Constitutional Adjudication, Italian Style

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June 2010

I. Introduction

We have written elsewhere of the rise of constitutional adjudication in the postwar period, especially in Europe.[1] We emphasized in our previous work that the new institutions of constitutional adjudication were nearly always created following periods of authoritarian rule: initially in Germany and Italy following the second World War; then in Greece, Spain and Portugal following the collapse of authoritarian regimes, and again in Eastern Europe and post Soviet Russia after the fall of the communist regimes in those countries.[2] We distinguished among three ideal typical regimes: which we called the Italian, German, and French Models. Of course our discussion of the French case emphasized that it was special both because it was not an authoritarian regime prior to the establishment of the Fifth Republic and because the French *Conseil Constitutionnel* was not really established as a constitutional court, though it has effectively become one after the Constitution was amended

[1] John Ferejohn and Pasquale Pasquino, 'Constitutional Adjudication: Lessons From Europe', *University of Texas Law Review*, 2004, vol. 82 (June 2004), 1671-1704. John Ferejohn and Pasquale Pasquino, 'Constitutional Courts as Deliberative Institutions: Toward an Institutional Theory of Constitutional Justice,' *Constitutional Justice, East and West: Democratic Legitimacy and Constitutional Courts in Post-Communist Europe in a Comparative Perspective* (Wojciech Sadurski, ed.), The Hague: Kluwer Law International, 2002, 21-36.

[2] There are exceptions : The South African system of constitutional adjudication was instituted following the apartied regime which may not have been authoritarian in the same way as those mentioned in the text. We discuss the French Conseil in the text. Recently, Wojciech Sadurski has expressed reservations about the "exceptionalist" thesis: "Judicial Review in Central and Eastern Europe: Rationales or Rationalizations?" Paper presented to the conference "Judicial Review: Why, Where, and For Whom?" 31 May – 1 June 2009, Hebrew University of Jerusalem.

in 1974.[3] Nevertheless we included this special case because it was established in new constitution and because by the time we are writing it plainly has demonstrated its potential to develop into a genuine instrument for constitutional adjudication.

Each of the three models exhibits a specialized constitutional court, which has *prima facie* a monopoly on constitutional adjudication – an institution that we and others have characterized as Kelsenian. Each of these courts is empowered to strike down legislation in certain circumstances. The chief differences among them have to do with the point in time when they can overturn a statute (or other legal order); whether they can control legislative or judicial (as in Germany) as well as parliamentary and executive actions, and what parties are able to gain access to them.[4] Roughly speaking, in the French model, the *Conseil* can overturn statutes prior to their promulgation, cannot review administrative or judicial actions, and can only be accessed by political actors, and mostly by the political minority in the parliament.[5] In the German model, the Federal Constitutional Court (*Bundesverfassungsgericht*) can review judicial and administrative final orders on appeal in constitutional complaint by an individual citizen, and can overturn parliamentary statutes in the process. In the Italian model, the court can review statutes if it is asked to rule on them by the judge of an ordinary court.

While our earlier work noted that the German model – which is open to ordinary citizens through the device of the constitutional complaint – was widely applied in the "third" surge of constitutionalism which followed the collapse of the Soviet system – commentators have said relatively little about the Italian model in that context. As we shall explain, the two models have very significant political implications and need to be distinguished. In fact there

[3] The Conseil was established in the 1958 Constitution as a device to control the legislature by permitting the majority the right to appeal legislative decisions. Insofar as the conservative majority retained effective control in the legislature this right of appeal was rarely used, except in one critically important case in 1971 when the majority fractured over a constitutional issue and the Conseil ended up overturning a government-backed law. In 1974, the government of Giscard D'Estaing obtained a *constitutional* amendment that permitted parliamentary minorities in either chamber the right to appeal against legislation. This right effectively gave the minority a right to appeal nearly any important governmental law and it has been extensively employed to check governmental projects.

[4] The control has been so far only *ex ante* in France, meaning that it operates only after the bill has been approved by the Parliament but before its promulgation. Both the German and Italian Constitutional Courts can exert *ex post control*: In the Italian case the CC can review a statute as soon as its application is challenged in a court, or immediately after the promulgation of the statute. In the German model, the FCC can take conduct a constitutional review after the exhaustion of legal remedies in. This question of temporality is very important and has never been clearly discussed in comparative analysis.

[5] A minority of 60 members of the House (the *Assemblée nationale*) or of the Senate is required for a referral; de facto it is only the parliamentary opposition that send referrals to the CC – we know only one exception, the first *saisine*, in 1971. Also the President of the Republic, the Prime Minister and the presidents of the House and the Senate are allowed to send referrals. The most important case was the referral by the president of the Senate Alain Poher in 1971, which is at the origin of the opinion that created the so called *bloc de constitutionnalité*, making the *Preamble* of the Constitution of the 5th Republic, the 1789 and 1946 Declarations of Rights, and the "fundamental principles of the republic" into constitutional texts that could serve as standards for the decisions of the Constitutional Council.

is recent evidence that what we are calling the Italian model may already be significant in post communist Europe. In a recent survey of post-communist constitutional courts Sadurski writes that, "The possibility of judicial review submitted through lower court referral channels exists in twelve of the twenty countries in the region. In Poland, for instance, so-called 'legal questions' addressed by regular courts to the Constitutional Tribunal …constitute now by far the highest proportion of all initiations of the review of constitutionality: in 2008 there were 121 such cases, compared with 25 initiations of abstract constitutional review by authorized organs."[6]

Recently it has become clear that the recent efflorescence of practices of constitutional adjudication, in Latin America, has seen the appearance of what we call the Italian model – in which the constitutional court decides constitutional issues that arise in the course of ordinary litigation.[7] At one level this is surprising since most of the Latin American countries have long had the *amparo* or constitutional complaint -- which postpones the question of whether a person's rights have been violated until the litigation in civil or administrative courts is complete -- which is also the most common instrument of the German system of constitutional adjudication. While it is true that the specific form of constitutional review varies widely throughout the region, one might have thought that increasingly vigorous constitutional adjudication would have relied on existing legal instruments and specifically the constitutional complaint. But as far as we can see that has not really been the case everywhere. Rather there has been experimentation with other forms of constitutional adjudication. Why? The idea we explore is this: that introducing effective constitutional review entails a shift in judicial-political relations, especially the relation between the ordinary judge and the institution that makes the final legal judgment on constitutional issues.

In our earlier papers, we suggested that the different models of constitutional adjudication effectively created "coalitional" partners in the political-constitutional system.

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[6] Wojciech Sadurski, « Twenty Years After the Transition : Constitutional Review in Central and Eastern Europe », presented to a conference on « Constitutional Courts, Human Rights, Democracy and Development » at the Konrad Adenauer Stiftung and Max Planck Institute, Heidelberg, 12-13 November, 2009, page 11.

[7] The recent increase of constitutional adjudication throughout Latin America is very complex and there are many more « models » on display in the region than our very simple categorization can account for. Julio Rios-Figueroa has recently provided a very useful survey and analysis of Latin American practices ussing the traditional analytical categories (abstract vs concrete ; a priori vs a posteriori, centralized vs decentralized,intra partes vs ergo omnes). « Institutions for Constitutional Justice in Latin America, » to appear as Chapter One in Helmke, Gretchen and Julio Ríos-Figueroa (eds.) Courts in Latin America. New York: Cambridge University Press, forthcoming. These categories, while they may be useful in giving an overview of change over time are difficult to fi with the Italian model which is, in various ways, both concrete and abstract. That is to say that a referral to ICC is always initiated in a concrete case. But the ICC does not decide the case but only judges the statute (deciding to strike it down in whole or part, or to rewrite it, or to restrict its interpretation) referring the case back to the judge to decide the concrete case.

