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Techniques of constitutional interpretation by the European Constitutional Courts

by

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A. CONSTITUTIONAL JUDICIAL REVIEW: ONLY TWO SYSTEMS?

When studying the constitutional judicial review of legislation, a difference between the European system (also known as the kelsenian or the concentrated system), and the American system (the so-called diffuse system), is usually made.

Leaving aside a number of complexities which for the time being, are of no interest, it may be said that the most remarkable difference between both systems is that in the first system constitutional review is only allowed to the Constitutional Court whereas in the second system judicial review of legislation is at the discretion of each judge and tribunal.

When the unconstitutionality is stated, the diffuse system compels the judge to disapply the unconstitutional norm to the case in hand; whereas, the concentrated system only entitles Contitutional Courts to repeal or quash unconstitutional statutes which may no longer be applied by the courts.

In other words, when the Constitutional Court declares unconstitutionality, its decision has general effects as a sort of negative legislation (Kelsen), whereas the judge's decision in the diffuse system shall only affect the parties to the process.

The so-called European system does not exist in all Western European countries. In some of them, and due to different reasons, there is no such constitutional judicial review. Those are the United Kingdom's, The Netherlands', Luxembourg's and Finland's cases. In the first case (U.K.), the lack of rigidity in the Constitution and the parliamentary sovereignity make any hipothesis of judicial review impossible. In the other cases, constitutional rigidity has proved to be perfectly compatible with the lack of constitutional review of parliamentary acts.

In other Western European countries the United States system of judicial review has been followed. That's the case of Norway, Sweden, Danemark, Iceland and Greece albeit with very remarkable differences among them.

It may even be considered that there are some countries where constitutional judical review has a mixed character: partially concentrated and partially diffuse as in Portugal, Ireland and Switzerland.

Hence, the system known as the kelsenian or European constitutional judicial review is strictly reduced to the German, Austrian, Belgian, French, Italian and Spanish Constitutions. And even among these countries, it is hardly acceptable that there is a unique system because the differences between them are not a few.

B. THE EUROPEAN SYSTEM OF CONSTITUTIONAL REVIEW: COMPOSITION OF THE COURTS AND COMPENTENCES

After this introduction, I will continue with a brief analysis of the Constitutional Court's membership and competences in the European constitutional judicial review system.

In all these countries, members of the Constitutional Court are largely elected by the political organs from the Nation (basically, the Parliament and the Executive). The participation

of the judiciary in the election of constitutional judges has, to a certain extent, only been foreseen by Italy and Spain[1].

France (and to some extent Belgium), is the sole country where members of the Constitutional Court (*Conseil Constitutionnel*) are not required to have any specific professional qualification. In the rest of the European countries, members are required to be jurists, normally professors of Law, practitioners or judges. In Italy, Spain and France, members of the Constitutional Court are nominated for a nine years term, in Germany their office last for twelve years but with an age limit of 68, and in Belgium and Austria they may stay no longer than to the age of 70. In all the cases, independence in the exercise of their duties is completely guaranteed.

However, the competences given to all these Constitutional Courts are not identical to each other and they are not only limited to constitutional judicial review of legislation. As a matter of fact, Constitutional Courts very often become tribunals on electoral complaints. The Constitutional Courts from Italy, Germany and Austria may sometimes act as a criminal court. Moreover, it is possible in Germany, Austria, Belgium and Spain, to bring before the Constitutional Court individual complaints on the protection of their fundamental rights.

Neverthless, I will focus on the constitutional review of legislation which is actually the common core to all the Constitutional Courts in the so-called European or Kelsenian system.

Constitutional review of legislation may be at "*a priori*" (preventive) or at "*a posteriori*" (reactive) stage, that is to say, before or after the statutes have come into force. The "*a priori*" review is available in France whose Constitution only authorizes "*a posteriori*" review in a specific hypothesis provided by art. 37.2.

The object of "a priori" review in France can be statutes (organic or ordinary *lois*), standing orders of the Parliament and International treaties before National Assembly ratifies them.

