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A Comparative Study of the Austrian and the American Constitution*

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The Austrian Constitution discussed here is that of October 1, 1920, as valid on January 1, 1930; on that day the text of the Constitution was officially published by an act of the Austrian Chancellor in the *Bundesgesetzblatt für die Republik Österreich* (the official Gazette for the obligatory publications of statutes). All later amendments will not be considered because they were enacted under a semi-fascist régime and had the tendency to restrict the democratic control of the constitutionality of legislation.

The Austrian Constitution of 1920-30 provided for guarantees to assure the constitutionality not only of statutes but also of ordinances. The latter were general legal rules enacted by administrative organs and not by a parliament, that is by a legislative organ. In Austria, as well as in other countries of the European continent these ordinances played a much greater rôle than in the United States. There were two kinds of ordinances: Ordinances based on statutes, *i.e.* ordinances the function of which was to execute the statutes, and ordinances which, like statutes, were enacted directly "on the basis of the constitution," that is ordinances issued in place of statutes. The significance of ordinances is due to the peculiar position which the administrative authorities occupy in the legal systems of the European continent. There they have, in their capacity as law-applying organs, the same rank as courts. The administrative act has in principle the same legal effect as a judicial decision. Besides, the administra-

* Cf. J. A. C. Grant, "Judicial Review of Legislation under the Austrian Constitution of 1920," *The American Political Science Review.* Vol. 28, pp. 670-676, (1934); and Hans Kelsen, "La garantie jurisdictionnelle de la constitution (La justice constitutionelle)," *Révue, de Droit Public et de la Science Politique en France et a l'Étranger*, Vol. 35, pp. 197-259 (1928).

tive authorities, especially the higher ones like the chief of the state and the ministers, have the power to issue general legal norms, and these general legal norms, the administrative ordinances, have the same legal effect as statutes. Hence the administrative authorities are not only law-applying but also law-creating organs and have a competence which has the same character as that of the legislative organs.

Ordinances issued "immediately on the basis of the Constitution" could be unconstitutional in the same way as statutes. Ordinances issued "on the basis of statutes" were illegal if they did not correspond to the statute. Since the Constitution provided that ordinances issued on the basis of statutes have to correspond to these statutes, the enactment of an illegal ordinance was a violation of the Constitution. The illegality of ordinances enacted on the basis of statutes was an indirect unconstitutionality.

In such a legal system the judicial review of ordinances is even more important than that of statutes, for the danger that administrative organs will exceed the limits of their power of creating general legal rules is much greater than the danger of an unconstitutional statute.

As soon as the administrative organs of the United States in the course of actual political and economic evolution will have attained a similar legal position as the administrative organs of the European Continent the problem of the constitutionality of ordinances will play a much more important rôle in this country than it does today.

II

The constitutionality of legislation (this term taken in the broadest sense and comprising also enactment of ordinances) can be guaranteed by two different means: Personal responsibility of the organ which has enacted the unconstitutional norm, and non-application of the unconstitutional norm. The Austrian constitution provided for both. Only the latter is of interest here. Non-application of the unconstitutional norm could be effected by authorizing the law-applying organs to test the constitutionality of

the norm which they had to apply in a concrete case, and to refuse its application in this particular case if they found that the norm was unconstitutional. This is in principle the legal situation in the United States.

The fact that a law-applying organ declares a general rule unconstitutional and does not apply it in a given case means that this organ is authorized to invalidate the general rule for the concrete case; but only for the concrete case, since the general rule as such—the statute, the ordinance —remains valid and can, therefore, be applied in other concrete cases.

The disadvantage of this solution consists in the fact that the different law-applying organs may have different opinions with regard to the constitutionality of a statute,[1] and that, therefore, one organ may apply the statute because it regards it as constitutional whereas the other organ will refuse the application on the ground of its alleged unconstitutionality. The lack of a uniform decision of the question as to whether a statute is constitutional, *i.e.* whether the constitution is violated is a great danger to the authority of the constitution.

