THE PROTECTION OF FUNDAMENTAL RIGHTS BY CONSTITUTIONAL COURTS – A COMPARATIVE PERSPECTIVE

Mario Patrono*

"Man", said Benjamin Franklin, "is a tool-making animal". A major contribution of 20th century Western legal thought to tool-making was possibly the publication in 1914 of Reichgesetz und Landesgesetz nach der österreichen Verfassung[1] *by Hans Kelsen, a Czech lawyer, but Austrian by adoption. Kelsen is noted for his "pure theory of law". By conferring upon a special constitutional court the exclusive power to rule on the constitutionality of legislation and to refuse to enforce legislation that in its judgment violated the constitution, Kelsen found a way for the United States pattern of constitutional adjudication (as established in 1803 by Chief Justice John Marshall in* Marbury v Madison) *to work in countries which have (as in the United States) a written and "rigid" Basic Law, and even where the doctrine of precedent does not operate.*

This is a very short history of the development of that Kelsen "tool" and an evaluation of it.

I A SHORT HISTORY

It is common knowledge that Chief Justice John Marshall founded judicial review on three arguments: the written form of the Constitution, previous history (which Marshall however does not mention, but may go back ultimately to Edward Coke's thought as expressed in *Fuller's* case, 1607-1608, and in *Dr Thomas Bonham's* Case, 1606, when Coke stated "when an act

* Professor of Public Law at the I University of Rome. Visiting Professor, Victoria University of Wellington 1998-1999. This paper was presented to the VUW Law Faculty by Professor Patrono on 20 October 1999 as one part of his Wellington research work "Human Rights in Europe: Achievements and Dangers in the Transition to a New Millenium".

1 Hans Kelsen *Reichgesetz und Landesgesetz nach der österreichen Verfassung* (Archiv des öffentlichen Rechts, 1914) 202-245, 390-438.

of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it, and judge such an act to be void"), and Article VI, which establishes that the Constitution is "the supreme Law of the Land; …. Any Thing in the Constitution or Laws of any State to the Contrary notwithstanding". Marshall did not give great consideration to Article V, which contains the "amending clause": the presence/absence of the "amending clause" is now the sole element which lawyers – on the grounds of a positivistic view of law – watch in order to establish whether a written constitution is the paramount law of the land. In this way, conformity with the rule of law became a binding limit for all acts of United States public authorities, including federal and state statutes.

But the precondition of judicial review – Marshall did not speak of it, obviously – is the doctrine of precedent. In fact, almost every question of constitutionality could bring different and quite often conflicting judicial responses if any judge could "interpret" outside the guidelines of precedent. And so the concept of rights and duties of everyone would be lost and the rule of law would be replaced by the rule of tyranny.

The solution to the problem has been, so to speak, of an artificial nature. As is well known, it remains faithful to the idea of the constitutional court which had its first theoretical and technical formulation in the intellectual powerhouse which operated at the University of Vienna between 1910 and 1930 within the Institute for State and Constitutional Law. The first proposal was put forward by Hans Kelsen in 1914. This was taken up in the Constitution of the Austrian Republic in 1920, a Constitution of which the master of the Vienna School was the principal architect, and from there slowly spread to other systems.[2]

Kelsen, as a matter of substance, sought to rationalise the United States model of judicial review, that is the control of constitutionality being entrusted to a guarantor body which is impartial and outside the political arena. The centralised power and the erga omnes effect of the rulings of unconstitutionality are the two criteria that he had available to create an institution – the *Verfassungsgerichts of* (the Constitutional Court) – comparable, both by the

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2 For example, Czechoslovakia and Spain in 1931. Kelsen's paternity of the idea of a Constitutional Court is universally recognised: see W D Grussman *Adolf Julius Merkl, Leben und Werk* (1989) 24-29. See also H Haller *Die Prüfung von Gesetzen- Ein Beitrag zur verfassungsgerichtlichen Normenkontrolle* (1979) 38-45; G Schmitz *Die Vorentwürfe Hans Kelsens für die österreichesche Bundesverfassung* (1981). The Austrian Constitutional Court was founded by statute on 25 January 1919, and began to work in February/March 1919: the first judgment was given on 10 March 1919. The Court was abolished and then recreated by the new Constitution of 1920: it started to work in November/December 1920; its first case was decided on 14 December 1920.

position within the institutional structure and in the importance of the functions exercised, to the United States Supreme Court.[3]

The constitutional jurisdiction, like judicial review, is of a kind that makes the constitution effectively considered "law" in its own specific legal signification. Not only is the regime of democracy constitutionalised, but it is also "jurisdictionalised". The constitution ceases to be simply a programme. It becomes a binding norm, the duty of respecting which is entrusted to the moderating and arbitrating function of the judge. This means that an important range of political questions are transformed into legal problems.[4] Kelsen described this shift of the political process to the level of legality as "pacification", underlining the conciliatory function of law. In fact, it is possible to observe a relationship of cause and effect between the low level of confrontation which usually characterises the political/social environment in contemporary democracies and the existence of constitutional jurisdiction or judicial review.

The cost of shifting conflicts and political problems to the level of law is or can be of two kinds: a certain degree of inflexibility in the political process, and the risk of making the Constitutional Court – whose judgments cannot by definition be appealed – a hyper-powerful institution.

It is precisely on two central aspects of the nature of the constitution, a simple legal act according to Kelsen and the risk of putting democracy in the hands of an extremely powerful structure which is without accountability at the level of democratic controls, that a violent polemic was developed. It began in the 1930s and opposed the views of Hans Kelsen and Carl Schmitt, concerning the problem of "who must be the guardian of the constitution?". Kelsen recommended that a constitutional court should avoid accepting, within the given parameters of the constitutional legitimacy of laws, general formulae such as "justice", "public welfare" and "equity", even when they were positively inserted in the constitution. According to Kelsen, to do so would amount in effect "to conferring on the Constitutional Court of Justice an intolerable plenitude of absolute powers".[5] One does not find in the Austrian Constitution of 1920 and its amendments, vague or ambiguous concepts which are more political than legal of

3 H Kelsen "Judicial Review of Legislation A comparative study of the Austrian and American Constitution" (1942) 4 J Pol 183.

