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Constitutional Review and Democracy – Constitutional Courts and the Legislative Process

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Introduction

The task assigned to me is to give a very short comparative survey of constitutional review in some western countries with special regard to the position of the constitutional courts in democratic systems: What are the objectives of court review and which role do constitutional courts have in this context today?

Comparison of this kind is hardly meaningful without some common ground in basic ideas, in ideology. Is there such common ground? Are there comparable institutions in western countries, do these countries have comparable problems, and have they really chosen comparable solutions?

First the common ground. History provides it. Constitutional review is an old feature in the constitutional framework of the states of Western Europe; it is possible to trace review procedures back to the 14th century or even to the Roman Empire 2000 years ago.

Modern constitutional review in Western Europe and the United States of America, however, is a child of the political ideologies of the 18th century and the American and French Revolutions.

One basic idea of Montesquieu and other great political writers two centuries ago was that the power of government should not be concentrated in one hand, but divided between different and separate bodies: the institutions of the legislative, the executive and the judicial branch. These institutions were to check and balance each other. But special consideration had to be given to parliament as the only institution directly elected by the people and thus with a very specific legitimacy – a factor which has had great influence on the European development of constitutional review and the of the position of constitutional courts in European democracies, but clearly not so much on the development in the USA.

Another idea was that a state should have a constitution – that is: written (or unwritten but identifiable) ground rules for government.

These ideas are common for all states of the Western Hemisphere, and thus a good base for comparisons. But the institutions and the methods to implement them are vastly different. Let me start with institutions and their methods of constitutional review.

Institutions for Constitutional Review – and Pre-view

Usually, constitutional review is assigned to the judicial branch, but that is done with considerable variations : There are specialised constitutional courts in Germany both on the federal level and on the level of the Länder – best known is the *Bundesverfassungsgericht,* the Constitutional Court on the federal level. Even Austria and Italy have specialised constitutional courts, the *Verfassungsgerichtshof* and the *Corte Costituzionale.*

But the United States and Switzerland have no specialised courts of this kind; constitutional review is instead a task among others for ordinary courts of law and especially for their supreme courts, the *Supreme Court of the United States* and the federal Swiss *Bundesgericht.* The situation is similar in the Scandinavian countries.

In Sweden and France, however, the institutional framework is not designed for constitutional

review of the usual kind. These countries do not emphasise the constitutional review at all. Review may be possible under certain conditions, but is in any case supposed to be a rare exception. The focus is instead on avoiding constitutional problems especially in legislative matters by an elaborate system of preventive control of legislation, before parliament votes on an Act – that is *pre*-view instead of *re*-view.

The Swedish institution for this task is not a law court, but *Lagrådet,* the *Law Council.* However, even this council has close connections to the judiciary: its members are judges (or retired judges) of the *Supreme Court* and the *Supreme Administrative Court*.

Pre-view of this kind – *ex ante,* not *ex post* control of legislation – is even the task for the prestigious *Conseil constitutionnel* in France – sometimes classified as a constitutional court, sometimes not.

Constitutional Review – Typical Tasks

What are the problems these institutions and their constitutional review procedures are supposed to solve?
Let me for the purpose of this report distinguish three tasks to deal with:

– Conflicts may arise between different organs of the state and a solution has to be found;
– legislation may be thought unconstitutional in some way – because of faulty enactment procedures or because of some material inconsistency with provisions in the constitution – and the matter has to be decided; and
– individuals may complain of violations of basic rights granted in the constitution and redress of the grievance is deemed necessary.

Let me briefly deal with each of these tasks.

Conflicts between Organs of State

The first task – to decide on constitutional conflicts between different organs of a state – is one of the oldest. It is an important feature of constitutional review in federal states – in the United States of America, in Austria, in Germany, in Switzerland. In these states questions may arise, for example, whether the federal parliament has the competence to legislate on a specific topic or whether the constitution assigns this competence to the parliamentary assemblies of the regional entities.