Before the Constitution of 1920 came into force the Austrian courts had the power to test the constitutionality of statutes only in so far as the due publication of the latter was concerned. The power of the courts to pass on the legality and hence on the constitutionality of ordinances, however, was not restricted. A judicial review of legislation was therefore possible only within very narrow limits. To enlarge this institution was one of the aims of the constitutional reform of 1920. It was not considered desirable to grant to every court the unlimited power of passing on the constitutionality of statutes. The above mentioned danger of non-uniformity in constitutional questions was too great; for in Austria as well as in other countries of the European continent the administrative authorities had no power to test the constitutionality of statutes and were

[1] The term statute will in the following be used in a sense comprising also ordinances unless an express distinction between the two concepts is made.

therefore obliged to apply a statute even if a court, *e.g.* the Supreme Court *(Oberster Gerichtshof)*, had declared the statute unconstitutional. It must be added that in Austria, as well as in many other countries of the European continent there were other courts besides the ordinary courts, especially administrative courts which occasionally had to apply the same statutes as the ordinary courts. Hence a contradiction between administrative courts and ordinary courts was not at all precluded. The most important fact, however, is that in Austria the decisions of the highest ordinary court, the so-called *Oberster Gerichtshof*, concerning the constitutionality of a statute or an ordinance had no binding force upon the lower courts. The latter were not forbidden to apply a statute which the *Oberster Gerichtshof* had previously declared unconstitutional and which it had, therefore, refused to apply in a given case. The *Oberster Gerichtshof* itself was not bound by the rule of *stare decisis*. Accordingly, the same statute which the court had declared in a given case unconstitutional could be declared by the same court as constitutional and be applied in another case. For these reasons a centralization of the judicial review of legislation was highly desirable in the interest of the authority of the constitution.

The Austrian Constitution of 1920 in Articles 137-148, attained this centralization by reserving the judicial review of legislation to a special court, the so-called Constitutional Court *(Verfassungsgerichtshof)*. At the same time the Constitution conferred upon this court the power to annul the statute which it had found to be unconstitutional. It was not always necessary to annul the entire statute; if the unconstitutional provision could be separated from the other part of the statute, then, the court could annul only this provision. The decision of the court invalidated the statute or a special provision thereof not only for the concrete case but generally for all future cases. As soon as the decision came into force the annulled statute ceased to exist. The annulling decision of the court was in principle to be effective only *ex nunc;* it had— with an exception of which we shall speak later—no retroactive force. Such a retroactive

force could hardly be justified, not only because of the critical consequences of every retroactive effect, but especially because the decision concerned an act of the constitutional legislator; and the legislator was also authorized to interpret the constitution, even if he was subjected in this respect to a judicial control. As long as the court had not declared the statute unconstitutional, the opinion of the legislator expressed in his legislative act had to be respected.

The rule that the decision of the Constitutional Court by which a statute was annulled had no retroactive force had, however, one exception. The statute annulled by the decision of the court was no longer to be applied to that case which gave occasion to the judicial review and to the annulment of the statute. Since this case occurred before the annulment, the latter was with respect to this case retroactive in effect.

The judgment of annulment became effective on the day of its publication, unless the Court provided for a delay. This delay could not exceed one year (Art. 140, Par. 3). It enabled the legislature to replace the impeached statute by a new and constitutional one before the annulment became effective. If the case which gave occasion to the judicial review of the statute was decided before the annulment came into force, the annulled statute had to be applied to this case. Then the annulment had no retroactive force with respect to this case either.

The decision of the Constitutional Court by which a statute was annulled had the same character as a statute which abrogated another statute. It was a negative act of legislation. Since the Constitution conferred upon the Constitutional Court a legislative function, *i.e.* a function which, in principle, was reserved to the Parliament, the Austrian Constitution of 1920, provided that the members of the Constitutional Court had to be elected by the Parliament and not like the other judges, to be appointed by the administration. The Austrian Parliament was, according to the federal character of the Constitution, composed of a House of Representatives *(Nationalrat)* and a Senate *(Bundesrat)*. Consequently, the President, the Vice-President and half of

the members of the Court were elected by the House of Representatives, whereas the other half of the judges was elected by the Senate (Art. 147). This way of constituting the Court was accepted in order to make the Court as independent as possible from the administration. This independence was necessary because the Court had the control over different acts of the administration, especially the judicial review of the ordinances issued by the Chief of the State, the Prime Minister, and the other Ministers, and the power of issuing these ordinances was of the greatest political importance. By a misuse of this power the administration could easily suppress the parliament and thus eliminate the democratic basis of the State.[2]