4 H Kelsen "La garantie jurisdictionnelle de la Constitution" (1929) Annuaire de l'Institut international de Droit Public 52-143, 194-195, 198-200.

5 H Kelsen "Wer soll Hüter der Verfassung sein?" (1931) 6 Die Justiz 576-628.

the type that are so frequently found in other constitutions. What is found is an extreme terminological precision, a precision that to a foreign observer might appear to be that of administrative law rather than of constitutional law. On the other hand "the court of Kelsen" - (a Kelsen who in the Constitutional Court at the beginning played quite a special role and it may be said the personalised role of a permanent commentator; a Kelsen also perhaps mindful of the strictures of Thomas Jefferson who, in 1819 when writing about the Supreme Court, stated that "the Constitution …. Is a mere thing of wax in the hand of the judiciary, which they may twist and shape into any form they please", and "It should be remembered, as an axiom of eternal truth in politics, that whatever power in any government is independent, is absolute also; in theory only, at first, while the spirit of the people is up, but in practice, as fast as that relaxes. Independence can be trusted now here, but with the people in mass"[6]) - assumes a low profile, a role reduced as it were to a sort of organ of administrative justice, from the moment that the so-called "theory of petrifaction" (*Versteinerungslehre*) is put into practice at the hermeneutic level, an interpretation of rules according to the meaning that the words had in the legislation, in doctrinal writings and Austrian practice at the time of their entry into force.

For his part, Carl Schmitt[7] regarded the Constitutional Court as an ambiguous and unwise solution to the problem of guarantees. Exchange the constitution for a simple legal act? That he said would be a case of being "penny wise pound foolish". Involve politics in justice? That would be chasing butterflies without a net and would serve only to achieve the opposite effect; the *Politisierung der Justiz*, the political use of justice. The natural guardian of the constitution for Schmitt, is rather the Head of State, the neutral power par excellence. Kelsen responded that the theory of the neutral Head of State was only an easy pretext for restoring the authority of the monarchs of the constitutions of the 19th century under false premises, and to increase the power of the executive. Kelsen foresaw the predisposition of Carl Schmitt towards an authoritarian regime and saw in it the eloquent expression of the diffidence that his antagonist bore to the institution of the constitutional jurisdiction.

It now remains to ascertain, following a comparative survey – first, whether or not Kelsen's idea of a special court at the highest level of government that handles only constitutional questions and to which all such questions are referred as soon as they arise, has received

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6 Letter from Thomas Jefferson to Judge Spencer Roane, 6 September 1819, in R Hofstadter *Great Issues in American History* (2 ed, Vintage Books, New York, 1958) 198-200.

7 Carl Schmitt *Die Hüter der Verfassung* (1931).

successful application in the civil law world and, secondly whether or not the court mechanism as originally conceived by Hans Kelsen, has stood up to the test of time.

II THE CONSTITUTIONAL COURT WORLDWIDE

The extraordinary success of Kelsen's idea of a constitutional court in several legal systems worldwide is now clear to all. Further, in general, it can be stated without suggestion of falsehood that judicial review, whether diffuse or centralised, is one of the significant underpinnings of modern legal culture. In the period between the two World Wars, the Austrian example of a constitutional court was followed only by Czechoslovakia and Spain. Post-World War Two there emerged other written constitutions, including the Basic Law of the Federal Republic of Germany and Italy's Republican Constitution of 1948, which provide explicitly for a centralised judicial review of parliamentary legislation.

More recently, constitutional courts have been born in Turkey (1961), in Yugoslavia (1963, then a communist country), in Spain (1978), even later in almost all Latin American nations and also in certain Asian and African countries that have modelled their legal systems on western European patterns. Even now, in France, where the Constitution confers upon an organ inside the legislative body the power to examine the constitutionality of statutes and authorises this organ to repeal a statute considered "unconstitutional", the Conseil Constitutional is becoming a special court to which a constitutional question may be referred in abstract form for a declaratory opinion by a procedure quite similar to that prevailing in states that allow advisory opinions.

With the fall of communism, the constitutional court idea has been confirmed both in the countries of the Soviet bloc of Eastern Europe and in those of the USSR itself (both European and Asian). All these countries appear to have received the principles of Western constitutionalism – a written and rigid constitution which includes the separation of powers, and the recognition and protection of rights and fundamental freedoms of individuals. Almost

all have provided in their constitutional structure for a constitutional court, albeit organised in diverse ways.[8]

Laszlo Solyom, President of the Hungarian Constitutional Court in 1996 said "in the former socialist countries, the introduction of the constitutional jurisdiction has become the symbol of a state governed by law".

III THE CONSTITUTIONAL COURT'S ROLE

The wide use of Kelsen's idea of a constitutional court is undoubtedly a sign of the idea's great success. However, it is a different story when the court mechanism is examined, as originally envisaged by Kelsen, both in relation to the role played by the courts in the political, social, or economic structure of society (a role pictured by Kelsen as of the least importance in terms both of law policy and possibility in fact), and the ability to act as the ultimate national defender of human rights.

It is beyond doubt that many constitutional courts have not only had to apply the law as Kelsen intended but have also, under certain guises and at certain times, had to create it. This problem had been foreseen by Schmitt and was regarded by him as insuperable, basically because constitutional provisions often express no fixed legal concept and therefore permit, the constitutional jurisdiction a profound interpretive possibility; in the final analysis there is a choice for the court interpreter between possible readings of the same provision. This is certainly not what Kelsen wished– as mentioned above – when he focused on the need for constitutional provisions to express only fixed legal concepts.

A few examples (from among the many that exist) are sufficient to prove the point.