In the United States there are plenty of decisions concerning state powers versus federal powers and the interpretation of the 10th Amendment to the Constitution. As an example I may mention two very famous cases on the federal taxation of states: *Collector v. Day*[1] dating back to 1871 which was leading until 1939, when it was expressly overruled in *Graves v. New York ex rel. O'Keefe*[2], and further a case concerning a federal tax on the sale of mineral waters taken from property owned by the state, *New York v. US*[3]. A German taxation case

[1] 11 Wallace 113 (1871).

[2] 306 US 466 (1939).

[3] 326 US 572 (1946).

was decided by the Bundesverfassungsgericht in 1971, when a pleasure tax, levied by a Land on gambling machines, was accepted as constitutional.[4]

Of course even in unitary states – in France and in the Scandinavian – this kind of conflict may arise, but constitutional review procedures are less likely to become instrumental for solving the conflict. As an example I may mention a taxation conflict between the Swedish state on one hand and Swedish county councils and municipalities on the other, which has been simmering for many years. The question at the heart of the conflict is whether tax rates should be set by decision of local assemblies or by legislative decision of the Swedish parliament. The Swedish Constitution states that the local authorities may levy taxes in order to perform their tasks, and both county councils and municipalities think this provision givs them the right to decide locally. However, for the years 1991 to 1993 the Swedish parliament enacted legislation restricting the rights of local communities to raise the local income tax temporally. This was done by statutory provisions, and the aim of these provisions was to freeze the tax rates for three years. The overall aim of these measures was to restrict public sector spending in order to balance the national economy. A number of local communities, however, were and are still thinking this legislation was unconstitutional. The Swedish constitution guarantees the freedom of local self-government, and the local communities argue that this guaranty is violated, if their rights are limited to obtain necessary financial means by taxation. Before the legislation was enacted, the Law Council was asked for a statement concerning the governments proposals, and the Council decided that temporary restrictions were constitutional. But the Council left open, whether permanent restrictions might be unconstitutional and at which point the continuation of temporary restrictions might be qualified as really permanent. I do not think that a final solution of this conflict will be found by constitutional review – by a decision of the Law Council or an ordinary court. It is more likely that the conflict is solved by political means – for example a buy-out. Presumably, parliament (as it has done before) will decide to appropriate higher state subsidies to local communities, but parliament will also tie payment of these subsidies to conditions that local income tax rates will remain unchanged.

Control of the Constitutionality of Legislation

Let me now turn to the second problem, which constitutional review is supposed to solve, the control of the constitutionality of legislation

As I mentioned before, a common basic element of the political ideology of the Western Hemisphere is that special consideration has to be given to the legitimacy which parliaments gain by being elected in general elections. This consideration leads to the consequence that statutes enacted by a parliament – as distinguished from norms of lower constitutional rank – should be treated as a special case or at least in an particularly careful manner. And *mutatis mutandis* the same applies to parliamentary decisions to accept conclusion of or accession to international treaties.

Because of this special view, which is deeply rooted in a number of European constitutional systems, the control of the constitutionality of parliamentary decisions sometimes is not allowed at all.

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[4] BVerfGE 31, 8 (1971); cf. BVerfGE 14, 76 (1962).

This, for example, is the case in *Switzerland.* The Swiss Constitution excludes from constitutional review any legislation enacted by the federal parliament[5]. But norms with lower rank may be reviewed without restrictions. And in *France* article 61 of the Constitution does not allow the *Conseil constitutionnel* to control whether legislation of the French parliament is in accordance with an international treaty ratified by France. This article

> "ne confère pas au Conseil constitutionnel un pouvoir général d'appréciation et de décision identique à celui du Parlement, mais lui donne seulement compétence pour se prononcer sur la conformité à la Constitution des lois déférées à son examen."[6]

