Role and functions of Constitutional Courts in the framework of a globalized law

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1. Legitimacy and functions of Constitutional Courts

The question of the democratic legitimacy of the constitutional jurisdiction is of fundamental importance in a democratic state. The amenability to the people of the constitutional jurisdiction as a manifestation and exercise of state sovereignty is essential especially if it is conferred to the jurisdiction the competence to declare null and void as unconstitutional laws passed by the representatives of the people elected by the Parliament.

The theory of constitutional justice is configured in such a way as an essential link between the theory of the Constitution on one hand and the theory of constitutional interpretation on the other hand. The continuum theory of the Constitution-theory of constitutional jurisdiction-theory of constitutional interpretation denotes the close interdependence of the segments that compose it and the mutual osmosis of the factors that characterize it, and necessarily implies a systemic approach in grading the second element of the triad in the light of the first (the theory of constitutional justice in view of the theory of the Constitution) and the third element of the triad in the light of the second (the theory of constitutional interpretation in the light of the theory of constitutional justice). This approach has been variously conceived by the various doctrinal positions that have addressed the issue previously outlined.

1.1. In the Italian literature

According to the realist theory elaborated by V. Crisafulli, no model of constitutional justice can boast full democratic legitimacy, and this also applies to the Italian system of constitutional jurisdiction. The contradiction between non-representativeness of the Constitutional Court and the power of control-annulment of laws is exceeded only,

however, according to the author, considering the mentioned contradiction inevitable and immanent to liberal-democratic constitution: “in fact, (...) constitutional justice is not an antinomy, but rather an alteration of the scheme of parliamentary democracy, but an alteration intentionally put in place by the constituents, according to a precise political design, in which is expressed at the highest level that liberal component, which qualifies the democratic regime constitutionally adopted”. The Constitutional Court, in fact, is a factor that converges in the characterization and definition of our form of government, from which it is beyond the principle of the omnipotence of the law; which removes the monopoly of legislation to Parliament; which provides a number of limitations and balances on political power of the same Parliament [V. CRISAFULLI, 1978, 74].

The problem of democratic legitimacy of constitutional courts, "real longae manus of the constituent power", was also addressed by A. Ruggeri and A. SPADARO [A. Ruggeri-A. Spadaro, 2004, 10 ff.] that, reversing the traditional approach and questioning in the first place on the legitimacy of the democratic regime itself, provide a detailed answer in seven points.

The "natural lack of democratic legitimacy" of constitutional courts is derived from its function as guardian of the meta-democratic frame of values that limit the power of the democratic regime itself: providing a balance between the two poles of popular sovereignty on the one hand and of the supremacy of a constitutionalized system of values on the other hand, the courts - even not pursuing activities of political direction in narrow sense, however are configured as "judiciary with political force, with legal and arbitration functions of custody-warranty also - if not especially - in respect of the same acts (laws) in which popular sovereignty results" [A. Ruggeri-A. Spadaro, 2004, 11]. Those guarantee and custody functions shall lead constitutional courts - even not elective - to work on behalf and in the interest of all citizens.

In addition as referee, the constitutional justice is part of a balanced system of checks and balances characterized by the presence of significant warranty functions conferred to other organs (such as the President of the Republic, the independent administrative authorities, etc.) and within which is difficult to imagine, according to Ruggeri - SPADARO, the hypothesis of a court that abuse of its powers, trying to impose their own hermeneutical tools in front of "cultured" interpretation of the clergy (lawyers) and "spread" of the laity (laymen) [A. Ruggeri-A. Spadaro, 2004, 12].

The fourth factor that induces the authors to relativize and substantiate the lack of

democratic legitimacy of constitutional bodies coincides with the faculty of the power of constitutional review to restore any legislation declared unconstitutional by constitutional courts.

The indefectibility, logical and legal, of "closing bodies" within the constitutional system and the need to recognize, "by convention", one system of constitutional checks, not being configurable the hypothesis of an organ criticizing the correctness of the interpretation, on one hand; the non self applying nature of decisions made by the organs of constitutional jurisdiction and the usual absence in these bodies of tools of implementation-execution of their judgments, on the other, constitute the fifth and the sixth factor identified by the authors as insuperable limits of "sovereignty "of the organs of custody of the Constitutions.

The power of these bodies, finally, is in a relationship of strict correlation and direct proportionality with the social consensus on the Constitutions and the ability of the citizens to observe the precepts and interpretations developed in case law.

1.2. In the German literature

The approach to the problem of democratic legitimacy of the constitutional jurisdiction took place in the German doctrine, in particular, with a constitutional focus. This approach has been articulated about α) methods of interpretation of the organs of constitutional justice; β) the demarcation of spheres of constitutional attributions of the organs of constitutional justice with respect to representative bodies; γ) a systemic approach

α) methods of interpretation of constitutional jurisdiction organs

Object of analysis has become especially by varous doctrinal positions and under a variety of viewing angles, the contribution of the Federal Constitutional Court for the nucleation and enunciation of new rights and values within the constitutional framework of the Grundgesetz, and by giving warnings and concrete guidelines for the Legislative and the Executive in various fields: these tools lead to a "colonization of the political sphere" [U. Haltern, 1998, 207], which is consequently juridified. Such legalization is treated as an ossification because margins of correction of the decisions of the constitutional justice by the Legislative are considered extremely low, which explains the quantitative prevalence of studies that have attempted to identify the boundaries of the spheres of the representative

assemblies and the Bundesverfassungsgericht, as well as an acceptable criterion evidence of the power of the first - organ devoid of direct democratic legitimacy - to annul acts of the latter - organ par excellence expression of direct democratic legitimacy [C. GUSY, 1985; K. CHRYSSOGONOS, 1987; C. Landfried 1984, 1988; J. JEKEWITZ, 1980; E. BENDA, 1979; K. STERN, 1997].

