APPUNTI LUISS

CONSTITUTIONAL LAW II

Appunti

F.A.B.

A.A. 2015/2016 - TESTO DI RIFERIMENTO : “THE ITALIAN CONSTITUTIONAL JUSTICE IN GLOBAL CONTEXT” DI V. BARSOTTI, P.G. CAROZZA, M. CARTABIA E ANDREA SIMONCINI (CAPITOLI DI RIFERIMENTO : 2-7)MATERIALI DIDATTICI : SLIDES DEL PROFESSORE E APPUNTI DELLE LEZIONI.

Sommario

CONSTITUTIONAL REVIEW OF LEGISLATION

In the juridical background we can distinguish two main models of constitutional review of legislation : the US model and the European model; these two system are very different in structure and functionality and, as a consequences, also the effects of their judgment are distinguishable.

- **THE US MODEL**

  INTRODUCTION : US model is characterized by a system of **decentralized and diffuse ordinary Courts**, whose **judgments are concrete and "a posteriori"**, moreover the **effects** of the decision are **"inter partes"** (differently from the "erga omnes" effects) and **retroactive**; furthermore, the decision, according to the **theory of "stare decisis"**, creates binding precedent so, when a different judge has to reckon subsequent cases with similar issues or facts, he has to consider the previous judgment, this procedure is typical of the common law system.

  FEDERALIST N.78 : In the discussion of the US model we should also consider the **Federalist n.78 of Alexander Hamilton**, written to explicate and justify the structure of the judiciary under the proposed Constitution of the United States. In particular he discusses the power of judicial review and argues that the federal courts have the duty to determine whether acts of Congress are constitutional, and to follow the Constitution when there is inconsistency. Hamilton viewed this as a protection against abuse of power by Congress, in fact he affirmed that the Courts were designed to be an intermediate body between the People and the Legislature, in order, among other things, to keep the latter within the limits assigned to their authority and the Constitution is, and must be, regarded as a fundamental law which should regulate the decisions of the judges.

  THE MARBURY V. MADISON CASE : In this context **the Marbury v. Madison Case of (1803)** was a landmark United States Supreme Court case in which the Court formed the basis for the exercise of judicial review in the United States under Article III of the Constitution. The landmark decision helped define the boundary between the constitutionally separate executive and judicial branches of the American form of government.

  COMPOSITION AND APPONTMENT : The **composition and appointment** in the Supreme Courts in diffused systems are the following :

  US Supreme Court → Justices appointed by the president with the advice and the consent of the Senate;

  UK Supreme Court → 12 members appointed by Her Majesty on the basis of a Prime Minister's proposal (after a selection commission).

  In all the cases they are chosen among judges, **law professors and law practitioners**.

- **THE EUROPEAN MODEL** :

  INTRODUCTION : The European model instead is demarcated by a **centralized and concentrated system** composed of a special tribunal, which is an **ad hoc tribunal**, whose judgment is abstract and preventive; in addiction, the **effects of the decision of**

unconstitutionality is void "erga omnes" and has **no retroactive effects** according to Kelsen.

KELSEN ORIGINAL VERSION OF THE SYSTEM : In the **original version of the system, shaped by Hans Kelsen for the 1920** Austrian Constitution, only certain given actors had access to the Constitutional Court; moreover, its review was abstract because it only necessitated a theoretical contrast between the statute and the constitution, rather than a concrete case or controversy to which the challenge statute had been or should have been applied. In addiction, Kelsen added that the **Constitutional Court is a negative legislator and the abstract judgment** has **effect only for the future.**

REASONS OF THE EXPANSION OF EUROPEAN MODEL : The **reasons of the expansion of the European model** lie in the fact that historically, in Europe, there was **more trust in the legislator and less in the judges**, in the **value of legal certainty**, essential in civil law, in the **non unity of the judiciary**, in the **link of Constitutional Court to the democratic branches** and in the **need for public visibility and for a mix of professional approaches and competences** , in particular in judgments regarding human rights and moral principle.

COMPOSITION AND APPOINTMENT : The **composition and the appointment** of the ad hoc bodies in centralized system are the following :

Austria →Judges, university professors, civil servants, lawyers appointed by the President from proposals given either by the Federal Government, the National Council or the Federal Council;

France →every citizen with experience in law and politics can be appointed. Three of its members shall be appointed by the President of the Republic, three by the President of the National Assembly and three by the President of the Senate. *De Jure* members former Presidents of the Republic;

Spain →Appointed amongst among magistrates and prosecutors, university professors, public officials and lawyers: 4 on Congress's proposal, 4 on Senate' proposal; 2 by the Government, and 2 by the General Council of the Judiciary;

Italy →law professors, law practitioners and judges appointed: 5 by the President of the Republic; 5 by the two Houses of Parliament in joint session; 5 by the ordinary and administrative supreme Courts.