The reform of the Austrian Constitution in 1929 was, not in the least, directed against the Constitutional Court because of a conflict between the latter and the administration. The amendment did not alter the jurisdiction of the Court but provided that its members should no longer be elected by the Parliament but be appointed by the Administration (Par. 65 of the Federal Statute of December 7, 1929, BGBI. N. 392). The old Court was, in fact, dissolved and replaced by a new one almost all the members of which were party followers of the Administration. This was the beginning of a political evolution which inevitably had to lead to Fascism and was responsible for the fact that the annexation of Austria by the Nazis did not encounter any resistance.

III

Although the courts in the United States have only the power in a concrete case to refuse to apply a statute which they declare unconstitutional, the danger of a contradictory practice of the law-applying organs is here not nearly so great as it was in Austria before the establishment of the

[2] The misuse of Article 48 of the Weimar Constitution authorizing the Government to enact ordinances was the way in which the democratic character of the Republic was destroyed in Germany and the entrée of the National Socialistic régime prepared. It is noteworthy that the semi-fascist Austrian Constitution of 1934 was enacted by an ordinance of the Government (Vdg. v. 24. April, 1934, B. I, 239).

Constitutional Court. In the first place, since in this country there are no administrative organs independent of the courts, the binding force of an administrative act (especially a command, a decree, etc.) depends in the last instance on the decision of a court to which the individual concerned by the administrative act may appeal. Furthermore, there are no administrative courts distinct from the ordinary courts. In the third place, the decisions of the Supreme Court are binding upon all other courts. Inasmuch as the American courts consider themselves bound by the judgments of the Supreme Court a decision of that Court refusing to apply a statute in a concrete case because of unconstitutionality has practically almost the same effect as general annulment of the statute. But the rule of *stare decisis* is not at all an absolute principle. It is not very clear to what extent it is recognized as valid. Above all it is assumed that it is not valid in the case of an interpretation of the Constitution. "Constitutional questions are always open to examination." [3] Hence it is possible that the Supreme Court declares one and the same statute in one case constitutional and in another case unconstitutional as well as *vice versa*. The same is true as far as other courts are concerned. And, in fact, such cases have occurred.[4] The possibility is not excluded either that a lower court, particularly a state court, decides the question of the constitutionality of a statute without the case being brought before the Supreme Court, and that the Supreme Court in another case examining the same statute decides the question in an opposite way. Then the principle of *res judicata* makes it impossible for the other court to adapt its previous decision to that of the Supreme Court.

It is also controversial whether the statute which the Supreme Court has declared unconstitutional has to be considered as void *ab initio*. Such an interpretation of the Supreme Court's decision would mean that this decision annuls the statute generally and with retroactive force so

[3] *O.V. and S.K.R.R. v. Morgan County*, 53, Mo. 156 (1873).

[4] For instance: *Denney v. State*, 144 Ind. 503, 42 N. E. 929 (1896); *McCollum v. McConnoughy*, 141 Iowa 172, 119 N. W. 539 (1909).

that all the legal effects which the statute had before are abolished. Within a system of positive law there is no absolute nullity. It is not possible to characterize an act which presents itself as a legal act as null *a priori* (void *ab initio*). Only annulment of such an act is possible; the act is not void, it is only voidable. For the statement that an act is null is not possible without another statement, answering the question of who is competent to establish the nullity of the act. Since the legal order—to avoid anarchy—empowers certain authorities to establish whether an act is null, this establishment always has a constitutive, not a declaratory character. The act is "null" only if the competent authority declares it null. This declaration is an annulment, an invalidation. Before this declaration the act is not null, for being "null" means legally non-existent. And the act must legally exist, if it can be the object of a judgment by an authority. The annulment may be retroactive in effect; and the legal order may authorize every individual to establish the nullity of the act, that is, to annul the act with retroactive force. But normally only certain organs of the legal community are authorized to establish the "nullity" of acts presenting themselves as legal acts.