The German model, since it focuses on reviewing final rulings by ordinary or administrative courts, enlists citizens to challenge judges. The FCC is in this respect a kind of "popular" court – of course it is not at all similar to the Athenian popular courts (the *dikasteria*) that were made up of citizens sorted by lotteries – because it is a court open to the complaint of any citizen who feels that her rights were violated in a judicial or administrative setting. [8] In the Italian model, by contrast the court is not open to citizens but to judges: the ICC cannot act unless a judge appeals for a ruling so ICC is in that sense allied with ordinary judges, and its creation effectively empowered these judges to take a part in constitutional review. In the French model, since 1974, the alliance is between the CC and the parliamentary minority which has the power to effectively activate a constitutional review of a statute. The constitutional amendment passed in 1974 permitted minority appeals effectively gave the minority some power to control the majority through the Constitutional council.

While each of these new constitutional institutions created a new characteristic set of coalition partners it also created characteristic opponents. In Germany the opponents are ordinary or administrative judges whose work is being put under a microscope in the FCC. In France it is the parliamentary majority and nowadays the President of the republic, whose

[8] In this context it is possible to speak of "constitutional patriotism". This expression was introduced in Germany by the political scientist Dolf Sternberger, who in a text published with the title *Verfassungspatriotismus*" (1979, in *Schriften*, Frankfurt am Main: Insel Verlag, 1992, vol. 10, pp. 13-16, translation by Allison Brown) wrote notably:
"State authority is not concentrated in one place, neither at the top nor the bottom, neither on the left nor the right; instead, it is distributed widely. We participate in it in many ways, not only passively and enduringly but also actively. The constitution does not live only in the parliaments of the Federal Republic, not only in the states and local communities, not only in the governments and administrations. In addition, the courts serve as the "third power," particularly those that check and balance the legislature and the executive; they have proven amazingly effective in keeping political power within its limits. Social organizations, in all their diversity, exist and work as guaranteed by the basic freedom of association; they represent the powers of a living constitution, even if they are not aware of it. It is up to the political institutions to respect their rights and to keep their enthusiasms from running roughshod. Every collective bargaining session is part of the living constitution; and the autonomy of the bargaining agents, who require no intervention by the authorities, itself represents a piece of the state. Not to mention the simultaneous conversation between the many voices of so-called public opinion that grows out of the freedom of speech and information. Citizens' initiatives and demonstrations are also part of a living constitution: the state is present not only in the squads of police officers who escort them and assure the peacefulness required by the constitution. It is a good constitution that provides for all these things and for a powerful leadership. We do not have to be afraid to praise the Basic Law. At any particular moment we might censure the government, charge the opposition with being too weak, resent the flood of laws passed by the parliament, find spirit and imagination generally lacking in the parties, feel burdened by bureaucracy, and consider the trade unions too demanding and the reporters too intrusive – the constitution allows all of this to be improved; it advises and encourages us to improve it. A certain degree of moderate dissatisfaction serves to benefit the state. It doesn't diminish the loyalty that is due the constitution. But the constitution must be defended against declared enemies – that is a patriotic duty." http://germanhistorydocs.ghi-dc.org/pdf/eng/Chapter14Doc6Intro.pdf

Jürgen Habermas made the expression of constitutional patriotism popular in a variety of his writings (for instance: *A Berlin Republic. Writings on Germany*, Cambridge : Polity Press, 1998). It is possible to argue that the constitutional complaints are an instrument by which the citizens participate to the defense of the constitution, playing an active role in the defense of their own rights.

work is being evaluated. In Italy, while government legislation is being judged as in France, the other enemy were the traditional supreme courts (actually the two highest appellate courts in the Italian judicial system: the *Corte di Cassazione* and the *Consiglio di Stato*), which lost their monopoly over reviewing the work of lower court judges. Of course, insofar as all these are systems of constitutional adjudication, the parliamentary majority is in all cases a potential opponent. But which parliamentary majority is opposed depends on the point in time when judicial review takes place: In France it is the sitting parliament at the moment of promulgation. In Germany and Italy, the legislation of old parliaments and old majorities is vulnerable and current legislation is much less so (especially in Germany where normally all ordinary remedies at law must be exhausted prior to filing a constitutional complaint). Moreover as we have observed elsewhere, the constitutional complaint is rarely against a piece of legislation, but is usually directed against a judicial ruling.

The first three waves of the institutionalization of postwar constitutional adjudication (I. Germany, Italy and Japan in the late 40s after the Second World War;[9] II. Spain, Portugal and Greece from the late 70s; III. Eastern Europe after 1989, South Africa in 1994, and South Korea 1988) were mostly established in newly adopted constitutions, the fourth wave (Latin America) has seen fewer new constitutions. Rather, older institutions and structures – generally intended for other uses -- have been transformed in ways that permit them to achieve higher levels of constitutional adjudication.[10] This situation is perhaps similar in this respect to the unexpected evolution of the French *Conseil Constitutionnel* into a constitutional court in that a pre-existing set of alliances had to be re-arranged for the transformation to occur. In France this was accomplished by a split among the conservatives (in 1971) and by the decline of the *gaulliste* majority which may have produced a constitutional amendment (1974). In the Latin American countries something similar may be happening, notably in Chile which we will discuss below. That is at least what we conjecture.

[9] We do not discuss Japan here since unlike the other Axis powers, they did not adopt a specialized constitutional court but was forced by the American framers of its constitution to accept instead to keep constitutional review powers in the Judiciary with a powerful Supreme Court at the apex. It stands as the one post authoritarian nation to have adopted an American style solution but with a more institutionally powerful Supreme Court at the top.

[10] A good example of this is Uruguay which has not created a constitutional tribunal or court but authorizes its Supreme Court to receive referrals on constitutional questions from ordinary courts, as in the Italian model. It may be significant that Uruguay's Supreme Court is part of the regular judiciary because it gives to the judiciary the power to check the legislature, which is very substantial departure from the notions of parliamentarism that have been widely accepted throughout those countries with some democratic experience, that see judges as required to apply legislative texts quite literally. And, as a cautionary note we point out constitutional review powers of the Uraguayian Supreme Court were swept away in the 1973 coup when the constitution itself was suspened in favor of a presidential/militiary dictatorship (and constitutional rule was not re-established until the late 1980s)

There is an irony in the late evolution of constitutional adjudication in Latin America. Most of the Latin American countries have long had supreme courts empowered to undertake constitutional adjudication. And because nearly all of the Latin American legal systems had some form of the *amparo* (constitutional complaint) one might have thought that their courts would have been open to popular grievances about violations of fundamental rights. But typically those courts and the lower judiciaries were dominated by very conservative legal professionals who were inclined to show a great deal of deference to whatever regime was in power, and especially to be highly protective of property interests. Moreover, the *amparo* was often restricted to having only *intra partes* effects, as perhaps seemed natural in civil law systems. As in most of Europe, the lower courts tended to be staffed by judges recruited into the judicial career out of law school. Typically the SC exercised a great deal of control over the careers of ordinary judges and not merely their particular rulings. And often, membership on the SC was very dependent on the political regime (viz Argentina and Mexico cases for examples). This situation is in many ways similar to other political circumstances: the court system in contemporary Japan seems to present a similar picture. But the Japanese have not, so far, decided to reform their judicial institutions in the direction of any of the European models (as, for example, the Koreans have). So from our perspective it is the postwar transformation in Italy that offers the most illuminating parallel.