β) the demarcation of the spheres of powers of the organs of constitutional justice and of representative bodies

The aim to identify the dividing line between the decision of parliamentary and constitutional justice bodies and the search for the source of legitimacy of decisions of the latter, implied the development by the German doctrine of theories based, respectively, on the basis of the principle of separation of powers, on the doctrine of political questions, on the principle of judicial self-restraint, on the principle of juxtaposition between law and politics, on the legal-functional principle.
Having regard to the first of the indicated profiles, the principle of separation of powers is configured - as the foundation of the state system of competences - as a central criterion for the determination of the position of constitutional jurisdiction in the democratic system [L. Adamovich, 1987, 281 ff.; Knies, W., 1997, 1155 ff.], identifying the constitutional justice as a sort of "fourth power", not easily amenable to the classic scheme of separation of powers [G. ROELLECKE, 1980, 24 ff.].
The second aspect mentioned, the automatic and mechanical application to the German system of constitutional justice of the doctrine of political questions of North American matrix, according to which - as is well known – judicial review excludes assessments of political nature and the control of Constitutional Court on the use of its discretion by the parliament - was assessed by the German doctrine with extreme caution and skepticism [K. Schlaich, 1994, 469; K. STERN, 1984, 961 ff.; E. Friesenhahn, 1976; H.-P. SCHNEIDER, 1980, 2103 ff.; W. GEIGER, 1979, 21; C. RAU, 1996, 228 ff.; G. Leibholz, 1963, 118], remarking by some doctrinal positions [K. CHRYSSOGONOS, 1987, 178; B.-O. Bryde, 1982, 311] that it is in principle unrelated to the Basic Law the concept of constitutional provisions that can not serve as a parameter for the exercise of judicial review.

Similarly, the principle of judicial self-restraint was deemed unreliable for identifying the source of legitimacy of the constitutional jurisdiction [R. Dolzer, 1972, 86; K. CHRYSSOGONOS 1987, 174; E.W. Böckenförde, 1991, 192; A. Rinken, 1989, 92; H.-P. SCHNEIDER, 1980, 2104; R. ZUCK, 1974, 366; D. MURSWIEK, 1982, 532 ff.; W. R.-SCHENKE, 1979, 1325; F.-C. ZEITLER, 1976, 631]. The legal and functional approach seems to denote a better attitude for the identification of the areas of the legislator and of the organ of constitutional justice as well as of the requirements of legitimacy of the latter. The analytical method is followed, among others, by E.W. Böckenförde, which identifies the primary function of constitutional jurisdiction in the protection of the Constitution. The peculiarities of the constitutional jurisdiction within the structure of the powers of the State are identified by the author in the subject of the constitutional jurisdiction, in the parts of the constitutional process, namely of the subjects taking part in the disputes of constitutional law, in the power of interpretation entirely unique that is characteristic of the constitutional jurisdiction.

How do you solve the dilemma of the democratic legitimacy of an actor with such a significant and pervasive role within the dynamics of the contemporary State? Böckenförde considers as insufficient to the guarantees offered by the mode of election, appointment and term of office of Constitutional Court judges, remaining to the constitutional jurisdiction the "last word" on the interpretation of the Constitution. A possible answer to the question proposed by the author is identified in the institute of the referral to the representatives of the people of a law declared unconstitutional by the constitutional jurisdiction, and the possibility that the representative assembly re-approves with the (qualified) majority required for the purposes of the constitutional revision, regulated by the Polish Constitution until July 1999. in this case, the '"last word" would be of the organ of popular representation: it is, however, an answer not free from criticisms, particularly regarding the possibility to amend the constitution for the individual case without proceeding to a formal constitutional amendment, implicitly admitting that it doesn't exist any limitation on constitutional amendments.
To ensure that the constitutional jurisdiction works, playing the role of full protection of the constitution, an essential part of the responsibility lies, however, according to the author, on the same constitutional judges: "they must be aware of the particularities of

their tasks, constraints and also limits that are related to their function, and they must adapt to these constraints and limits" [E. W. Böckenförde 2006, 659-660].

γ) the systemic approach

Paradigmatic and preliminary for the reconstruction of the systemic approach is the classic doctrine of BACHOF [O. BACHOF, 1959].
For BACHOF, a characteristic trait of the Basic Law, which differs not only from the previous German Constitutions, but also from many contemporary constitutions, is given by the function assigned to the judiciary within the constitutional system. This new element is the "control's function that our Basic Law has recognized the Court in front of the other "powers" of the State, the Executive and the Legislative" and the extraordinary extension of this control's function. This increase of the judicial function implies a marked increase of the powers of the judge and, necessarily, a proportional reduction of the power of the Legislative and the Executive. [O. BACHOF, 1959, 27].
The mentioned expansion of the powers of the judiciary, and in particular of the Federal Constitutional Court, which under German law falls under the same power, according to the author is evidenced by the introduction of the control of the constitutionality of laws, the direct action for the constitutional protection of fundamental rights (*Verfassungsbeschwerde*), the inter-organic and inter-subjective conflicts' resolution.
These skills are not yet able *per se* to justify the effectiveness of the control exercised by the judiciary: the very effectiveness is the result "of
the energetic ambition of validity of the substantive rules of our Constitution; of an order of values that binds directly the three State powers and manifests itself specifically in the regulation of fundamental rights; of an order of values - not in its details, but in the fundamental rules that constitute and legitimize it – that has been considered by the Constitution as previous to itself; of an order of values, then, that was not created by the Constitution, but that the latter recognizes and guarantees and whose ultimate foundation of validity is found in determining values of the Western culture, in a conception of man which is based on these values" [O. BACHOF, 1959, 39-40].
This explains why fundamental rights, as a dominant expression of this order of values, cannot be changed except through a formal review of the constitutional text and will not become subject to any variation where it would be affected the fundamental value of