It is especially impossible to consider a statute enacted by the constitutional legislator as absolutely null or "void *ab initio*." Only courts have the power to decide the question whether a statute is unconstitutional. If another person refuses to obey a statute enacted by the constitutional legislator because he believes the statute to be unconstitutional he acts on the risk that the competent court considers his conduct as illegal because the court regards the statute as constitutional. From a legal point of view only the opinion of the court is decisive. Therefore the statute must be considered valid so long as it is not declared unconstitutional by the competent court. Such a declaration has, therefore, always a constitutive and not a declaratory character. But the act by which a court declares a statute unconstitutional may, according to the Constitution, abolish the statute with retroactive force. In that case the decision of the court has, as we have previously pointed out, the

character of a legislative act. Legislative acts with retroactive force are, however, hardly compatible with the prohibition of the American Constitution according to which no *ex post facto* law shall be passed. But this interpretation which excludes the "void *ab initio* theory" is not generally accepted.

Nevertheless, private parties who consider a statute unconstitutional and initiate a law suit with the purpose of bringing about a judicial decision declaring the statute unconstitutional very often refuse to obey the statute before the decision is pronounced. They do so in reliance on the retroactive effect of the expected decision. Even the government recognizes such an attitude which from a legal point of view is more than questionable; the government itself reckons with the retroactive effect of a judicial decision declaring the statute unconstitutional. This was, for instance, the case in the litigation involving the constitutionality of the Public Utility Holding Company Act of 1935, the constitutionality of which was contested in a great number of law suits. The provisions of the Act were in fact ignored by the parties concerned from the first moment the Act came into force, long before the constitutional question was decided by the courts. What was the attitude of the government during this time? On October 9, 1935, the Securities and Exchange Commission "promulgated its Rule 4 under the Holding Company Act, to the effect that holding companies might register under the Act while expressly reserving all of their constitutional or legal rights, and to the further effect that if the reservation should be held invalid registrants could elect to have their registration deemed to have been void. On November 21, 1935, the Attorney General instructed the United States Attorneys thoughout the country not to attempt to enforce the criminal provisions of the Act until its constitutionality was assured. On the same day the Postmaster General advised all postmasters that utility holding companies which failed to register were nevertheless to have the continued right to use the mails until the Supreme Court had finally deter-

mined the validity of the Act."[5] These measures were justified by the intention of the government "to reduce to a minimum the hardship of the retroactive effect of a possible final decision in favor of the constitutionality of the statute."[6] Even to a judicial decision declaring a statute constitutional a retroactive effect is ascribed. That means that the opinion of any private party concerning the constitutionality of a statute enacted by the constitutional legislator may have some legal effect on the validity of this statute, if the party contests the constitutionality of this statute in a lawsuit, even if the lawsuit has the result that the statute is declared constitutional. It is hardly possible to define precisely the legal effect of the fact that a private party contests the constitutionality of a statute in a law suit, namely, the legal effect on the validity of the statute during the time before the judicial decision. For the lawsuit in itself can neither invalidate nor confirm the validity of the statute. The only thing we can say is that any lawsuit in which the constitutionality of a statute is contested creates a period of doubt and uncertainty concerning the validity of the statute and its legal effects. That is, from the point of view of legal technique, not at all satisfactory.

In the absence of a clear provision of the Constitution all questions concerning the effect of an unconstitutional statute may be answered in contradictory ways. To avoid such an uncertainty was one of the reasons leading to a centralization of the judicial review of legislation in Austria and to vesting jurisdiction in the Constitutional Court to abolish generally and not only for a given case the unconstitutional statute. The actual practice in the United States has the same aim but it pursues it by juristically imperfect means.

The greatest difference between the American and the Austrian Constitution concerns the procedure by which a statute is declared unconstitutional by the competent organ.

[5] Chester T. Lane, "The Litigation involving the Constitutionality of the Public Utility Holding Company Act of 1935." Paper read at the Annual Meeting of the American Political Science Association, December 30, 1941.