A key aspect of that transformation was a breakdown of the traditional left opposition to judicial review. From the standpoint of the Italian Communist party, conservative property protecting judges could not be trusted to review new legislation that they hoped and expected to issue from the new parliament. Surely some of that new legislation would seek to institute social legislation and to disturb traditional institutions of property.[11] As things transpired, the left was to be disappointed in short order because they were unable to win the legislative elections in 1948. Prior to that (unexpected) setback occurred the only way the left could have been persuaded to accept any kind of constitutional review, therefore, was to keep it out of the hands of the judges, and especially those high court judges who controlled the judicial institutions. That is the reason that the Kelsenian model of a Constitutional Court was politically required in Italy, since a Kelsenian Court is located outside the judiciary altogether.

But there are many ways that such a court could have been implemented and is necessary to ask how this new institution was supposed to work. The Cassation Court

[11] It is a sort of paradox that progressive legislation expropriating southern Italian *latifundia* was passed by the Christian-democratic governments under American impulsion at the end of the 40ties and at the beginning of the 50ties, in order to defuse the danger of a stronger control of the communist over the poor peasants of the south of the country.

proposed to control referrals to the new ICC – thereby making it its political dependent in a way. Proponents of the new court saw that this would weaken it perhaps fatally and proposed, instead, to permit any judge to refer questions to it. Because no single body could control access to the court, none could stop it from deciding a question if there was any judge in the whole country who could be persuaded that there was a constitutional issue at stake. In effect ordinary judges were invited to compete with each other to play a role in the process of constitutional adjudication. This system made it very likely that constitutionally dubious statutes (and many of these would have been enacted during the quarter century of Mussolini's government) would be examined in the ICC. And it no doubt liberated the ordinary judges from control by the higher judiciary (who rose to their posts during the fascist period).

We think some of the post war "Italian" circumstances have been reproduced more recently: a conservative judiciary, inclined to defer to the executive, where both the decisions and careers are controlled by the higher courts, and where there is a felt political need to reconcile left and right to the transition. Such a circumstance may have held in several countries in Eastern Europe after the collapse of the Soviet supported regimes. And it may have occurred during at least some of the transitions from authoritarian rule in Latin America, and specifically in Chile.

II. The Italian Model

The standard account of *constitutional adjudication* in continental Europe emphasizes its differences with the American mechanism of *judicial review*, an opposition based on three major structural differences: 1. it is *concentrated* in a specialized constitutional tribunal rather than *diffused* throughout the judiciary 2. it permits *a priori* review rather than being confined to *a posteriori* adjudication of constitutional claims 3. and, the questions posed in a constitutional court are *abstract* – asking whether a legislative text is constitutional -- rather than *concrete*.[12] Here we want to dwell on the last dichotomy in order to show why it is misleading.

The abstract-concrete dichotomy is actually based (as is much of the comparative analysis in this field) on the French case in which litigation could never trigger constitutional

[12] Typical of these dichotomous approach: L. Favoreu, "American and European Models of Constitutional Justice", in D. Clark (ed.), *Comparative and Private International Law. Essays in Honor of John Merryman*, Duncker & Humblot, Berlin, pp. 105-120.

review and was therefore necessarily abstract for that reason. But the history of constitutional adjudication in France is exceptional in the European panorama. And, in any case the original French model is now in some question due to the recent reform that permits judicial referrals to the *Constitutional Council* that the French parliament passed in 2009, a question that we will discuss later. We shall also say something on the first opposition, concentrated vs. diffuse review. As to the second dichotomy, *a priori* vs. *a posteriori*, it is also drawn from France where, at least until the enforcement of the recent constitutional reform, no statute could be nullified, since only voted bills before their promulgation could be declared unconstitutional.

Narrowly rational choice (we would say, materialist) explanations of the origin of political institutions, such as constitutional courts,[13] tend to focus on the *interests* of political actors. But one can seek a more general account that takes into account the way actors conceive of their interests, and specifically by considering two other factors *ideology* and *myopia*. By ideology we mean the beliefs and values publically held by political actors – which may be different from their private opinions and intentions. These public attitudes are important because they represent ways that public actors are constrained to explain their activities. Myopia may also be seen as the "short term interests" of public actors: specifically the necessity of taking account of periodic elections or, to put it otherwise, the election cycle. We may illustrate the consequences of this broader formulation in the following narrative.

At the end of two years of intense and very interesting debates, the Constituent assembly of the post-Second World War Italian Republic decided in December 1947 to establish a Constitutional Court, for the first time on the European continent, patterned after the Austrian *Verfassungsgericht* (the experience of Portugal in 1911, of Czechoslovakia in 1920 and of Spain during the Republic were too short to allow us to say anything relevant about them) which was established in 1920 and which was dismantled after 1930, when the man who inspired it, Hans Kelsen, was removed from the Court by the conservative political majority in Vienna.[14] The debate that took place inside the Italian Constituent assembly was extremely contentious and could not be resolved until the very last days of the constitution-making process, because of the stubborn and long-standing opposition of the social-communists and of the pro-British liberals, who defended the model of absolute parliamentary

[13] T. Ginsburg, *Judicial Review in New Democracies*, Cambridge University Press, 2003.

[14] The pretext of this decision was that Kelsen declared as unconstitutional a statute that made divorce impossible. Growing anti-Semitism was another cause of his removal (even though he had converted to Catholicism in 1905 and was, in any case, an agnostic. In the atmosphere of Austria at that time, evidently such things were no barrier to anti-Semitic persecution).

democracy.[15] Probably because of these divisions, the text of the constitution only specified the competences of the new organ and not the details of its implementation.[16] Because of the contentious nature of this decision nothing could be specified in the constitution as to the mechanism of access to the Court – evidently a crucial question since without it nobody could have opened the door of the institution – so that question was left to be resolved by a parliamentary statute.

In the section of the fundamental law on *Constitutional Guarantees* (notice that in he Italian Constitution the CC is not part of the judiciary, so it is established in a special part of the Constitutional text: "Guarantees of the Constitution" Title VI, Part II) we read:

Art. 134

The Constitutional Court shall pass judgment on:

– controversies on the *constitutional legitimacy of laws* and enactments having force of law issued by the State and Regions;

– conflicts arising from *allocation of powers of the State* and those powers allocated to State and Regions, and between Regions;

– charges brought against the President of the Republic and the Ministers, according to the provisions of the Constitution.