human dignity that they legitimate: the institutional core of fundamental rights is guaranteed by the absolute inviolability of their substantive content. Recalling the formulation already used by H. KRÜGER [H. KRÜGER, 1950 12], BACHOF states that "in the past, fundamental rights were worth only in the context of the law, today the laws are only valid in the context of fundamental rights" [O. BACHOF, 1959, 41]. Fundamental rights are therefore immediately applicable binding law, for the government as well as for the same legislator. What was stated with reference to fundamental rights and to the ethical order of values and to its immediate validity claims, is applicable, according to the German scholar, to the political system in a strict sense: the decision adopted by the Constitution in favor of the democracy and the parliamentary form of government, in favor of the separation of powers as a principle of the rule of law to prevent abuses in the exercise of power, in favor of the principles of the welfare state and the federal state with respect to the articulation of responsibilities among the different State bodies [O. BACHOF, 1959, 31].

The material substance of the Constitution, the order of values as a whole that characterizes it, rest operatively on the position of the courts: the courts has been given the ultimate responsibility for the protection of the Constitution. The fundamental reason for the submission of the Legislative to the control the judges must find, according to BACHOF, in the total change that has affected the relationship between the men and the law: a feeling of profound malaise and radical distrust on law arose, founded on dominant impression that the law itself, once the shield of liberty and law, has turned into a threat to these goods [O. BACHOF, 1959, 48]. The law has ceased to be configured as a general abstract rule governing human behaviors, a *ratio* translated into a norm, with a mandate oriented towards justice, to convert, in the modern "welfare state", "state services", "state distribution", in "an act of policy-oriented conformation to an end, as a measure to overcome a determined totally concrete situation and, for this reason, planned short-range and often negotiated in the conflict of opposing groups of interest" [O. BACHOF, 1959, 51]. The laws have become, therefore, acts of political direction as expression of a will of political nature of this case conditioned by contingent and occasional circumstances. It is an evolutionary phenomenon that has led the fight for the supremacy of individual interests to extend to legislative bodies, reducing the ability of the latter to consider the legal value which should constrain the political will: for BACHOF is a inevitable development that necessarily requires a counterweight: “a force which watches that the

higher values of law and the order that the Constitution has established as fundamental are protected; a force that decides, at the same time, with the highest possible authority, if in any conflict those values have been the object of preserving, ensuring or restoring the legal peace" [O. BACHOF, 1959, 52].

To the objections to the control's function given to the organ of constitutional justice - breach of the principle of separation of powers, inherent anti-democratic nature of the decision on the constitutional system of values entrusted to a body of more restricted composition than the Parliament, the danger of politicization of justice - the Author responds by three kinds of considerations. As to the first objection, BACHOF considers that the meaning of separation of powers is to prevent the concentration of power and the possible abuse of the same. Currently, in the modern welfare State, the character that it has for men, the almost total dependence of the latter by the State apparatus, implies as a corollary a total control of the apparatus: the limitation of power that experiment Parliament and the Government assumes a necessary correction to restore the equilibrium [O. BACHOF, 1959, 58]. With regard to the supposed anti-democratic nature of the judiciary, the author points out, first, that other bodies or persons are not in a relationship of direct derivation from the people (the Government, the President of the Republic, the administrative officials); on the other hand that the reference should not be the kind of mandate but rather the exercised function: administering justice in the name of the people means for the German scholar to keep by the court a constant and continuous dialogue with the parties of to the proceedings, with colleagues, with the techno-legal and scientific world and with the public opinion [O. BACHOF, 1959, 60]. In terms of the risks of politicization of judges, finally, the author notes that the expert judge knows the dangers arising from the introduction in his judgments of emotional and irrational elements: his training, the need for a continuous dialogue and the same independence of the judge guarantee a high level of objectivity.

The real danger that the organ of constitutional justice slides toward a judicial paternalism that may involve the transition from the legislative parliamentary State to a State characterized by the primacy of judicial authority of the Constitutional Court, is a risk that can be avoided, according to R. Alexy [R. Alexy, 1986, 526 ff.], through the successful incorporation of the constitutional jurisdiction in the democratic process. This assumes that the Constitutional Court is designed as a forum reflection of the political process and is accepted as such. To this end, the body of constitutional justice shall require, negatively,

that the outcome of the political process does not contradict the parameters of fundamental rights and must establish, positively, its claims so that people can rationally endorse the arguments of the Court. Fundamental rights must be interpreted, according to the German scholar, in accordance with a "public moral conception" which reflects a common representation of the right conditions for social cooperation in a world characterized by pluralism: the body of constitutional justice must not oppose its thought to that of the legislature, but aspire to configure it as a argumentative representation of the citizens.

