ACCESS TO CONSTITUTIONAL COURTS

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“La question du mode d’introduction de la procédure devant le tribunal constitutionnel a une importance primordiale : c’est de sa solution que dépend principalement la mesure dans laquelle le tribunal constitutionnel pourra remplir sa mission de garant de la Constitution”

Hans Kelsen 1

With my talk I’d like to prompt the discussion on our topic: Access to High Courts, considering three models of constitutional adjudication in Europe. I’m going to present the first two cases only briefly, and the third one in more detail.

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1 I’d like to draw your attention to an important difference among three European systems of constitutional justice: the French, the German [Spanish] and the Italian. The difference depends – so I’ll claim – on the type of referral, i.e. the mechanism activating the organ of control and, at the same time, on the actors allowed to put that organ in motion. So we shall see considering the three systems, respectively, parliamentary minority [through saisine parlementaire], citizens [through constitutional complaints = Vergfassungsbeschwerde/amparo] and ordinary courts [This is not entirely true, nonetheless essentially true if we look at the statistical data].

1 La garantie juridictionnelle de la Constitution (La Justice constitutionnelle), Revue de droit public et de science politique, vol. 45, 1928, p. 245.
I want to point out that the nature of the actors “putting in motion” the control has important effects on the function of constitutional adjudication inside the political system.

To begin with, let us consider the French constitutional system. At least since 1974 – when the action of the Constitutional Council became effective – the quasi-monopoly of the referrals has been in the hands of the political minority in the Parliament {data about the other agents of the saisine}. By referring a voted but not yet promulgated law to the Constitutional Council, the minority tries to limit the unchecked power of the political majority in the Parliament. The Constitutional Council – even more than a third non elective chamber – works, de facto, as a brake or a bridle to an otherwise sovereign democratic majority. This is the limited revenge of Montesquieu in a country dominated by the “Rousseauian-plus-representation” ideology of the general will. A good question to ask would be why do political actors obey the Council, which has no “democratic” legitimacy. My essential intuition is that the answer has to be found in the reasons underlying the 1974 reform opening up the saisine.

In Germany the quasi-monopoly of the referrals is in the hands of the citizens who can complain about the constitutionality of laws and acts of other branches of the government. We may want to describe this system as one in which citizens have more than just the political right to participate to the legislative process, choosing by repeated elections the representative legislators. They also have the opportunity to engage in a continuous, uninterrupted dialogue with their government, by sending constitutional complains to the justices in Karlsruhe and getting answers to their questions. This is certainly one important element of what Professor Habermas calls Verfassungspatriotismus, which is not just an element of an abstract
normative political philosophy but, up to a certain point, a concrete institutional aspect of the German constitutional system! It is quite intriguing that Habermas himself seems never to have realized the important role the Bundesverfassungsgericht plays from his own theoretical standpoint.

German citizens (like the Spaniards through the amparo) do not just add their own vote to millions of other ballots each “x” (4 or 5) years but are part of a constitutional conversation and exchange of arguments with their justices, representatives of the legal and constitutional order of the country.

In the Italian constitutional system, the referral to the Constitutional court is almost monopolized by ordinary courts. Judges send cases they have to decide to Rome, to the specialized organ called Corte Costituzionale, whenever they have a “reasonable doubt” [non manifesta infondatezza] concerning the constitutionality of the law they - the ordinary judges - have to enforce. More exactly, when they think that enforcing the law will produce some sort of injustice (not just a contradiction between higher and lower norms, to speak as a Kelsenian legal theorists).

Considering this last case in more details is what I’ve been asked to do here [and what hopefully I know better].

2. So, to my second point. I want to start with a few comments on the peculiar/particular form of the separation of powers established by the Italian Constitution in 1947 and the role of the Constitutional Court within

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2 Here we may want to notice that in Germany, where exists the same possibility of a referral from ordinary judges, this possibility is rarely used; likely because the German judge has to prove more than a non evident absence of doubts, but the existence of good reasons to consider the law unconstitutional; something intellectually more ‘costly’.
The Italian Founding Fathers, following a model that nowadays seems attractive to professor Ackerman – I’m thinking of his last article: The New Separation of Powers [Harvard Law Review, January 2000] –, established, beyond a pretty useless “perfect bicameralism”, a constitutional system based on a Trinitarian formulation – a topic in which Catholics are specialized! – made up by Parliament plus the People plus the [Constitutional] Court: as a specialized body in charge of constitutional review. Interestingly enough, the first example of this Trinitarian formulation can actually be found in an old article published by Raymond Carré de Malberg in 1931⁴, at the end of a long intellectual career spent supporting the almost monocratic constitutional system of the French Third Republic!

