

Presentation of the *General Report* on

CONSTITUTIONAL COURTS AS POSITIVE LEGISLATORS IN COMPARATIVE LAW

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PRELIMINARY REMARKS

- *The subordination of Constitutional Courts to the Constitution*

In all democratic countries, Constitutional Courts¹ have the same role of interpreting and applying the Constitution in order to preserve its supremacy testing the constitutionality or conventionality of statutes,² and in order to assure the prevalence of the democratic principle and of fundamental rights they even have the role of adapting the Constitution when changes and time imposes such task.

And this is true in all systems of constitutional judicial review, where a progressive convergence of principles and solutions has been consolidated over the past decades, being nowadays very difficult even to draw in a clear way the classical distinction between the concentrated and the diffuse systems of judicial review.³

¹ For the purpose of the *General Report*, due to the variety of solutions, I have used the expression “constitutional court” in a general sense, as referring to any court acting as constitutional judge.

² For the purpose of the *General Report*, I have used the expression “control of constitutionality” as comprising not only judicial review of statutes regarding their conformity with the Constitution, but also comprising “control of conventionality” in the sense of their conformity with International Conventions, particularly on matters of Human Rights, as is the case, for instance, in The Netherlands, in the U.K., in France and in many Latin American countries, as well as their conformity with Constitutional Conventions, called by John Bell, the *British National Reporter*, as “constitutional review.”

³ Regarding the distinction, it can be said that the only aspect of it that nowadays remains, is the one referred to the organ of control, in the sense that in the diffuse system all courts are constitutional judges without the need for their powers to be expressly established in the Constitution; whether

In all the systems, the basic principle that can be identified is that Constitutional Courts, when accomplishing their roles, must always be subordinated to the Constitution, not being allowed to invade the field of the legislator or of the constituent power, The contrary would be, as asserted by Sandra Morelli the *Colombian National Reporter*, to develop an “irresponsible judicial totalitarianism,” which of course is a chapter of the pathology of judicial review.

That is to say, Constitutional Courts can assist the legislators in the accomplishment of their functions, but they cannot substitute the Legislators and enact legislation, nor they have any discretionary political basis in order to create legal norms or provisions that could not be deducted from the Constitution itself.

It is in this sense that it is then possible to affirm as a general principle, that Constitutional Courts, still are considered to be –as Hans Kelsen used to say- “Negative Legislators” or that they are not “Positive Legislators” in the sense that, as affirmed by Richard Kay and Laurence Claus, *the American National Reporters*, they are not able to consider, propound or create *ex novo* pieces of legislation “of their own conception,” or to introduce “reforms” on statutes conceived by other legislative actors.

- New role of Constitutional Courts and the question of acting as Positive Legislators

This continues to be the general principle in comparative law, notwithstanding the fact that during the past decades the role of Constitutional courts has dramatically changed, due to the fact that their role is not limited to declare the unconstitutionality of statutes or to annul or not to annul a statute on the grounds of its unconstitutionality.

In all systems, new approaches have been developed, for instance, based on the principle of conservation of statutes, due to their presumption of constitutionality, empowering Constitutional Courts not to annul or declared them unconstitutional (even though being contrary to the Constitution), but to interpret them according to the Constitution or in harmony with the Constitution. This has allowed the Courts to avoid creating any legislative vacuum, and in some cases, to fill permanently or temporarily the vacuums that could be originated by the nullity.

that in the concentrated system, it is the Constitution the one that must expressly established the Constitutional Jurisdiction, assigning to a single Constitutional Court, Tribunal or Council, or to the existing Supreme or High Court or Tribunal, the power to control the constitutionality of statutes and to annul them.

In addition, nowadays is more frequent to see Constitutional Courts, instead of dealing with existing statutes, to deal with the absence of statutes or with absolute or relative omissions or abstention incurred by the Legislator. By controlling these omissions, Constitutional Courts in many cases have assume the role of legislative assistant or auxiliaries, creating norms they normally deduct from the Constitution; and even, in some cases, substituting the Legislator, by assuming an open role of “Positive Legislators,” issuing temporary or provisional rules to be applied on specific matters pending the enactment of legislation.

One of the main tools to trigger this new role of Constitutional Courts, has been the principles of progressiveness and of the prevalence of human rights, as has occurred in many cases with the rediscovery of the right to equality and non discrimination. In these cases, in the interest of the protection of citizens’ rights and guaranties, there have been no doubts in accepting the legitimacy of Constitutional Courts’ activism interfering with the Legislative functions, applying constitutional principles and values.

In these matters, the main discussion today is directed, not to reject these legislative activities by the courts, but to determine the extent and limits of Constitutional Courts decisions, and the degree of interference allowed regarding Legislative functions, as expressed by Francisco Fernandez Segado, the *Spanish National Reporter*, in order to avoid “transforming the guardian of the Constitution into sovereign.”

My analysis of the subject of “Constitutional Courts as ‘Positive Legislators,’”⁴ in comparative law, has allowed me to identify four main trends regarding the relations of the Constitutional Courts not only with the Legislator, but also with the “Constitutional Legislator,” that can be considered as expressions of their activities acting as been positive legislators. These are:

First, the role of Constitutional Courts interfering with the Constituent Power, enacting constitutional rules and even mutating the Constitution;

Second, the role of Constitutional Courts interfering with existing legislation, assuming the task of being assistants to the Legislator, complementing statutes, adding to them new provisions, and also determining the temporal effects of legislation;

⁴ For the preparation of the *General Report* I received 36 National Reports from 31 counties: 19 from Europe (including 6 from Eastern Europe), 10 from the American Continent (3 from North America, 5 from South America, and 2 from Central America); one from Asia, and one from Australia.