The Constitution prescribes and prohibits certain actions through fundamental rules and principles, establishing a framework as fundamental; however, it leaves open room for maneuver, structural and epistemic, giving some confidence to the legislature for the purpose of the realization of fundamental rights. Similarly, the intervention of the organ of constitutional justice, if it finds a violation of the competence by the Legisaltive, does not produce a shift of the Court in the institutional competence of the Legisaltive. This intervention, Alexy notes, is not only allowed, but is prescribed by the Constitution, to the extent in which itself determines the sphere of action. The core of this sphere of responsibilities is the protection of a legal framework that establishes simultaneously a fundamental order [R. Alexy, 1986, 529]. The consideration of the function of constitutional justice in social dynamics is followed by the authors who have dedicated a systemic approach to the issue of the legitimacy of the constitutional jurisdiction, based on the reference to legal-constitutional criteria, but also based on the use of criteria of social, political, economic, historical and cultural nature *lato sensu*.

An example is given by the reconstruction of E. STEIN [E. STEIN, 1972, 485 ff.], which identifies seven functions of the Federal Constitutional Court within the German political system. According to this doctrinal position, the body of constitutional justice is called upon to play a role in *stabilization of the Constitution*, at the same time facilitates a controlled social change (*evolutionary function*), also acting as a valve capable of preventing (or avoid) the phenomena of stagnation of political and social forces (*valve-function*). As supervisory body competent to verify that the process of formation of the political takes place within the limits assigned to it, the Federal Constitutional Court corrects behaviors incompatibles with the Constitution (*control function*). The composition of the conflicts by the body of constitutional justice contributes to the formation of social peace and resolve political and social conflicts through a judicial

procedure (*pacification function*). The implementation of fundamental rights promotes activation of freedom (*educational function*) and the preservation of the open nature of the political process, in particular through the protection of minorities, allows to overcome the crisis of legitimacy of the political system, leading to the realization of democracy (*integration function*). In addition to doctrinal positions, such as that now examined, aiming to provide a plurality of tasks and functions to constitutional justice, other scholars have sought to identify more specific and targeted goals. In view of the criticism of the capitalist model, O. MASSING [O. MASSING, 2005, 81 ff.] configures the constitutional jurisdiction as a central part of the system of interventionist late-capitalist political-administrative State, with the function of developing and maintaining balance and stability internally to the system. The Federal Constitutional Court, as a tool for achieving consensus in binding way and influencing on the imperatives of collective actions, is conceived by the author as a factor of management of the political crisis of the late-capitalist State and as a support of a system of forces structured according to a oligopolistic model.

Similar arguments are adduced by R. Schlothauer [R. Schlothauer, 1979], which identifies the crisis of the constitutional jurisdiction with a crisis of the Constitution. Decisive importance in this direction is attributed to the "crisis of the methods of the Federal Constitutional Court", understood as multi-faceted and indifference of the methods of interpretation of the body of constitutional justice that would give rise to a "methodological chaos" that leads to the total loss of legitimacy of its decisions. According to the author, the methodological criteria used by the body of constitutional justice are aimed to achieve two essential goals: the de-politicization of conflicts of interest in the society and the camouflage of their causes within the legislative sphere. For these reasons the Federal Constitutional Court would not be able to legitimize the exercise of sovereign activity, but simply to mask it: according to Schlothauer, the crisis of legitimacy of sovereignty is not resolved, but only postponed.

With an ideological critique parallel to the previous one, the study by K.-H LADEUR [K.-H. LADEUR, 1980, 189 ff.] focuses on the nexus of constitutional jurisdiction with the social "normality". The author develops this concept on the basis of the paradigm of the "fundamental agreement" of the civil society that in a liberal democracy ties the legitimacy of any law to the consent of the subject holder of sovereignty by democratic decision-making. The functional modes of Parliament and the Executive have been coordinated in

accordance to LADEUR by means of a key-convention, which could assume as a whole " the Constitution-social contract as relatively solid functional model of ‘civil 'normality'. In the transition to capitalism characterized by State interventionism the assumptions of this functional model are now lapsed: the subject of law as a reference entity for State action is liquefied, his behavior and his needs are no longer a calculable measure, but require planning, the functional mode of consent is separate from the legislative process and now refers to the political system as a whole: these characteristics are, according to LADEUR, a sign of loss of identity of the State as an universal object and of the degeneration of the bourgeois order. From the different substance of law consequences also for the constitutional jurisdiction derive: the disintegration of the principle of generality and the accentuation of the contingency of law imply that the same is topped by an abstract symbol, the Constitution, on which oversees the organ of constitutional justice, whose main functions are to control and unification of the formation of dominant ideologies, as well as the realization of the ideological coherence of the strategies of the State apparatus. According to LADEUR, the Federal Constitutional Court fulfills its main task in the arena of constituent policy: positively by the care of symbols and the processing of consent, negatively by the lack of key issues such as redistribution, as well as through the stigma of " anti-system enemies" to guarantee the political and economic *status quo*.

Similarly, according to U.K. PREUSS, the pivotal function of the Federal Constitutional Court is the formulation of a "basic agreement" (*Grundkonsens*) as a meta-law, the which terms the Constitution fulfills its function of social regulation [U. K. PREUSS, 1987, 1 ff.]. The integrationist conception of the constitutional jurisdiction has always played an important relevance, at least starting from the theory of R. Smend on the integrative force of the Constitution [R. Smend, 1928]. More recently, pluralist theories of constitutional justice have become object of reconsideration, in particular, within the doctrinal positions of P. Häberle and I. EBSEN. The grading of constitutional justice takes place in the works of P. Häberle, both general [P. Häberle, 2005] and specifically devoted to the subject [P. Häberle, 1980 and 2006, 35 ff.], in the light of the idea of the Constitution: "Constitution" is the fundamental legal order of State and society; it is not just the limit of State power, but also authorization to State power; it contains State and society. The constitutional justice as a political force acts from the beginning outside of the dogma of the division State/society” [P. Häberle, 2005, 158].