The first example relates to abortion. The judgment of the German Federal Constitutional Court of 25 February 1975 deemed unconstitutional the legislation that decriminalised the voluntary termination of pregnancy. This judgment was based upon extending the right to life and the protected physical integrity of everyone, which is found in article 2 C2 paragraph 1 of the Basic Law, to the foetus. This was possible for two reasons. First, the word "everyone" does

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8 Albania (Basic Law n 7561 of 1992), Bulgaria (art 147 Constitution), Croatia (art 122 Constitution), Poland (art 188 Constitution), Romania (art 140 Constitution), Czech Rep (art 84 Constitution), Slovakia Rep (art 124 9S Constitution), Slovenia (art 160 Constitution), Hungary (art 32a Constitution), Armenia (art 96 Constitution), Azerbaijan (art 130 Constitution), Byelorussia (art 125 Constitution), Georgia (art 88 Constitution), Kazakhstan (art 7a Constitution), Kyrgyzstan (art 81 Constitution), Lithuania (art 102 Constitution), Moldavia (art 133 Constitution), Russia (art 125 Constitution), Tajikistan (art 89 Constitution), Ukraine (art 147 Constitution), and Uzbekistan (art 107 Constitution).

not have an unequivocal meaning because it could include either only those who have been born or both those who have been born and those who have been conceived; second, because the Federal Constitutional Court regarded the problem of when life begins as solved in the sense that "life like the historical existence of a human being begins according to clear bio-physiological phenomena in every case from the fourteenth day after conception". The conclusion of the German Court would have been somewhat different if there had been other criteria for determining the point of the beginning of life. Confronted with that same question the United States Supreme Court affirmed that it was impossible to resolve the problem about the beginning of life "because experts in medicine, philosophy, and theology" have not yet reached agreement on this matter. The Supreme Court therefore held as without utility any argument advanced at that date, and they went on to decide on the illegality of abortion (calculated between certain time limits). The Supreme Court based its decision on the non-criminality of abortion on the fact that the term "person" as used in the Constitution "is always used in the sense of a person who has been born".[9]

Therefore, there is a single problem but different answers from the judges. Only the Austrian Constitutional Court, when called upon to give judgment on the matter of abortion a few months before the German Court, decided not to decide; it maintained that the decision had to await the attention of the legislature. This is one of the solutions accepted by constitutional courts in other countries with constitutions similar to that of Austria.

The second example relates to the principle of equality before the law. Often in this area constitutional courts rely on the criterion of reasonableness. The principle of equality, marvellously given form by the articles of the Universal Declaration of Human Rights, is violated when the differences of discipline provided by the legislature (for example between man and woman or between citizen and foreigner) appear lacking in any appreciable rational basis. In these cases the court is involved in an activity which goes well beyond an interpretive exercise of a penetrating nature. This constitutes one of the reasons for the political role of constitutional courts.

The third example is the boundaries between the powers vested in central government and those of states or regions. In Italy's case the regional legislative power finds a strict limit in the central government's exclusive legislative power in areas such as fundamental social economic reform. This rule has a high degree of flexibility and the Constitutional Court has tried in vain

9 *Roe v Wade* (1973) 410 US 113, 147.

to restrict it.[10] The basis for defining a piece of legislation as social economic reform according to the Court is discovered by a deep analysis of the object, of the political social motivation, of the scope, and of the content and novel character of laws under its control. In applying these criteria, the Italian Court has notably restricted regional autonomy. This is an obvious result of the political role that the court plays when it comes in contact with sensitive issues.

This short examination of some of the experiences of constitutional courts shows how the Kelsen model, in being put into practice, has undergone modifications exactly on its most delicate point: that the constitutional jurisdiction must apply constitutional law, not create it. It restates the problem of the choices that are inevitable in the interpretive activity of constitutional courts and that can assume political value of incalculable significance. In order to reduce these choices and limit the interpretive activity – something that is difficult to achieve, it would help to draft precise constitutional laws, but that would mean restrictions for the legislature and therefore limitations on legislative freedom. The solution, if one exists, must come from the constitutional courts themselves by acknowledging that they are bodies outside the range of political responsibility every time that they are required to go beyond the letter of the constitution, establishing – for example – principles that are unwritten, they must find their legitimacy in the form or style of their argumentation. Constitutional courts – in particular the German one – show (luckily) that they are aware of this matter and often speak of the need for judicial self-restraint, a greater autonomy from other constitutional bodies, and the refusal to make political decisions.

IV CONSTITUTIONAL COURTS AND HUMAN RIGHTS

The quality and quantity of "Kelsen's court" service (as of the other courts which have derived their features from the Austrian model: for example, the Constitutional Court of Italy) is limited fundamentally by the purpose which that court serves: to ensure the smooth running of the constitutional process of government. That function is to resolve any dispute with regard to the boundaries of the constitutional authority between, or repair any usurpation of power by, any governmental departments or bodies. In this sense "Kelsen's court" may be said to be the umpire of the constitutional process of government. Consequently, the court's protection of basic rights could come only *eventually* and *indirectly*; but the struggle for human rights has increased massively since Kelsen's day.

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10 See the judgment of the Italian Constitutional Court, number 219/84.

A demand for a sufficiently high efficiency of the constitutional court to protect basic human rights, as enshrined in the constitution, stimulates many important refinements. Most notable is the "individual complaint of infringement of the fundamental rights" (in Spanish, "recurso de amparo constitutional"; in German "Verfassungsbeschwerde").

To assess how this system works, and whether it works well or not, based on its essential features, it is convenient to observe the situation in Germany, Austria, and Spain, the only nations in Western Europe to have implemented it.

A Germany

1 Legislation

The individual's right of constitutional complaint (*Verfassungsbeschwerde*) was introduced into the German system on 12 March 1951 with the founding statute of the Federal Constitutional Court (*Bundesverfassungsgerichtgesetz* (BVGG)) which dedicates sections 90-95 to this matter. Initially this was not provided for in the Basic Law (*Grundgesetz* (GG)). Only with the legislation which revised the Constitution on 29 January 1969 was challenge on the grounds of constitutionality included in article 93 of the Constitution. Article 93 states that "the Federal Constitutional Court decides on complaints of unconstitutionality, being filed by any person claiming that one of his or her basic rights or one of his or her rights under article 20(4) or under article 33, 38, 101, 103, or 104 has been violated by public authority".

2 Protected rights

An individual's right to challenge the constitutionality of a public authority's action is recognised for the protection of everyone's fundamental rights or other similar rights.[11] The fundamental rights are expressly listed by articles 1-19 of the GG. Every organ of government respects them. This is well proclaimed in the constitutional law by article 1(3) of the GG which says "The following basic rights are binding on the legislature, executive, and judiciary as directly enforceable law". It may also be said that this listing of rights does not appear to be exhaustive. It is possible that other fundamental rights may be identified. Rights of a nature similar to the fundamental rights are contained in other rules of the Basic Law: the right to resistance in article 20(4); the right of access to public office and political rights in article 33; suffrage rights in article 38; the right to natural justice and the proscription of extraordinary or special tribunals in article 101; the right to defend oneself in the courts and the principle of

11 Article 93 (1)(4a) of the GG and s 90 of the BVGG.

legality and the non-retroactivity of the law in criminal matters in article 103; and the right to personal freedom in article 104.

