THE FUNCTIONING OF THE MECHANISMS OF CONSTITUTIONAL CONTROL:

SOME REFLECTIONS ON THE BASIS OF THE EUROPEAN EXPERIENCE

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The paper analyzes the evolution of the constitutional control from the beginning of the XIX century till nowadays. The basic model of constitutional control, its various functions, ways of forming and qualifying features of these legal institutions are reviewed. Author notes the special increasing role of the constitutional control of the European Court and the European Court of Human Rights. In this regard, author emphasizes the legal trend for reduce of the role of the constitutional control of some European countries in the protection of civil rights and a definite shift to their activity to the sphere of conflict resolution and the distribution of powers between the state authorities, in particular, between the central government and local authorities.

Keywords: law, the constitution, the state, the state bodies of the constitutional control, the Constitutional Court, the Constitutional Council, the European Court of Justice, European Court of Human Rights, the dialogue of national and international courts and human rights.

1. The development of constitutional control mechanisms is strictly linked with the birth of the modern constitutional State: drafting of Fundamental Charters and establishing of the Rule of Law represented the prerequisites for constitutional control. There is no doubt that the judicial review took place when constitutional Charters became the fundamental document of the modern States, building up political and social organizations according the principles of democracy and human dignity.

The establishment of institutions with the competence of constitutional review is nowadays considered a standard component of a democracy. It is increasingly common to entrust the power of constitutional review to a specialised constitutional court that can issue authoritative decisions on the constitutionality of laws and on Government's actions and interpret the Constitution's provisions.

Furthermore, a constitutional Court can play many important roles, always related with the fundamental power of ensuring the respect of the highest State principles and values. Its jurisdiction could aim at protecting individual rights; at providing a forum for the resolution of disputes in federal systems, and also in regionalised and in decentralised systems; at ensuring and enforcing the separation of powers through decisions about the conflicts between State organs; at suing the Head of the State or the Government for high treason to the Nation; at certifying election results and the admissibility of referendum; at assessing the legality of political parties.

In order to achieve the best functioning of judicial review, different States, in relation with their social, political and economic situation, have adopted various mechanisms of constitutional justice. The specific historical, political and social events, that marked the building of National States (not only European), have contributed to define the different features of constitutional control mechanisms.

First of all, policy makers had to choose between the two main constitutional control models: centralised system – or the European one, since it was introduced in Austria after the First World War and then followed by other European Countries after Second World War – and diffuse method of control, firstly adopted in the United States.

In fact, if the post-French revolutionary States on a "pitch invasion" by the Judiciary power against Parliament did not allow the creation of a modern constitutional control system until the beginning of Twentieth century, United States judiciary review of legislation took place since Philadelphia Constitution was drafted: in 1788 the Federalist published an essay written by Alexander Hamilton on the "Judicial Department", in which he affirmed that constitutional control function is provided to guarantee the people's general will, embodied and expressed by Constitution.

A landmark decision was written in 1803 by Chief Justice John Marshall: Marbury v. Madison was the first U.S. Supreme Court case that applied the principle of judicial review, the power of federal Courts to make void acts of Congress in conflict with the Constitution. The decision played a key role in making the judicial branch an equal partner of the Executive and Legislative branches within the developing system of Government: Chief Marshall affirmed that the Constitution is the supreme Law of the land, and established the Supreme Court as the final authority entitled to interpret it.

In resolving the case, the Court stated its incompetence to issue a writ of mandamus to require Madison to deliver the commission (as Judge of Peace) to Marbury, since the Court itself found that the Judiciary Act of 1789 conflicted with the Constitution because it gave the Supreme Court more authority than it was given under the Constitution. Infact, the Judiciary Act of 1789 authorized the Supreme Court to "issue writs of mandamus… to persons holding office under the

