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The Constitutional Law-making

Constitutional Law and the Jurisprudence of the European Court of Human Rights: An Attempt at a Synthesis[1]

There are a few premises underlying this discourse on the relationship between constitutional law and European human-rights law which I should reveal before we explore the relationship itself. I start with a functionalistic designation of the general legal process as being no more (and no less!) than a conflict-resolution process. From this point of view, the most important of my starting premises is what I consider to be an empirical fact, that is to say that the constitutional courts now produce jurisprudence2 overtly and explicitly transcending the Enlightenment's illusion of complete separation between the competencies of the legislative and judicial branches of power.

In other words, it is a fact that constitutional courts today produce law. This corpus of law, derived from continuous judicial review of the activities of all three branches of power, in so far as human rights are concerned, has much in common with the procedures and the substance of the case-law fashioned by the European Court of Human Rights (hereinafter ECHR).3

The big picture is such that a constitutional complaint - such as a Spanish amparo or a German Verfassungsbeschwerde - entails procedures and legal consequences at the national level that are clearly analogous to the procedures and legal consequences by an "application" or (in French "requete") at the international level, e.g. before the European Court of Human Rights. A violation of human rights is alleged, and the court produces an inter partes decision which, in the end, inevitably has at least a de facto erga omnes effect.

My second premise is that, epistemologically speaking, the wording of the national constitution is merely the tip of a vast legal-hermeneutic iceberg. This iceberg, if I may be excused the mixed metaphor here, is in most cases simply a variant of the heritage of our Judeo-Christian civilisation. Below the tip of the iceberg, but still above the water-line, are situated the layers of age-old ingredients of our common legal discourse, of legally articulated principles, doctrines and rules. Below the water-line of social consciousness, there are the less articulable moralities of duty and of aspiration, there are different hierarchies of values and there are different individual and social levels of moral development.[4] There is Durkheim's "collective conscience" as well as Karl Jung's dangerous "collective unconscious".[5]

The judges of constitutional courts, individually and collectively, epitomise prticular ethical standards built into their general world-view, as well as purely cognitive intelligence concerning the historical, civilisational, cultural and semantic connotations of the constitution's specific words, idioms, phrases, contexts, etc. Typically, if we speak of the constitutional principle of the separation of church and state being applied to the question whether the state may or may not finance certain activities of schools, this entails a whole range of legal alternatives and values being balanced against one another. It is

unlikely that thah a constitutional court willbe able to find a specific legal rule helping it to decide such a case. The whole history may in tunr be quite dissimilar in, say, France and Greece when compared with Bavaria, for example.

It is in this cultural environment that constitutional court judges carry out their own balancing of values, rule on the divergences of constitutional principles and, especially when reasoning in accordance with the principle of equality before the law (discrimination), decide basically what is in their view reasonable and rational. Clearly, the level of attained moral and broad cognitive development, i.e. the wisdom of these judges, is decisive.

While all of this is happening, the above-the-water part at least of the heurmeneutic iceberg is accumulating new layers of legal discernment, sensivity, perspicacity and so forth.[6] In terms of system analysis, one could also say that the legal systems in Europe have developed many return (negative) feedback loops. European legal systems are acquiring the capacity to store and recall their legal encounters with social reality, to learn from them, and to modify their own functioning. In a vfery definite sense, the legal systems are enhancing their own self-awareness and their ability to assimilate past experiences. These feedback loops reach from the top of the legal pyramid down to each of its lower hierarchical layers - and vise versa. Through constitutional (judicial) review, however, the negative feedback loops (which traditionally existed only in the ordinary system of appeals within the judicial branch itself) have in the meantime penetrated into the legislative and executive (administrative) branches.

Previously immune to constitutional rectification ("negative feedback"), these two branches may now be in the initial state of shock. In accordance with the general imperative of the rule of law, however, both the executive and the legislative branches are fast learning that they too are and must be constrained by the constitution, i.e. by the social contract that is binding on all. Quite specifically, for example, it is becoming clear through the judgments of the constitutional courts that the constitution binds even "the people" themselves. A referendum introducing a choice of racial discrimination would be clearly unconstitutional. The outcome of this complex and complicated process is the authentic and functional supremacy of the national constitution as a social, political and legal Magna Carta Libertatum.

In a sense, this is what human rights - politically and otherwise - are all about. That is to say, even in substantive terms, constitutional and human rights do largely coincide.