[6] *Ibid.*

According to the Constitution of the United States judicial review of legislation is possible only in the course of a process the chief aim of which is not the establishment of the unconstitutionality or constitutionality of a statute. This question can only arise incidentally when a party maintains that the application of a statute in a concrete case is an illegal violation of its interests because the statute is unconstitutional. Hence it is in principle only the violation of a party-interest which puts in motion the procedure of the judicial review of legislation. The interest in the constitutionality of legislation is, however, a public one which does not necessarily coincide with the private interest of the parties concerned. It is a public interest which deserves protection by a special procedure in conformity with its special character. The disadvantages resulting from the lack of such a procedure are widely recognized in American juristic literature.[7] The Act of August 24, 1937 "to provide for intervention by the United States, direct appeals to the Supreme Court of the United States, and regulation of the issuance of injunctions in certain cases involving the constitutionality of Acts of Congress, and for other purposes," also recognizes the public interest in the judicial review of legislation; but it concerns only federal statutes. The Act grants to the federal government the right to intervene in any action between private parties and become a party for presentation of evidence and argument upon the constitutional question whenever the constitutionality of any act of Congress affecting the public interest is brought in question. The Act grants to the Government the right to appeal from a decision by which a federal statute is declared unconstitutional to the Supreme Court, and it seeks to expedite final decisions in such cases by the Supreme Court. Finally the Act of 1937 seeks to preclude the granting of injunctions by a single judge to restrain the enforcement of an act of

[7] Cf. Oliver P. Field, *The Effect of an Unconstitutional Statute*, (Minneapolis, 1935).

Congress on the ground of its alleged unconstitutionality.[8] But all this is provided for by the Act of 1937 only to defend the validity of statutes enacted by Congress, to render more difficult a judicial decision by which a federal statute is declared unconstitutional, not to promote the annulment of unconstitutional statutes.

To the disadvantage that the judicial review of legislation can take place only incidentally, *i.e.*, in the course of a procedure serving mainly other purposes, another disadvantage is added which is connected with the federal character of the United States. The federal government can bring an action against a state in the course of which the constitutionality of a state statute can be contested. But the states, although they may be sued by the federal government may not sue the latter. A state which wishes to have a federal statute declared unconstitutional, can achieve this only by a legal detour, that is by an action against the federal official; and the interest of the state as party litigant must be more than a mere political or constitutional one—for instance, the state must be a proprietor or have an interest in things which are *res communes*, etc.

It was especially the experience of the constitutional practice in the United States which influenced the regulation of this question in the Austrian Constitution. According to this Constitution two ways were open which led to a judicial review of legislation; an indirect and a direct one. First, a private party could in the course of an administrative procedure claim that one of his rights granted by the Constitution had been violated by an administrative act because this act was based on an unconstitutional statute. The complaint could be brought before the Constitutional Court only after the matter had been taken through all the stages of administrative appeal. The Court decided the question of the constitutionality of the statute only incidentally. But the Court instituted this procedure on its own motion, and only if the Court itself was doubtful of

[8] Alexander Holtzoff, "The Judiciary Act of 1937," Paper read at the Annual Meeting of the American Political Science Association, December 30, 1941.

the constitutionality of the statute. Private parties could only suggest judicial review, they had no legal right to demand it.

In the procedures of courts the question of the constitutionality of statutes was treated in a different way from that of ordinances. The unconstitutionality of ordinances could be alleged by a party in any judicial procedure, but judicial review took place only if the court itself had doubts concerning the applicability of the ordinance. The court had to discontinue its procedure in the given case and to make an application to the Constitutional Court for the annulment of the ordinace. The procedure of the Constitutional Court was devoted solely to this question.

The unconstitutionality of statutes could be claimed only before the *Oberster Gerichtshof* (Supreme Court) or the *Verwaltungsgerichtshof* (Administrative Court), because only these courts could interrupt their procedure in such a case and make an application to the Constitutional Court for the annulment of the statute if they doubted its constitutionality. The Supreme Court and the Administrative Court here proceeded *ex officio*. They were not bound to grant the respective petitions of the parties.