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authority of the United States, considering it as an exercise of its original jurisdiction. However, Article III, section 2, clause 2 of the Constitution, stated that the exercise of original jurisdiction is allowed only in cases that involve "ambassadors, other public ministers and consuls… In all other cases, the Supreme Court shall have appellate jurisdiction" (that is, the case must first be argued and decided by judges in the lower Courts). Since the dispute between Marbury and Madison did not involve "ambassadors, public ministers, consuls…", the Supreme Court did not have the authority to exercise its original jurisdiction in this case. Thus, the Judiciary Act of 1789 and the Constitution were in conflict with each other. Thus, declaring the Constitution as a real "paramount law," the Supreme Court ruled that each judge has the duty to interpret laws and to determine when they conflict with the supreme Charter: the judicial branch has the power to declare void laws passed by Congress in contrast with the Constitution.

In this sense, the Judicial review has been conceived essentially as a natural function of the judicial department: each Court may hear constitutional claims since there is no a specific tribunal to only examine the constitutionality of statutes. In order to ensure an uniform interpretation, the «stare decisis» principle restrains the fragmentation of the judicial review function and balances the lack of erga omnes effect of the constitutional judgments: it thus determines that the constitutional interpretations proposed by the Supreme Court (or by a hierarchically superior Court) are binding upon lower Courts.

On the contrary, at the beginning of the Twentieth century in the European contest, the dispute between two German jurists, Hans Kelsen and Carl Schmitt, about the constitutional control system introduced a theoretic alternative between two different model of constitutional control: the control could have a jurisdictional nature or a pure political nature.

According to Kelsen's "Pure Theory of Law" and to the hierarchical structure of the normative system, the constitutional control must be exercised by a special Court, a Judge totally external to the political circuit, whose independence is guaranteed by the Constitution, since he could not be removed from his function (centralised system). This judge has the task to perform a professional and technical activity applying legal devices and controlling the conformity of the statutes before the Constitution without any political, social or religious considerations.

On the contrary, since Schmitt considered the Constitution as a fundamental political decision, he affirmed that only the highest political authority could properly manage the constitutional control activity. In this sense, the President of the Weimar Republic was the only political authority able to hold properly the constitutional control function, since he should have been able to unify and represent the will of the nation.

2. After the Second War World, in reaction to the violence and to the breakdown of the Rule of Law, many European States rejected Schmitt's theorization and adopted a system of centralised judicial review with the provision of a specific body, independent from political and judiciary system, able to retain a jurisdictional monopoly over constitutional issues. It was based on the model proposed by Kelsen for the 1920 Austrian Constitution (the Verfassungsgerichtsbarkeit), so as modified in the 1929 when the Constitution established two kinds of access to the Court: the review could be brought before the Court not only via direct access by Federal and Länder Governments, as it is was foreseen in the test of 1920, but also via indirect access (incidental review) by supreme ordinary and administrative Courts during a judicial proceeding.

The original model of 1920 was changed in a "hybrid» system: a specific constitutional Court with the exclusive jurisdiction on legislation could be approached not only by the Governments, but also the judges were entitled to approach the Constitutional Court through incidental review.

In fact, the centralised system could be reproduced with several distinctive figures but it is undeniable that a democratic context represents the essential field for building up a powerful judicial review system. We could take a valid demonstration not just by the European post-war State's building process but even by the more recent democratic evolution carried on by many developing Countries. In fact, the creation of a specialised body could ensure both a specialised developing expertise in the area of constitutional jurisprudence and the respect of the principle of separation of powers, avoiding a judicial politicisation. Establishing a specific Court with centralised power in reviewing the constitutionality of laws and Government's acts also provides an "insurance for the future" to the political parties, confident in the respect of democratic constitutional limits by the other State Bodies and Institutions.