MECHANISM OF REFERREAL TO CONSTITUTIONAL COURTS : Moreover we should also talk about the mechanism of referral to Constitutional Court which Kelsen defined of "utmost importance"; we can identified 3 different mechanism to activate the Constitutional courts which are "passive" organs, and these 3 ways have their own applicants:

Three mechanisms to activate Constitutional courts, which is a "passive" organ. Each mechanism has its own applicants:

Parliamentary minorities (the French so called "saisine parlementaire") → the court as a judge of the majority;

Citizens (the German "Verfassungsbeschwerde", and the Spanish "recurso de amparo") → the Court as a judge of the judges;

Judges (the Italian "eccezione di incostituzionalità") → the Court as a judge of the law .

THE AMBIGUOUS NATURE OF ITALIAN CONSTITUTION : the Italian system of constitutional justice has been defined as ambiguous and as a "hybrid"; the ambiguous nature of the Italian Constitutional Court derives primarily from the inherent ambiguity attached to any system of constitutional adjudication : the Court determines the validity of statutes, an act that is traditionally political, but it does so on the basis of rules and principles that are typical of judicial proceedings. This ambiguity reflects a classic and partly unresolved question that deeply affected the debate among the framers: whether the nature of the of the Constitutional Court is a political or jurisdictional.

CRISIS OF THE EUROPEAN MODEL : This crisis and so the decentralized and anti-monopolistic trends derive from:

1) **The diffusion of the Constitutional values and principles** : ordinary judges tend to apply directly the Constitution. Slight difference between interpretation in coherence with the Constitution and correction (or annulment) of statutes;
2) **The existence of other "Constitutional Judges"** : CJEU (Luxembourg) and ECtHR (Strasbourg);
3) **The primacy of EU Law**;
4) **The possibility/obligation for national judges to refer directly to ECJ**;
5) **Citizens can bring the State before the ECtHR against a violation of a fundamental right once used all internal judicial remedies → principle of subsidiarity** : it is based on the fact that the obligation to apply the guarantees of the European Convention lies primarily with the national authorities.

- **THE MODERN/CURRENT SITUATION** : Nowadays, among the Member States of the EU, we can distinguish:
  A) 19 States → Constitutional Courts;
  B) 3 States (Sweden, Finland, Denmark) → similar to US model;
  C) 4 States (Ireland, Greece, Cyprus, Estonia) → a combination of the two models;
  D) 2 States (Netherlands, UK) → no constitutional review of legislation (but now UK Supreme Court)

THE ITALIAN CONSTITUTIONAL COURT

- **THE COMPOSITION : article 135** of the Italian Constitution outlines the essential characteristics of the composition of the Court, which adjudicates as a unitary body rather than panels. The Court is composed of **15 members**:
  a) **5 appointed by the President of the Republic;**
  b) **5 elected by the Parliament in joint session** (with a 2/3 majority in the first two rounds; after the second round, a 3/5 majority is sufficient, secret ballot);
  c) **5 elected by the Highest judges**:
     a. 3 by the Court of Cassation,
     b. 1 by the Council of State,
     c. 1 by the Court of accounts.

- **INDEPENDENCE OF THE COURT AND ITS JUSTICE** : the independence of the Court and its Justices is assured in several ways :
  a) The Court has **full authority to verify the formal prerequisites for the appointment of**

its Justices;

b) The Court has **full organizational and financial autonomy** , which entails among other things the power to make its own rules of procedure, and jurisdiction over its employees
c) In order to justify the nature of the Court's power, these **norms are qualified as "rules of a supreme body" → primary sources of law → Constitutional Organ = independent from all other State organs**;
d) The **Constitution and other statutes provide for the incompatibility of the office of Justice with many other duties and activities**, both public and private;
e) **Constitutional Court Justices are appointed through a completely different system**, have a different tenure and background from the of ordinary judges, with the exception of those members elected by the Supreme Courts who are "ordinary judges" in the sense that they come from the ordinary judiciary and therefore bring the expertise of the bench to the Court.

- **THE TERM :** the Justices of the Court elect the **President of the Court from among their members, for a renewable term of three years**; the president tends to be elected based only on his/her seniority, and sometimes for only few months before his **nine year term** expires.

- **THE IMPORTANT POWERS OF THE PRESIDENT :** even through the general principle of collegiality applies to the Court, the President is vested with important powers:
  a) He **represents the Courts publicity** and **before the other political organs of the State;**
  b) He gives **annual address on the state of the Court;**
  c) **He chooses the reporting justice for a case**, who is in charge of writing the final opinion;
  d) **He convenes the Court in Camera di Consiglio** behind closed doors when the parties to the case have not filed an appearance and when a case is manifestly inadmissible or unfounded;
  e) 11 judges are required to decide a case, but **in case of parity, the vote of President prevails.**

- **THE PRINCIPLE OF COLLEGIALITY :** a strict principle of collegiality distinguishes the Italian Constitutional Court not only from the supreme courts of common law countries but also from some of its European counterparts . After an intense debate that consider both the strengths and the weaknesses of separate opinions, as well as the historical, cultural, and institutional reasons that explain the difference between common law and civil law judicial style, the principle of collegiality still prevails → **the prohibition on disclosing individual opinions favors judicial modesty and is thought to discourage judges from excessive emphasis on the judge's person as an individual rather than in the institutional role of the judges** → FUNCTION OF THE NECESSITY OF FINDING EQUILIBRIUM BETWEEN LAW AND POLITICS.