Organic *lois* and standing orders of the parliamentary chambers must automatically be submitted to constitutional review before being promulgated. Ordinary *lois* and International treaties may only be referred to the Conseil Constitutionnel at the request of any of the following political organs: the President of the Republic, the Prime Minister, the President of

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[1] *Austria (Verfassungsgerichtshof): 14 judges. Eight of them, included the President (Chief Justice) and the Vicepresident, appointed by the Council of Ministers; three elected by the Nationalrat, and three by the Bundesrat.*

Belgium (Cour d'arbitrage) 12 judges. Appointed by the King from a list of 24 candidates proposed by the Senate.

France (Conseil constitutionnel): 9 judges. Appointed by the President of the Republic [3], the Speaker of the National Assembly [3], and the Speaker of the Senate [3]. Moreover the former Heads of the State are also members of the Conseil.

Germany (Bundesverfassungsgericht): 16 judges. Elected by both Chambers of Parliament (i.e. the Bundestag [8] and the Bundesrat [8]).

Italy (Corte Costituzionale): 15 judges. Five appointed by the President of the Republic; five elected by both Chambers of Parliament in joint session, and five elected by the supreme judiciary organs (Supreme Court [3], Council of State, [1], and Court of Audit [1]).

Spain (Tribunal Constitucional): 12 judges. Elected by the Chamber of Deputies [4], the Senate [4], the Council of Ministers [2], and the General Council of the Judiciary [2].

the National Assembly, the President of the Senate, sixty deputies (approximately the 10% of the whole National Assembly) or sixty senators (approximately the 20% of the whole Senate).

The "*a priori*" constitutional review as such may equally be found in Spain (at the request of the Council of Ministers or of any of the Chambers of the National Parliament) and in Germany (at the request of one third of the seats in the *Bundestag* or of any of the *Länder* Cabinets) but only in order to decide on the compatibility of international treaties with the Spanish and the German Constitution before ratification.

Constitutional review of bills (preventive control) has also been provided for in Austria and Italy (in Italy only as regards Regional bills) in order to establish who is the competent on the subject at issue, the State, the *Land* or the Region.

Notwithstanding these few exceptions, the constitutional review always refers to statutes in force. That is an "*a posteriori*" (reactive) control. This control may in any case be abstract or concrete.

As far as abstract control is concerned (through the action of unconstitutionality), the intervention of the Constitutional Court takes place regardless of the application of the statute at hand to a concrete dispute or adversary litigation. Sometimes, even before any judge has already applied it for the very first time. Thus, two different political options confront themselves before the Constitutional Court: the parliamentary majority that supported the statute at issue and those who brought the statute before the Court. The first shall remain firm in its constitutionality and the second shall deny it. Therefore, it may be considered that the political fight moves, by using legal arguments, from the Parliament to the Constitutional Court.

The "*locus standi*" for abstract judicial review is limited to some political organs, i.e., Federal and Regional cabinets and Parliamentary minorities (50 deputies -the 14% of the seats of the Chamber of Deputies- or 50 senators in Spain -the 20% of the whole Senate-; one third of the seats in both German and Austrian *Bundestags*). The Spanish Ombudsman is also entitled to refer his/her doubts on the constitutionality of a statute.

In Italy, the right to ask for abstract "*a posteriori*" review is also attributed to Regions but only in relation to statutes approved by the Parliament of the Nation or by the Legislative Council of any other Region.

In most of the cases (not in Germany and Austria though) this action of unconstitutionality must be lodged within a certain time: thirty days from the publication of the statute at issue in Italy, three months in Spain and six months in Belgium.

In the so-called concret or incidental judicial review (through the preliminary question of unconstitutionality), as far as the judge is competent to deal with the issue (civil, criminal, administrative ...), each judge is authorized to suspend proceedings if he deems a statute relevant to the case unconstitutional and to submit the statute to the Constitutional Court for ultimate consideration.

By means of its decision in this preliminary question of unconstitutionality, the Constitutional Court shall only decide whether the statutory rule brought before it is in

accordance with the Constitution or not, but it shall not decide the case at hand. Once the Constitutional adjudication is known, the decision of the pending case (criminal, administrative ...) is left to the judge who raised the issue. That is the way for preserving the monopoly of the Constitutional Court to decide on the validity of parliamentary statutes and for preserving its status as an instrument of Constitutional guarantee far (theoretically at least) from the day to day legal application.

The referral to the Constitutional Court in the concrete judicial review is limited to the different types and hierarchies of judges, courts and tribunals and neither political organs nor individuals are entitled to do so.