The configuration of the Federal Constitutional Court as a "constitutional court" of the entire *res publica* means that the body of constitutional justice does not adhere to a theory or school of doctrine, but pursues the pragmatic integration of elements of different theories.

The conception of the Federal Constitutional Court more like "court of the society in general" than "State" court means the conferral to the constitutional justice body of "a special general responsibility in ensuring and in the development of the Constitution as a social contract, affecting the continuous process of its realization and in doing so it is forced towards pluralism. (...) The function of constitutional justice is the limitation, rationalization and control of State and social power, it co-works, from the point of view of the content, to the general consensus and it is centered on the protection of minorities and the weaks, in flexible and timely responding to new threats to the dignity of man, in his a-political character of leadership and response [P. Häberle, 2005, 159-160]. Similarly, according to the theory of constitutional justice elaborated by I. EBSEN, in the democratic constitutional State three fundamental tasks are attributed to the bodies of constitutional: conservation of the opening of the political process, which assumes the legitimacy of the principle of majority rule; assurance of the socially permissible measure of protection of the individual against the State power; integration of special interests to the extent that would make it possible the majoritarian decision-making system [I. EBSEN, 1985, 229]. These three tasks presuppose a certain degree of consensus: the function intended to maintain the open character of the political process is based on the consensus at the meta-level of social relations; the regulatory function of the protection of freedom is due to the elements of the general concept of freedom, brought in principle by the constitutional material consensus; the consensus, that on one hand assumes the function of integration, but on the other hand is aimed to ensure the same, concerns a meta-level characterized by the objective of ensuring and implementing the social compromise formed in the constituent period [I. EBSEN, 1985, 322].

1.3. – In the French literature

FAVOREU identifies six core functions that constitutional justice is called upon to exert, and that, taken together, denote the ability to increase the legitimacy of the same: the *function of appeasement of political life*, the *function of regulation and authentication of*

the political changes and of alternation, the *function of strengthening the cohesion of the political society*, the *function of spreading and rooting of fundamental rights*, the *function of protection of fundamental rights*, the *role of adaptation and updating of the Constitution* [L. FAVOREU, 1986, 62-66]. A configuration of the constitutional jurisdiction of dynamic nature as a model adaptable to the changing reality of democracy in its current stage, working as a *standing democracy*, was elaborated in the French doctrine, in particular, by D. ROUSSEAU, and presupposes the emergence of three new forms of representation of the opinions in competition policy: the shape of the polls, the media form, which is carried out through the media, the constitutional form, which is brought about by the constitutional courts or, in the case of France, the Constitutional Council [D . ROUSSEAU, 1995, 7 ff.; 1998, 139 ff. and, more recently, 2006]. Through its interpretive work, the constitutional justice organ gives normativity to the Constitution coming into a game of power relations with other institutions, of different nature, contributing in the field of standing democracy - in his capacity as privileged entrepreneur among legislative entrepreneurs which together participate in the enunciation of the rule – to the delineation of a system of competitive statement of the rules: on one hand, in fact, the formation of the law today appears the result of the work of three competing institutions (Parliament, Government, the body of constitutional justice), on the other hand the interpretation of the Constitutional Council is never the result of totally free and arbitrary choices, but the consequence of a series of constraints, "a game that puts various players in competition": the members of the Parliament, professors of law, trade unions, the press, the same constitutional jurisprudence.

1.4. – In the Ibero-American literature

Beside the traditional justifications four basic arguments are put forward by N.P. SAGÜES for the purposes of identification of the factors of legitimacy of constitutional justice [N. P. SAGÜES, 2002, 51 ff.]. The first of these factors is identified by the Argentinian constitutionalist with the process of selection and appointment of constitutional judges (for example, by representative assemblies) that, as programmed by a democratic Constitution, enjoys a significant share of democratic legitimacy. It is a legitimation of second (or third) degree, but arising from the constitutional system that allows to the legitimacy to transmit itself to the constitutional justice organ through the mechanisms

provided for that purpose. The second factor of legitimacy identified by the author regards training and cultural heritage of constitutional judges. Remarking that the democratic legitimacy derives not only from the elections, but also by other democratic procedures of selection, SAGÜES considers that a more refined and mature version of contemporary democracy requires, for example, and with particular reference to the constitutional jurisdiction, the implementation of regulations of recruitment of judges capable of fulfilling the democratic principles of equality of opportunity and of selection based on capability criteria and the waiver of forms of discretionary appointment causing the phenomena of partiality and favoritism: in this sense, the appointment of judges preceded by phases of preventive training and specialization, competitions and aptitude tests etc.. is able to confer to the same an high dose of democratic legitimacy [N. P. SAGÜES, 2002, 51].
The third factor of legitimacy mentioned by the author coincides with the legitimacy of the exercise of constitutional jurisdiction. He believes that the democratic legitimacy of the constitutional legal system can not be attributed solely to a problem of democratic origin, but also (and to a large extent) to the behaviors of its managers: “such "democratic behavior" requires the courts that control the constitutional supremacy to enact their own decisions as custodians of the democratic constitution that they must protect against violations made by other organs of the State (or by lower courts), and with a sense of good common, which do not always coincide with the will of the majority” [N. P. SAGÜES, 2002, 51-52].
The fourth argumentative reason configured by SAGÜES is based on the compatibility between democracy and effectiveness of the institutional system. The author remarks how the democratic regime should not necessarily manifest itself in pure or absolute forms when the same are capable of affecting the functioning of the political system. The examples that the author offers relate to, among others, the military, diplomatic or judicial career: the symbiosis which must be developed in such cases between democracy and efficiency is a prerequisite for the stability and persistence of the democratic framework [N. P. SAGÜES, 2002, 52].