The constitution of *Sweden* permits in principle the constitutional review of all acts of parliament, but only in principle, as any review is restricted by a clause in the constitution[7] that a provision enacted by parliament may be set aside only if the fault is *manifest.* And law courts are very rarely convinced that this could be the case. There are only a handful of known cases in which constitutional control of this kind has been exercised by the supreme courts of Sweden since today's Swedish constitution entered into force in 1975.[8]

This particular Swedish restriction, that a statutory provision may be set aside only if the fault is manifest, is extended even to the constitutional review of statutory instruments enacted by the Swedish government, the highest executive institution of Sweden, which also has a a number of legislative competences. Only norms of lower rank than those enacted by parliament or by the government may be reviewed without restrictions, which applies mainly to statutory instruments emanating from administrative authorities of the Swedish state or from local authorities.

Completely different is the concept of constitutional control of norms by the law courts of the *United States of America.* For them the doctrine of a government of laws and not of men applies. And since the classical case of *Marbury v. Madison*[9], which was decided as early as 1803 – two centuries ago – there are no restrictions accepted; any and all norms ranking lower than the constitution may be reviewed by the courts (but it took many years before the US Supreme Court really became active in this field of law).

Even in *Germany* practically no restrictions apply to the control of the constitutionality of norms. There, too, any norm ranking lower than the constitution (and, in theory even parts of the Constitution) may be reviewed and declared unconstitutional. But this is not a task for all law courts. Every law court may raise the question of constitutionality and give a positive answer – that a contested norm is not unconstitutional. But if a court thinks the question of constitutionality should be answered in a negative way, the matter has to be referred to the Constitutional Court for a ruling on the question. With a few minor exceptions federal norms may be declared unconstitutional only by the Federal Constitutional Court.

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[5] Art. 113 of the Constitution.

[6] Conseil constitutionnel, decision no 74-54 du 15.1.1975.

[7] Chapter 11 para 14 of the Instrument of Government.

[8] Cf. the Supreme Administrative Court in Regeringsrättens årsbok 2001 ref. 72 and the Supreme Court in Nytt juridiskt arkiv 2001 s. 239.

[9] 1 Cranch 137 (1803).

But these provisions for control of the constitutionality of legislation in the United States and Germany are telling only half of the truth. The courts of both the United States and Germany are rather cautious, when the possibility arises, that a decision of Congress of the United States or of the Federal Parliament of Germany concerning a statute or an international treaty may be unconstitutional. They observe a *doctrine of judicial restraint,* which means that their judges can give parliamentary decisions the benefit of doubt and can avoid to declare them unconstitutional in certain situations. Partly unconstitutional provisions of enacted statutes may, for example, sometimes be saved by interpretative measures, which restrict possible applications to what is constitutionally acceptable for the court.

I may add that the courts of the United States and Germany definitely are not the only ones to observe judicial restraint when acts or other decisions of parliament are in question. I think you can find similar reluctance more and less explicit in every constitutional jurisdiction of the Western Hemisphere.

Individual Complaints

Finally, I want to turn to the third task, constitutional review in connection with *complaints of individuals that basic rights granted to them in the constitution were violated.*

Constitutional review on such grounds has been a well known feature of many constitutions since the 19th century. But the efficiency of this remedy has varied, and varies still, depending, predominantly, on two conditions:
1. The constitution has to grant concrete basic human rights, and
2. there has to be an established court procedure available for hearing complaints of individuals.

Outstanding, and definitely to be mentioned in the first place, are the possibilities to achieve constitutional review of this kind under the *Constitution of the United States.* The first condition – that the constitution grants concrete basic rights – is met extensively by the Bill of Rights, the first Ten Amendments to the Constitution, and apart from these amendments by a lot of other provisions in the main text of the constitution, which can be construed as guaranties of other concrete rights. The second condition is partly met by the *Marbury v. Madison* doctrine, and partly by the clarifying 14th Amendment to the Constitution and especially its due process clause, that no person shall be denied "the equal protection of the laws".