(italics ours)

The constitutional provision seems to imply indeed that the Court would work a mechanism that can be described as a Kelsenian (or Marshallian) constitutional syllogism: if a statute law, a norm of inferior rank, contradicts a constitutional provision, then the first one has to be cancelled in order to maintain the strict hierarchy of norms, which is required for a legal system with a *rigid* constitution. The phrasing of art. 134, as it is apparent, doesn't say who is able to activate the CC by bringing a case or question to it. As a court, the CC was, by definition, a "passive" organ that had to wait to be asked before giving answers. It may have seemed natural (to the constituent assembly) that the CC had to be a political actor (as was established in the 1958 French Constitution) since the CC was introduced to protect the losers of the elections from the winners, which could threaten and dismantle the constitutional

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[15] On those debates see P. Pasquino, "L'origine du contrôle de constitutionnalité en Italie: Les débats de l'Assemblée constituante (1946-47) ; in *Rivista trimestrale di diritto pubblico,* 2006, n.1, p. 1-11

[16] In February 1948, the Constituent Assembly itself enacted Constitutional Law No. 1/1948, stipulates who can petition the Court and in what way. Other implementation statutes were not enacted for several years as the short run interests and beliefs of party leaders shifted with political events, so the Court did not begin to function until the Sping of 1956.

compromise. But this is not what was actually decided in January 1948 when the first constitutional law was approved regulating the access to the CC.

Notice that the Constituent Assembly was still active after the approval of the constitution until the end of January, and moreover that the government, run by the Christian-democratic leader Alcide De Gasperi, was very keen to pass immediately a statute regulating the referral. This was because he very much wanted to activate the CC as soon as possible so it would be able to maintain the constitutional bargain after the upcoming legislative elections, because there seemed a real possibility that the Christian Democrats would be defeated!

The text of the article 1 of the constitutional [*ratione materiae*] law N° 1/1948 reads: "The question concerning the constitutional legitimacy of a statute law or of a norm of the same rank of the Italian Republic may be sent to the Constitutional Court by the *ordinary judge during* a trial or by one of the litigants, *if the judge* doesn't consider the question *evidently lacking any justification*" [italics ours].[17]

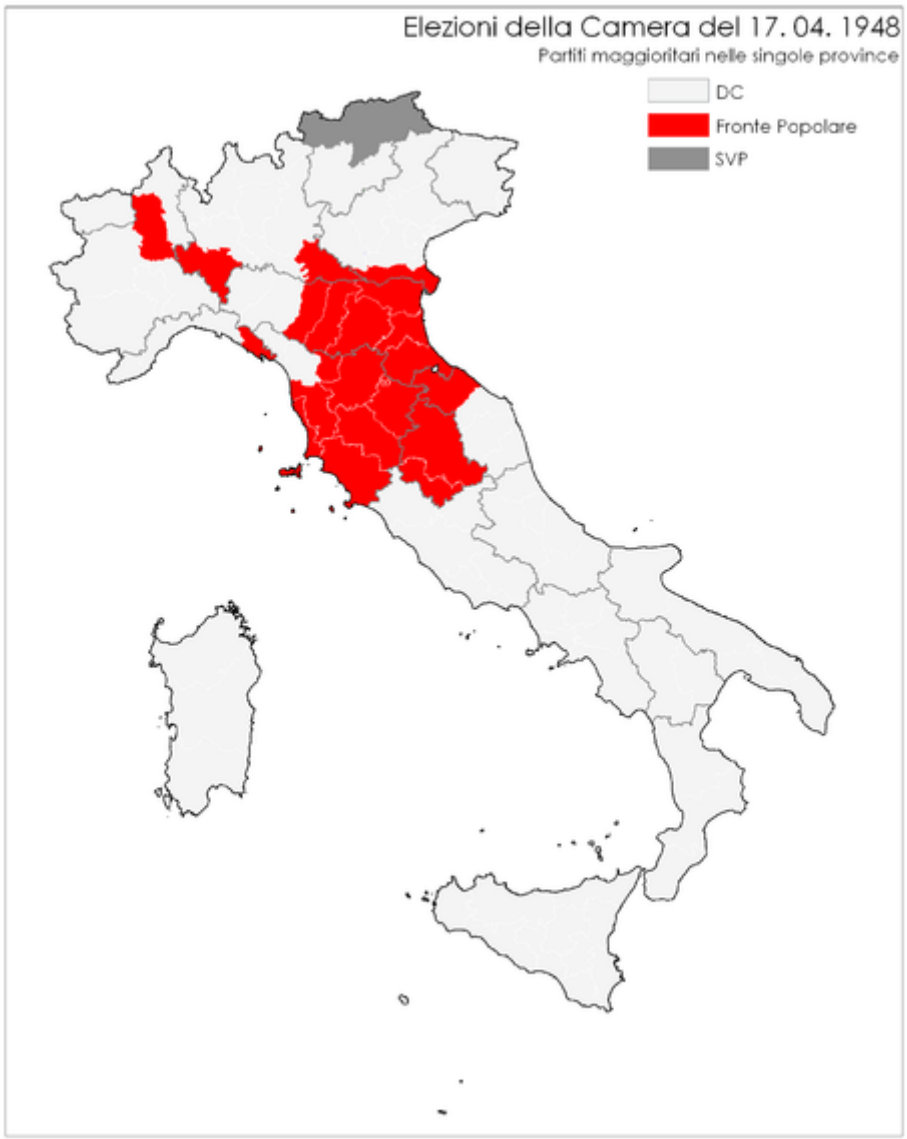
Before considering the effects of this crucial decision, let us step back and consider the possible reasons that explain the behavior of the political actors during the Constituent Assembly. This body was divided in two almost equal political groups: the Christian-democrats, on one side, and the social-communists on the other (a very important intellectual role was also played by few other representatives, notably by Piero Calamandrei a law professor, and by members of a left non Marxist party, the *Partito d'Azione*, favorable to constitutional adjudication). As we have emphasized the outcome of the upcoming legislative elections, scheduled after the end of the Constituent assembly (April 18th 1948) seemed particularly uncertain to everyone. One would think that actors motivated by simple material interests would have agreed upon the introduction of an independent organ able to protect the constitutional agreement to avoid the possibility that the newly elected majority could abuse its powers. But at that time only the Christian-democrats supported that project; with the exception of the minuscule *Partito d'Azione*, the left strongly opposed that idea (as did the French left in 1946, 1958, 1974, and 2008!). Why?

Supporting this provision would have seemed *prima facie* in the interests of the communists given that they had no (objective) certainty of repeating their very good score in

[17] http://legislature.camera.it/_dati/Costituente/Lavori/LEGGI/68nc.pdf , for the Italian text.

1946.[18] The reason can be presented as a peculiar mix of self-interest, ideology and myopia. In effect the social communists held beliefs that had been shaped by their ideological understanding of political structures and motivations and thought that gave them had a powerful advantage in the upcoming election. In other words, they thought that for various historical and material reasons, that they were likely to continue to gain strength in new elections and that nothing should be put in place to limit the powers they would inherit once they formed a majority. The ideological background of the social-communist public discourse was the Jacobin version of Rousseau's political theory: popular sovereignty is exercised by the parliament, the only governmental organ with democratic legitimacy,

[18] In fact the DC won the absolute majority in the first legislature, 1948-53. The Figure with the electoral results is very interesting since it shows the stability of the Italian electoral behavior during the last 60 years!



because its members are elected, and by an executive accountable to it[19]. This further tapped into a long tradition in French political thought, which was opposed to any institutional limitations on direct majority control, such as bicameralism for example. Any obstacle to the exercise of parliamentary power, that is to the power of the elected majority, was a considered reactionary attempt to make impossible the social and political reforms that the working class would have been able to implement after winning the upcoming elections.