- **FUNCTIONS :** looking at **Article 134 of the Constitution** and **Article 2 of the**

Constitutional Law of March 11, 1953, n°1, we may single aut **four main areas of jurisdiction**, which are :

a) **Conflicts of attribution;**
b) **Charges against the President of Republic;**
c) **Admissibility of Referenda;**
d) **Judicial review of statutes;**
e) **Judicial review system.**

CONFLICTS OF ATTRIBUTION : the Italian Constitution, based on the idea of a strong institutional pluralism, establishes complex relationships between the branches of government; due to this complexity, the Constitutional Court settles "conflicts of attributions" which may arise among the different powers of the States. These conflicts may derives from the **horizontal allocation of state powers among the constitutional organs of the State (conflitti interorganici) → Notion of "Potere dello Stato"** : Constitutional bodies, individual judges, promoters of the abrogative referendum; **Excluding** : political parties, parliamentary minorities, groups, individual MPs, individuals. It can derives also from the **vertical allocation of powers between State and Regions and among Regions (conflitti intersoggettivi) → different from principaliter proceeding within judicial review of legislation** (it is not based on a piece of legislation , it is not related to the exercise of a specific legislative competence, but to a more general constitutional attribution, no deadline for the action) **and residual nature of the dispute as a judicial remedy.**

CHARGES AGAINST THE PRESIDENT OF THE REPUBLIC: he is not responsible for acts performed in his executive role, and can be prosecuted only for high treason or offences against the Constitution.

ADMISSIBILITY OF REFERENDA : article 75 affirms that some categories are expressly excluded, such as **ratification of international treaties**, **budget and tax law** and **pardon law**.

JUDICIAL REVIEW OF STATUTES : sometime is necessary to verify the compliance of general statutes with the Constitution.

JUDICIAL REVIEW OF LEGISLATION : The Constitutional Court exercises its power of judicial review of legislation through the direct method and the incidental method; moreover there are only **few justiciable acts** which are all those identified with the **primary sources of law**: **parliamentary legislation**, **regional statutes**, **decree-law** and **legislative decrees**; the acts not **subject to the revision of the Court** are the **EU law**, the **secondary legislation** and the **principles expressed in articles 2 and 139 of Italian Constitution**. As we said before, the access to the Court can be through a State or Regional reference (**principaliter proceeding**) and through Court references (**incidenter proceedings**). The **principaliter proceedings is focused on the division of legislative competences between State and Regions**, as established in **article 117 paras. 2,3,4**; after the constitutional

amendment in 2001, it is always on laws already in force. Even after the constitutional reform in 2001, still an **asymmetry between the two parties: the State can claim any breach of the Constitution by a regional piece of legislation and the Regions can claim only an invasion of their own competences by the State**. The **incidenter proceeding** raises during a court case before a judge so there are two necessary requirements, the **objective one, which regards the nature of the referring body**, the notion of "processo", and the **subjective one, which regards the nature of the referring bodies**, the so called "giudice a quo". Only the Constitutional Court is empowered to strike down legislation, for this reason we can identify this system of judicial review as a centralized system. In this proceeding, **the individual judge has a filter function**; he/she is called to analyze some **preconditions** such as the **relevance of the doubt ("question") and the doubt must be "not clearly unfounded"**. The basic elements of the judgment are:

a) **the question of constitutionality** → a doubt a non-compliance between the object and the parameter;
b) **the object** → the norm to be applied;
c) **the parameter** → the Constitution (or the constitutional norm) that the applicant assumes to be violated by the object;
d) **"norma interposta"** → a norm that integrates the parameter in the judgment on the object.

The **typology of decisions can be two**, the **orders** and the **judgments**; in particular, the judgments can be qualified according to their effects so we can distinguish **acceptance/dismissal** (also partial), **interpretative** and **manipulative judgments**. The **acceptance judgments** comports the **annulment of the object with erga omnes and retroactive effects**; the **dismissal judgments** imply that the same question can not be raised again by the same judge in the same court case (but a different judge, or even the same judge, may raise a different question about the same objects) and the **interpretative judgments** through which the court declares a certain interpretation of the given wording as unconstitutional.

- **THE CONCLUSION** : the Italian model of judicial review is becoming more diffuse and more concrete; today, ordinary judges are playing a more important role : they not only have the power to refer issues of constitutionality but are also called to apply the Constitution directly by means of the "interpretazione conforme a Costituzione", as described earlier; in addiction, considering the European frame, we can describe the Italian model of judicial review as a cooperative and networked system.

THE CONSTITUTIONAL NATURE OF THE EUROPEAN UNION

- **INTRODUCTION → SELF-LIMITATION TO THE EXTERNAL SIDE OF THE STATES' SOVEREIGNTY:** after the **tragic events of WWII**, States have became committed to accept **limitation to their sovereign power** for the **purposes of maintaining a**