An European example of the different nature of centralised model is certainly the French constitutional control system. In fact, due to its specific political and institutional events, French Republic (Fourth and Fifth) adopted a constitutional control sui generis, since there is a specific body legitimated to carry out it – the Conseil Constitutionnel – but its review is a priori, that is it takes place before the enactment of a normative act, during the parliamentary procedures. Furthermore, the constitutional question could be proposed by political actors such as the President of the Republic, Prime Minister and the Presidents of the two branches of Parliament; Court composition itself shows the political nature of the constitutional control. A few important reforms have mitigated the original rigidity of the constitutional guarantee function: the first two reforms, dated back to Seventies, introduced the saisine parlementaire, that allowed also sixty Deputies and sixty Senators to file a review to the Court, and extended the constitutionality parameter to the so-called bloc de constitutionnalité, that includes the fundamental rights. The most important reform was accomplished in 2008 when the Government introduced a "priority question of constitutionality", allowing the Conseil d'Etat and the Cour d'Appel to refer constitutional issues regarding the validity of statutes to the Conseil after their parliamentary approval (Constitutional Law Reform n. 2008-724, implemented by L.O. n. 2009/153.

Other differences can be noted into the German and Spanish procedures of access to the constitutional Tribunal: their systems provide to each person – so not just a judicial authority – the right to file a complaint before the supreme Tribunal if there is a violation of her/his fundamental rights.

3. When we go in detail, a careful thought must be given to the design of the mechanisms for judicial enforcement. We need to take into account some of basic design questions that policymakers should have to address when constructing a constitutional court.

These include: the Court's membership, that is to say the composition and the procedures to appoint the judges; the access to the court; the effects of the court's decisions, that is the judicial remedies in response to constitutional violations; and the relationship between the national constitutional Court and other supranational courts, such as European Courts are.

The composition of the Constitutional Courts, it represents a very important subject: judges should be protected from undue political pressure. An appointment procedure that involves many different political actors, rules that strictly define the causes for which a judge

may be removed and the procedure for removal, judicial qualifications based on merit and expertise, and non-renewable terms for judges can help to foster judicial independence.

Whereas many models foresee that all the members are nominated or elected by political institutions (this is the American or the German or the French model, and in addition in France there is no need for juridical qualification for the members), in other cases the choice of the members is subdivided among different subjects: according to the italian model, five judges are elected by the Parliament with a very high quorum, to permit a liaison of the Court with the political life, five are elected by the supreme Courts, ordinary, administrative, account, so to bring in the Court the concrete judicial experience, five are nominated by the President of the Republic to balance the other two criteria of composition and to bring into the Court different competences. They must be full professor of law, lawyers with 20 years of practice, judges of the supreme Courts.

Strictly connected are the subjects of the number of the judges (9 in USA, 16 in Germany, 15 in Italy), the functioning of the Court in sections (with the risk of losing uniformity) and of the duration of the charge: in the Italian model the duration is today of nine years (in the original test was twelve years). The length of a constitutional court judge's term can affect the court's ability to function independently. The charge may be renewable or non-renewable: this latter hypothesis seems to ensure better judge's independence, since, on the contrary, his ruling could be influenced by an eventual renewable character. It's not a coincidence that the Venice Commission – the European Commission for Democracy through Law, created in 1990 – generally recommends "a fixed and relatively long term with no scope for re-election" for constitutional Court judges. The possibility of a life-term appointment, such as is for the nine members of the Supreme Court of United States and for the seven judges of Australian High Court, could hide the risk of a non-dynamic attitude of the Court, leading to crystallized or static judgments.

4. As far as the access is concerned, there are two main different models.

Indirect access is characterised by incidental control: each judge, hearing a proceeding, could suspend it when he recognises a question of constitutionality in order to refer a preliminary request to the Constitutional Court, the only judge entitled to declare the possible provision of unconstitutionality.

Through the indirect access the control of constitutionality is run on acts and statutes when they are applied in concrete cases. In the case of indirect access, it could be permitted to each judge or only to the judges of appeal or supreme to approach the Court. It is important also to define the concept of judge, that is to say which organ can approach the Court: ordinary judges, administrative and account judges, quasi jurisdictional organs, administrative authorities? If one desires to reach the result of a large extent of control, it could be better to broaden the number of subjects that can approach the Constitutional Court.