Third, the role of Constitutional Courts interfering with the absence of Legislation due to absolute and relative legislative omissions, acting in some cases as Provisional Legislators; and

Forth, the role of Constitutional Courts as Legislators on matters of judicial review.

FIRST TREND: CONSTITUTIONAL COURTS INTERFERING WITH THE CONSTITUENT POWER

The first trend that comparative law shows us is the role of Constitutional Courts, interfering with the “Constitutional Legislator”, that is with the Constituent Power, in some cases enacting constitutional rules, for instance, when resolving constitutional disputes between State organs; when exercising constitutional control over constitutional provisions or over constitutional amendments; and when mutating in a legitimate way the Constitutions by means of adapting their provisions to current times, giving them concrete meaning.

- Constitutional Courts Resolving Constitutional Federal Disputes and Enacting Constitutional Rules

The first case refers to the Constitutional Courts interfering with the Constituent power, when they resolve constitutional conflicts or disputes between State organs, which is a common role in Federal States, as has been highlighted by Konrad Lachmayer, the *Austrian National Reporter*, referring to the Austrian Constitutional Court, saying that it has acted as a “positive legislator,” “enacting constitutional law” when exercising positive powers regarding the division of competences between the Federation and the “*Länder*,” having the final say on the matter. It has also been the case in the United States, where the Supreme Court has been progressively determining the powers of the federal government regarding the states, based on “commerce clause,” being difficult nowadays to imagine anything that Congress could not regulate. By means of these case law on matters related to the federal State, the Supreme Court’s decisions, without doubt, eventually have enacted constitutional rules.

- Constitutional Courts Exercising Judicial Review on Constitutional Provisions

The second way in which Constitutional Courts can participate in the enactment of constitutional rules is when they are empowered to review the Constitution itself, as is also the case in Austria, where the Constitutional Court is empowered to confront the Constitution with its own basic principles,

like the principle of democracy, the federal state, the rule of law, separation of powers and the general system of human rights.

- *Constitutional Courts Exercising Judicial Review Constitutional Reforms and Amendments*

The third way Constitutional Courts interfere with the Constituent Power, is when they are empowered to review constitutional amendments, as is the case of Colombia, Ecuador and Bolivia, although limited to its procedural aspects.

In other countries, discussions have been developed regarding the powers of Constitutional Courts to exercise judicial review powers on the merits of constitutional reforms or amendments, for instance, regarding the unchangeable constitutional clauses (*cláusulas pétreas*) expressly defined in the Constitutions. The basic principle here is that in such cases, the courts' powers derive from the supremacy of those constitutional clauses. In such cases, in order not to confront the will of the people and not to substitute the constituent power, the control must be exercised before the reform has been enacted through popular vote, when this is the case.

Nonetheless, even in the absence of constitutional authorization, there are cases in which Constitutional Courts have exercised judicial review regarding constitutional amendments. It was the case, a few months ago, in Colombia where the Constitutional Court (February 26, 2010) annulled a Law convening a referendum for the purpose of approving a reform of an article of the Constitution directed to allow the reelection for a third period of the President of the Republic, by considering that such reform contained "substantial violations of the democratic principle," introducing reforms implying the "substitution or subrogation of the Constitution."

In other cases, like in India, it has been the Supreme Court the one that has imposed "implied" limits on the power of Parliament to amend the Constitution, excluding basic features or basic structure of the Constitution, like for instance, the scope of judicial review powers, the Supreme Court being converted, as said by Surya Deva, in the *Indian National Report*, "as probably the most powerful court in any democracy."

- *The Role of Constitutional Courts Adapting the Constitution on matters of fundamental rights*

The fourth case Constitutional Courts interfering with the Constituent Power, is when they assume the role of adapting constitutional provisions by means of their interpretation, particularly on matters of fundamental rights. In these cases, as said by Laurence Claus and Richard S. Kay, the *U.S. National*

Reporters, Constitutional, Courts “engage in positive constitutional lawmaking” particularly when the rule they “formulate, creates ‘affirmative’ public duties.”

This role of Constitutional Courts has been the result of a “discovering” process of fundamental rights not expressly enlisted in the Constitutions, enlarging the scope of its provisions. Referring to the U.S. Supreme Court role in the elaboration of constitutional principles and values, as mentioned by Laurence Claus and Richard S. Kay, “provides perhaps the most salient example of positive lawmaking in the course of American constitutional adjudication,” for instance, when having interpreted the “equal protection” clause of the Fourteenth Amendment in order to expound the nature of equality; or when having argued about the constitutional guarantee of “due process” (Amendments V and XIV), or the open clause of Amendment IX, in order to construct the sense of “liberty.” This process has converted the Court, they have said, in “the most powerful sitting [constitutional] lawmaker in the nation,”

The same has happened in France, where the Constitution does not have at all a declaration of fundamental rights, the role of the Constitutional Council during the past decades has been precisely of mutating the Constitution, enlarging the *bloc de constitutionnalité*, by giving constitutional rank, through the Preamble of the 1958 Constitution, to the Preamble of 1946 Constitution, and eventually to the 1789 Declaration of Rights of Man and Citizens.