The American system of protection of civil rights has had tremendous impact on the international legal development and especially in Western Europe after the Second World War. In the late forties and the early fifties many states adopted or modernised procedures for enforcement of constitutional provisions concerning basic human rights. In 1948 the *General Assembly of the United Nations* proclaimed the *Universal Declaration of Human Rights.* And in Europe, in 1950, the first major task of the *Council of Europe* was to adopt the *Convention for the Protection of Human Rights and Fundamental Freedoms* and to institute remedy procedures, which were made rather easily available and accessible for individuals.

Even the Constitution of Germany of 1949 is a typical product of this reaction to the horrors of the late thirties and early forties. It contains a rather brief, but elaborately written Bill of Rights in its first articles and thus meets the first condition. And the second condition is met by its provisions for a Constitutional Court with the competence to hear complaints of

individuals concerning the violation of their constitutional rights. And I may add, that these provisions concerning the competence to hear complaints of individuals were introduced into German law under the influence and after an intervention during the preparatory work of the American Military Governor in then occupied Germany.[10]

The German case is probably the easiest to recognise, because a entirely new constitution was prepared and adopted in 1948/49. Other states in Western Europe chose a step by step approach to modernise their constitutional provisions. *Austria,* for example, reached back to the constitutional situation before the German occupation of 1938 and again put into force, among other provisions, the constitutional statute of 1867 concerning the rights of citizens and Hans Kelsen's famous Constitution of 1920. But this *corpus* of old and venerable constitutional law was later amended by legislation implementing, for example, the European Human Rights Convention of 1950, which by legislation in 1964 was given the rank and dignity of constitutional law.

The tidal wave of Human Rights ideas reached *Sweden* rather late. In 1974 Sweden adopted a new constitution. The original version of this constitution did not contain concrete guaranties for traditional basic human rights. This omission was heavily criticised, and in 1976 the constitution was amended with human rights provisions. This amendment only meets the first of the two conditions, which I mentioned before. The second condition, that there has to be an established court procedure available for hearing complaints of individuals, is still not met, if the the individual is complaining of a violation by a statute enacted by the Swedish parliament or government. As I said before, the constitutional review is limited in such cases, and the only way for the individual to get redress for a violation is a complaint under the European convention of 1950, which since 1995 is applicable as internal Swedish law.[11]

Constitutional Review today

Let me now conclude with a few sketchy remarks about the general character of today's constitutional review decisions in the Western Hemisphere.

Great Political Matters of the Day

All constitutional courts are sometimes asked to take decisions in great political matters of the day. The famous desegregation decision *Brown v. Board of Education of Topeka*[12] and the Watergate decision of the US Supreme Court 30 years ago[13] are good examples, the abortion decisions of the same court,[14] of the French *Conseil constitutionnel,*[15] of the German

[10] Cf. Memorandum of the Military Governors of 22 November 1948; E. R. Huber (ed.): Quellen zum Staatsrecht der Neuzeit, Band 2, Tübingen 1951, p. 208 f. (para e).

[11] Lagen (1994:1219) om den europeiska konventionen angående skydd för de mänskliga rättigheterna och de grundläggande friheterna.

[12] 347 US 483 (1954).

[13] US v. Nixon, 418 US 683 (1974).

[14] Roe v. Wade, 410 US 113 (1973), with others thereafter.

[15] Conseil constitutionnel, decision no 74-54 du 15.1.1975, at http://www.conseil-constitutionnel.fr/decision/1974/7454dc.htm.

Bundesverfassungsgericht[16] and – in an Irish case – of the *Court of Justice of the European Communities*[17] are others.

Constitutional courts usually feel uncomfortable when they are forced to decide in matters like these. And sometimes the courts feel they are used by politicians to solve problems which should be solved by political, not by judicial means, but which cannot be solved in the proper way because of lack of political will to search for a convincing solution or to agree upon a compromise. This is to use constitutional review in a rather problematic way. Judges, who are not elected in general elections, are in those cases forced to act as replacements for any elected majority, and there is always the risk that they have to take sides – eventually with a minority opinion – or that they find a compromise solution, which no one wants to accept. Luckily such cases are relatively rare.