Under the point of view of the attitude facing the Constitution, the indirect access can someway be assimilated to diffuse control (United States model): Constitution can be applied by judges, it is not only a political document, with the difference that in the centralized systems the judge can only suspend the proceeding, asking to the Court to say the last word about the conformity of a statute to the Constitution; whereas in the diffuse system ordinary courts are entitled to assess the constitutionality of any legal norm or individual act. The judges of such Courts are able to disapply any norm or act which they hold to be unconstitutional. In order to avoid incoherence and uncertainty in the law that might be generated by this diffuse control, the stare decisis principle states that the inferior Courts have to follow the superior Courts judgments.

In both cases, the review proposition is necessarily related to a specific case, for which resolution the judge has to apply the act suspicious of unconstitutionality. Overall the power of the Commonwealth judges in centralized system are growing, being similar to the power of judges in diffuse system of control: it depends from the technique of verfassungskonforme Auslegung (interpretation conform to the Constitution) and of disapplication of acts.

Direct access: Constitutional courts can be approached by public entities such the central and regional Governments or by other constitutional bodies, generally when conflicts arise on power distribution among them. In federal, regional or decentralised States these disputes arise between the central Government and sub-national or local Governments, or among sub-national Governments themselves and concern the constitutionality of a law passed or acts taken by the national or a sub-national Governments.

We call it abstract control since the review is exercised regardless of the existence of a concrete dispute. The constitutionality of a statute is determined by contrasting the challenged legislation with a provision of the constitution: that is, the controversy did not arise from a concrete case. The constitutional question is not only an element of the case but is indeed the case itself. Consequently, the lawfulness of legislation is considered in abstract and in general, without taking into account the precise circumstances of any particular case.

Individual direct action is another kind of direct access to the constitutional Court: a private citizen might complain before the Court a violation of a fundamental right protected by the Charter, caused by legislative, administrative and judicial proceedings of public authorities. Most important examples are the German "Verfassungsbeschwerde" and the Spanish "recurso de amparo": although these reviews have some different figures, they possess similar access requirements such as having exhausted all the applicable stages of the appeal procedures and the interest in the action must be personal, real and direct. In Italy we do not have the individual direct access, but a recent decision of the Cassazione – accepted by the Constitutional Court – has opened the way to a peculiar form of individual access, allowing the individual to utilize the incidental access without an individual interest to a concrete controversy.

In order to ensure the highest level of constitutional guarantees, it is clear the need to foster an even more simultaneously use and an interaction between the incidental and direct model both in centralised and diffuse systems. Strictly related to the access matter, it is the need to identify the subjects legally able/entitled to bring a case (via direct or indirect procedure) before the Constitutional Court: as seen, referrals could be brought by lower Courts, by different branches of the central or subnational Government, by citizens and by the same Constitutional Court.

5. Another crucial aspect strictly related to the effectiveness of the constitutional control is the judgment effects: it is possible dividing them into two categories, as far as concern to the decisions' subject.

The decision passed by a constitutional Court has erga omnes effects: the centralized review of legislation has the power to declare void a statute – or its controversial provisions – and the decision is binding for all branches of Courts and administrative. So, Constitutional Tribunal, having the force to make disappear a statute from the legal order with its decision, acts as a "negative legislator", as Hans Kelsen named this related «function».

On the contrary, in common law Countries with diffuse constitutional review, a decision passed by an ordinary Judge has binding effects only for the parties of the case, even if precedents issued by the Supreme Court are compulsory for lower Courts unless they distinguish the case from the precedent or overrule it with adequate reasoning.

Furthermore, decisions who concern the unconstitutionality of a normative act may have different temporary effects: ex nunc, when the invalidity takes place from the moment in which the decision is issued, or ex tunc, in the cases in which the act is declared void from the moment of its adoption, which has important consequences for individual cases.

Nevertheless, there is the possibility to 'modulate' the effects of a judgment both ex tunc and ex nunc. In fact, Court could determine the date from which a decision of unconstitutionality produces its effects: for example it is possible to defer the effects in order to enable Legislator to intervene in the subject of the Court's decision and thus avoid a legal "gap" (in Austria, deferral must not exceed 12 months).