This role of Constitutional Courts adapting the Constitution in order to guaranty fundamental rights can be nowadays considered as a main trend in comparative law, which can be identified in many countries with different systems of judicial review, as is the case of Switzerland, Germany, Portugal, Austria, Poland, Croatia, Greece, and India, where Constitutional Courts have introduced important changes in the Constitution, expanding the scope of fundamental rights.

- The Mutation of the Constitution on Institutional Matters

On the other hand, on matters different to fundamental rights is also possible to find legitimate constitutional mutations made by Constitutional Courts referred to other key constitutional matters related to the organization and functioning of the State. The German Federal Constitutional Tribunal, for instance, has ruled on the deployment in time of peace, of missions of German Armed Forces to foreign countries, detailing a substitute legislation (provisional measures) ordering the Legislator and the Executive to proceed according to it, imposing the formal participation of the Legislator. The

Constitutional Court of Austria, has even created new constitutional framework to be followed by Parliament in areas not expressly provided in the Constitution, like the privatization process, imposing rules to all State authorities. The Council of State of Greece has also imposed limits on matters of privatization excluding for instance police powers. The Constitutional Court of the Slovak Republic, has reshaped the constitutional provisions regarding the position and authority of the President of the Republic within the general organization of the State, being the Court considered by Ján Svák and Lucia Bertisová, the *Slovak National Reporters* as “the direct creator of the constitutional system of the Slovak Republic.” Finally, the Supreme Court of Canada, through the very important instrument of the “reference judgments” has created and declared constitutional rules, for instance, governing important constitutional processes as the patriation of Canada’s constitution from the United Kingdom; and the possible secession of Quebec from Canada, laying down as mentioned by Kent Roach, the *Canadian National Reporter*, some basic rules to guide constitutional change and to avert potential constitutional crises.

SECOND TREND: CONSTITUTIONAL COURTS INTERFERING WITH THE EXISTING LEGISLATION

The most important and common role of Constitutional Courts is developed regarding existing legislation, not only declaring their unconstitutionality but interpreting statutes in conformity to or in harmony with the Constitution, giving directives or guidelines to the Legislator.

- Constitutional Courts Complementing Legislative Functions interpreting Statutes in Harmony with the Constitution

This role of Constitutional Courts has resulted from the surpassing of the classical binomial: *unconstitutionality / invalidity-nullity* that conformed the initial activity of Constitutional Courts as “Negative Legislators,” having Constitutional Courts, on the contrary, progressively assumed a more active role interpreting the Constitution, and the statutes in order not only to annul or not to apply them when unconstitutional, but to preserve the Legislator actions and the statutes it has enacted, interpreting them in harmony with the Constitution; molding these Constitutional Courts as important constitutional institutions in order to assist and cooperate with the legislator in its legislative functions.

These sort of interpretative decisions have been widely used by the Constitutional Court in Italy, Spain, France and Hungary, where in many cases they have decided not to annul the challenged law, and instead have ruled

modifying its meaning by establishing a new content, making the law constitutional as it result from the constitutional interpretation.

In all these cases, the interference of Constitutional Courts with existing legislation has followed two main courses of action: first, complementing legislative functions as provisional Legislators or by adding rules to existing Legislation through interpretative decisions; and second, interfering with the temporal effects of existing legislation.

- Constitutional Courts Complementing the Legislator by “Adding” to the Existent Legislative Provision New Rules when giving it a New Meaning

Regarding the process of interpreting statutes in harmony with the Constitution, when testing their unconstitutionality, Constitutional Courts, in order to avoid their invalidation, have frequently create new legislative rules, in some occasions altering the meaning of the particular provision, and adding to its wording what is considered to be lacking.

These are the so-called “additive decisions” that have been extensively issued by the Italian Constitutional, as explained by Gianpaolo Parodi, the *Italian National Reporter*, through decisions in which although leaving unaltered “the text of the provision that is declared unconstitutional, the Court have “transformed its normative meaning, at times reducing, at others extending the sphere of application, not without introducing a new norm into the legal system,” or “creating” new norms. These additive decisions have also been applied for instance in Germany by the Federal Constitutional Court and in Peru by the Constitutional Tribunal.

These additive decision have been regularly applied in cases related to the protection the right to equality and non discrimination, seeking to eliminate the differences established in the law. This is the case in Spain, where the Constitutional Tribunal for instance, has extended to “sons and brothers,” the benefit of Social Security pensions granted to “daughters and sisters;” to those living in a marital de facto and stable way, the right of those married; cases in which Francisco Fernandez Segado, the *Spanish National Reporter*, has said that is possible to consider the Spanish Constitutional Tribunal as a “real positive legislator.”

A similar situation can be found in Portugal, where the Constitutional Tribunal, for instance, has extended to the widower, the allowances assigned to the widow; to the *de facto* unions, rights of married persons; and legal protection given to children of *de facto* unions, similar to the one given to legitimate children.

In similar way, in South Africa, the Constitutional Court has extended to the same sex partner in a stable condition, some rights assigned to married couples.

In Canada, the Ontario Court of Appeal to strike down a definition of marriage as a union of a man and a woman substituting it with the gender neutral concept of a union between persons, in order to allow same sex marriages. These decisions, as affirmed by the *Canadian National Reporter*, Kent Roach, “amount to judicial amendments or additions to legislation.”