Of course, the interpretation of the constitution is entrusted to a specialised court. In Kelsen's traditional pyramid of legal acts, the constitution is the queen bee of the legal system, the cloud-hidden tip of the abstract and deductive logical pyramid with which all subordinate legal acts must be logically concordant. In this tradition, therefore, the specific sentences of the constitution only rarely formed the major legal premises of judgments delivered by courts. In Kelsen's view and according to his model of deductive rationality, what mattered was an abstract logical concordance between higher and lower lčegal acts. Because we now appreciate the law as a science of conflict resolution feeds inductively (empirically) on the specific controversies it is expected to resolve, we also realise that this concordance could never have remained purely abstract.

Only when the citizen-plaintiff alleges a concrete, new and different breach of a particular constitutional (or human) right do the abstract principles of the constitution (or the Convention) emerge in a new light. Once again, they become the immediate basis

of constitutional litigation. Through constitutional review of individual complaints practically all the aspects of the legal system may be tested and (dis)confirmed. Case-law, a by-product of this empirical process, now represents the lion's share of modern constitutional law.

Moreover, it is also an empirical fact that Europe has had in Strasbourg, for the last forty years, its own constitutional court. Of course, here the external legal features have been international rather than national - with all the dissimilarities this entails. The quintessence of the constitutional and human rights in question, however, is the same. I take this big picture as a Weberian "ideal type" and as a starting premise, a fait accompli. For what is interesting here are not the technical details and the hesitations one might harbour concerning the across-the-board comparison between national constitutional law and international human-rights law in Europe, but the historical evolution - and I do not think that in terms of legal history this is an overstatement - whereby we judges and professors of law all speak a certain MoliÈresque "prose", without perhaps being fully aware that we are in the process of "deconstructing" the Enlightenment's idea of law.[7]

As I have said, that idea required strict separation and division of labour between abstract legislative jurisdiction and the mere concretisation of abstract legislative acts by the judicial branch.[8] *It required a separation between the "abstract" and the "concrete" which is untenable both practically and, in particular, philosophically.*[9] *In other words, the constitutional courts are no longer simply mouthpieces of the law. A fortiori, since it is further removed from the technicalities of national law, the same goes for the European Court of Human Rights.*[10]

The vitality of the law derives from its direct and empirical contact with the conflicts it is charged with resolving. The European Court of Human Rights and the national constitutional courts translate the empirical reality of these conflicts (in which the State is the defendant) into the legal "reality" of their own interpretation of the Convention or the Constitution. In doing so, these courts create and re-create their particular legal systems' virtual reality. The technical legal aspects of the (in)compatibilities between the national and the international systems are best dealt with by means of an analytical or case-by-case approach.[11]

But these (in)compatibilities also have a broader synthetical aspect. From this wider perspective, it has now become impossible to maintain the view that the European Court's jurisprudence is simply a separate virtual reality that happens to be above and beyond the systems being continuously fashioned by the national constitutional courts. In today's language, we also speak of "harmonisation". The European Court in Strasbourg has been determining minimum legal standards in the field of human rights - in other words, it has been responsible for this harmonisation process over the last forty-two years.[12] *Of course, the European Court's judgments have never had the direct and dramatic binding consequences of constitutional-review judgments in terms of erga omnes effect and unconstitutionality.*

Consequently, the process of determining the categorical imperatives of human rights in Europe was and it remains incremental. The reasons for this become patent if we study the travaux prÈparatoires for the remedies available to the European Court of Human Rights (today's Article 41).[13] *There we discern a great concern with the signatory States' sovereignty and the rejection of the idea that the European Court of Human Rights' judgments might have a directly binding and erga omnes effect. On a substantive level, the so-called "margins of appreciation" are the inverse of the*

constitutional standards of what is "fundamental".[14] *The European Court of Human Rights perceived itself as an international court and has therefore been much more cautious, perhaps too cautious, in explaining and imposing the European Bill of Human Rights.*

Nevertheless, there is now a corpus of accumulated ECHR jurisprudence, a veritable legal system unto itself. This system is being continuously transposed into domestic legislation in the member States of the Council of Europe. The signatories of the Convention, of course, have different ways of assimilating these minimum human-rights standards into their own legal systems. One of the best ways, in my opinion, is via the State's constitutional court.

Constitutional courts continuously scan their legal systems for incompatibilities with the constitution and with super ordinate international provisions. Application of the European Court's minimum (quasi-constitutional) standards is therefore part of their skilled modus operandi.