6. Furthermore, we may mention the "Verfassungskonforme Auslegung", the constitutional Court's power to ensure constitutionality through a specific interpretation: in fact the Superior Judge may impose on all other State organs to apply a normative act only in a specific interpretation which the constitutional Court has found to be conformed to the Charter, helps to preserve normative acts even if one or several unconstitutional interpretations would be possible. But if the ordinary or administrative Judges do not follow the Court's interpretations, these are ineffective. In order to overcome the problem of non-application of the constitutional Court's decision, the Italian Constitutional Court has developed the concept of "diritto vivente". The constitutional Judge interprets the contested legal provision both as it is "usually" interpreted by ordinary Courts (Corte di Cassazione and Consiglio di Stato) and in the "living meaning", and waives to propose its own constitutional interpretation.

7. If the greater guarantee offered by a subjective and centralised control based on the Kelsenian model has fostered the almost exclusive implementation of the Judicial review entrusted to an authority which is substantially unrelated or neutral to the political circuit, it is nevertheless incorrect to exclude the political configuration theorized by Schmitt from the network of the current debate.

In fact, in the current supranational dimension of the European jurisdiction, the aforementioned juxtaposition seems to have been transposed, in the relation between art. 7 of the EU Treaty – set to protect its foundational values (the democratic principle and the fundamental human Rights) – and the European Court of Justice, having the jurisdiction on the legality of the acts adopted in accordance with the aforementioned enacting term (as well as art. 2 UET) and the procedures provided for in art. 269 UET.

The European Court effectively operates in the capacity of constitutional Jurisdiction: it ensures the observance of the Union law in the interpretation and enactment of the Treaty, through the provision of a mechanism of preliminary ruling procedure actioned by a national Court, should it detect an antinomy between a Community provision and an internal regulation. It also passes judgment on the conflicts of competence between Community institutions and member States, operating an evaluation of the allocation of powers.

Precisely the EU Jurisdiction's ever more incisive and penetrating activity (on the part of the European Court of Justice and the European Court of Human Rights) has contributed to the construction of the system of fundamental rights and values common at European level, perfectly in line with the essence of the fundamental Charters which represent a balanced set of values and principles on which the social and institutional life of a State is based.

This matter is part of a wider debate on the relationship between national and international legal systems: in order to establish the relations among the national ordinary Courts and the Constitutional one, as well as among these and the international and supranational Courts, it is required, first of all, having a fixed and stable system that provides the procedure for ensure the application of international Law into the domestic one. In this sense, it is needed taking into account the two main ways that allow the interaction between the systems: on the one hand the monistic approach, on the other the dualistic theory. According to the former approach, the international Law does not need to be translated into national Law since they represents a unified legal system, with a hierarchical relation each other. In this sense, the act of ratifying an international Treaty immediately incorporates the international Law into domestic system. On the contrary, since the second approach considers the international and domestic legal orders as two separated, distinct sets of legal systems, it sustains a non-direct application of the international Legislation into the national Law but it is required a "translation" of the first legal provisions through a specific internal law.

As far as concern to direct application of European Law into the Italian legislation system, we need underline the different approach held by national institutions towards the European Law 'stricto sensu', and the ECHR legislation. If the Italian Constitutional Court – as well as the other national Constitutional Courts and as the ECJ required – affirmed the disapplication of the domestic Law in contrast with the European one, it holds a different attitude towards Human Rights Court's normative. In fact, main doctrine stated that an internal Law in contrast with ECHR is unconstitutional: with two important decisions – n. 348 and 349 passed in 2007 – the Italian constitutional Court decreed the specific position held by ECHR into the internal Law system, considered it such as an external/third constitutional parameter (well-known as "norma interposta"). Nevertheless, we have to mention a minority doctrine that sustains the same procedure provided for the European general Law, that is the disapplication of domestic normative that diverges from Communitarian one.

