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CONSTITUTIONAL COMPLAINTS

by

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Constitutional review has developed in Europe since 1945 in three stages:

- Just after 1945 the Italian and German Constitutional Courts were created on the ruins of Nazism and Fascism. In the same context was reestablished the Austrian Constitutional Court;

- In the Seventies, the fall of the dictatorship in Spain and Portugal explains the creation of Constitutional Courts in Spain and Portugal;

- After the fall of the Berlin wall in 1989, Constitutional Courts were created in all the Eastern and Central Europe countries following the German model.

Today the question arises whether new Arab democracies, which have gone through a democratic revolution like Tunisia, Egypt and others, will also establish Constitutional Courts. This program is a contribution to this reflection.

There are two great models of constitutional review:

- The American model in which constitutional review is exercised by ordinary courts , is part of " judicial review" under the supervision of a Supreme Court;

- The European model of Constitutional justice, the "Kelsenian" model named after the great Austrian Constitutionalist Hans Kelsen in which a special Court, a Constitutional Court, is created outside of the judiciary to rule exclusively constitutional matters.

1. Who can bring a matter before the Constitutional Court?

There are two great systems:

- Either political authorities refer a statute to the Constitutional Court: it is generally described as "abstract review";
- Or citizens can refer a statute which has been already enacted to the Constitutional Court: it is generally described as concrete review.

1.1. Political authorities and abstract review

Abstract review is a constitutional review in which a statute is referred to the Constitutional Court by political authorities: it's always an objective trial, a trial made to a statute.

There are two kinds of abstract review since the political authorities which may refer a statute to the Constitutional Court maybe either national or local authorities:

- **National authorities:**

- In France, in the Constitution of 1958, originally, after a statute is voted and before it is promulgated, it may be referred to the Constitutional Council either by the President of the Republic, the Prime Minister or the President of the National Assembly or of the Senate. And the Constitutional Council has one month to make its decision.

In 1974, a constitutional amendment was adopted which allows any sixty deputies or sixty senators – which means one or several groups of the opposition - to refer a statute to the Council.

Today all major and controversial statutes voted by Parliament in France are referred to the Council by the opposition, which means an average of 20 cases a year.

- In Germany, one third of the member of the Bundestag can refer a statute to the Constitutional Court according to article 93, paragraph 1, number 2, of the 1949 fundamental law

➢ **Local authorities**

In Federal states or in states where the local authorities have a large autonomy, statutes or sometimes even regulations may also be referred to the Constitutional Court by local authorities:

- In Italy, the state may refer a regional or provincial law, and a region or a province, a national law, to the Constitutional Court according to article 127 of the Constitution.

- In Austria, since the creation of the Constitutional court in 1921, according to the ideas of Hans Kelsen, the Federal Government or the Government of a Land can refer either a statute or a regulation to the Constitutional Court. Since 1975, statutes may also be referred to the Court by one third of the National Assembly or one third of the Federal Council.

This kind of review may be described as ex ante and abstract:

- ex ante, because statutes may be referred to the council before or just after they are promulgated: if the Council rules that the statute is unconstitutional, it will never come into force. It will remain stillborn;

- **abstract**, since statutes can be referred to the Council only by political authorities: the President of the Republic, the Prime Minister, the President of each legislative chamber and, in most cases, by a group of the opposition.

1.2. Citizens and concrete review

In this system, citizens may argue that a statute, which is being applied to them, is unconstitutional.

There are two great models of concrete review:

➢ **The American model:**

In this model, any court belonging to the Judiciary may review the conformity to the Constitution of a statute under the control of the Supreme Court which is at the top of the Judiciary. If the court rules that the stature in unconstitunel, it will not apply it to the case according to the famous reasoning of Chief Justice Marshall in Marbury versus Madison in 1803:

"It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and

interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.

So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

If then the courts are to regard the constitution; and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply"[1]*.*

This model has been adopted by the Scandinavian countries.

In some cases, it relies only on a case law basis inspired by Marbury versus Madison: this is the case of Norway and Denmark.

In other cases, it relies on a provision of the Constitution: this is the case of Sweden (paragraph 14 of Chapter 11 of the Constitution) and of Finland (Article 106 of the Constitution).

- **The Italian model:**

In this model, if a citizen argues before an Italian Court that a provision of a statute which is applied to him is unconstitutional, the judge may not rule himself on the constitutionality of the statute, but must refer it to the Constitutional Court which is the only Court competent to rule that question (article 23 of the statute on the Constitutional Court).

The same system has just been introduced in France, based on the Italian model according to article 61-1 of the Constitution: "*If, during proceedings in progress before a court of law, it is claimed that a legislative provision infringes the rights and freedoms guaranteed by the Constitution, the matter may be referred by the Conseil d'Etat or by the Cour de Cassation to the Constitutional Council which shall rule within a determined period.*"

This kind of review may be described as ex-post and concrete:

- ex-post, because it concerns statutes already enacted, what the Americans refer to as "*laws on the books*";
- concrete since it opens the possibility for citizen to whom a statute is being applied to ask for a preliminary ruling on the constitutionality of that statute by the Constitutional Council.

1.3. Most countries combine the possibility for political authorities and citizens to refer a statute to the Constitutional Council, in other words, abstract and concrete review.

[1] E. Zoller, « Grands arrêts de la Cour suprême des Etats-Unis » (PUF), p. 71.

- It is the case of Germany: according to the statute of 1951on the Constitutional court, a federal statute or the statute of a land may be referred to the Constitutional Court by the federal Government, the Government of a land or one third of the members of the Bundestag.