The parties to the process may ask the tribunal or the judge to submit the issue at the Constitutional Court but it is up to the tribunal or judge to decide on whether to bring it or not. In Italy, Belgium and Germany parties to the pending case are permitted to intervene in the proceeding before the Constitutional Court.

Each judge and tribunal from Germany, Belgium, Italy and Spain is entitled to refer issues through the preliminary question of unconstitutionality to their respective Constitutional court; in Austria this competence is only attributed to some of the higher tribunals in each of the different legal branches.

Austria, Germany and Belgium admit individual complaints against statutes concerning alleged violation of the basic rights. The necessary requirements for accepting these individual complaints according to their respective Constitutions and the case-law of the different national Constitutional Courts make that such complaints are far from being an *actio popularis* and are very limited the possibilities of use of this instrument. The complainant rights must have suffered a direct, personal and present injury by the application of the statute at issue. In Belgium, individual complaints must be lodged within the six month's period following to the publication of the statute.

C. THE EFFECTS OF THE JUDGEMENTS IN CONSTITUTIONAL ADJUDICATION

I shall go on to analyze the effects of the judgements in Constitutional adjudication in the so-called European system of constitutional review of legislation.

The basic distinction to be done is the one between judgements upholding alleged unconstitutionality through the action or the preliminary question and those dismissing it.

A.) *Sentences (judgements) upholding alleged unconstitutionality of a statutory rule or of some of its provisions.*

In France (and also in the rest of the above "*a priori*" control cases), the bill deemed unconstitutional is never promulgated, does not come into force. With regard to "*a posteriori*" control, when unconstitutionality is sustained it means the ejection from the legal system of the statute or of the unconstitutional provision because they are considered null and void and they shall no longer be applied to any case. Therefore, the Constitutional Court becomes a real

negative legislator. The decision of the Constitutional Court may not be appealed against before any other court or tribunal and all the authorities and public powers are bound by it.

When the Austrian Constitutional Court upholds the unconstitutionality of a statute, the decision has *ex-nunc* effects, that is to say, from the moment the Court's decision is published the affected provisions do not exist anymore. Moreover, the Austrian constitution provides for postponing the effects of the decision so that in the meantime (no more than 18 months) the Legislature shall be able to modify and amend the affected statute and so that legal gaps may be avoided. During that period of time, the provisions held unconstitutional still apply but not to the case which gave rise to the doubt before the Constitutional Court. The scope of this measure is to protect the legislative power's freedom to elaborate a new statute and to guarantee the integrity of the legal system together with the legal certainty and security.

As far as the rest of the "*a posteriori*" controls are concerned, when considering unconstitutionality the effects in principle are retroactive (*ex tunc*), that is to say, the effects go backwards to the moment of the promulgation (even in Italy, despite the article 136 of the Constitution). Nevertheless, in order to protect legal certainty these retroactive effects are restrained in order to prevent firm judgements from being checked. Only criminal trials (or, more generally, all sanctioning processes) may be checked or revised when the non-application of the "unconstitutional" provisions implies the acquittal or the suspension of the penalty.

Notwithstanding this fact, the unconstitutionality does not always imply invalidity and the Constitutional Court's decision does not always have retroactive effects. The German Constitutional Court may at the same time declare unconstitutional but not void a statute, fixing a delay for Parliament to replace the unconstitutional instrument. The provision held non constitutional shall exceptionally be applied to other cases. Although the Spanish Constitutional Court Act has not provided for it, it is possible, according to the case-law of the Spanish Court, to declare unconstitutionality without the retroactive invalidity effects: the principle of legal certainty and the economic effects over the already executed National Budget are some of the arguments for declaring unconstitutionality only.

The Italian Constitutional Court also uses the so-called technique of the unconstitutionality acquired in order to limit the effect of the decisions of unconstitutionality in time.

In all these countries, it is quite easy to find decisions including indications and recommendations to the Legislature so that it may, in its future activities, adjust itself to the standards set by the Constitutional Court.

The role of Constitutional Courts as negative legislators is surpassed by the content of some of the judgements discussed herein. This is largely confirmed by means of some of the types of decisions dismissing the alleged unconstitutionality not only as regards actions of unconstitutionality but also as regards for preliminary questions of unconstitutionality.