The attempt to identify the justifications of the legitimacy of constitutional justice outside - at least partially - of the representative democratic circuit strictly understood, even by reference to meta-democratic values and principles, it is also be found in the work of A.R. Brewer-Carias [A. R. Brewer-Carias, 1996, VI, 65 ff.].

Democratic and legitimate, according to the Author, is the power given to judges or to certain constitutional bodies to monitor the violations of fundamental rights as the same power is immanent and inherent to every representative and democratic regime and aimed at strengthening the freedom of the citizen. The democratic legitimacy of judicial review of the constitutionality of laws thus derives from the relationship of identification that exists between the protection of fundamental rights and the democratic system (first reason justifying the legitimacy) and is based on the distribution of powers adopted by the Constitution, vertically and horizontally, both in the articulation of the State-legal order and of the State-apparatus (second reason justifying the legitimacy). However - the Venezuelan scholar remarks - if the problem of legitimacy has never been arisen on the side of the vertical distribution of power between different levels of government within a federal, regional or otherwise marked to decentralization form of State, resulting intrinsic to federalism the imposition of a certain degree of supremacy of the Constitution and federal laws on the legislation of Member States, it is instead arisen on the side of the (horizontal) separation of powers, a principle considered subject to erosion as a result of the limitation of the supremacy of Parliament by judicial review. Also on this side, however, it is still valid the criterion proposed just now: the separation of powers has involved the provision of an independent mechanism to ensure the organic content of the Constitution: the indefectibility of constitutional jurisdiction as an instrument operating in the constitutional system of checks and balances comes from the need to preserve the balance on which rests the Constitution itself. Judicial review (and the organ that carries it) does not appear in the reconstruction of Brewer-Carias, a spurious element with respect to the separation of powers: the apparent collision between the need to establish a judicial review of the Constitution and the principle of separation of powers is a contradiction resolved by updating the conception of the principle itself, considering the conception as more inclusive of organ and process than the traditional connotation.

The legitimacy of judicial review proceeding from the legitimacy of the constitutional State that determines the normative force of the Constitution and the need for its protection against the action of constituted powers who intend to violate it, is a central syllogism in the thought of H. NOGUEIRA [H. NOGUEIRA, 2004, 13 ff.]. The alleged invasion of the constitutional jurisdiction of the sphere of legislative power is a critique that neglects the existence, according to the Chilean scholar, of a deeper division between the constituent power and constituted powers, within which the constitutional jurisdiction is developed to

protect the Constitution against the "waves" (*embates*) raised by constituted constitutional bodies:

“constitutional jurisdiction guarantees the normative force of the Constitution, which makes it possible to conceive it as a binding legal rule and not just as a political-philosophical proclamation (...) In this way, the constitutional jurisdiction is legitimate for the transition from the legal State to the constitutional State and for the recognition of the Constitution as a superior and mandatory for constituted powers rule of law [H. NOGUEIRA, 2004, 13-14].To the criticism that emphasizes the lack of legitimacy of constitutional jurisdiction with respect to the representation of the people and the irresponsibility of the first against the electoral body, the author moves five fundamental objections.

The democratic legitimacy of constitutional jurisdiction is considered descending, in the first place, by the same decision and legitimacy of constituent power that establishes the Constitution, a power that gives legitimacy to constituted bodies and determines the form of integration. In most cases the members of constitutional justice are elected or appointed by political bodies (Parliament and Government), a factor whose consequence is that constitutional jurisdiction is equipped with adequate representation [H. NOGUEIRA, 2004, 14]. It is noted, secondly, how the decisions of the majority of political bodies do not always represent the will of the political body of the society or respect the fundamental rights of persons and of most vulnerable groups within the same, as they often are "artificial" majorities, a product of electoral systems, which do not act as a true reflection of the sectors of the society: the constitutional jurisdiction appears here as an institution designed to protect fundamental rights against abuses or wills of political bodies, to preserve the distribution of authority and powers prescribed by the Constitution, rationalizing and legally framing the action of political actors, resolving conflicts, strengthening the functioning of democratic constitutional State, protecting the rights of individuals and groups, increasing the quality of democracy and an adequate governance [H. NOGUEIRA, 2004, 15].

The third reason justifying the legitimacy of constitutional jurisdiction is given according to NOGUEIRA by two factors: one is the general rule according to which to the organs of constitutional justice is normally precluded the possibility to proceed *ex officio* (their decisions having to be solicited by instances or claims of third parties, political bodies, parliamentary minorities, organs of protection of fundamental rights or people they

consider their subjective legal situations); on the other hand, the fact that the decisions of these bodies have to find a legal and rational justification, with foundation, consistent and based on the sources of constitutional law in force, what makes it possible the scientific community (especially legal) and the society as a whole to control the work of the Constitutional courts (or Tribunals) [H. NOGUEIRA, 2004, 15-16]. An additional test of the legitimacy of constitutional jurisdiction is provided, according to the author, by the general acceptance of the same by the constituents of the democratic constitutional States that, at the dawn of the twenty-first century, in different continents realize processes of constitutional transition and attempts at democratic consolidation: in such contexts, constitutional justice is conceived as a cornerstone and fundamental axis around which constitutional democracy develops and consolidates, as not merely representative but also deliberative and continuous, within which constitutional judges contribute to expressing the current will through the construction of constitutional jurisprudence [H. NOGUEIRA, 2004, 16].