From this ideological viewpoint, a constitutional court was seen by the social-communists not only as an anachronistic aristocratic institution, but its unelected and unaccountable members seemed likely to be a bunch of conservative bourgeois empowered to stop the social and political reforms that would be passed by a democratic parliament. This view was not intrinsically wrong, but just, as we will see, slightly myopic in combining Jacobin institutional ideology with the Marxist belief that the rise of the left was both inevitable and immediate and pointed to a victory of the social-communists at the very next election. And what if they would have lost the race? Well, they could have answered, not wrongly so: "Was it not a certainty that a conservative aristocratic court would be antagonistic to the interests of the Italian working class?" So, as far as they were concerned there was no need for a constitutional court which would inevitably be a body defending the interests of the Catholic and conservative social elites (the obsession with the elites in social-communist discourse is a well known mania).

Moreover, independently of their different ideologies and interests, both the social communists and the Christian Democrats were thinking in shortsighted perspectives, which seem natural for election driven politicians. Both the Christian democrats and the left were quite sure that the judges (here the members of the CC) in Italy would always be conservative and indoctrinated in the French legal culture requiring the strict subordination of judges to the letter of the positive statute law. As regards the constitutional court, this proved to be completely wrong.

The experience of the opposition after the staggering victory of the Christian democrats in the election of April 1948 and the transformation in the culture of the Italian judges; - very relevant in this perspective is the final declaration of *Gardone*'s meeting of the Italian ordinary judges in1965, when they declared their *subordination to the constitution*

[19] In the French Constitution of 1793, art. 64, we read : "[the executive council] shall be renewed each half session of every legislature, in the last months of its session" [the legislature last one year]. This is evidently an extreme and peculiar form of accountability.

before the subordination to statute laws [20] - are at the origin of the radical change of the attitude of the social-communist vis-à-vis the CC. But we have to come back now to the constitutional law enacted before the first legislative election in February 1948. Thanks to this statute, the ordinary judges were established as the gatekeepers of the CC. It is not difficult to understand why. Catholic, conservative and largely educated under the fascist regime that lasted in Italy more than 20 years, and always subservient to the political branches, the ordinary Italian judges of the end of the 1940s in Italy certainly did not represent a threat to the power of the elected majority. In case of victory of the left they would have very likely kept the door of the Constitutional Court just as well closed as they would in the case of a Christian Democratic government. So this "bizarre idea" of the CC, as Togliatti described it, seemed to be a perfectly conservative mechanism, in that it would probable not disrupt the normal operations of parliamentary government. Yes, in the *short run,* this seems right. Though, from a longer perspective, as the composition of the ordinary judiciary evolved, the choice made in January 1948 by the political class had important systemic consequences on the Italian mechanism of constitutional adjudication.

During the constitutional debates and in article 134 the central idea was to guarantee the hierarchy of norms introduced by the *rigid* constitution, which the Constituent Assembly had decided would replace the *flexible* constitution [*Statuto Albertino*] that governed Piedmont from 1848 and then Italy, from 1861, for one century and was no obstacle at all[21] to the establishment of a fascist regime. In this perspective the job of the CC had to consist simply – so to speak – in making sure that no statute would contradict the constitutional norm. Notice by the way that the section 2 of art. 134 gives the court a connected and major function: the one of being the judge of the conflicts not only among the central government and the regions, like in the original jurisdiction attributed by the American Constitution to the

[20] Associazione nazionale magistrati, XII Congresso nazionale. Brescia-Gardone 25-28-IX 1965. Atti e commenti, Arti grafiche Jasillo, Roma, 1966, pp 309-310. See also: L'ordinamento giudiziario, edited by Alessandro Pizzorusso, Il Mulino, 1974, p. 31 fn.; the final report by Giuseppe Maranini, ivi, p. 257.

[21] Evidently a rigid constitution is not at all a guarantee of its stability, nor of the respect of its provision by the elected majority; a dramatic case in point is the Weimar constitution that was rigid and though entirely disregarded by Hitler:
Article 76 of the Weimar Constitution writes:
"The constitution may be amended by legislation. Constitutional changes become valid only if at least two thirds of the members are present and at least two thirds of the present members vote in favor of the amendment.
Decisions of *Reichsrat* regarding a constitutional amendment also require a two-thirds-majority. If, requested by referendum petition, a constitutional amendment shall be decided by plebiscite, the majority of the enfranchised voters is required in order for the amendment to pass.
If *Reichstag* decided on a constitutional amendment against *Reichsrat* objection, the Reich president may not proclaim the amendment, if *Reichsrat*, within a period of two weeks, demands a plebiscite to be held.".
But if there is a Constitutional Court, which was not the case in Weimar Germany, the violation of the constitution can at least be signaled. Pakistan was recently an example of what we have in mind.

USSC, but also of *conflicts among the branches of the central government*. If we do not believe in the (Madisonian) mythology of a self-forcing equilibrium of the horizontal distribution of power and also reject the Bodinian-Jacobin idea of legislative sovereignty, an independent judge of this type of conflicts represents the only possibility of conceiving of a limited governmental power. The German Federal Constitutional Court assumes the same competence under the name of *Organstreit*. And indeed the German law speaks of *abstrakte Normenkontrolle* when the court has to decide of the constitutionality of a statute law *facially* we could say [*ohne dass subjektive Rechte verletzt sein müssten*], meaning independently from its enforcement or application, since the consequences of the statute are supposed to be clear and clearly unconstitutional or not. But the mechanism of referral invented in Italy in 1948 introduced a different function of the Constitutional court making it a proper *co-legislator* quite far away from the simple Boolean logic according to which a statute can just be constitutional or not.

More and more starting from the Sixties, ordinary judges, recognizing that they were subordinate to the constitution even more than to statute laws, have been active in sending questions to the CC in Rome. These questions are posed either by the litigants in a trial and sent to the CC, or by the judge acting on his own.[22] Sending a question is not costly for the judge given the modest precondition for sending the question: *non manifesta infondatezza* - [evident futility]. In any case the condition for a question arises during the trial and is very often not connected with the *facial* unconstitutionality of the norm, with the exception of old fascist statutes still in the books (notably the as to criminal law), but with what we could call the effects of the statute in its concrete enforcement/application. This corresponds roughly to the American distinction between facial challenge to a statute's constitutionality and an as applied challenge to the statute's application under specific factual circumstances. So she, the Italian judge starting from the 70ties, was asking the CCourt: "Please, what I have to do with this statute which, if applied in this case, seems to produce unconstitutional (we may want to say: unjust) effects?" So the CC was asked because of the specific access mechanism to do more and less than exercise a constitutional syllogism, it was asked to help the judge in her job of doing justice in the specific case, by means of the constitutional interpretation of the law in the light of the specific facts of the case itself.