On the other hand, fundamental rights provided for in an international treaty signed by Germany (for instance, the human rights conventions of the United Nations or the guarantees that flow from the European Union Treaty) are not individual justiciable rights, because they are not contained in the Basic Law. Recently however, the Constitutional Court has adopted a more flexible approach in respect of violations of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, when these violations were caused by "arbitrary" ignorance. In fact, violating the Convention can amount to a violation of article 3 of the GG, which enshrines the principle of equality before the law. In this way the Constitutional Court, within the framework of the challenge of constitutionality, can control the more serious and flagrant violations of the Convention.

3 Right of constitutional complaint

Section 90 of the BVGG and article 93(1)(4a) of the GG grant the right of constitutional complaint to "any person" claiming in a reasoned way that he or she has suffered harm in respect of one of his or her basic (or equivalent) rights. This means several things. First, this ability lies with every physical person, including foreigners. However, the Basic Law makes a distinction between those fundamental rights which relate to every human being (human rights), and the fundamental rights which relate only to German citizens (for example freedom of movement under article 11.1 of the GG). Therefore, a foreigner can have access to the Federal Constitutional Court only when the harm alleged relates to one of the fundamental rights of every person, or the harm of a fundamental right of foreigners recognised by the Basic Law (for example, the right of asylum: article 16a of the GG); and not therefore the harming of a fundamental right which is recognised for German citizens only.

Furthermore, all private legal persons have the right of complaint of infringement of a basic right, and this includes political parties since they also are the holders of fundamental rights "to the extent that the nature of such rights permit".[12] On the other hand, for the opposite reason, public legal persons have no right of individual recourse (with some rare exceptions).[13]

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12 Article 19(3) of the GG.

13 For example universities under art 5(3) of the GG, which explicitly enunciates the freedom of science and teaching.

Public legal persons do have the right of complaint to the Constitutional Court for the protection of "fundamental procedural rights".[14]

4 Subject-matter of complaint

A very important aspect of the individual's right of constitutional complaint relates to its object – that is the acts against which recourse can be taken. The broader the range of actions covered, the greater the protection of individuals. Section 90 of the BVGG speaks of harm to fundamental rights or to similar rights caused by a public authority. The phrase "public authority" means that the acts challengeable by complaint of unconstitutionality are all acts which are committed by a Federal or State authority which are prejudicial to fundamental rights. These may be statutes, administrative measures, or judicial decisions. This interpretation is confirmed by section 94 of the BVGG, where in the second paragraph, references are made to the acts or omissions of a kind harmful to fundamental rights which can be attributed to the Minister or to an administrative authority of the Federation or a State, while the third paragraph, refers to constitutional complaints against judicial decisions which harm fundamental rights, as well as against statutes.

5 Admissibility of complaint

To avoid indiscriminate access to the Constitutional Court, the German law has provided a filter made up of two specific admissibility requirements in respect of individual complaint. The first relates to the nature of the harm alleged by the petitioner; the second to the subsidiarity of the remedy in question.

6 The nature of harm

The Constitutional Court has established that it is not sufficient to allege harm to a fundamental right, but it is also necessary that the harm is personal, real and immediate. "Personal" means that the petitioner can address the Constitutional Court only for the protection of one of that person's own fundamental rights, which thereby excludes the possibility that the complaint can be used for the protection of others. "Real" means that the harm is present at the time of the recourse and is not merely a potential of future harm. Otherwise the possibility would arise for a "popular action" against general laws. "Immediate" indicates that the harm must be a direct consequence of the impugned act and not a result of a later executive act. This requirement makes it very difficult for the object of a challenge to be a

14 Articles 101 and 103 of the GG.

statute, because normally the harm to a right flows from the regulatory activities of the executive, which are independently challengeable before the ordinary courts. Criminal legislation is an exception, because it immediately gives rise to the possibility of harm to a fundamental right. As a result, the necessity that the harm has these characteristics and in particular the characteristic of immediacy, tends to mean that the constitutional complaint is not transformed into a "popular action" for the protection of fundamental rights (as for instance is possible in the State of Bavaria in the form of the *Popularkläge*; "popular action" is provided also in the Hungarian legal system).

7 The subsidiary nature of the complaint

This means that the challenge can be presented only after all other legal remedies have been exhausted. The challenger must have used all the judicial means of challenge available. The principle of subsidiarity has found expression in the combined dispositions of section 90 of the BVGG and article 94(2) of the GG. Article 94 of the GG states that:

> The constitution and procedure of the Federal Constitutional Court are regulated by a federal statute which …. may require that all other legal remedies must have been exhausted before a complaint of unconstitutionality can be entered… .

In fact, the viability of the constitutional complaint presupposes the finality of the administrative and jurisdictional acts which result from the decision becoming res judicata respectively of the administrative and ordinary courts. Adhering to the principle of subsidiarity has the result of making a complaint of unconstitutionality a final and extraordinary legal remedy which is granted to an individual for the protection of his or her fundamental rights only after the courts – which under article 19 of the GG are called upon to protect basic rights – have first given a final judgment on that case.

Section 90 of the BVGG admits one exception to the principle of subsidiarity when it allows a decision on the constitutional complaint before it has followed the judicial path. This is when the recourse is considered to be of general interest and when pursuing the judicial decision could result in a serious and irreparable loss to the petitioner. It is of course obvious that subsidiarity has no role in challenges to statutes which directly harm a fundamental right.