  On the other hand, there are two forms of concrete review:

  - Preliminary rulings asked by an ordinary judge to the Constitutional Court;

  - And, mostly, individual referrals introduced by any citizens against any legislative administrative or jurisdictional act which he deems has infringed his Constitutional rights (article 93 of the Constitution) this very large definition includes judgments of the Supreme Courts which may be referred to the Constitutional court.,

- This model has been adopted by Spain which also combines abstract review (article 161.1 de la Constitution) preliminary rulings asked by an ordinary judge to the Constitutional tribunal (article 163 of the Constitution) and an individual referral introduced by any citizen which is called in Spanish "*amparo*".
  This model has been also adopted according to different ways by the Eastern and central Europe countries.

  They have all created an abstract review, but most of them have also introduced concrete review with a preliminary ruling procedure. It is the case of Hungary (article 38 of the statute on the Constitutional Court), of Slovenia (article 156 of the Constitution, article 23 of the statute), of Poland (article 11 of the law on the Constitutional Court) of Lithuania (article 105 of the Constitution, article 65 of the statute) and of Romania (article 144 c of the Constitution).

  Sometimes the preliminary procedure may only be introduced by the Supreme Court, either civil criminal or administrative, like in Bulgaria, Croatia, Russia and France.

  Many states have introduced an individual referral in case of violation of the Constitutional rights: the Czech Republic, Slovenia, Russia and France recently.

2. Which matters can be brought before the Constitutional Court?

There are two great systems here too:

- Laws, either national or local, when they are enacted;
- Laws already enacted.

2.1. Abstract review as described in the first part, has many advantages in terms of efficiency and legal security:

- A referral against a statute before it is promulgated or just after it has been promulgated, allows solving the question ab initio without waiting that the statute develops its effect to be challenged.

- The remedy is also very efficient whether it is the non-promulgation of the statute, which means that, if the Constitutional court rules that the statute is unconstitutional, it will never come into force, it will remain still born or it will be canceled just after being promulgated.

- The ex-ante and preventive review may appear in that respect as a true guaranty of legal security: if the statute is to be challenged, it is challenged just when it is enacted and if it is ruled constitutional, it will not be challenged later.

This is particularly important when the central state or a local state challenges the conformity to the constitutional of a federal or legal statute: the conflict of competence may be solved from the very beginning.

2.2. Laws already enacted: concrete review

In that model – concrete or ex-post review- laws are referred to the Constitution Court once they have been enacted and when they are applied to a citizen.

The experience of France is from that point of view interesting since France has known first only abstract review from 1958 to 2008 and has developed since the Constitution amendment of 2008 concrete review.

The success of concrete review in most countries where it has been developed, first of all in the United States, is due to three reasons:

- First, **the preliminary ruling procedure has two great merits** :

- It creates a direct link between the judge who asks the question and the judge who answers it ;

- It makes the judge who asks the question take part in the function of the judge who answers it.

As the Italian experience has already proved, the great strength of the preliminary ruling procedure is that it makes the judge who asks the question a constitutional judge: when a lower court or the Conseil d'Etat or the Cour de cassation decides not to refer a legislation to the council because it deems that the unconstitutionality which is argued is not serious, it acts like a constitutional judge.

- Second, one great difference between abstract review and concrete review is that **the applications in concrete review are written by barristers whereas the referrals in abstract review are written supposedly by politicians** but in fact by political party bureaucrats.

Barristers are not perfect. But they are a great help for judges : they develop arguments, they look for the case law, they make comparative law.

- Third, **abstract review,** of the kind in which I engaged for 9 years, is a difficult and often frustrating exercise for three reasons:

- First, the full legal meaning of a statute is often uncertain and must be specified frequently through case-by-case applications. Abstract review is based only on the wording of a statute, on its possible, theoretical, hypothetical interpretations : the law is constitutional if it means this; it's unconstitutional if it means that. And nobody really knows, at that stage, what will come out of it. As Alec Stone Sweet, an American Professor, put it very rightly, "*There is no storyline or, if there is, the story is an imaginary or hypothetical one told to highlight the constitutional moral that comes at the end*"[2]. This explains the large use, in this kind of review, of interpretative qualifications ("*réserves d'interprétation*") in order to prevent any interpretation which would infringe upon rights and liberties.

- Second, at this stage, the judge can only confront the wording of the statute with the Constitution. It can only rely, to understand the scope of the statue, on the parliamentary debates. As the US Supreme Court said, in United States v. Raines[3], "*The delicate power of pronouncing an Act of Congress unconstitutional is not to be exercised with reference to hypothetical cases"*.

- Last, and it is probably the main point, politically initiated, abstract review, which is a pre-enforcement review, is, in fact, the legal extension of a political debate : it is because it fights politically a statute that the opposition will argue that it violates rights and liberties or is contrary to the principle of equality.

Concrete review, by contrast, is based on real life, on real cases and controversies. It is based on the implementation of the law, on the actual injury that this implementation has caused a physical or moral person. It rules on the constitutionality of a statute as it is applied, and not as it could or should be applied.

In that sense, it avoids unnecessary and premature constitutional issues and allows the Constitutional court to declare the law unconstitutional only as applied to one category of persons or situations.

According to the famous word of La Bruyère, Corneille paints men as they should be – the valiance of the Cid – whereas Racine paints them as they are – the tears of Andromaque.

Abstract review is like Corneille: it is about the law as it should be.

Concrete review is like Racine: it is about the law as it is.

[2] Alec Stone Sweet and Martin Shapiro, « Abstract and Concrete Review in the United States" in "On Law, Politics, and Judicialization", abovementioned p 345, Oxford University Press
[3] 362 U.S. 17 (1960).

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To conclude, I will stress the great specificity, beyond the different models and systems, of constitutional review: according to a famous word of Dean Favoreu, a great French constitutionalist, "*Constitutional adjudication is law captured by politics or politics captured by law".*