Since the Constitutional Court also had matters to decide other than the constitutionality of statutes and ordinances, the Constitutional Court, too, could discontinue its proceedings in such a matter, if it had doubts concerning the constitutionality of the statute or the ordinance which had to be applied in the case. The interruption of the procedure occurred in order to enable the Court in a special procedure to test the constitutionality of the statute or ordinance concerned.

In all these cases in which judicial review was attained in an indirect way the courts instituted that procedure *ex officio*. The parties could only call the attention of the courts to the question of the constitutionality of the statutes or ordinances. They had no right to put such procedure into motion. It was exclusively the public interest protected by the courts and not the private interest of the

parties which was decisive from the point of view of the procedure.

If the Constitutional Court declared the statute submitted to its review unconstitutional, the Court which made the application for review, or the Constitutional Court itself, could not apply the statute in the case which gave occasion to the annulment of the statue. In this instance, the annulment had retroactive force, as we have already pointed out. This retroactive force, exceptionally granted to the judgement of annulment, was a technical necessity, because without it the authorities charged with the application of the law (that is, the judges of the Supreme Court and of the Administrative Court respectively) would not have had an immediate and consequently sufficiently cogent interest to cause the intervention of the Constitutional Court. The authorities making an application to the Constitutional Court for the judicial review of a statute had to know that their application, if it succeeded in annulling the statute, had an immediate effect on their own decision in the concrete case in which they interrupted the procedure to obtain the judgment of annulment.

The way leading directly to a judicial review of legislation was the following: the Constitution authorized the federal government to make an application to the Constitutional Court for the annulment of a state statute or ordinance issued by an administrative authority of a state; and the governments of the states were likewise authorized to make such an application for the annulment of a federal statute or an ordinance issued by an administrative authority of the Federation. This solution of the problem was due to the federal character of the Austrian republic. For political reasons it was necessary to recognize that the federal administration and the administrations of the states had full equality with respect to the judicial review of legislation. According to the Austrian Constitution federal statutes could not come into force except with the collaboration of the federal administration, especially not without the promulgation of the statute by the President, but without any interference on the side of the administration of

the states; similarly state statutes could not come into effect without the collaboration of the administration of the respective state but could without interference on the part of the federal administration. Hence, it was superfluous to grant to the federal administration the right to contest the constitutionality of federal statutes and to the administrations of the states to contest the constitutionality of state statutes. The federal administration had to refuse promulgation of any bill voted by the federal Parliament if the former considered this bill unconstitutional. The fact that a federal statute came into force meant that the federal administration accepted full responsibility for the constitutionality of the statute. The same was true as far as state statutes are concerned with respect to the state administration. Hence it was possible to grant to the federal administration the initiative for the judicial review only of state legislation and to the state administration the initiative for the judicial review only of federal legislation.

V

When the Constitution of 1920 was prepared two other methods for putting into motion the judicial review of legislation were discussed. The first was to grant to every citizen the right to make an application to the Constitutional Court which would have been obliged to pass upon the validity of the statute. It was a kind of *actio popularis* in constitutional questions. The second possibility was to institute at the Constitutional Court the office of a General Prosecutor in charge of the protection of the Constitution. His function would have been to examine all federal and state statutes and to submit those of doubtful constitutionality to the consideration of the Constitutional Court. Neither of these methods was utilized. With respect to the protection of minorities a third possibility may be mentioned, namely the proposal to grant to an outvoted minority the right of contesting the constitutionality of the statute adopted by the majority through application made to the Constitutional Court.

Finally, I should like to mention two provisions of the Austrian Constitution which may possibly be of a certain interest to the American jurists. When a statute is annulled in the United States the question arises concerning the legal status created by the annulment with respect to the subject previously regulated by the annulled statute. We must distinguish two possibilities: the first that the annulled statute has regulated a subject which at the time the statute came into force was not yet legally regulated. For example a statute has been annulled which prohibits the production and the sale of certain radio sets. Before this statute came into effect the production and the sale of radio sets was not regulated by any legal rule. Individuals were completely free in this respect. The second possibility is that the annulled statute has replaced a previous statute, or a rule of common law, regulating the same subject. For example a statute by which the production and the sale of radio sets was forbidden but sanctioned by much milder penalties. In the first case the annulment of the statute has the effect of restoring the legal status which existed before the enactment of the statute. But this is not so in the second case. Here the legal status which existed prior to the enactment of the annulled statute, *i.e.* the previous statute regulating the production and the sale of certain radio sets is not automatically restored. The earlier statute, or the previously valid rule of common law, has been derogated by the later which was annulled. For this statute is not, as we have pointed out, void *ab inito* but only invalidated by the decision of the Supreme Court. Through the annulment of the last statute prohibiting the production and the sale of certain radio sets the production and the sale of these radio sets become free from regulation.