8 Procedural rules

To avoid inundating the Federal Constitutional Court with individuals' complaints of unconstitutionality, as has happened in Mexico, the German legislature has prescribed a special procedure: the so-called "acceptance procedure" which finds its rules in section 93 of the

BVGG (most recently amended in 1993). As is well-known, the Constitutional Court has been rigidly divided into two sections (Senates) since 1951. This gave rise to the thought that there were two separate courts because one of these chambers had the specific task of deciding on individual complaint. Section 15 of the BVGG states that within each chamber there are commissions ("Kammern") comprising (according to section 15) three judges. These commissions are entrusted with the duty of determining at a preliminary level whether the challenge is admissible and therefore able to go on to a hearing or not. According to section 93 of the BVGG, there are two bases for a challenge being acceptable: the first is its legal aspect which flows from a harm of one of the rights mentioned in section 90 of the BVGG. When the commission of three judges accepts the challenge, the case is transferred for decision to the chamber. If the commission decides against its admission, the challenge is denied. In such a case the commission must make its decision unanimously.

It is said that 97 per cent of challenges are decided in a negative sense within the commission process of admissibility.

9 Legal effects of the decision

When the Federal Constitutional Court finds that the challenge is well founded it admits it and annuls the challenged act. In this case according to section 95 of the BVGG the Constitutional Court must expressly declare which provision of the Basic Law has been violated by the act or omission.

When the challenge is in relation to a judgment of a court, the Constitutional Court will annul it. If it is a judgment of one of the highest courts (that is, Federal Court of Justice, Federal Administrative Court, Federal Finance Court, Federal Labour Court, and Federal Social Court), the Constitutional Court will refer the matter back to the competent court (section 95 of the BVGG). However, if the basis for the challenge is a judgment which indirectly violates fundamental rights because it was founded on an unconstitutional law, the Constitutional Court as well as declaring the judgment void will also declare the statute void (section 93 of the BVGG). In doing this the Constitutional Court has become an institution with the capacity to dictate a uniform interpretation of the Constitution and to impose it on the ordinary courts.

When the complaint relates to a statute, the Constitutional Court will declare the statute void.[15] The judgment that declares the nullity of the statute has the same effect and produces

15 Article 93 of the BVGG.

the same duties as in other courts of constitutionality affecting statutes: "abstract" control (*abstrakte Normenkontrolle*) and "concrete" control (*konkrete Normenkontrolle*).

B Austria

1 Legislation

The right of individual complaint on the grounds of constitutionality (*Individualantrag-Bescheidbeschwerde*) finds its basis in the Federal Constitution of 1 October 1920 (*Bundes-Verfassungsgesetz* (BVG)) in articles 139, 140, 140a, 144, and in the Constitutional Court Statute of 1953 (*Verfassungsgerichtshofgesetz* (VerfGG)), in particular in articles 57, 62, 66, and 82. However, it must be noted that until 1975 the right of constitutional complaint was limited to administrative acts. It was in fact only with the revision of the BVG in 1975 that the right of individual complaint was introduced in respect of laws and regulations which breached constitutionally protected rights.

2 Protected rights

The situation of the rights protected by means of constitutional complaint is not uniform, and depends on the "nature" of the harmful act. Articles 139, 140 and 140a of the BVG and article 57 of the VerfGG establish that the complaint can be made by any person who claims to be harmed directly in respect of one of their rights by a regulation, a law, or an international treaty.

On the other hand article 144 of the BVG and article 82 of the VerfGG require that there must be harm to a right protected by the Constitution for there to be recourse against an administrative act.

On the basis of this distinction it seems possible to assume that the Austrian Constitution intends to protect any right when the harmful act is a law or a regulation, but at the same time to limit the protection to rights provided in the Constitution when the harmful act is an administrative act.

This is a question of a very delicate nature, and there is a division of opinion about it in Austrian academic thinking. However, it is clear that the range of protected rights is wider in the Austrian legal system than in the German. This is because, even accepting the least favourable thesis, the ambit of constitutionally protected rights is greater than for "basic" rights or "freedoms" provided in the German Constitution.

3 Right of constitutional complaint

Both the BVG in articles 139 and 140 and the VerfGG in articles 57 and 62 give legitimacy to the right of individual complaint to any "person". According to the Constitutional Court the word "person" includes natural persons – both citizens and foreigners, and artificial legal persons.

4 Subject-matter of complaint

Until 1975 the BVG admitted constitutional complaints only in relation to administrative actions. Within this category are administrative services – that is administrative acts which are characterised by a specific form and result from a specific procedure – and acts which are the expression of a power of control and coercion by a public authority (for example, supervision by the police, the removal of a document or a firearm, or the search of a house without judicial warrant).

It is only since the constitutional revision of 1975 that there has also been the possibility of individual complaint against laws and other legal norms – including in this term any act of administrative authority at the federal or state level that has "normative" content (general and abstract).[16] Further, from 1975, individual complaint could be in respect of international treaties.[17]

In summary, there may be individual complaint against laws, regulations, and international treaties, as well as against administrative acts. All that is absent from the list are omissions of administrative bodies and judicial acts.

5 Admissibility of complaint

The conditions of admissibility of complaints differ for laws, other legal norms and international treaties, and for administrative decisions. It is article 140 of the BVG and article 62 of the VerfGG for the first, and articles 139 of the BVG and article 57 of the VerfGG for the second. These require that a person who makes the petition should affirm a direct harm of their rights because of the unconstitutionality of the law or invalidity of the regulation. That means that the Federal Constitution permits individual complaint against such acts but only on the condition that the harm is the "immediate, direct and present" effect of the act. The harm

16 Articles 140 and 139 of the BVG and articles 62 and 57 of the VerfGG.

17 Article 140a of the BVG.

cannot be the result of executive rules in respect of laws, or of specific provisions of an administrative authority or judgment in the case of regulations. The same articles 57 and 62 of the VerfGG require that the petitioner show that in some way the regulation or law may become effective in its operation without the necessity of a judgment or an administrative requirement. The failure of the petitioner to fulfil these requirements makes the petition non-receivable in the sense of article 19 of the VerfGG.

The situation is different for the admissibility of a petition in respect of administrative acts. For administrative acts, articles 144 of the BVG and article 82 of the VerfGG require that the actions are final. The ordinary remedies of administrative appeal must have been exhausted. It is clear that if the procedure is unchallengeable (a decision of a Minister, or of the Governor of a member State), individual complaint can proceed immediately. Normally however the individual complaint to the Constitutional Court has a subsidiary character in relationship to the ordinary administrative recourse system.