This is the concrete origin of a type of very important decision of the It. CC they call *interpretative di rigetto* (in Germany where there is a similar tradition of adjudication they

[22] We cannot say "from her" since the beginning, for in Italy the judicial career opened to women only in 1965 (!), by the way thanks to some opinions of the Constitutional Court, see notably the *Sentenza* n. 33/1960.

speak of *verfassungsmäßige Auslegung* = constitutional interpretation). Through such a determination the Court may declare a statute *constitutional*, provided it is interpreted in a way that the Court specifies in its opinion (*sentenza*). A number of important consequences follow:

1. The CC is no longer a merely negative legislator of the Kelsenian doctrine; it does much more than just nullifying statutes, it rewrites them (co-legislative function);
2. The CC starts not from the "facial content" of the statute but from the problems emerging from the concrete enforcement of the statute in a particular case;
3. This makes it possible to limit potential conflicts with the political branches since the statute is not cancelled but only modified through interpretation;
4. and it makes obsolete the dichotomy between counter-majoritarian and deferential Court's opinions (in Italy like in France and mostly in Germany it is not possible to speak of the opinions of the justices, since the decisions are collective and the vote, when and if it takes place, covered by secrecy, justices in these countries are like the members of a good string quartet not soloists);
5. the opinion of the CC cannot therefore be considered "abstract" *stricto sensu*. To be sure the decision is about the law and not directly about the case at the origin of the *preliminary question* sent by the judge, and its effect as the Italian doctrine says are *erga omnes* (not very different from a *precedent* in the so called common law legal systems), but the decision originates in the context of problems emerging from the concrete enforcement of the statute;
6. because of its independence vis-à-vis the judicial power and its constitutional prerogatives the CC cannot (unlikely the USSC as the last appellate court of the judicial pyramid and also unlikely the *Bundesverfassungsgericht*, at least concerning constitutional questions) directly decide the case and can only provide an interpretation of the statute (art. 134 It. Const.). But the statute is not considered abstractly but in terms of its real effects in actual circumstances; what is abstract is the language and the rhetoric of the CC opinion.

We said at the beginning that the dichotomy diffuse/centralized is part of the canonical opposition between the American judicial review and the European constitutional adjudication. Now it should be apparent that this opposition works only in a very limited perspective. It is true that Italian (ordinary) judges cannot nullify and even refuse to enforce statutes, but having a kind of quasi-monopoly of the referral, they effectively have in their

hands the key that opens the door of the Constitutional Court and even more so in enforcing its decision, so it seems evident that they play a crucial role both *before* and *after* the opinion of the CC. *They put it in motion and enforce its decision*. Without the cooperation of ordinary judges the CC would be a *vox clamans in deserto.* Moreover ordinary Italian (and other European) judges directly dis-apply European Union law in way parallel to their constitutional role..

This shows also how myopic were the leftist members of the Constituent assembly opposing the CC. The judicial body is in Italy the only branch of the central government able, with the cooperation of the CC, to exercise an active counter-power vis-à-vis the political branches: the Parliament and the government. In a parliamentary *Parteienstaat*, like Italy, Germany and France (notably since the introduction of the *quinquennat* that makes *de facto* impossible the *cohabitation*, the French version of the American "divided government") an elective counter-power is impossible (even though conflicts inside the governing majority are non impossible and may limit the power abuses by the elected branches). Moreover, the control *per via incidentale*, coming from the concrete questions that judges have to adjudicate seems to be the best mechanism to protect individual rights. By that we do not mean only the rights of individuals in general (like voting, freedom of speech and religion), or those of groups that can organize themselves and act on the political system by lobbing or election. We mean the rights of individuals who have no access to the political process. Since they are too weak to coalesce or not rich or numerous enough to lobby (especially in countries that have almost no equivalent of the ACLU). A referral to the It. CC costs, in principle, nothing[23]. And its members are not up for re-election so that they can care a bit more about justice than about consent.

In a more important sense, constitutional adjudication of the Italian type puts an end to the myth of the negative legislator as it allows us to redefine the old and obsolete doctrine of the governmental functions. It is not any more believable to claim that the legislators enact statutes and the judges apply them. But legislative and judicial organs each have normative power, in the Kelsenian language, the power of *Rechtserzeugung* – each can produce legal norms. The Parliament enacts general and abstract norms, so to speak, under a veil of ignorance. Even Portalis, the father of the French post revolutionary codification recognized

[23] The plaintiff doesn't need to hire a counsel; hearings are not necessary for the It. Court's decision and the referral comes from the judge *a quo* not from a lawyer.

that the legislator cannot foresee everything[24] and even less we would add the effects of the general and abstract enacted statutes. The CC with the help of the ordinary courts of justice rewrites, partially, statutes on the basis of the often unforeseeable consequences of them. And if needed, it can exercise the function of *eipieikeia* [25] which abstract laws cannot really recognize.

The control *incidentale* starting from concrete cases has also another important function as constitutional counter-power, notably versus the possible exorbitant power of the elected majority controlling both the parliament and the executive in parliamentary democracies. An example can explain what we have in mind. The Berlusconi government passed last year a statute (124/2008, known as *Lodo Alfano* from the name of the attorney general who introduced the bill) making impossible to put on trial the prime minister for whatever crime he is supposing to have committed in his life during the exercise of his political functions (no crime was excluded from stealing an apple to slaughter). Evidently since the same majority controls the two houses of the Italian Parliament and since the executive is the expression of this majority, the opposition cannot do anything except hoping to win the next elections and change then the law. But an ordinary *judge* could send the statute immediately to the CC, asking if she has to apply it (meaning in this case, cancelling the trial),, in effect asking the CC to check the constitutional character of the statute. In this case this happened immediately because the prime minister was under trial in different courts in Italy. And in October 2009 the It. CC nullified the statute arguing that it violated the constitutional principle of citizens' equality in front of the law.

The model introduced in Italy in 1948 and that exists also in Germany, Spain and a variety of other countries, has now been introduced also in France since a so called *organic law* specifying the art. 61-1 of the constitution has been approved. [26] And, as we are finishing

[24] « Nous nous sommes également préservés de la dangereuse ambition de vouloir tout régler et tout prévoir. Qui pourrait penser que ce sont ceux mêmes auxquels un code paraît toujours trop volumineux, qui osent prescrire impérieusement au législateur, la terrible tâche de ne rien abandonner à la décision du juge ?

Quoi que l'on fasse, les lois positives ne sauraient jamais entièrement remplacer l'usage de la raison naturelle dans les affaires de la vie. Les besoins de la société sont si variés, la communication des hommes est si active, leurs intérêts sont si multipliés, et leurs rapports si étendus, qu'il est impossible au législateur de pourvoir à tout. » Jean-Étienne-Marie Portalis, Discours préliminaire du premier projet de Code civil, (1801); http://classiques.uqac.ca/, p. 16

[25] Suspending the law in a specific case if its enforcement would produce injustice.

[26] See P. Pasquino "*New Constitutional Adjudication in France: The Reform of the Referral to the French Constitutional Council in light of the Italian Model*", 3 INDIAN JOURNAL OF CONSTITUTIONAL LAW, 105-117 (2009).

this paper, the French *Conseil Constitutionnel* has, for the first time in France's history nullified a statute, based on a referral of a constitutional question from a court.[27]

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III. Latin American Circumstances

Julio Rios-Figueroa has written a very useful survey of constitutional practices in Latin America that he presented at the 2009 meetings of the America Political Science Association.[28] He was able to demonstrate, among other things, an striking increase in the independence of constitutional judges in recent years. He also showed an increase in the number of constitutional organs situated outside the judiciary (six such entities have been created since 1950 and only one was abolished). Most interestingly he also argued that the powers of the constitutional adjudicator have increased steadily since 1950 as well. His paper also provides an illuminating breakdown that allows the reader to see precisely how changes have occurred year-by-year. He demonstrated that the biggest change has been in the availability of abstract, centralized and a posteriori review. Such review was available in less than half of the 18 nations he studies in 1945, whereas more than three quarters of them have such a possibility now. There has been relatively little change in the (already high) levels of concrete a posteriori review (mostly this the various forms of *amparo* but it also would include the Columbian *tutela* -- roughly 80% of the countries have both centralized and decentralized forms of such review – but would also include one aspect of the Italian model). At the same time, there has been a substantial rise in *erga omnes* effects of constitutional review (from about 25% to nearly 50%).