It is relativized, finally, the power of constitutional jurisdiction, "whose word is not the last word", considering that the political body of the society and the power of constitutional amendment, if they believe that the Constitutional Court has overstepped the idea of law valid and in force within the society, can always change the constitutional text, inducing the constitutional jurisdiction to act in the direction indicated by them [H. NOGUEIRA, 2004, 16]. The reconstruction of functions, purposes and justifications of the legitimacy of constitutional justice marked by a peculiar systematic is to be found in Spanish doctrine within the work of J. Acosta Sánchez [J. Acosta Sánchez, 1998, 341 ff.]. The author identifies three fundamental goals that constitutional jurisdiction is called to pursue: the purification of the legal order by unconstitutional norms and purification of law, the guarantee of fundamental rights and freedoms, the resolution of conflicts of jurisdiction, in particular with reference to the territorial organization of power [J. Acosta Sánchez 1998, 349]. To the three basic purposes other are added of unwritten nature: the participation to the legislative process or the creation of norm in the field of legislation, the establishment of constitutional norms, the constitutionalization of all law branches [J. Acosta Sánchez, 1998, 354]. The explanations provided by general doctrine of all those functions are classified by the author into two categories, one of the *exorbitant explanations* and one of the *plausible explanations* [J. Acosta Sánchez, 1998, 362 ff.]. The first category includes the configuration of the body of constitutional justice as a third chamber, the conception of

constitutional jurisdiction as " continuous constituent power ", "secondary constituent" and "executor or commissioner of constituent power" and the consideration of constitutional justice as a "paradox "and fundamentally undemocratic.

The first exorbitant explanation of the constitutional jurisdiction dates back to the nineteenth century and presents it as a third legislative chamber with absolute veto. Other "exorbitant" explanations consider constitutional jurisdiction as continuous constituent power, secondary constituent and commissioner of constituent power. The first configuration origins in North America and was coined by W. WILSON in the qualification of the Supreme Court as a continous constitutional convention [W. WILSON, Congressional Government, 1895]. The expression that presents the constitutional judge as a secondary constituent is used in France by the realist theory of constitutional interpretation, which has M. Troper as its most representative figure [M. Troper, 1998, especially 305 ff.]. According to this theory, any interpretation assumes a creative function, resulting in an act of will by which the interpreter recreates the text, which lacks an objective sense before the work of interpretation. The bodies of constitutional justice, in particular, in his capacity as supreme interpreters of the Constitution, which can make an "authentic" interpretation as invested of the same power to interpret, provide an interpretation that is embedded within the legal system apart from its meaning, and being their decisions not subject to cancellation, you must consider that they participate in the exercise of constituent power, as a secondary constituent. The third explanation of the constitutional jurisdiction contemplates the competent body as executor or commissioner of constituent power, defining it as an instance commissioned by the Constitution [R. Marčić, 1963, 204], as an executor of the will of the constituent power [A. WEBER, 1986, 70] or identifying its legal position as a commissioner of constituent power [E. GARCÍA DE Enterría, 1981, 197]. The third exorbitant explanation conceives the constitutional jurisdiction as "paradoxical" and undemocratic.

The paradox of the constitutional judge has been configured as an application case of the general paradox of the courts in a democratic society: the paradox should consists in the necessity of the judicial review of laws made by an assembly formed by individuals that - it is assumed - represent the will of the people, or at least its majority. There is a parallel - it is said - between the situation of ordinary courts, which is never totally faithful to democracy as in its interpretation of laws always takes the risk to move away from the will of the Legislative, and that of the constitutional court, which is obliged to adopt, or at least

to establish, counter-majoritarian positions, as happens in the protection of fundamental rights against violations arising from the will of the parliamentary majority [M. ROSENFELD, 1995, 104]. It is doctrinal position that has remarked, in particular, the fact that

"derives from a simplification based on a confused paradigm: it lies in the general parliamentary system, not in the specific corresponding field, which is that of constitutional democracy or of the democratic constitutional State. In the latter, the Legislative is not democratic *per se*, although it expresses the will of the parliamentary majority, but *only in compliance with the Constitution*, which expresses a will superior to its, the will of the sovereign people. When the Constitutional Court annuls a law as unconstitutional therefore does not incur in a paradox, on the contrary it restores the consistency between the supreme will of the sovereign, the primary source of law, and the work of its representatives [J. Acosta Sánchez, 1998, 366].

On the other hand, the conclusion that the judicial interpretation of laws is inevitably undemocratic in consideration of the subjectivity inherent in it and of the political force which affects the decisions of the judges [R. UNGER, 1983, 561 ff.] Is not applicable to European constitutional jurisdictions, in which constitutional judges have full constitutional legitimacy: the verification of their objectivity goes through the analysis of the methods of constitutional interpretation, and in particular of positive or plausible explanations that a variety of doctrinal positions has given [J. Acosta Sánchez, 1998, 367]. Fall into the category of plausible or possibilistic explanations the constitutional jurisdiction the *realist* explanation of V. Crisafulli (see above), that conceives it as an necessary alteration of the parliamentary-democratic system, the *dynamic* explication, which binds it to a new democratic paradigm, the continous democracy, and finally the *contextual* explication, which considers the expansion and strengthening of constitutional courts as a result of the dynamics of contexts, in particular the social context.

