pursued by the supreme court and the constitutional court within the constitutional framework.

Final remarks

M. Cappelletti (6) has analysed traditions of judicial review of constitutionality in the contemporary world and has given examples of the classical models and of mixes, and has shown that, though historically the distinctions were clear, today they are blurred.

The established traditions in judicial review of constitutionality can be studied in two broad types (7). In the first, decentralised, diffuse, incidental, inter partes, concrete, and retroactive ex tunc, and in the second centralised, concentrated, principaliter, erga omnes, abstract, invalidating and prospective ex nunc. All others, developed under the influence of these two original models, are intermediary systems.

These are not all pure ‘ordinary’ models. There are some ‘mixed’ systems here. Today there are more and more ‘mixed’ and intermediary systems developing in addition to the original intermediary systems such as the Mexican, the Irish and the Israeli. If so, which new ones are ‘mixed’ and what are their characteristics? How much have they influenced each other? This is an interesting line of inquiry for comparative lawyers looking at cross-fertilisations and mixed legal systems and mixed areas of law.

Footnotes

(1) For the purpose of this paper the European model means a model championed by the Austrian legal scholar Hans Kelsen, often referred to as the Kelsen, Austrian or Continental model.

(2) Schwartz, H.: The Struggle for Constitutional Justice in Post-Communist Europe. Chicago and London, p. 17.

(3) For details see also Steinberger, M.: Models of Constitutional Jurisdiction. European Commission for Democracy through Law. Science and Technique of Democracy, no. 2, passim.

(4) See for instance Kommers, D.P.: An Introduction to the Federal Constitutional Court. German Law Journal Vol. 2 No. 9 – 1 June 2001.

(5) More on that see The Composition of Constitutional Courts. European Commission for Democracy through Law. Science and Technique of Democracy, no. 20, p. 6, p. 19.

(6) Cappelletti, M.: Judicial Review in the Contemporary World, Bobbs-Merrill, Indianapolis, 1971.

(7) The latest development on that question see Rosenfeld, M.: Constitutional adjudication in Europe and the United States: paradoxes and contrasts. International Journal of Constitutional Law. I-CON, Volume 2, Number 4, 2004, pp 635-668.