The requirement of finality is no help in the case of administrative acts which result from the exercise of a direct administrative power of command or compulsion. This is because these acts do not manifest themselves in formal procedural actions and therefore no legal remedies against them exist.

The difficulties of proof that can arise in respect of the regulations, laws and international treaties means that the greater part of complaints to the Constitutional Court relate to administrative actions.

6 *Procedural rules*

The decisions of the Constitutional Court are normally taken by the plenum of the court and this is validly constituted if the President and at least eight other judges are present,[18] following an oral public hearing at which the petitioner must appeal.[19] The petitioner may plead the case in person or with the aid of legal representation,[20] however it is possible that the court may sit with only the President and four members (a restricted quorum) in chambers when:

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18 Article 7 of the VerfGG.

19 Article 19 of the VerfGG.

20 Articles 17 and 24 of the VerfGG.

(a) there is a clear absence of any violation of a right protected by the Constitution;[21]

(b) the question is one of law which has already been sufficiently clarified by prior judgments of the Constitutional Court;[22] and

(c) the complaint relates to an act of command or coercion which has harmed rights which are constitutionally protected.[23]

The Constitutional Court, in order to lighten its workload, has been granted – at the time of the constitutional revision of the years 1981-1984 – the power to reject a complaint without reasons.[24]

7 The legal effects of the decision

When the Constitutional Court finds that the petitioner's case is well founded, it moves to protect his or her basic rights. The effect of the decision varies according to the nature of the impugned acts. If the object of the complaint was a law, article 140 of the BVG provides that the Court shall rescind it as unconstitutional. In reality the effects of the judgment are ex nunc, as becomes clear from the combined effect of article 140(5) of the BVG ("The rescission enters into force on the day of publication if the Court does not set a deadline for the rescission") and article 140(7) of the BVG ("The law shall … continue to apply to the circumstances effected before the rescission, the case in point excepted, unless the Court….."). The same applies in respect of other legal norms.[25]

The situation is different if the complaint's subject-matter regards an international treaty. In this case, the Constitutional Court cannot rescind the treaty as unconstitutional but can only declare it non-applicable, and this decision binds all state institutions which are required to execute that treaty.[26]

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21 Article 19 of the BGG.

22 Articles 7 and 19 of the VerfGG.

23 Article 7 of the VerfGG.

24 Article 44 of the VerfGG.

25 Articles 139(5) and (6) of the BVG.

26 Article 140 of the BVG.

When the Constitutional Court grants recourse against an administrative measure because there has been a violation of constitutionally protected rights, it rescinds the measure.[27] If the administrative action relates to an administrative power to command or compel, the decision of the Constitutional Court is limited to declaring the invalidity of the exercise of the power. The decision of the Constitutional Court imposes on the administrative authority the duty to create a situation which is in conformity with the legal interpretation given by the Court. This results in the administrative authority making a measure (so-called "substitutive" measure) which corresponds to the content of the decision of the Court.[28]

C Spain

1 Legislation

The protection of fundamental rights by constitutional complaint (*recurso de amparo constitucional*) finds its structure in the Constitution, articles 53 1.6.1 and 1.6.2, and in the Organic Law on the Constitutional Court of 3 October 1979 (LOTC). Articles 41-59 of this statute were modified by the Organic Law of 26 December 1984 which governs appeals in the case of conscientious objection, and were also modified by article 50 of the Organic Law of 9 January 1988, which prescribed a new set of rules for the admissibility of constitutional complaints.

2 Protected rights

The constitutional complaint does not extend to all constitutionally protected rights but only to those listed in articles 14-30 of the Constitution. According to article 53 of the Constitution these same rights can form the basis of recourse in the ordinary courts by way of a special procedure which is based on the principles of priority and summary process which to date has not found legislative expression.

Furthermore the appeal to the Constitutional Court does not necessarily have to follow these special procedures in the ordinary courts, even though these remain the principal method of protecting the rights in question (as is indicated by article 53.2 and by article 161b). This confirms the view that the constitutional complaint is compatible with the habeas corpus provided in article 17 of the Constitution for the protection of illegally detained persons, also

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27 Article 87 of the VerfGG.

28 Article 87 of the VerfGG.

because habeas corpus is among the fundamental rights that have recourse to the Constitutional Court.

3 Right of constitutional complaint

According to article 162 of the Constitution, the right of constitutional complaint belongs to any "natural" person. The phrase "natural person" includes both nationals and foreigners. In reality, in respect of the rights of foreigners some doubt has arisen so far as Article 53 of the Constitution is concerned, because article 41 of the LOTC speaks specifically of "citizens" as the persons entitled to constitutional complaint. From the beginning, however, academic writing has rejected that restrictive interpretation for the simple reason that the Constitution itself provides that the fundamental freedoms and rights belong to every human being and therefore also to foreigners.[29]

Obviously foreigners do not have rights which the Constitution specifically recognises as rights of citizens: for example article 19 regarding "the freedom of movement in the national territory"; another example is article 13(2), which reserves the right to stand for election to municipal councils to Spanish nationals, until the Constitutional Court, by the decision in *Re Municipal Electoral Rights*,[30] recommended a reform of the Constitution on this point.

Besides physical persons, article 162 of the Constitution recognises the right of complaint for artificial legal persons among which are included both private and public organisations. Naturally for these persons the right is limited to those matters which are compatible with the legal nature of the person.

Article 162 also admits the propriety of the presentation of a constitutional complaint by the Public Defender (*Defensor del Pueblo*) or the Attorney-General. This is because the harming of a fundamental right affects not only private interests, but also has a negative impact in respect of human rights generally.

4 Subject-matter of complaint

According to article 41 of the LOTC, the right of constitutional complaint exists to protect against violations of rights and liberties which result from "decisions, legal acts or simple actions" of public authorities. Public authorities, according to the Spanish legislation, are the

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29 Article 15 "the right to life and physical and moral integrity"; article 24 "the right to have access to the courts and tribunals", and "a person can in no case be left without a right of defence".

30 Case 1236/1992.

State and the autonomous communities as well as public organisations of a territorial character, whether corporate or institutional in nature, and also their employees or agents. As for the acts which could be the object of complaint, they are identified as administrative acts, judicial acts, and include omissions and rule-making actions. It must be noted, in respect of the rule-making processes, that article 42 includes only "decisions or acts without the status of law statute" and therefore the choice of the legislator has been to exclude statutes from the complaint system but to include, for example, Parliamentary rules.