A similar solution of additive decisions to enforce the right to equality and non discrimination can also be found in many similar cases in the Netherlands, in Peru, Costa Rica, Argentine, Poland, the Czech Republic and France, where, in a particular case regarding the right to respond on matters of TV Communications, as mentioned by Bertrand Mathieu, the *French National Reporter*, the Constitutional Council has substituted the will of the legislator.

- *Constitutional Courts Complementing Legislative Functions by Interfering with the Temporal Effects of Legislation*

The second role of Constitutional Courts interfering with existing legislation refers to the power of said Courts to determine the temporal effects of legislation. Decades ago, the matter of the temporal effects of the decisions issued by Constitutional Courts was one of the main aspects of the distinction between the diffuse and the concentrated system of judicial review. Nowadays, this distinctive element has completely disappeared, and a process of convergence can be found between all the systems, so the role of Constitutional Courts on matters of interfering with the temporal effects of legislation is common.

This can be seen, in comparative law, regarding three different situations: in postponing the effects of the Courts decisions; in extending retroactively or prospectively the effects of the Courts decisions and on reviving repealed legislation as a consequence of the constitutional control.

- *The Power of the Constitutional Court to determine in the future when an Annulled Legislation will Cease to have Effects: the Postponement of the Effect of the Courts' Ruling*

The first of the cases in which the Constitutional Courts interfere with the legislative function modulating the temporal effects of its decision declaring the unconstitutionality or nullity of a statute, is when the Court establishes a *vacatio sententiae*, determining when an annulled legislation will cease to have effects in the future by postponing the beginning of the effects

of its own decision and extending the application of the invalidated statute. This is the situation in Austria, Greece, Belgium, the Czech Republic, France, Croatia, Brazil, Poland, Peru and Mexico where if it is true that in principle, the Court's decisions have general effects since the date of its publication, the Court can establish another date in order to avoid legislative vacuums, giving time to the Legislator to enact a new legislation in substitution of the annulled one.

The same solution is found in Germany, although without a clear provision and based in the Constitutional Tribunal Law provision that gives it the power to establish the way in which the execution of the decision will take place.

Also, in Italy, although the Constitution establishes in a clear way that when the Constitutional Court declares the unconstitutionality of a statutory provision it ceases in its effects the following day after its publication there are important decisions of the Constitutional Court of deferment of the effects in time of the declaration of unconstitutional provision. The same has happened in Spain and Canada, in the absence of any legal rule on the matter, the Constitutional Courts have assumed the power to postpone the beginning of the effects of its nullity decisions; and also in Argentina, having a diffuse system of judicial review.

- The Power of the Constitutional Court to Determine since when an Annulled Legislation Will Have Ceased to Have Had Effects: the Retroactive or Non Retroactive Effects of its Own Decisions

Another aspect regarding the temporal effects of the Constitutional Courts decisions, refers to their retroactive or non retroactive effects, in which a process of convergence has occurred between all systems of judicial review, where is not possible now to find rigid solutions.

- The Possibility of Limiting the Retroactive Ex Tunc Effects Regarding Declarative Decisions

The classic approach to these matters was that as a matter of principle, in a diffuse system of judicial review, the judicial review decisions were considered to be declarative ones, with *ex tunc*, *ab initio* and retroactive effects. This was the traditional principle for instance in the United States, assigning the U.S., the Supreme Court decisions' retroactive effects, particularly in criminal matters. Nonetheless, the principle has been progressively relaxed, due to its possible negative or unjust effects regarding the effects already produced by the unconstitutional statute; so the former

“absolute rule,” has been abandoned, recognizing its authority to give or to deny retroactive effects to its ruling on constitutional issues. The same solution has been followed in Argentina, and in the Netherlands, regarding the control of “conventionality” of statutes.

The same relaxation of the principle has occurred in countries with a concentrated system of judicial review where the same retroactive principle was adopted for decisions annulling statutes. It is the case of Germany, where although being the declarative effects of the Federal Constitutional Tribunal the applicable rule, in practice is uncommon to find decisions annulling statutes with purely *ex tunc* effects. In Poland, and Brazil, the Constitutional Courts are authorized to restrict the retroactive effects of their decisions and to give them *ex nunc, pro futuro* decisions”

- *The Possibility of Giving Retroactive Effects to Ex Nunc Constitutive Decisions*

On the other hand, in countries with concentrated systems of judicial review, although the initial principle following Kelsen’s thoughts adopted in the 1920 Austrian Constitution was the constitutive effects of the Constitutional Courts decision annulling a statute, having in principle *ex-nunc, pro futuro* or prospective effects, such principle has also been mitigated particularly in criminal cases, accepting the retroactive effects of the annulment decision. This general trend is today the common principle applied for instance in Spain, Peru, France, Croatia, Serbia, the Slovak Republic, Mexico and Bolivia. In other countries like Venezuela, Brazil, Colombia and Costa Rica, the principle is that Constitutional Court is authorized to determine the temporal effects on its judicial review decisions, which according to the case, can have or not retroactive effects.