Moreover, a State with an independent constitutional court aware of the ECHR's human-rights jurisprudence is much less likely to be condemned for a violation of the Convention, especially if the constitution provides for an individual constitutional complaint - amparo, Verfassungsbeschwerde or whatever it might be called. Individual constitutional complaints of this kind authorise the constitutional court of the State in question to examine the human-rights complaint before it ever reaches Strasbourg. Judicial review of individual constitutional complaints, one after another, continues to lead to the growth and further internal differentiation of the State's own constitutional law. In the meantime, this constitutional development is continuously being harmonised - on an analytical case-by-case basis - with the jurisprudence of the European Court of Human Rights.

In other words, the existence of a constitutional complaint in a State's legal system seems to me to provide the happiest medium for interaction between national constitutional law and the law of the European Court of Human Rights.

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1 *This article was originally presented as a speech at a meeting of the International Association of Constitutional Law - French Senate, June, 2001. The article appeared in the German Law Journal (http://www.germanlawjournal.com) with the author's permission but all rights thereto reside with the author.* **2** *The word "jurisprudence" is somewhat misleading, especially in the context of American legal terminology where it refers to what we in Europe call "legal philosophy". In French, the term refers to the consistent practice of the courts, especially of the higher courts. I chose the term here because etymologically it refers to legal wisdom (prudentia juris). As such, the term is somewhat neutral and ambiguous. This suits me well because it averts the question whether the case-law produced by courts is a sub rosa legislative activity. Friedrich Carl von Savigny, Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft, 1814 (rev. 1828), André-Vincent in France and Rantoul in the United States are some of the foremost authors on this subject. See below, note 8.* **3** *Here we do find an important difference between the constitutional courts and the European Court of Human Rights. The ECHR's judicial review applies only to the decisions of the national courts of last instance. This is due to international law's doctrine of subsidiarity. See, for example, A. A. Cancado Trindade, The Application of the Rule of Exhaustion of Domestic Remedies in International Law, Cambridge University Press, 1983. This question represents an important aspect of the ECHR's recent Cyprus v. Turkey inter-State judgment (application no. 25781/94, judgment of 10 May 2001) where the Court required domestic remedies before the "TRNC" courts to be exhausted before it could consider the case. See §§ 82 to 102, citing the International Court of Justice's Advisory Opinion on Namibia (1971 ICJ reports, p. 56, § 125). Even so, the ultimate decisions of the national courts time and again entail legal problems deriving from the legislative and executive branches. See, for example, Chassagnou v. France, judgment of 24 April 1999, Nikolova v. Bulgaria, judgment of 25 March 1999, etc.* **4** *See Robert Kegan, The Evolving Self, Harvard University Press, 1979. I also deal with the central issue of the level of moral development attained by judges in "From Combat to Contract or 'What does the Constitution Constitute?'", 11 European Review of Public Law 11-58, 1999.* **5** *I say "dangerous" because it can be activated by people like Hitler, Mussolini or Milosevic. Human-rights philosophy is one of the first lines of defence against such populist approaches. The history of the European Convention on Human Rights is a clear testimony to that. For example, although this is purely hypothetical, I am convinced that the Serbian tragedy could have been*