I will consider now the Italian separation of powers, focusing on the Constitutional Court and the mechanism of referral. Let me first point out that parliament, the people and the Court interact strongly when a political minority in the parliament tries to make an appeal to the people to call a referendum in order to repeal a law passed by the majority. The surmise here is that the majority in parliament is not representative of the majority of the voters. In such a case the Constitutional Court has the legal obligation to decide whether the referendum [that may end up abrogating the law] is “admissible” or not. That means the Court has the power to check the constitutional competence of voters to disprove the representative majority (negative legislation) or, the other side of the same point, it can guarantee

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³ I might say, using a distinction made by Michel Troper, that the Court is at the junction between the constitution as a “mechanism” and the constitution as “a set of values”. By this I mean that the Court is at the same time the judge of conflicts among state organs and the judge and the mediator of conflicts among constitutionally protected values.
the parliamentary competence to pass laws (positive legislation). Moreover, it has to check that the people, meaning the simple majority are not trying to modify the constitution.\textsuperscript{5} The Italian people, “in the forms and limits” established by the constitution, are actually sovereign. That seems \textit{prima facie} self-contradictory. The contradiction may defuse if we stop thinking like Hobbes. In a specific infra-constitutional sense, the Italian people are sovereign since they have the last world. In the sense that popular decision (referendum) cannot be overruled; which is by the way the minimalist definition of democracy. With the specification, that the only actor with competence of saying the “last word” is the people, constitutional adjudication is perfectly compatible with democracy. The existence of this sovereign power is the reason why its competencies have to be defined and delimited. But in the case of popular referenda the judge of those limits cannot be the parliament since it would be judge and litigant in the same trial!

More generally, elective institutions (government and parliament) in a constitutional system without an (absolute) sovereign, like the Italian one, have to confront two counter-powers. On one side, the people [the voters] can be asked to nullify a law by a referendum and, on the other side, the Constitutional Court can repeal a law if it \textit{contradicts the constitution}. Here I will ask the question: what exactly does it mean for the Court to check the constitutionality of the law? You may accept that it is not an empty or useless question if you agree, as you should, that it is somehow simplistic to claim [with Kelsen] that it means simply to verify whether the inferior norm

\footnote{\textit{Considérations théoriques sur la question de la combinaison du référendum avec le parlementarisme} [\textit{Theoretical considerations about the possibility of combining referenda with parliamentarism}], in Annuaire de l’Institut international de droit public, Paris, 1931, vol. II, pp. 272-84.}
contradicts the superior norm – as it were, a sort of geometry of laws. If it were that way, the legislators could anticipate the judgment of the CC and avoid passing an unconstitutional law, doomed ex ante to be nullified. For sure, the legislator does this, at least up to a certain point [Alec Stone persuasively made this point studying the French Constitutional Council]⁶. Nonetheless, quite often it is unclear what is compatible with the constitution and what is not. Consider, moreover, that in the Italian system most cases have a filter –which is also an interface – between the law (the legislator) and the Court: the judiciary, which, as already stated, has the competence to refer to the Corte Costituzionale. If one looks at the referrals [ordinanze del giudice a quo], it is easy to see that they have often the form of a request for help and clarification. The ordinary judge may have doubts concerning the consequences of enforcing a given law. She may think, for instance, that there is a contradiction or a tension between strict legality [implying the application of the law to the case in point] and justice, by which I mean the values and principles vindicated by the constitution. It may happen that the Constitutional Court does agree with the judge and will try to relax the tension, helping the judge to avoid injustice.

We have got to consider now concrete ways of avoiding it. But anyone can see that the Italian Court doing that puts actually in question or bypasses one of the tenets of the continental doctrine of the rule of law: the principle of legality. Claiming that the enforcement of the law can produce injustice means to break with the old idea so beloved by any legal positivist, including Kelsenian, that liberty is the obedience to laws. By law I mean

⁵ Referendum may play a role even in the process of amending the constitution [see Const. Art. 138]; but this is a different question I cannot discuss here.
⁶ The French case fits better with Stone’s analysis because of the specific form [ex ante] of the French saisine.
here “stable and general norms enacted by a legitimated lawgiver” (in that context, democracy adds to this definition that only an elective organ can legitimately enacts laws).

