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THE LEGISLATIVE PROCESS

by

Mr Cesare PINELLI
(Professor of Constitutional Law, Sapienza University, Roma)

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The legislative process

In the preceding sessions, you have treated the topics of the importance and of the independence of constitutional courts, together with that of constitutional complaints. The subject of this talk is clearly different, dealing with the legislative process, and its relationship with constitutional rulings.
To this end, my proposal is to articulate the session into three parts, each one consisting in my presentation of a certain issue, followed by an exchange of views concerning the experience of your country on such issue. The issues are the following: 1) what legislators are expected to do in constitutional democracies vis-à-vis the tasks of constitutional courts, 2) the main aspects distinguishing the legislative procedures from the judicial, and 3) which kind of conflict between legislators and courts might be considered physiological, or to the contrary pathological, in democratic regimes.

1- Under democratic regimes, laws are discussed and approved on the ground of the policy that they are expected to pursue. MPs are elected because of their capacity of representing a certain political vision of the general welfare, rather than the rights of citizens. Parliamentary procedures are not structured with a view to give voice to claims regarding rights, but for the sake of granting a fair debate between the majority and the opposition. Governments, and majorities endorsing governments in parliamentary systems, are called to account before the electors for how they exerted political power, not for how they composed disagreements about rights.
In the legislative process, rights are at stake whenever the constitution, be it written or conventionally made, requires that laws shape in advance, and in general terms, the discretionary powers of the executive regarding certain rights, or entrust parliament with the exclusive power of providing the financial resources that may be required for funding rights pertaining to certain categories. Both these examples demonstrate that legislative rules affecting rights are expected to achieve purposes that are clearly distinguished from those guiding the judicial function. The idea that the power of dictating the rules concerning the executive's action vis-à-vis individual rights should rest with parliament not only reflects the need for certainty and predictability of the state's interventions in the realm of individuals. It also tends to limit as far as possible the subjectivity of judges, that particularly in this field may amount to arbitrariness. It should appear clear, at any rate, that here courts are prevented from "re-considering" legislative settlements. The same occurs, a fortiori, for what concerns the power of the purse, being exclusively given to parliament.
Parliaments, we have assumed, rely on arguments of policy even when rights issues are at stake. In these cases, the discussion is thus centered on the social (or economic, or whatever else might be relevant at this respect) consequences of the decision. This orientation does not necessarily mean that MPs are guided by utilitarian or selfish considerations. To the contrary, attention to the consequences might reveal a principled approach to the right at stake. Usually, parliaments will face the challenge of choosing between diverse solutions or policies, none of which costless. They will face a dilemma. Here lies, in my opinion, the noble art of legislation, or political deliberation.
Contrary to legislators, the task of courts, including constitutional courts, is centered on rights, namely on the ascertainment of whether the decisions of political or administrative authorities violate the citizens' rights. It is against such background that, at least in Western democracies, constitutional review proves to have become the irreplaceable counterweight to the supremacy of the majority principle, beyond the differences between the European Constitutional Courts from the U.S. Supreme Court. Contrary to the US, in Europe's continental countries judicial review is explicitly spelled out in the respective Constitutions, and Constitutional Courts are specialized in judicial review. That choice was due both to cultural and institutional reasons. The high value given to the principle of legal certainty in countries adhering to the civil law tradition was likely to be ensured only by a special court in charge of constitutional review of legislation. The choice for a specialized and centralized court resulted from the fear that, given the absence of a doctrine of precedent in the civil law tradition, ordinary judges would endanger the value of legal certainty.

Notwithstanding the differences with the US experience of constitutional review, the evolution of constitutional justice in continental Europe has remarkably changed these premises. Ordinary judges not only have abandoned the deference which characterized their attitude toward democratically elected institutions since the French Revolution, but, especially in those countries where judicial review of legislation is made dependent on their own impulse, have become more and more involved in the constitutional interpretation process. On the other hand, the value of legal certainty has lost its crucial significance vis-à-vis the quest for preserving the sense of constitutional principles. Even on this ground, then, the European experience appears far closer to the American than at the moment of its foundation, although the power to set aside unconstitutional statutes remains with constitutional courts.