averted in its early stages had the Yugoslav Constitutional Court at that time had the courage and the power (in that order!) to do so. Likewise, various other current populist, xenophobic, racist, revisionist, etc. pronouncements are a constitutional (and not merely a political) issue in so far as political programmes and activities, too, are and should be constrained by the constitution as a basic social contract. Freedom of speech, for example, is generally restricted by the "clear and present danger" constitutional test. But a political party's undemocratic programme and xenophobic activities are a fortiori constrained by the democratic principles which European constitutions typically stand for. **6** *For those of us who benefited from a good education in Roman law it may be obvious that, on the whole, the legal process has not really changed in the last two thousand years. We still employ pretty much the same mental approach as Paulus, Ulpianus and other great Roman jurists. (Medicine, for example, has been transformed by science and technology. We cannot say this of law.) Napoleon's codification itself was inspired by and modelled upon Justinian's Corpus Juris. If ground has been gained, it is certainly not in classical fields such as private and criminal law. The real structural changes in law are now arising from the transformed role of constitutional and international judicial bodies. A meaningful discussion of the above predicament would require a re-evaluation of some of the basic philosophical premises. Suffice it to say here, that the constitutional doctrine of checks and balances does provide a dynamic (as opposed to static) answer to many of these concerns. In terms of Henri Bergson's philosophy, this reiterates the basic distinction between two divergent modes of thinking: on the one hand, the static (sub specie aeternitatis), and on the other hand, the dynamic (sub specie durationis). The distinction has been revived by another French philosopher, the late Gilles Deleuze.* **7** *The Enlightenment's notion of the rule of law derived, at least partly, from the over-reaction against the arbitrariness of the French aristocratic justice of the ancien régime. See, for example, Cappelletti and Cohen, Comparative Constitutional Law, 1979, Ch. I.* **8** *See Friedrich Carl von Savigny, Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft, 1814 (rev.1828). Von Savigny was, for the very same reasons, opposed to the grand designs of Napoleonic codification. He firmly believed (to borrow his metaphor) that the umbilical cord between the life of the nation and its law must not be cut, i.e. that law, as we would say today, is an inductive empirical process of settling any new controversies that arise. Time proved him to be right. The Enlightenment's deductive and reductive rationalistic method tacitly collapsed with, for example, Professor Steinberger's discovery that the decisions of the German Constitutional Court are not only effective erga omnes but are an authentic Rechtsquelle, source de droit, source of law.* **9** *From the practical and technical standpoint, I think every judge of every constitutional court can testify to the difficulties arising from this fundamentally artificial distinction. Moreover, in countries in which the rule of law is not established, this "logic" tends to be perversely abused both in politics and in the "free" press orchestrated by the new (ex-Communist) anciens rÈgimes in order to rein in the nascent independence of the judiciary and especially of the constitutional courts. I should say "absurdly abused" because - when the constitutional courts are being disparaged on the grounds that they have overstepped the margin of the narrow "concretising" jurisdiction and that they have transgressed into the "abstract" territory of legislative jurisdiction - the rule of law is being nipped in the bud in the name of the "rule of law". See Brumarescu v. Romania, judgment of 28 October 1999; Streletz, Kessler and Krenz v. Germany, judgment of 22 March 2001, etc.* **10** *Of course, this raises a further elemental issue. Montesquieu's idea of the separation of powers derived from a premise that it was possible to construct the division of labour between the legislative and the judicial branch by means of the Cartesian separation of what is abstract and what is concrete. In so far as the separation of abstract and concrete jurisdiction is workable, it has been given ample opportunity to test itself in politics and in the legal tradition. But it has proved to be quite impracticable, to say the least. It required the construction of the falsehood of complete separation of powers, which has become difficult to sustain. Of course, in so far as it is a question of power and prestige, the political protagonists of the executive (the most dangerous) and the legislative (the less dangerous) branch of power do cling to it. They maintain that they have a popular democratic mandate and that the judicial branch (the least dangerous), appointed by them, lacks this electoral accountability. Hence the somewhat disingenuous suggestions concerning "judicial restraint", the purely "negative jurisdiction" of constitutional courts, etc.* **11** *See an excellent essay on this by a former judge of the ECHR, Professor Benedetto Conforti, entitled "Community Law and European Convention on Human Rights: A Quest for Coordination". The article will appear in the volume of essays in honour of A. Cassese. A more or less similar article has already appeared, in Italian, in the Rivista Internazionale dei Diritti dell'Uomo, 2000.* **12** *In comparative legal terms, this process is similar to the XIVth Amendment due-process issues. In those cases the US Supreme Court determined which constitutional rights were "fundamental" to the extent that it was necessary to overrule and reverse states' legal rules and practices accordingly. This covered everything from criminal procedure, which in the US is largely a concern of constitutional law, to substantive and procedural due process, equal protection by the law (prohibition of discrimination), freedoms of thought, speech, the press and assembly, etc. Given the directly binding and erga omnes effect of the United States Supreme Court's constitutional-review judgments upon the states, this meant that the latter were required to change their specific legislation in order to conform to the US Supreme Court's interpretation of the Federal Constitution.* **13** *See Luca v. Italy, judgment of 27 February 2001 and Scozzari and Giunta v. Italy, judgment of 13 July 2000. These cases have to do with the binding nature of ECHR judgments.* **14** *The term "fundamental" is used with reference to the XIVth Amendment jurisprudence of the U.S. Supreme Court. But similar criteria are, mutatis mutandis, applied by the ECHR. The Convention itself is an establishment of fundamental and minimal human rights standards in Europe.*