- The Power of Constitutional Courts to Revive Repealed Legislation

Finally, although as a matter of principle, also according to Hans Kelsen 1928 writings, judicial review decisions declaring the nullity of a statutory provision adopted by a Constitutional Court, does not imply the revival of the former legislation that the annulled statute had repeal, the contrary principle has been the one adopted in Austria, and is the one applied in Portugal and Belgium. In other countries like in Poland, Mexico and Costa Rica, it is for the Constitutional Courts to decide on the matter.

THIRD TREND: CONSTITUTIONAL COURTS INTERFERING WITH THE ABSENCE OF LEGISLATION OR WITH LEGISLATIVE OMISSIONS

In contemporary world, one of the most important roles of Constitutional Courts is not to control the constitutionality of existing legislation, but the absence of such legislation, or the omissions the statutes contain, when the Legislator does not comply with its constitutional obligation to legislate on specific matters, or when the legislation has been issued in an incomplete or discriminatory way.

Two sorts of legislative omissions are generally distinguished: absolute and relative omissions, being both subjected to judicial review.

- Constitutional Courts Filling Absolute Legislative Omissions

Regarding judicial review over absolute legislative omissions, Constitutional Courts have carried out constitutional control through two judicial means: First, when deciding a direct action filed against the unconstitutional absolute omission of the Legislator; and second, when deciding a particular action or complaint for the protection of fundamental rights filed against an omission of the Legislator that in a particular case prevents the possibility of enjoying such right.

- The Direct Action against Absolute Legislative Omissions

The direct action in order to seek judicial review of unconstitutional absolute legislative omissions was first established in the 1974 Constitution of the former Yugoslavia, and two years later, was incorporated in the 1976 Constitution of Portugal, giving standing to sue to some high public officials. The decisions of the Constitutional Tribunal in these could only inform the competent legislative organ of its findings conduct. A few years later, the direct action for judicial review of absolute unconstitutional legislative omissions was adopted in a few Latin American countries, in particular in Brazil, Costa Rica, Ecuador and Venezuela, where it has been used extensively. Nonetheless, the main difference regarding these countries is that in the case of Venezuela, the action is conceived as a popular action, and Constitutional Chamber has been granted express powers to establish not only the unconstitutionality of the omission but the terms, and if necessary, the guidelines for the correction of the omission. Nonetheless, the Constitutional Chamber has enlarge its powers controlling the legislative omission regarding non-legislative acts, and in 2004, after the National Assembly fail to appoint the members of the National Electoral Council, the Chamber not only declared the unconstitutionality of the omission, but proceeded to appoint directly those

high officials, usurping the Assembly's exclusive powers, assuring in this way the complete control of the Electoral branch of government by the National Executive. A case, also, for the Chapter of the pathology of judicial review.

Also in Hungary, the Constitution grants the Constitutional Court to decide *ex officio* or at anyone's petition, upon the unconstitutionality of legislative omissions, being able to instruct the Legislator to fulfill its task within a specific deadline, and even defining the contents of the rules to be sanctioned. This power has also been attributed in Croatia to the Constitutional Court, which can also proceed *ex officio*.

*- The Protection of Fundamental Rights against Absolute
Legislative Omissions by Means of Actions or Complaints for
their Protection*

The other mean commonly used for Constitutional Courts to exercise judicial review regarding unconstitutional legislative omissions are the specific actions or complaints for the protection of fundamental rights that can be filed against the harms or threats that such omissions can cause to such rights.

In this sense, it is the case in Germany, where the complaint for the constitutional protection of fundamental rights (*Verfassungsbeschwerde*), has been used by the Federal Constitutional Tribunal as a mean for judicial review of absolute legislative omissions, applied, for instance in cases regarding rights of illegitimate children, imposing the application of the same conditions referred to the legitimate ones, exhorting the Legislator to reform the Civil Code in a giving specific term.

In India, also, the Supreme Court has controlled the legislative omissions, ruling in cases of complaints for the protection of fundamental rights, like in the important case regarding ragging (bullying) menace at Universities, in which the Court not only urged the Legislator to enact the omitted legislation, but prescribed detailed steps to curb the practice, and outlined diverse modes of punishment that educational authorities may take. The Indian Supreme Court even directly appointed, in 2006, a Committee to suggest remedial measures; ordering in 2007, the implementation of its recommendations.

In a similar orientation, and also through equitable remedies like the injunctions, the U.S. Supreme Court progressively developed the protection of fundamental rights filling the gap of legislative omissions, particularly using coercive and preventive remedies, as well as structural injunctions. This was very important after the Supreme Courts decision in *Brown v. Board of Education* case 347 U.S. 483 (1954); 349 U.S. 294 (1955) declaring the dual

school system discriminatory, allowing the courts to undertake the supervision over institutional State policies and practices in order to prevent discrimination. This injunction activism was later applied in other important cases of civil rights litigations involving electoral reappointments, mental hospitals, prisons, trade practices, and the environment. Also, deciding these equitable remedies for the protection of fundamental rights, the U.S. Supreme Court has also created complementary judicial legislation, for instance, regarding the conditions for lawful search and arrest in connection with investigation and prosecution of crime.

In Latin America, these complaints for the protection of legislative omissions have also been used. It has been the case of the Brazilian *mandado de injunção*, as writ of injunction granted whenever the lack of regulatory provision makes the exercise of constitutional rights and freedoms, unfeasible. If these injunction the courts can given the Congress not only a term to repair its omission, but established the rules, some time by analogy, to be applied if the omission persist.