Many times, in order to avoid the tension between strict legality and justice, the Court simply produces what the German doctrine calls a verfassungsmaessige Auslegung (an interpretation of the law compatible with the constitution). But sometimes the latter is an interpretation claiming that the only interpretation of the law compatible with the constitutional principles consists of just not applying the law – that the Court doesn’t consider itself unconstitutional. {My preferred example is the Court’s decision on adoption that I commented in a previous article [see: Ratio Juris, 1998]. Let me give you another example drown from a recent opinion written for the Court by Justice Valerio Onida: opinion 436, 1999} [An Italian law, enacted in 1975, dictates that during the first three years after the sentence a convict cannot benefit from any relaxation of the conditions of his imprisonment. The judge who had to apply this norm to a prisoner younger than 18 years thought that the rule was too harsh and asked the Constitutional Court its opinion. After deliberation, the Court decided to modify the law declaring it unconstitutional in so far as it applies to people younger than 18]. That is an example of what I mean by review of a law which takes into account the unjust consequences of its rigid application.

Moreover, sometimes the law that the CC has to judge contradicts one but not all the constitutional standards or values. It is a fact that constitutions, and in any event the Italian constitution, aren’t simply unambiguous political decisions [Carl Schmitt’s positive Verfassung]. Instead they are a compromise between different values and principles (freedom and equality; individual liberty and collective security; and so on).
Now, an essential task of the Constitutional Court is to keep the balance and the equilibrium among these different values. I want to offer an example of that taken from an important function of the Italian CC: to adjudicate conflicts among branches of the central government [the equivalent of the German Organstreiten, perhaps a “political question” in the United States].

Some years ago, a man called Rudeness - this is no joke (the Italian name is Sgarbi) who was member of the Parliament, started to insult and violently address and to insult judges and other citizens, notably during a TV show called Daily Rudeness (Sgarbi quotidiani). Eventually, some exasperated judges asked an ordinary court to open a judiciary investigation against Mr. Rudeness. The Parliament opposed this move of the ordinary court saying that it was not allowed to open such an investigation since Mr. Rudeness, being an MP, was protected by art. 68, which says: “Members of the Parliament are not responsible for the opinion expressed in the exercise of their functions”. The judiciary appealed to the Constitutional Court, which decided that MP Rudeness speaking outside the Parliament in his personal TV show was not protected by the constitution, which, in this case, refers only to the exercise of the “parliamentary” functions. In its decision, the Court rejected the broad interpretation of art 68 suggested by the Parliament in defense of Rudeness. Actually, and this is what I want to stress, the Court had to find a balance between the parliamentary immunity and the right of the citizens (and judges are citizens) not to be subjected to aggression even by a member of the parliament and notwithstanding his family name.

With my examples I wanted to suggest two things. On one hand, there is no such role of the Italian Constitutional Court which would consist
simply of cleaning up possible “vertical contradictions” between statutes and constitutional norms, since possible conflicts arise in and among the constitutional principles themselves that need to be balanced. On the other hand, difficulties may arise between the law and its effects once concretely enforced. Here the problem goes deeper, as I hinted. To put it explicitly, I may say that the law is not necessarily the best or the only way to marry justice and government. Sometimes, the Court has to go around the law in order to avoid injustice.

There are contingent and structural reasons for discrediting the law. The contingent reason is the disqualification [in Italy, but not only in Italy] of the author of the law: the Parteienstaat or the political class. Personally I do not view this phenomenon without serious worries, but it may well be a trend more powerful than my wishes. The deeper, structural reason is that adjudication seems more able than legislation to respond to social demands for justice. We should remember that the law imposed its general form on the government when people were fighting against privileges (privata lex) and offensive exceptions to a common/general law. Nowadays, people seem more sensitive to a form of government able to single out specific and concrete situations, something that cannot be easily achieved by general, stable and inflexible laws. People ask for protection of rights, which is more than they did under the old Rechtssicherheit (the rule of law), since rights had multiplied in the last few decades and need to be handled with more refined instruments.

The point I wanted to clarify with my comments and examples is that the mechanism of referral that characterizes the Italian system of constitutional adjudication allows the Constitutional Court to rewrite (most of the time through interpretation) statutes passed by a majority, often quite
long ago, in order to avoid negative, even unjust, consequences emerging though concrete enforcement of the statute. This is what I suggest to call “lenient” legislation – to use an Aristotelian expression.

At the same time, since the Constitutional Court intervenes before the judgement of the ordinary courts, and at their request, there is nowadays no conflict between the judiciary and the organ of constitutional justice. On the contrary, the judiciary and the Corte costituzionale can and do work together as checks on the legislative body and to correct unjust laws.