Faulty legislation

Definitely more frequent are cases in which constitutional review has to repair faulty preparatory work before enactment of a statute. Take, for example, the German decision on the constitutionality of provisions in an Act for the Protection of Animals, which banned the selling of animals by mail order.[18] The situation was the following.

One late spring the weather was fine and very warm in Germany. The newspapers had nothing important to report and had to find something to put on the first page, and Bild-Zeitung, one of the German tabloid papers, had the story of the day: With gigantic headlines the paper reported, that someone had sold little dogs, really sweet puppies, by mail order. The dogs were sent to one buyer by ordinary mail. The buyer wasn't at home, when the postman called with the package. The postman therefore left a paper at the door informing the buyer that the package could be picked up at the post office. But the buyer did not show up to get the package. As Bild told the story – and you can imagine how heartbreaking the paper told it – the poor dog did get neither water nor food and died after days of agony with the personnel of the post office listening to weaker and weaker sounds.

Well that was the time to show political initiative. A proposal for a new Act for the Protection of Animals was before the German parliament and the final reading and vote just a few days away. It was therefore the easiest thing in the world to add to the proposal a provision which banned any selling of animals by postal service to avoid similar tragedies. That the parliament did, and the Act was promulgated and published in the official gazette within a matter of days. And parliament adjourned for summer.

But everything was wrong. The story of the paper was wholly made up. The reported tragedy had never happened. And the ban in the new statute was going to have serious consequences for a flourishing but unknown trade, the breeding of geese, ducks and the like. These animals were sold by breeders and transported to their customers everywhere in the European

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[16] BVerfGE 39, 1 (1975), 88, 203 (1993) and 98, 265 (1998).

[17] C-159/90, Society for the Protection of Unborn Children v. Grogan, 4.10.1991, 1991 ECR I-4685; at http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=61990J0159.

[18] BVerfGE 36, 47 (1973).

Community by special postal service. This trade was in detail regulated by statutory nstruments and even a European convention[19] and every conceivable safeguard had been applied to transports of the – rather expensive – animals. The ban in the new statute made this trade impossible.

This was a consequence nobody had thought of, when parliament amended the proposed legislation. And of course the provision prohibiting the use of mail services should have been repealed immediately. But that was impossible, because parliament was not in session. The only remedy for the breeders, who could not wait for a solution sometime later, was a complaint to the Constitutional Court. And the Court by judgement found the ban violating constitutional guaranties for property rights and therefore declared it unconstitutional and void.

This was an easily documented case of sloppy preparatory work of law makers. Other cases are not so clear. But it is quite obvious that a significant part of constitutional review cases in Germany and other countries are caused by not sufficiently thorough work of ministries, parliamentary committees and other law making institutions.

Revision of Well Established Law

Another frequent cause of constitutional review are decisions of courts and administrative authorities which are regarded as so routine that nobody has the time or the will to give closer consideration to the meaning and contents of the decision. Let me even here cite a German case as illustration.[20]

Police thought they had seen a car driver violating some traffic rules. The number of the licence plate was readable, but the car could not be stopped. The incident was reported and a court order to pay a fine was sent to the registered address of the car owner. He was not at home, when the postman called. The postman therefore left a note telling the owner that he should pick up the court order at the post office. The owner was on vacation for a little more than three weeks. He picked up the letter immediately after he returned and decided to appeal the decision. But the time for doing so had expired. He asked two courts – the Local Court and the Court of Appeal – for special leave to get a hearing of the case, but both courts refused arbitrarily to hear the case telling him that he should have arranged for someone to take care of his legal business while away. The man made a complaint to the Constitutional Court, which decided that the courts should have granted him the special leave and should have tried the case. The Court considered a three week holiday a fact of life which had to be accepted by the courts. It was unreasonable – the Constitutional Court decided – to demand that preparations for an entirely normal holiday should include a visit to a lawyer in order to give him power of attorney without concret reason. The Constitutional Court acknowledged that the lower Courts' interpretation of the statute on special leave was well established by precedent. But the Court nevertheless found the Courts' interpretation violating the constitution's provisions concerning due process of the law, and the Constitutional Court therefore ordered the Local Court as court of first instance to grant the leave and hear the case.