While Rios-Figueroa's classification is quite abstract, it shows that the biggest change is roughly in the direction of one aspect of the Italian model (which exhibits both concrete and abstract, centralized a priori review) with, perhaps, a smaller move in the direction of the German model (via increasing the availability of centralized *amparo* rulings with *ergo omnes effect),* though it is difficult to be sure of this he does not give comparative detail about the time point at which constitutional review is available. His classification says little about two other issues that we believe are important features of the Italian case: the development of a specialized constitutional tribunal which has a monopoly over specifically constitutional issues (we noted above that there have six new constitutional courts created since 1950); and, the allocation of the power to refer questions to this tribunal to ordinary judges (a priori

[27] The new French constitutional law permitting referrals to the Conseil Constitutionnel does not (yet) permit ordinary judges to make referrals but restricts that right to the supreme courts.
[28] JulioRios-Figueroa,« Institutions for Constitutional Justice in Latin America, » **op cit.**

review can occur in many different ways – either through referral from an ordinary court, from a high court, or from direct petition as with the various forms of *amparo)*. But as we have said, Rios-Figueroa's classification is too abstract to capture these important aspects of the Italian model so we cannot really make any stronger claim for developments in this direction over the whole region.

It may be useful, however, to examine one particular case to see concretely how some of these transformations may have occurred. For that purpose we draw on another paper that was presented at the same 2009 APSA panel, where Rios-Figueroa first presented his results and which describes recent developments in Chile.[29] Couso and Hibink, in their extraordinarily rich and detailed paper, describe traditional Chilean courts as deferential to political authorities and not at all inclined to intervene to provide constitutional guarantees against the sitting government. They argue that courts in Chile have traditionally isolated themselves from political developments in various ways as a means to protect their institutional prerogatives and have functioned mostly as appliers of legislated codes. But they note that this traditional pattern appears to be changing as courts are showing more willingness, for example, to examine the conduct of the earlier military regime, and specifically to look into institutional protections for its members, and to embrace international human rights standards. From our point of view the most interesting institutional development, is the reinvigoration (or maybe the invigoration) of the Constitutional Tribunal (which was itself established under the Pinochet regime, but was until very recently reluctant to use its powers of constitutional adjudication[30]), which has become an important actor in these changes.

Their paper surveys the main changes in the administrative structure of the judiciary after 1990 and almost reads (to us) like a textbook for transforming a conservative and apprehensive judiciary into an institution capable and willing to assert and defend constitutional claims, and specifically human rights claims, against the government. "…this change is most dramatic at the level of the Constitutional Court and in pockets of the lower ranks of the regular judiciary, but it is almost imperceptible at the high echelons of the of the judiciary, such as the Courts of Appeals and the Supreme Court." (35) Traditionally, the judicial career in Chile did not attract high quality talent and the judicial career was itself

[29] Javier Couso and Lisa Hibink, « From Quietism to Incipient Activism : The Institutional and Ideological Roots of Rights Adjudication in Chile, », chapter four in Helmke, Gretchen and Julio Ríos-Figueroa (eds.). Courts in Latin America. New York: Cambridge University Press, forthcoming.

[30] The Constitutional Tribunal initially was restricted to a priori abstract review, to be conducted prior to the promulgation of a legislative statute, as was the case of the French Conseil Constitutionnel until this year).

carefully regulated by a Supreme Court, anxious to defer to executive authority, to read statutory texts literally and to avoid political entanglements. But after the Pinochet period, successive presidents attempted a number of judicial reforms including some of a technical nature that were aimed at improving the quality and training of new judges and restricting the control over their careers by the high court. Others were more substantive and had the effect of making ordinary judges more interested in taking on human rights cases. While these transformations have been very important, the authors suggest that they would not have effected a substantial change in Chilean jurisprudence without some positive change at the top. The key changes concerned the membership and jurisdiction of the Constitutional Court (in 2005) specifically "…the elimination of the members of the Supreme Court from the Constitutional Court and their replacement with legal academics and former politicians…" and the "… transfer of the *recurso de inaplicabilidad* to the Constitutional Court…."(37). The results of these changes have been dramatic in producing two interlinked transformations: first a rise in judicial activism by ordinary judges and second the rise in a powerful and independent constitutional court.

We refer the reader to the Couso-Hibink paper for a description of the changes in the judicial career and the makeup and dispositions of the lower judiciary (ie. the rise of judicial activism): they link this to the removal of control of the judicial career by the Supreme Court, the development of judicial schools, and the introduction of new (adversarial and oral) criminal trial procedures, all of which increased the independence and prestige of ordinary judges. We are more interested, here, in the rise of the Constitutional Court.

Couso-Hibink point to two key changes: the Constitutional Tribunal was no longer to have Supreme Court members sitting on it (3 of the 7 justices were from the SC before 2005). Second the "*recurso de inaplicabilidad*" was transferred from the Supreme Court to the Constitutional Tribunal, which "…gave lower-court judges and average citizens access to the latter for the first time." (p. 18). This permitted the Constitutional Tribunal for the first time "the power to decide actual cases…" (18) The transfer "provoked a dramatic increase in the caseload of the Constitutional Court."(19), Decided cases "…increased ten-fold…" (19) making membership on the Constitutional Court a full time job. Overall the effect has been to make the Court more active and visible to ordinary citizens because "… can directly address their concerns via the *recurso,* often in a highly visible fashion without directly confronting the government. At the same time, this newly active Court has been "… more likely to directly confront the government in its abstract a priori jurisdiction …" (19)

From our viewpoint a key aspect of the reform is this: "transfer of the *recurso de inapplicabilidad* from the Supreme Court to Constitutional Court also opened a new opportunity for ordinary judges at any level to challenge the constitutionality of a law that affects a case before them." (19) By *empowering ordinary judges to send questions directly*, after 2005 Chile's justice system has been transformed decisively in the direction of the Italian model. Our reading of their paper suggests that, in effect, the 2005 transformation leveraged the ongoing changes in the lower judiciary accomplished in the reforms, which the authors describe in detail, in a way that effectively created a new alliance: between the ordinary judge and the Constitutional Tribunal. The ordinary judge, who is now more highly educated and less dependent on judicial superiors, is now invited to play an active role in defending constitutional rights just as Italian judges can.

We do not mean to say that all of the important changes that Rios-Figueroa describes can be seen as a move to the Italian model. The region has seen a great number of innovations at the constitutional level, many of them drawing on local traditions. But the Italian model opens a new avenue for constitutional adjudication which works partly by developing the competence and powers of the judiciary itself, and partly enlisting its members in the project of constitutionalism that can be pursued outside the channels of the judiciary. The interesting politics of this transformation has the capacity to break down older political alliances and replace them with new alignments that seem likely to enhance the legal protections for fundamental rights and liberties.

Conclusion

In conclusion we offer a tentative assessment of the properties of the three models of constitutional adjudication that we introduced at the beginning of the paper, an assessment based both on the dimension of temporality and the mechanism of access to Constitutional Courts.