8. The European Court of Justice, in its function of interpreting and guaranteeing the respect and application of the Treaties, has gradually expanded its range of action, operating a "field invasion" with regard to the jurisdiction on the fundamental rights such as carried out by ECHR and national Court.

Therefore, the need to regulate the relations between the two main European Courts has become clear, at least until the European Union does not subscribe the European Convention on Human Rights, as well as set up by Article 6, par. 2 of the Lisbon Treaty.

In this sense, the «Equivalence principle» states the exclusion of the ECHR review over any acts of the European Union, in case they provide an "equivalent" protection over fundamental rights such as Convention does. This principle is partially codified into art. 52, par. 3 ECHR. However, this exclusion shows an essential primacy of ECHR provisions respect to the European law, since this has to be "equivalent" to the first mentioned system.

Furthermore, this progressive European jurisdiction enlargement over fundamental rights claims and over economic rights seems to produce/involve a gradual restraint of the national constitutional Courts jurisdiction over the same matter.

Relevant to this aspect, the relation between the Italian jurisdiction and the other two European Courts. The dialogue established among national ordinary Courts and European Courts is much more direct and deeper: it has been encouraged by the development of an European common model for protecting and fostering fundamental rights and a common heritage of constitutional values. These factors have involved in a reduction of the role of the Constitutional judge about the protection of citizen rights: it exercises mainly is jurisdiction over distribution powers conflicts, among constitutional bodies as well as between central Government and subnational governments. This "juridical trend" is confirmed by the decrease in the number of incidental reviews brought before the Constitutional Court and by the simultaneous increase of the constitutional questions that concern power conflicts among constitutional bodies. This trend – still to be deeply analyzed – may have relevant consequences on the national and European institutions.

Б. Каравита ди Торитто: Конституциялық бақылау механизмдерінің қызметі етуі: еуропалық тәжірибе негізіндегі кейбір ойлар .

Мақалада XIX ғ. басынан бастап осы уақытқа дейінгі конституциялық бақылаудың эволюциясына талдау жасалған. Конституциялық бақылаудың негізгі моделі, оның сан алуан қызметі, осы құқықтық институттарды қалыптастыру жолдары мен олардың саралау ерекшеліктері қарастырылады. Конституциялық бақылауда Еуропалық Соттың және адам құқықтары туралы Еуропалық соттың артып отырған рөлі атап өтіледі.

Осыған байланысты азаматтардың құқығын қорғау ісінде бірқатар еуропа елдерінің конституциялық бақылау органдарының рөлінің біртіндеп төмендеу үрдісі және олардың қызметінің дау-дамайларды шешу саласына белгілі бір араласуы мен мемлекеттік органдар арасында, атап айтқанда, орталық үкімет пен жергілікті билік органдары арасында уәкілеттіктерді бөлу баяндалады.

Түйінді сөз: құқық, конституция, мемлекет, конституциялық бақылау органдары, конституциялық сот, конституциялық кеңес, Еуропалық Сот, адам құқықтары туралы Еуропалық сот, ұлттық және халықаралық соттардың диалогы, адам құқықтары.

Б. Каравита ди Торитто: Функционирование механизмов конституционного контроля: некоторые размышления на основе европейского опыта.

В статье дан анализ эволюции конституционного контроля от начала XIX в. до настоящего времени. Рассмотрены основные модели конституционного контроля, его разнообразные функции, пути формирования и квалификационные особенности данных правовых институтов. Отмечена возрастающая роль в конституционном контроле Европейского Суда и Европейского суда по правам человека.

В связи с этим констатируется юридическая тенденция постепенного снижения роли органов конституционного контроля некоторых европейских стран в деле защиты прав граждан и определенное смещение их деятельности в сферу разрешения конфликтов и распределения полномочий между государственными органами, в частности, между центральным правительством и местными органами власти.

Ключевые слова: право, конституция, государство, органы конституционного контроля, конституционный суд, конституционный совет, Европейский Суд, Европейский суд по правам человека, диалог национальных и международных судов, права человека.

НОВЫЕ КНИГИ

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