5 Admissibility of complaint

The LOTC sets out the requirements for admissibility of a constitutional complaint by reference to the nature of the act that is at its base. Briefly, the requirements are a direct harm of a fundamental right, and subsidiarity.

The first requirement relates to legislative acts. The complaint is the only way for individuals to protect fundamental rights and liberties, apart from the availability of the special procedures before the ordinary courts under article 53 of the Constitution.

Subsidiarity, which has various forms, is required when the object of the complaint is an administrative or judicial act, or in a matter of conscientious objection.

Specifically in the case of administrative acts, the judge can be seized of the matter only when the judicial avenues provided by article 53 of the Constitution or the special procedures before the ordinary courts have been exhausted.[31] Therefore an individual, for the protection of his or her fundamental rights, must first go to the ordinary courts and only after that can appeal to the Constitutional Court to impugn the administrative act, but not the judgment of the ordinary court.

As far as acts or omissions at the judicial level are concerned, article 44 requires the exhaustion of all available means of challenge within the ordinary judicial system, that the violation of the right or liberty is directly and immediately attributable to the act or omission of the judicial organ, and that the right affected has already been pleaded in the course of the ordinary procedure.

The requirement of subsidiarity makes the constitutional complaint a final, extraordinary, and subsidiary remedy for the protection of fundamental rights and freedoms through the ordinary process before the ordinary courts.

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31 Article 43 of the Constitution.

6 Procedural rules

According to article 49 of the LOTC, the constitutional complaint begins with a request in which the facts on which it is founded are set out with clarity and concision. In the request, the constitutional principles that are claimed to have been violated and the remedy or the protection that is claimed to protect or restore the right or freedom which has been violated, must be indicated.

According to article 48, jurisdiction to hear a constitutional complaint lies with one of two sections (*Salas*) which make up the Constitutional Court. A full sitting of the Constitutional Court can deal with the complaints only in particular cases: when the President and three Judges of the Constitutional Court require it;[32] or when the section intends to depart from constitutional principles established by the Court.[33] Every section, made up of six Judges, is divided into two chambers, each comprising three Judges. These chambers reduce the burden of the work of the Constitutional Court. It is in one of these chambers that decisions are made on the admissibility or inadmissibility of the complaints. Inadmissibility can be based, according to article 50 (as amended by the Organic Law 6/1988) on one of four reasons:

(a) the request, in a manifest and uncorrectable manner, does not fulfil one of the conditions required by articles 41-46 of the LOTC or falls within the situation provided for by article 4 of the LOTC (the lack of jurisdiction of the Constitutional Court);

(b) the complaint relates to rights and freedoms which are not subject to the protection, by complaint, of the Constitutional Court;

(c) the request manifestly lacks a basis which would justify a judgment of the Constitutional Court; or

(d) the Constitutional Court has already rejected on its merits a constitutional appeal or an issue of unconstitutionality which relates to an identical matter.

The Organic Law of June 1998 provided for the procedure of the rejection of a complaint by a chamber of the Court. Before the reform of 1988 a chamber could hold that a particular complaint was inadmissible by "auto" (order), assuming – after having heard the interested

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32 Article 10 of the LOTC.

33 Article 13 of the LOTC.

parties and the Attorney-General – a decision which was only summarily motivated and not susceptible of challenge. Experience had shown that such a procedure did not much lighten the load of the Court; for this reason a chamber was given the power to reject a petition by a decision less formal than that for the "auto": the "*providencia*". More specifically, where the three members of a chamber are agreed on rejecting the complaint they decide with "*providencia*", which is distinguished from "auto" and from a judgment of the Court; it is reached without hearing argument on each side and there is no need for reasons or publication. Where, on the other hand, two of the three Judges are in favour of rejection, the section will decide by "auto".

As in Germany, it was intended to deal with the problem of protecting fundamental rights from abuse. The new procedure however does not seem to have achieved what it was intended to achieve, if one considers that about 90 per cent of the complaints are decided against the complainant by a chamber of the Court. Where the chamber holds the complaint to be admissible, the matter passes to the chamber for decision.

The complaint process does not suspend the execution of the impugned act. However, the suspension of that execution can be decided on by the section either *motu proprio* or at the request of a party when executing the act would cause prejudice of such a kind as to make the judgment of the Court of little impact.[34] However, notwithstanding this possibility, the section cannot suspend the execution of the impugned act if that would cause serious disruption of general interests or infringe the fundamental rights of a third party.[35]

7 Legal effects of the decision

According to article 164 of the Constitution, the judgment of the Constitutional Court is not appealable and furthermore it has effect erga omnes. Article 53 of the LOTC confirms that the judgment can be a rejection of the complaint or its acceptance. When the Court decides on acceptance of the complaint, the judgment can have one or more of the following results:[36]

(a) declare the nullity of the decision, act or resolution that has restricted the full enjoyment of protected rights or freedoms; or

(b) restore to the complainant the integrity of his or her rights or freedoms by the adoption of appropriate measures. This possibility shows the great power of the

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34 Article 56 of the LOTC.

35 Article 56 of the LOTC.

36 Article 54 of the LOTC.

Constitutional Court: which cannot only invalidate the impugned act, but can also restore the complainant to his or her previous position by taking the required steps. This is significantly different from the practice of the Austrian Constitutional Court which, as has been seen, can only annul the administrative act. Restoring the complainant to his or her previous condition is the duty of the public administration.

V CONCLUSION

From this examination of the protection of fundamental rights by individual complaint in Germany, Austria and Spain, two observations can be made. One relates to the system, and the other to its usefulness.

The system of protection is not uniform in the three States. The main points of distinction are:

(1) in Austria the protected rights are all constitutionally protected rights. In the other two countries they are only those fundamental rights which the Constitution expressly admits protection;

(2) in Austria, the subject-matter of complaints can be all legal norms (statutes, regulations, and international treaties) and administrative actions, but judicial acts and omissions are excluded. These two are included in Germany and Spain. In Spain all other legislative instruments are not included, even though the Constitutional Court procedure can offer an avenue for challenging the constitutionality of legislative acts;

(3) decisions of the courts – with particular reference to the Spanish Supreme Court (*Tribunal Supremo*), that as well as annulling an act which harms a fundamental right it can restore the position of the complainant and require, if necessary, the appropriate procedures to be fulfilled and in this respect substitutes itself for the public administration.