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[19] European Convention for the Protection of Animals during International Transport (open for signature 13.12.1968, entry into force 20.2.1971), ETS 65.

[20] BVerfGE 40, 182 (1975).

Unspectacular cases like this, with not easily thought of violations of human rights by widely accepted routine decisions, seem to be astonishingly frequent in many constitutional jurisdictions.

New Developments

Let me finally add two commentaries on new developments in constitutional review in Western Europe.

The first: The output of decisions of the *European Court of Human Rights* at Strasbourg is increasing fast and the recently reorganised Court has now firmly established itself as an important source of new constitutional thinking. But not very many member states of the Council of Europe, who all have accepted the jurisdiction of the Court, take notice of cases other than those against themselves. It is really important to change this attitude and to seriously analyse all the precedents coming from Strasbourg and to achieve closer integration of all of them inte the constitutional law of the member states.

And the second: Do not forget the *Court of Justice of the European Communities* in Luxembourg as a source of constitutional law. Of course, this Court has no jurisdiction in other than certain European Union matters. But the consequences for countries with free trade agreements with the European Union and even for third party countries without such agreements can be far reaching. It is well established community doctrine that community law takes precedent over national law of the member states. And that includes constitutional law. Incompatibilities of community law on the one hand and national constitutional law on the other are still rare, and occurring problems usually can be avoided or solved by interpretative measures. That may change, if and when the Nice Charter of fundamental rights of the European Union[21] enters into force as generally applicable law, and even other broadly worded or interpreted provisions of community law as for example the since 1957 well established anti-discrimination provisions of the EEC-treaty and of the successors to this treaty definitely and easily can become sources – maybe of irritation and stagnation or, preferably, – of new developments in constitutional and other law. Everything depends on how open minded constitutional courts not only in member states of the European Union, but also in states with close contacts to the community want to meet the challenges emanating from the law and practice of community institutions.

Summary

Let me now summarise my report and answer the questions which were put to me.

I think that the experience of the last half century of constitutional review quite clearly shows that constitutional courts since the difficult years of the 1950ies and 1960ies have established themselves as well integrated elements of the democratic systems in Europe. Tensions in the relations to other democatic institutions occur, but are less intensive now, than they sometimes were 25 or more years ago.

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[21] OJ 2000 C 364/1.

Constitutional courts not very often have to give answers to great political questions of the day. If and when they have to do that, it is not because any whish on their side to actively promote a political agenda; the constitutional systems and the doctrin of judicial restraint do not permit that. Instead, the reason quite often seems to be a failure of other democratic institutions to reach consensus or to find an acceptable compromise, for example in urgent legislative matters. Then the constitutional court – if asked to do so – may have to act as an arbitrator.

However, cases of this kind are rare now. The really heavy part of the caseload of constitutional courts is different; the majority of their cases – sometimes an overwhelming majority – is about constitutional complaints of citizens, and these complaints may reach into every conceivable field of law. In these cases another task of constitutional review has become prominent: The constitutional court has to act as repair shop, which may have to adjust incomplete, faulty or outright sloppy legislation and to revise decisions of courts or administrative authorities which may be in violation of basic rights.

The last – and most important – factor to remember, however, is the role of constitutional courts when it comes to implement guaranties of human rights as established not only in national constitutions, but also in the many international documents, of the United Nations, of the Council of Europe and of the European Union.

Minsk, 26 June 2003