The same general approach of the Constitutional Court complementing the Legislator on matters of protection of fundamental rights deciding actions of amparo can be found in Argentina. Also, in Colombia, deciding actions of *tutela*, in the case of massive violations of human rights regarding displaced persons, the Constitutional Court has created even ex officio, what it has called factual a “state of unconstitutionality” (*estado de cosas inconstitucionales*) used in order to substitute the ordinary judges, the Legislator and the Administration in the definition and coordination of public policies.

In Canada, in a very similar way to the Latin American amparo proceeding for the protection of constitutional rights, according to the Charter the courts have the power to issue a wide variety of remedies including declarations and injunctions requiring the government to take positive actions to comply with the Constitution and to remedy the effects of past constitutional violations. These judicial powers have been widely used for instance enforcing protection on minority language in order to assure bilingualism obligations of the Provinces; on matters of criminal justice, due to the absence of legislative response to enact statutory standards for speedy trials and disclosure of evidence to the accused by the prosecutor; and on matters of extradition of person that could face death penalty in the requesting state.

In a certain way, in the United Kingdom, although the basic principle is that the courts does not substitute itself for the legislature, it is also possible to identify important activity developed by the courts on matters of constitutional

review regarding the protection of human rights, by issuing decisions with guidelines that supplement the jurisdiction of the legislator or the administration, as has occurred on matters related to sterilization of intellectually handicapped adults, and persons in a permanent vegetative state, providing rules for future application. Also in the Czech Republic the Constitutional Court has filled the gap derived from legislative omission on specific matters like the one related to rent rising in apartment houses, in which the Court considered that “its role of protector of constitutionality, can not limit its function to the mere position of a ‘negative’ legislator.”

- *Constitutional Court Filling the Gap of Relative Legislative Omissions*

In the case of judicial review regarding relative legislative omissions, when dealing with poor, deficient or inadequate legislative regulations affecting the enjoyment of fundamental rights, during the past decades, particularly in concentrated system of judicial review, Constitutional Courts have developed the technique of declaring the unconstitutionality of the insufficient provisions but without annulling them, sending instead to the Legislator, directives, guidelines and recommendations, and even orders, in order to seek for the correction of unconstitutional legislative omissions. In all these cases, the Constitutional Courts have developed a role of assisting and collaborating with the Legislator, particularly in order to protect the right to equality and non discrimination. These instruction or directives sent by Constitutional Courts to the Legislator are in some cases non binding recommendations; in other cases they have an obligatory character; and in others, they are conceived as provisional pieces of legislation.

- *Constitutional Courts Issuing Non Binding Directives to the Legislator*

In general terms, regarding the non compulsory judicial recommendations, called in Italy, exhortative decisions, delegate decisions or *sentenze indirizzato*, the Constitutional Court declares the unconstitutionality of a provision but does not introduce the norm to be applied through interpretation leaving this task to the Legislator. In other cases the instruction directed to the legislator can have a conditional character regarding the judicial review power of the Constitutional Court, so that in Italy, through the so-called *doppia pronuncia* formula, if the Legislator fails to execute the recommendations of the Court, in a second decision, the Court would declare the unconstitutionality of the impugned statute.

This sort of exhortative judicial review is also accepted in Germany, and is called “appellate decisions,” where the Federal Constitutional Tribunal can issue “admonitions to the Legislator,” containing legislative directives giving a term to enact the omitted provision. This same technique has been applied in France and Belgium, where the Constitutional Council and Court have also issued these directives addressed to the Legislator, which and even without normative direct effects, can establish a framework for the future legislative action. A similar technique has been applied in Poland, called “signalizations,” through which the Constitutional Tribunal directs the legislator’s attention to problems of general nature; and has also been applied in Serbia, the Czech Republic and Mexico..

Also in countries with diffuse systems of judicial review, like Argentina, these exhortative rulings have also been issued by the Supreme Courts, in cases related to collective habeas corpus petition, exhorting the involved authorities to sanction new legal provisions in order to take care, for instance, of the overcrowding and dreadful situation in the penitentiary system. These powers have also been used in cases of judicial review of “conventionality” regarding the American Convention of Human Rights. A similar position has been adopted by the Supreme Court of the Netherlands giving its “expert advice” to the Legislator.

- Constitutional Courts Issuing Binding Orders and Directives to the Legislator

In many other cases of judicial review referred to relative legislative omissions, generally based on the violation of the right to non discrimination and to equality, Constitutional Courts, when declaring the unconstitutionality of a provision without annulling it, have progressively assumed a more positive role, issuing regarding the Legislator, not only directives, but orders or instructions, in order for it to reform or correct pieces of legislation in the sense indicated by the Court. This has transformed Constitutional Courts into some sort of auxiliary of the Legislator, imposing them certain tasks, and establishing a precise term for its performance.

This judicial review technique has been used in Germany, where the Federal Constitutional Tribunal, through injunctive decisions has issued orders to the Legislator on matters related of the regime of alimony, professional incompatibilities, reimbursement of electoral expenses in electoral campaigns, status concerning professors, abortion, and alternative civilian service, even indicating the Legislator what not to do that could aggravate the unconstitutional inequalities. A similar sort of decision of the Constitutional Court can be found in Belgium, Austria and Croatia, and Colombia.