This diversity of systems for individual complaint, particularly in Austria on the one hand and Germany and Spain on the other, reflects on the efficacy of the protection given to fundamental rights. Where this is greater, the range of protected rights and challengeable legal remedies is more extensive.

The usefulness of the individual right of complaint on constitutional grounds can be established by reference to the efficacy of the protection it gives to fundamental rights. Any

right of the individual (whether of a "fundamental" character or not) is well protected from possible infringement by public authorities when:

(1) the right is justiciable; and

(2) the beneficiary of the right can personally seek protection of the right in the courts.

These two conditions are present in judicial review in the United States where the intervention of the courts (whether at the District, Federal or Supreme Court or State level) is by definition designed to protect individuals' rights and liberties.

In Europe things have proceeded differently. The European model of constitutional justice is traditionally the power to rule on the unconstitutionality of the legislation centralised in a special Court. Its distinctive features are:

(1) judicial review is limited to the text of statutes only, and the Court does not have the right to examine the actions of the executive, administrative or judicial arms of the government, nor the right to enforce them on constitutional grounds;

(2) the Constitutional Court can only be resorted to by public bodies, and not by private citizens. This model corresponds to Kelsen's conception of the "hierarchical" structure of the legal order.[37] Consequently, a statute alone may directly violate the Constitution (every other action of executive, administrative and judicial arms of government may not conform to the Constitution only indirectly, either if it has executed an unconstitutional superordinated legislative norm, or if it is ultra legislative vires, and what is more, unconstitutional). Second, a statute may not violate any individual rights. A legislative norm is a *general* norm, which becomes singular at the administrative or judicial level. Thus, when a conflict occurs between a legislative enactment and the Constitution, the only *truly* fundamental right which exists is the right to lawfulness. Therefore it is the State, not the private citizen, whose interest it is to bring the issue of the constitutionality of laws before the Constitutional Court.

The birth and development of constitutional justice has meant that in Europe it would also be possible to assure the protection of fundamental rights, but only partially and indirectly. So, when the problem of basic rights reached boiling point, this level of protection became insufficient, and it was necessary to add to the European model the device of individual

37 See Hans Kelsen *Pure Theory of Law* (2 ed, University of California Press, California, 1967) 221-267.

complaint. Recently, the majority of nations which have freed themselves from communist dictatorship have supplemented the centralised control of constitutionality with the individual right of complaint for the protection of basic human rights.

Each legal device has its own special advantages, disadvantages, and purposes. The exercise of an individual right of complaint runs the risk of flooding the courts with work, and hindering the relationship between ordinary and constitutional courts. On the other hand, the individual right of complaint serves to prevent the unconstitutional action of public authorities, and establishes a direct link between citizens and their Constitution understood as the "treasure" of values and rights. Therefore I conclude with the words of Rubio Llorente: "the way of organising the weapon of constitutional complaint can be discussed, but its necessity cannot".[38]

The entire history of humanity can perhaps be read, from an optimistic perspective, as a continuous struggle, including great improvements but also serious setbacks, towards the goal that Thomas Jefferson has described as "right to life, and liberty, and the pursuit of happiness".[39]

Many people think, in the past and even more now, that the best environment for experiencing these gifts of life and liberty and seeking the personal adventure of happiness, is democracy: a political system and a form of civilisation where it is possible to control violence by submitting power (including majority power) to the authority of supreme law, as well as by the protection of fundamental rights. In this area, the purpose remains largely divorced from reality, as democracy must extend to many other nations and must improve its ways of working. There are signs that we are at a good point today.

The robust growth of democracy owes much to three great jurists of different periods. Edward Coke, John Marshall, and Hans Kelsen shared a common commitment, over and above particular facts and theories in politics at large: the achievement of peace through law.

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38 R Llorente "Seis tesis sobre la jurisdicción constitucional en Europa" (1992) 35 Revista Española de Derecho Constitucional 9.

39 Thomas Jefferson *Draft of the American Declaration of Independence 1776* in J P Boyd and L H Butterfield (eds) *Papers of Thomas Jefferson* (Princeton University Press, Princeton, 1950).

ETUDE COMPARATIVE DE LA MISE EN OEUVRE DE LA PROTECTION DES DROITS FONDAMENTAUX PAR LES JURIDICTIONS CONSTITUTIONNELLES (PREMIER ARTICLE)

ALCHIMIE ÉLECTORALE OU SOLUTION FONDAMENTALE: LA NOUVELLE ZÉLANDE ET L'ITALIE (SECOND ARTICLE)

Le 12 octobre 1999, le Professeur Mario Patrono de l'Université "La Sapienza" de Rome (où il enseigne le droit constitutionnel) a été l'invité de la New Zealand Association for Comparative Law.

Deux thèmes de réflexion ont été abordés dans le cadre de sa conférence et font l'objet des deux articles ci-après publiés:

A la manière d'un comparatiste, Il s'est tout d'abord, attaché à décrire, les situations conflictuelles qui peuvent apparaître, sous divers régimes constitutionnels, chaque fois qu'un Etat souhaite mettre en œuvre une politique sociale déterminée tout en tentant de concilier le nécessaire respect des droits de l'homme. En pareilles circonstances, le rôle imparti aux juridictions constitutionnelles devient alors fondamental puisqu'elles deviennent les garantes de cet équilibre. C'est l'objet de son premier article intitulé : Etude comparative de la mise en œuvre de la protection des droits fondamentaux par les juridictions constitutionnelles.

Poursuivant sa réflexion, il s'est ensuite interrogé (dans son article intitulé: Alchimie électorale ou solution fondamentale: la Nouvelle Zélande et l'Italie) sur l'intérêt que pourrait présenter, dans le contexte politique italien actuel, la transposition du modèle parlementaire néo-zélandais. Fort de ce constat, il s'est plus particulièrement attaché à décrire les conséquences que pourraient avoir en Italie, une éventuelle séparation entre la représentation parlementaire et l'élection du gouvernement.