This effect of the annulment may be very undesirable and may go far beyond the interest in the maintenance of the Constitution. In cases in which a statute annulled on the ground of its unconstitutionality had replaced an earlier statute or a rule of common law regulating the same subject it is better to let the earlier statute or the previously valid rule of common law be restored rather than to have a legal

status which leaves the subject free from all regulation. The revival of the first statute or the rule of common law is not possible without an express provision of the constitution which attributes this effect to judgments of nullification by the Court. In order to avoid such situations the Austrian Constitution contained the following provision:

"If by a decision of the Constitutional Court a statute or a part of it has been annulled on the ground of its unconstitutionality the legal rules derogated by the mentioned statute come into force simultaneously with the decision of the Constitutional Court unless the latter provides otherwise."

Thus a decision of the Constitutional Court by which not only a statute was annulled but also a preceding rule was restored was not a mere negative but a positive act of legislation.

So far as the American practice is concerned I should like to call the attention of jurists to the following difficulty: If the "void *ab initio* theory" is not accepted—and many outstanding American lawyers do not accept it[9] —then it is impossible to maintain the opinion that the judicial decision by which a statute is declared unconstitutional has the automatic effect that the preceding statute is restored. If an American court declares the statute unconstitutional and refuses to apply it in a concrete case the court has no legal possibility of applying the previous statute to the case. Only if the statute declared by the court unconstitutional were void *ab initio* (and that means that if the statute has been annulled with retroactive force) the previous statute, or the previously valid rule of common law, would be applicable. For the statute declared unconstitutional with retroactive force could not derogate the

[9] For example, Chief Justice Hughes in: *Chicot County Drainage District v. Baxter State Bank*, 308 U. S. 371 (1940). The best formulation of the problem is to be found in: *Wellington et al. Petitioners*, 16 Pick. 87 (Mass., 1834), at p. 96: "Perhaps, however, it may be well doubted whether a formal act of legislation can ever with strict legal propriety be said to be void; it seems more consistent with the nature of the subject, and the principles applicable to analogous cases, to treat it as voidable."

previous statute, or more exactly expressed, the derogatory effect of the statute declared unconstitutional has been annulled. But the void *ab initio* theory is—as we have pointed out—incompatible with Article I, Section 9, Paragraph 3 of the Constitution.

The other provision of the Austrian Constitution which may interest American jurists authorized the Constitutional Court to give an advisory opinion on the application of the federal government or the governments of the states. This device was, however, limited to the question whether a certain act of legislation or administration fell under the jurisdiction of the federation or that of the member states. If it was a question of legislative competence the application made to the Constitutional Court had to contain the draft of the bill which was being considered by the respective legislative organ. If it was a question of the executive competence the application to the Constitutional Court had to contain:

a) The draft of the proposed ordinance and the designation of the authority by which the ordinance would be issued, or;

b) In the case of other executive acts the determination of the facts in respect to which the act in question shall be issued.[10]

In the United States lawyers have always been opposed to conferring upon the courts the power of rendering advisory opinions.[11] Such a competence of courts is considered incompatible with the principle of the separation of powers. But this is an argument against the whole institution of judicial review of legislation which is a legislative and not a purely judicial function.

[10] Art. 138, Par. 2 of the Constitution, Par. 53-56 of the Statute of December 18, 1925, BGBl., No. 454.

[11] *Cf.* Felix Frankfurter, "Advisory Opinions," in: *Encyclopaedia of the Social Sciences*, Vol. 1, pp. 475-478 (New York, 1927).