In the case of France, due to the traditional a priori judicial review of legislation system exercised by the Constitutional Council, one of the most important means in order to assure the enforcement of the Council's decisions have been the directives called "*réserve d'interprétation*" or "*réserve d'application*" although directed to the administrative authorities that must issue the regulations of the law and to the judges that must apply the law.

- *Constitutional Courts as Provisional Legislators*

Finally, in many other cases facing relative legislative omissions, Constitutional Courts have not limited themselves to issue orders to the Legislator seeking the enactment of legislative provisions, but have assumed the direct role of being "provisional Legislators" by including in their decisions when declaring the unconstitutionality of statutes, provisional measures or regulations to be applied in the specific matter considered unconstitutional, until the Legislator sanctions the statute it is obliged to produce. In these cases, the Court immediately stops the application of the unconstitutional provision, but in order to avoid the vacuum that a nullity can originate, temporarily establishes certain rules to be applied until the enactment of a new legislation. Constitutional Courts, in these cases, in some way act as "substitute legislators" although not in order to usurp its functions but in order to preserve its legislative freedom.

This technique has been applied also in Germany by the Federal Constitutional Tribunal, assuming "an auxiliary legislative power," and acting as a "parliamentary reparation enterprise," on a matter like the one resolved in 1975, on the partial decriminalization of abortion. In the case, after declaring unconstitutional the provisions of the Criminal Code, the Tribunal considered that "in the interest of the clarity of law" it was suitable to establish "provisory regulation" that was to be applicable until the new provisions would be enacted by the Legislator," and proceed to enact a very detailed "provisional legislation" on the matter that was applied for nearly 15 years, until 1992. In 1993, after the corresponding reform, the Federal Constitutional Tribunal issued a new decision considering it to be contrary to the Constitution, and establishing once more in an extremely detailed way, as "real legislator," all the rules applicable to abortion in the country.

In Switzerland, the Supreme Court in various cases has also provided for rules in order to fill the gap due to legislative omissions concerning enforcement of constitutional rights, as has happened, for instance, regarding the proceedings concerning the detention of foreigners; the right of asylum; and the rules on expropriation.

Also in India, the Supreme Court has assumed the role of provisional legislator, also on matters of protection of fundamental rights related to police arrest and detention, issuing notices to all state governments, establishing very detail “requirements to be followed in all cases of arrest or detention till legal provisions are made.” In this case, even though the requirements were seemingly intended to be temporary, they have continued to be the main rules applicable on the matter. The Supreme Court has also exercised the same powers protecting these rights of working women against sexual harassment at workplace, issuing “for the protection of these rights *to fill the legislative vacuum.*”

Within these sort of judicial review decisions including provisional regulations by interpreting the Constitution, it is possible to mention the cases of “*súmula vinculante*” issued by the Federal Supreme Tribunal of Brazil, for instance, regarding the prohibition of nepotism in the Judiciary, and the demarcation of indigenous people land. Also in Venezuela it is possible to find cases in which the Constitutional Chamber of the Supreme Tribunal, in the absence of the corresponding statutes, has issued decisions containing legislation, when exercising what the Chamber has called its “normative jurisdiction,” establishing complete regulations for instance regarding the *de facto* stable relations between men and women, and on matters of in vitro fertilization,

FOURTH TREND: CONSTITUTIONAL COURTS AS LEGISLATORS ON MATTERS OF JUDICIAL REVIEW

Finally, the fourth trend that can be identified in comparative law regarding the role of Constitutional Courts as “positive legislators,” is related to matters of legislation on judicial review, not only regarding the powers of the Court when exercising judicial review and the actions that can be filed before them, but regarding the rules of procedure applicable to the judicial review proceedings. This situation varies according to the system of judicial review adopted.

- Constitutional Courts creating their own judicial review powers

- The Judge-Made Law Regarding the Diffuse System of Judicial Review

In the diffuse or decentralized system of judicial review, being a power attributed to all courts which derives from the principle of the supremacy of the Constitution and the duty of the courts to discard statutes contrary to the

Constitution, such power does not need to be expressly established in the Constitution. This was the main doctrine established by Chief Justice Marshall in *Marbury v. Madison* 1 Cranch 137 (1803). Consequently, in the U.S., due to this essential link between supremacy of the Constitution and judicial review, judicial review was a creation of the courts, as was also the case a few decades later in Norway, in Greece, and in Argentina, where judicial review was also a creation of the respective Supreme or High Courts. ,

- The extension of judicial review powers in order to assure the protection of fundamental rights

Also in the same sense, and in particular regarding the protection of fundamental rights and liberties, Constitutional Courts in many Latin American countries, in their character of supreme interpreter of the Constitution have created in the absence of legislation, the action of amparo, as a special judicial mean for the protection of fundamental rights. This was also the case in Argentina in 1957, in Dominican Republic in 1999, and in the Slovak Republic, where the Constitutional “created” a specific means of protection. In Venezuela, the Constitutional Chamber has admitted the direct amparo action for the protection of diffused and collective rights and interests established in the Constitution, and in India, the Supreme Court has also expanded the action for the protection of fundamental rights for the protection of collective or diffused rights, called “public interest litigation” (PIL).

- The Need for the Express Provision in the Constitution of Judicial Review Powers of the Constitutional Jurisdiction and its Deviation

Nonetheless, and specifically referring to the concentrated system of judicial review, the power to judge the control of constitutionality of legislative acts when reserved to a Supreme Court of Justice or to a Constitutional Court must be accomplished as expressly provided in the Constitution; and cannot be developed by deduction through court’s decisions.