2- In modern legal systems, the legislative procedure is to be distinguished from the judicial for at least three aspects: the initiative, whether the procedure should be terminated, and whether the final decision requires to be justified.

a) As for legislative procedure, the initiative is free, in the sense that MPs, as well as the government or other subject according to the different constitutional provisions, may freely initiate the procedure through which they might take a decision. This freedom reflects the fact that democratically elected authorities are as such legitimized to choose the policies corresponding to their own political ideas. There are only few exceptions to such rule, concerning the presentation from goverment of the proposals concerning the financial budget of each year and the domestic laws giving execution to international treaties. Therefore, we might say that the legislative procedure is governed by the principle of officiality, according to which the decision-maker disposes of the subject-matter of the decision. Even the fact that amendments to the bill can almost always be presented in the course of the parliamentary procedure corresponds to the principle of officiality.
To the contrary, courts, including constitutional courts, are prevented from initiating the judicial procedure. According to the so called principle of party-presentation, the scope and content of judicial controversy are to be defined by the parties or, conversely, the court is restricted to a consideration of what the parties have put before it. This principle, corresponding to the latin maxim *ne procedat judex ex officio*, namely the judge is prevented from initiating the procedure, is deeply rooted in the judicial procedure both of common law and of civil law countries, going back to ancient times. From such principle it follows that, unlike legislators, in the going forward of the cause judges are also prevented from responding to issues different from those that the parties have put before themselves (*Ne eat judex ultra petita partium*). Such rule affects also the procedure before Constitutional Courts,although with some limitations.

b) Legislators are also free to withdraw a bill, or even to avoid to decide. This is true not only in the UK, where still holds the Blackstone's remark that "Parliament can do everything that is not naturally impossible". It is true almost everywhere.
To the contrary, the judge cannot as a rule evade his basic duty, that of adjudicating. He has the option of either allowing or of rejecting the plaintiff's claims. Under the criminal procedure rules adopted by several countries, a judge may acquit for insufficient evidence. But he cannot be released from exercising his function as a judge, claiming either that the facts of the case are not sufficiently clear to him (factual doubt), or that the norm to be applied in the specific case cannot be determined (judicial doubt), or even that there exists no fixed norm for the determination of the case *(lacuna* in the law). Thus the French *Code Civil* lays down explicitly: "A judge who refuses to decide a case, on the pretext that the law is silent, obscure or insufficient, may be prosecuted as being guilty of denial of justice." But the judge's duty of adjudicating affects common law countries as well.

c) Finally, contrary to legislators, courts are constitutionally bound to give reasons of their own decisions. It has been observed that "In a democratic state judges are accountable for their decisions. This is one reason why they have to publicly justify their rulings". It is rather

the legal constraint posed upon judges to justify their rulings that demonstrates that they are accountable. More precisely, judicial reason-giving, particularly in the civil law system, is mandatory exactly because judges, being non-elected authorities, ought to justify before the public opinion why they reached a certain decision. Constitutional adjudication renders clearly more acute the need for a satisfactory reason-giving, since constitutional courts are empowered to struck down legislation, namely the product of democratically elected authorities. The functions and powers with which these authorities are respectively entrusted reflect the different, although related, goals of democracy and constitutionalism, and are thus likely to be exerted and evaluated on the grounds, respectively, of political deliberation and of constitutional reasoning.

3- The procedural constraints posed upon judges depend on the fact that these, contrary to legislators, are not invested with democratic legitimacy. But such costraints should also be taken into account while considering the now hotly debated issue of 'judicial activism'.