In the (old) *French model* system control is immediate (*if asked*)[31] but unable to take into account the effects of the enforcement of the statute, which is scrutinized by the Constitutional Council "under a veil of ignorance", we mean without knowing the concrete forms and effects of its enforcement in real cases and controversies. As Guy Canivet (the ex president of the French Supreme court – the *Cour de cassation*) claims, the French

[31] Guy Carcassonne has drawn attention to the so-called "*non saisines*", meaning the statutes that for different reasons are not referred to the *Constitutional Council*, (« Les non saisines », in: *Trente ans de saisine parlementaire du Conseil Constitutionnel*, Economica, 2006, p. 45-48).

Constitutional Council has to anticipate possible effects of the statute enforcement, which is not really possible. Moreover the French constitutional adjudication is so far (before the reform of the 61-1) exclusively internal to the "representative circuit": citizens are excluded from the control likewise the judicial power.[32]

The *German* system presents opposite features. The access is very large and open virtually to every human being – one doesn't even need to be a German citizen in order to send a constitutional complaint to Karlsruhe.[33] But the waiting period is normally very long since the GCC is an appellate court for constitutional complaints (*Verfassungsbeschwerden*), in a way similar to the USSC. The difference with US judicial review is that German inferior courts cannot hear constitutional complaints so they can be heard only after exhaustion of the regular litigation process (there are exceptions, but we are describing the rule).

As a result there Germany has produced a kind of "popular" constitutionalism. Citizens as such are involved in a dialogue with the GCC about the meaning of their Constitution. They do not need any political (France) or institutional (Italy) mediation to access the organ that guarantees their rights. A negative side effect could be considered the huge caseload. With more than five thousand complaints each year the GCC has barely the time to be a deliberative body (most of the decisions concerning constitutional complaints are taken by

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[32] « *En premier lieu, que l'acte à contrôler soit un traité, une loi organique ou une loi ordinaire, le Conseil constitutionnel ne peut être saisi que par des acteurs de la vie politique: l'exercice du droit de saisine ne dépend donc pas de l'intensité de l'atteinte portée aux droits des individus, mais de la simple appréciation de l'opportunité politique faite par les détenteurs du droit de saisine. De fait, des lois portant gravement atteinte aux droits de l'homme peuvent ne pas être contestés par des hommes politiques peu soucieux de défendre, par exemple, les droits des membres d'une minorité peu populaire dans l'opinion publique ou des droits traditionnellement mal défendus. C'est une première faiblesse du système français.* »

« En effet, ce qui est demandé au Conseil constitutionnel, ce n'est pas d'apprécier à la lumière de la Constitution les effets produits par l'application d'une règle de droit à l'individu. Ce qui est demandé au juge constitutionnel français, c'est tout autre chose: il doit soit constater qu'il y a une sorte de contradiction flagrante entre les règles du droit constitutionnel et les dispositions contenues dans le texte examiné, soit de pronostiquer que le texte examiné produira à l'avenir des effets juridiques qui seront en contradiction avec les règles constitutionnelles. La première hypothèse est nécessairement exceptionnelle: elle correspond en réalité à la notion de violation directe de la règle de droit dans le contentieux administratif. C'est donc la seconde hypothèse qui est la plus importante. Or, dans cette seconde hypothèse, il est demandé au Conseil constitutionnel d'imaginer tous les cas dans lesquels le texte examiné est susceptible de produire des effets incompatibles avec la Constitution, ce qui est une tâche impossible à faire, surtout lorsqu'on se souvient qu'il doit rendre sa décision dans un délai très bref. […] *le contrôle ne peut pas être déclenché au moment de l'application de la loi, c'est-à-dire au moment où la loi est susceptible de manifester sa malfaisance; enfin le contrôle repose sur de simples suppositions. Le contrôle se ramène à un exercice de pronostic.* » (italics ours),
Michel Fromont, « La justice constitutionnelle en France : l'exception française », *Le nouveau constitutionnalisme. Mélanges en l'honneur de Gérard Conac,* sous la direction de Jean-Claude Colliard et Yves Jegouzo, Economica, Paris, 2001, p. 177.

[33] Gertrude Lübbe-Wolff, „The German Federal Constitutional Court from the point of view of complainants in search of their constitutional rights", in P. Pasquino (ed.), *La giustizia costituzionale ed i suoi utenti,* 2006, Milano; Giuffrè, 2006, p. 61-88.

single justices in panels of three of them and only exceptionally they reach the plenum of one of the two 'Senate' – the two groups of 8 justices who make up the GCC).

The Italian model (*ricorso incidentale*)[34] allows a pretty quick control since any statute can be sent to the CC even the first time of its possible enforcement (like in the case of the *Lodo Alfano*) and the application of the law is suspended until the judgment/decision of the CC. Citizens (*litigants*) are involved through the ordinary courts where the judges are nowadays normally willing, when they do not take the initiative themselves, to send the questions to the CC. The It. CC is moreover a very deliberative organ since all the decisions are taken by the Court sitting in its *plenum*. A limit of the model is nonetheless that administrative and judicial decisions are not object of constitutional scrutiny but only parliamentary statutes. Why does the "Italian system" seem attractive? In a country that takes rights seriously it is a way to give rapid access to rights protections to citizens, avoiding at the same time the flood of individual complaints. The concrete review has moreover an effect *erga omnes* and not just on the specific case like for the *amparo*.

In France there was an additional reason at the origin of the 61-1 which will introduce a variation of the Italian model: The European Courts were increasing creating a way for judges or ordinary people to circumvent French courts on some issues. The ECJ permits direct (Italian-style) referrals by ordinary judges. And the ECHR permits litigants to appeal (German-style) when their rights are violated after exhausting all legal remedies. As a result a number of disputes aboutFrench legislation were bypassing internal legal controls, so that the government and the *Président* Sarkozy suggested to bring some element of that type of litigation under the control of French institutions, meaning the *Conseil Constitutionnel* [35].

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We argued in the beginning of the paper for two kinds of implications: one for the litigants and protections of rights; the other for ordinary judges: here we have mostly been

[34] To avoid misconceptions or useless objections let us remind in a footnote that we are speaking here of *Idealtypen*. The It.CC has four majors constitutional competences: next to 1. the control of constitutional legitimacy of statutes send to it by ordinary judges – historically the essential bulk of its activity –, the Court is the judge 2. of conflicts concerning the respective legislative powers of the regions and the national parliament, 3. of constitutional conflicts among the branches of the national government and 4. last but not least, the *ex ante* control of the constitutionality of popular referendums cancelling statutes passed by the Parliament.

[35] See the article on the 61-1 by P. Pasquino and the exhaustive research by Alyssa King on the French CC: « Un récit à propos d'un projet de loi: la réforme de l'article 61-1 de la Constitution et le justiciable en droit constitutionnel français », Mémoire soutenu à l'EHESS, July 2009.

addressing the first but we have to come back to the second too. Especially since, one of the things that seems to have been happening in Latin America (and maybe in Eastern Europe) is that Italian style adjudication empowers ordinary judges and makes them more likely to play more active, and even aggressive judicial roles than they have done previously. We think the Italian model has begun to play an important role in fostering this transformation of the judiciary and in its capacity to protect human rights. And it may well lead to a strengthening of constitutional controls on the political branches overall, in a region that has long resisted such limitations.