Notwithstanding, regarding their judicial review powers, in some cases, Constitutional Courts have extended or adapted them, as happened for instance, when applying the technique of declaring the unconstitutionality of statutes, but without annulling them, including the powers to extend the application of the unconstitutional statute for a term, and to issue directives to the legislator for him to legislate in harmony to the Constitution. This was a technique developed in Germany, as mentioned by Ines Härtel, the *German National Reporter*, “without statutory authorization, in fact *contra legem*,” and in Spain, where the Constitutional Tribunal, has applied the technique in

spite of the provision on the contrary contained in the Organic Law of the Constitutional.

But in other cases, Constitutional Courts have created their own judicial review powers not established in the Constitution, as has been the case in Venezuela, where the Constitutional Chamber of the Supreme Tribunal has created as a new means of judicial review not envisaged in the Constitution, the so called “abstract recourse for constitutional interpretation,” through which at the Attorney General requests, the Constitutional Chamber has distorted important constitutional provisions. It was the case, for instance, of the decisions adopted regarding the consultative and repeal referendums between 2002 and 2004, where the Chamber transformed the repeal referendum into a ratification referendum not established in the Constitution. Any way, these are cases for the chapter of the pathology of judicial review.

- Constitutional Courts Creating Procedural Rules on Judicial Review Processes

Finally, regarding Constitutional interfering upon the legislative functions, the process of creating rules of procedures for the exercise of their constitutional attributions, when not established in the legislation regulating their functions, must also be mentioned.

For such purpose, Constitutional Courts, as is the case of the Constitutional Tribunal of Peru, have claimed to have “procedural autonomy” having exercise their extended powers developing and complementing the procedural rules applicable in judicial review process not expressly regulated in the statutes.

In Germany, the same principle of procedural autonomy has been used (*Verfahrensautonomie*) to explain the powers developed by the Federal Constitutional Tribunal to complement procedural rules on judicial review process based on the interpretation of article 35 of the Law of the Federal Constitutional Tribunal related to the execution of its decision.

In other cases, judicial interference on legislative matters related to rules of procedures on matters of judicial review has been more intense, as in Colombia, where the Constitutional Court has assumed the exclusive competency to establish the effects of its own decisions. And in Venezuela, the Constitutional Chamber of the Supreme Tribunal of Justice, has also invoked its “normative jurisdiction” in order to establish the procedural rules for judicial review when not regulated in statutes, in particular regarding the action for controlling absolute legislative omission, and on matters of the habeas data, establishing detail procedural regulations “in order to fill the existing vacuum.”

FINAL REMARKS

The main conclusion that we can deduct from this comparative law study on “Constitutional Courts as Positive Legislators,” is that in contemporary world, Constitutional Courts have progressively assumed roles that decades ago only corresponded to the Constituent power or to the Legislator, in some cases, discovering and deducting constitutional rules particularly on matters of human rights not expressly enshrined in the Constitution, and that could not even be considered to have been the intention of an ancient and original Constituent when sanctioning a Constitution conceived for other society.

In other cases, Constitutional Courts have progressively been performing legislative functions, complementing the Legislator in its role of lawmaker, in many cases, filling the gaps resulting from legislative omissions, or sending guidelines and order to the Legislator, and even issuing provisional legislation resulting from the exercise of their functions.

These common trends, found in different countries, and in all legal systems, are of course more numerous and important than the possible essential and exceptional differences that could exist. That is why, in these matters of judicial review, Constitutional Courts in many countries, in order to develop their own competencies and exercise their powers to control the constitutionality of statutes, to protect fundamental rights and to assure the supremacy of the Constitution, have progressively begun to study and analyze the similar work developed in other Courts and in other countries, enriching their ruling.

Consequently, it is possible to say that nowadays, perhaps with the exception of the United States Supreme Court, is common to find in Constitutional Courts’ decisions, constant references to decisions issued on similar matters or cases by other Constitutional Courts, so it can be said that in general there is no aversion about using foreign law, to interpret, when applicable, the Constitution.

On the contrary, in the United States is possible to hear voices like those of Justice Sonia Sotomayor at her Senate confirmation hearings a few month ago, affirming that “American Law does not permit the use of foreign law or international law to interpret the Constitution” being this a “given” question regarding which “There is no debate.” On the contrary, on these matters, Justice Ruth Bader Ginsburg, has said that she: “frankly don’t understand all the brouhaha lately from Congress and even from some of my colleagues about referring to foreign law,” explaining that the controversy was based in the misunderstanding that citing a foreign precedent means for the court to considers itself bound by foreign law as opposed to merely being

influenced by such power as its reasoning holds. That is why she formulated the following question: "Why shouldn't we look to the wisdom of a judge from abroad with at least as much ease as we would read a law review article written by a professor?"

And this is precisely what is now common in all Constitutional Jurisdiction all over the world, where Constitutional Courts commonly consider foreign law, when they have to decide on the same matter and based on the same principles. In such cases, in the same sense as of studying the matter according to authors' opinion and analysis in books and articles, they can also rely on courts' decisions from other countries, which can be very useful because they dealt not only with a theoretical proposition, but with a specific solution already applied by a court in the solution of a particular case. And it is here, precisely, where comparative law is a very important and useful tool

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