B.) *Sentences (judgements) dissmissing the alleged unconstitutionality*

Before any study is carried out on the types of dissmissing judgements, it may be useful to bear in mind the distinction (elaborated in the Theory of Law) between provision and norm: a provision is purely the physical text of the legislative document; the norm is the meaning given

to the provision. In other words, whilst the provision is the object of the hermeneutic activity (for instance one article of the Constitution), the norm is the result (for instance what is understood from the words of the above mentioned article by the Constitutional Court). Hence, we may distinguish between decisions bearing on provisions and decisions bearing on norms.

1.- Decisions bearing on provisions:

As for "*a priori*" (preventive) control cases, the alleged statutes or provisions become effective; on the other hand, in the "*a posteriori*" control cases, the statutes or provisions are maintained within the legal order albeit they may be object of a new constitutional control (depending on the circumstances at each national system). Those decisions dissmissing actions or preliminary questions of unconstitutionality shall never be appealed against.

2.- Decisions bearing on norms:

These judgements are called, in a wide sense, interpretative decisions or declaratory judgements. Two types may be distinguished:

a) judgements declaring the unconstitutionality of the norm: the decision establishes the meaning or meanings which can not be given to the provision at issue, and therefore it makes possible different interpretations apart from the excluded one.

b) judgements declaring the constitutionality of the norm: the decision establishes the *only possible interpretation* of the provision. This type of interpretative judgement may be justified on the grounds of some rules of Constitutional interpretation: the principle whereby constitutionality in parliamentary statutes is pressumed and according to which acts of Parliament must be, as far as possible, upheld, and also the principle of statutory interpretation in conformity with the Constitution (constitutionally conform interpretation).

Every declaratory judgement implies the creation of Law by the Constitutional Court that so contributes to legislate in a positive way. The Court must sometimes force the senses of the provision at issue by openly acting as a lawmaker in order to maintain the provision within the legal order and to avoid unconstitutionality. This is what happens with the so-called norm-adding and norm-substituting decisions.

As regards the norm-adding decisions, they declare the unconstitutionality of the provision at issue because the legislator did not bear something in mind that from the point of view of the Constitution, should have already been foreseen. Concerning this, when the Constitutional Court deems a provision to be unconstitutional in so far as it does not include something constitutionally necessary, the Court does not really make that provision void but preserves its validity by creating a new norm, that is to say, it adds "something" not provided by the Parliament.

The norm-substituting decisions imply declaring the unconstitutionality of a provision in so far as it states something istead of any different thing. The practice of the Constitutional Courts shows how that provision shall at the same time be upheld no valid, repealed and substituted not by the Legislature but by the standard contents of the Constitutional Court.

The same creative effect exists regarding those decisions whereby partial unconstitutionality is held and whereby a few words from the provision at issue are repealed.

Hence, its sense has changed.

As far as all these decisions (in a wide sense, interpretative or declaratory decisions) are concerned, the constitutional doctrine is commonly to be found not in the ruling but in the legal reasoning, specially in the *ratio decidendi*, elaborated by the Constitutional Court. As a consequence of this, the Court's arguments are considerably more important than the decision itself in order to know the real contents of one judgement.

The practice followed by the different Constitutional Courts in the European system of constitutional review upholds the fact that their decisions are certainly sources of law. Therefore, they may be considered something more than mere negative legislators.

In any case and to sum up, it should be remembered that this sort of interpretative-creative activity is not free because Constitutional Courts shall exclusively intervene on the basis of an action brought by a judge, a political organ or an individual, and they may only decide upon the claims alleged by the parties. Moreover, the Constitutional Court shall only decide on what may be justified by way of legal reasoning. So, the creation of Law by these Courts is not at their discretion whereas the Legislature's is. In theory, it is a pure declaration of preexisting Law whose sense and contents are adjusted to the case at hand by the Constitutional Court.

One must bear in mind, finally, that the activities as supreme interpreter carried out by the Constitutional Courts must be guided by the self-restraint principle. This principle has to take into account the particular position of the Court in the institutional structure of the Constitutional State, that is to say a true commissioner of the *pouvoir constituant*: it is an organ that controls the democratically elected Legislature; all public authorities are bound by its decisions and its activity may never be controlled by any other State organ or power, political or jurisdictional.