The term 'judicial actvism' may design a certain approach of courts toward the text that they are expected to interpret, whenever the meaning of the words which it is composed of, the intentions of its authors, or the legal context in which it is inserted, are deemed insufficient to resolve the case. Judges may recur in such hypothesis to "teleological-evaluative" interpretation, that, contrary to the linguistic and the systemic, poses "the perennial problem" of "the interpersonal disputability of the values and principles that should guide us". In such hypothesis, judges are likely to express an activist approach. that might create tensions with the political branches. This arguing becomes crucial with respect to constitutional interpretation for the following reasons. First, the indeterminacy of the constitution's formulas, which is fairly broader than that of statutes or regulations, leaves correspondently more room to judicial interpretation. Moreover, since the constitution occupies the highest position in the hierarchy of norms within a domestic legal system, decisions of courts in the position of the final arbiter of constitutional claims can be overruled only by a constitutional amendment, or through different *rationes decidendi* affecting their own subsequent decisions. Finally, constitutional rights claim often raises issues that are politically highly controversial.

These features should not simply be intended in the sense that constitutions allow a greater degree of uncertainty than that of statutes or regulations. Constitutions are expected to endure. This expectation might be frustrated from the events, but it is also the most important element for distinguishing constitutions from the other legal acts. The fact that the former may admit shiftings of meaning to a greater extent than the latter needs thus to be connected with the presumption of the constitution's adaptability to the diverse circumstances occurring over time. This is precisely the kind of challenge which constitutional interpretation is expected to meet, and which contemporary constitutional texts are suited for, due to their relatively indeterminate language. It is that language which gives a constitution the capacity to survive those changes which may impose reform of the ordinary legislation. On the other hand, constitutional rights claim raises politically controversial issues to the extent that constitutions mirror pluralistic societies, and at the same time put the premises for their own free development.

It is worth adding that constitutional courts usually rely on teleological criterion after having demonstrated that the language plainly emerging from the text or from the intentions of its authors is insufficient for resolving the case. This is not only a recommendation. It also depicts a current judicial practice. Although 'activism' is sometimes seen as failing to apply a rule at hand in accordance with its meaning, or applying a rule which has no warrant in the existing legal materials, it has been convincingly replied that, "understood in these terms, an account of 'activism' is unlikely to be of much assistance. Few judges will knowingly fail to apply a rule in accordance with its meaning, or rely on a rule which has no legal warrant as they see it".

We might say, then, that the activism/restraint dichotomy consists in a different attitude toward the fairly indeterminate language of constitutional texts with which courts have to confront. The activist approach tends more easily than the restraint-based approach to rely

on criteria, first and foremost the teleological, which are not directly grounded on the text. The before mentioned dichotomy is therefore a matter of degree, being apprehended in quantitative rather than in qualitative terms.
However, we should also take into account of a different criterion. In democratic countries constitutional courts are expected not to insulate themselves from other institutions and from the general public, but to ensure the openness of the democratic process. This very assumption affords perhaps a better criterion for evaluating both the opportunities and the limits of an activist approach, that should be deemed correct until it doesn't impede further political debate and participation of the public on the issue at stake. Whenever courts pretend instead to give a final word over issues that still need public discussion and decisions from democratically elected authorities, they are likely to put the premises for a pathological tension with legislators.

On the other hand, tensions between courts and legislators may arise when the latter tend to neglect the rule of law. It is far from easy to enumerate the different occasions in which such event might occur, going from an undue overruling of the caselaw on a certain subject to the attempts of jeopardizing judicial independence. It is clear, however, that while a mere overruling of the caselaw from legislators reflects a physiological tension between the two branches, whichever threat to judicial independence corresponds rather to a pathological tension between these branches. In other words, such threat is likely to put into question the very identity of a constitutional democracy. It might consist in changing the composition of courts, and of constitutional courts in particular, with a view to obtain a majority of judges reflecting the political opinions of the parliamentary majority. It might consist in abolishing the functions of the constitutional court that might potentially run counter the legislation or the decisions of the executive. More rarely, it consists in abolishing the constitutional court. At any rate, in all these cases a constitutional democracy is likely to be put at risk from the decisions of the political rulers, even when they claim to act in the name or on behalf of the people.
On the other hand, in case of transition from an authoritarian to a democratic regime, the constitutional frame of the judicial independence's guarantees, and, more generaly, of the rule of law, is certainly important. It is clearly insufficient, however, in ensuring that such frame will be coherently implemented. This depends on a number of conditions, depending on the social and political situation of the country concerned. Therefore, the study of the written text needs to be complemented with a thorough evaluation of such situation.