2. Conclusions

If you adopt as a benchmark the function consisting in controlling the constitutionality of laws, we are aware as the role played by the organs of constitutional justice today trends to call back to a different and additional location rather than to the political one the process of recognition and fulfillment of constitutional values, in the contribution made by constitutional courts to define the subject of constitutional norms through an hermeneutic

work which, according to various assumptions, supports, integrates, corrects or even replaces the choices made by the Legislative. It is carried out, in the described way, a subsidiary and complementary weighting of interests emerging in society in any single area of law that, in the most decisive cases, results in a kind of axiological drainage by constitutional courts, which contributes to the identification of the cardinal principles and values which guide the legislator who must regulate or adapt a given legal matter. The bodies of constitutional justice, on the other hand, appear as guardians of compliance with the constitutional rules on which a consensus has been reached: this function is not only aimed at the realization of consent, but also to the preservation, safeguarding and consolidation of consensus about the rules themselves. Complying, completing or censoring the regulatory choices made by the Legislative, the organs of constitutional jurisdiction also play in the sense a legitimizing function of the content of legislative acts, whose screening and verification by constitutional judges results in a kind certification of constitutionality in the cases of control of constitutionality *a priori* (as in the French case) or in the determination and declaration of conformance with the Constitution of the normative proposition forged by the Legislative, of the legitimacy of the content that characterizes the proposition itself. This determination becomes particularly effective when the constitutional decisions own force of law. The bodies of constitutional jurisdiction usually have an articulated typology of decisions that allow the constitutional judges to modulate and vary the political impact of their decisions, which become an instrument used with different ductility according to the degree of interference within the sphere of discretion of the Legislative that the court intend to achieve.

The morphology of constitutional decisions is thus extremely various and is characterized by the presence, within the arc whose extremes are represented by the judgments of mere acceptance or rejection of the constitutional questions, of types of rulings that make extremely resilient the margins in favor of the holders of legislative power in their efforts to discipline or reform of the single matters. The availability of these instruments leads, on the other hand, constitutional judges to conceive in a ductile and elastic key the principle of self-restraint and to widely relativize the principle, closely related to the first, of the abstention from judgments concerning only political questions pertaining to the Legislative. The trend followed by the organs of constitutional justice is a concrete configuration of hypothesis and alternatives in favor of the Legislative that wants regulate or reform single matters, although within a framework determined by the constitutional

judge and by placing accurate limits, generally accompanied by a warning to cater towards the intended goal or by the threat of sanction in the constitutional process different options preferred by the Legislative in the Parliament. The use of instruments of case law in the sense described seems to reveal the intent of constitutional courts to enhance the role and functions of moderation, of critique and of decanting of the decision-making process undertaken by minorities, interest groups, exponential subjects of collective interests, that would otherwise be devoid of key stakeholders, who find in constitutional justice a representation of its instances.

Constitutional courts also play a function of connection and osmosis among different levels of contemporary constitutionalism (national, European, supra-national), facilitating the dialogue between courts, particularly for the elaboration and protection of human rights.

In doing so, they have not to preserve the constitutional identity of a single Country in the sense of the development of a constitutional autarky, that would deny the various, recent steps of re-opening of the societies (after 1945, 1975, 1989, 2010, the four waves of constitutional transitions and democratic consolidation worldwide) and their will to allow a cross-fertilization among themselves, but in the sense of ensuring osmosis between courts and constitutional experiences, contributing constitutional jurisdictions to the emergence of a common constitutional feeling, shared by people identifying common values and principles, beyond borders.

For these reasons, constitutional courts are not only " negative keepers" of the Constitution, called to purify the legal system of unconstitutional norms created by other powers of the State [L. Garlicki-W. Zakrzewski, 1985 31] - what would tend to emphasize only the static dimension - as well *active guardians*, which in their dynamic dimension are called to play a creative role of principles, values and constitutional rights, a function of arbitration inconflicts between constitutional bodies, in general a function of adjustment of the system as a whole which pursues two main objectives: to bridge the gap that sometimes exists between law and society and to protect democracy [A. BARAK, 2006, 231]. This function to let comply law with justice is embodied in the censorship of the legislative work and is accompanied by the identification of principles, values and rights which updates and amend options originally made by the constituent power, if necessary by taking the necessary weighting and balance of interests (on the side of the dogmatic part, as well as the organizational one of the Constitutions) and is possibly supplemented by the exercise of other functions designed to ensure the perpetuation of the Constitution over time

(conflicts resolution, control over political parties etc.). The source of legitimacy of these functions must necessarily be sought at the highest level and should be identified with the constituent power and the Constitution that he wanted. Constitutional justice enjoys democratic legitimacy as contemplated within a democratic constitution that came into existence according to a democratic process. The constituents that - especially after 1945 - have adopted within contemporary constitutions one of the models of constitutional justice and in particular the judicial review, have prospectively designed organs of constitutional justice as their commissioners for the future, giving them the mandate, always revocable upon the occurrence of the event working according to the terminology of ACKERMAN as *constitutional moment*, to protect, adapt and update the options followed in founding the constitutional legal order. The bodies of constitutional jurisdiction participate more closely than other powers to the typical nature of the constituent power. The constituents take note, since World War II, of the failure of the traditional representative circuit to ensure appropriate representation of the plurality of interests emerging in the society and of the inadequacy of the law, that has become - as Bachof and Forsthoff warned - more contingent and exposed to the humoral and occasional aspirations of minorities, to select the interests and to ensure them appropriate protection according to the traditional canons of generality and abstractness of norms. Divided and lazy Parliaments, procrastinators and unable to provide sufficient technique regulation to the represented interests, as well as the progressive attitude of the law as administrative act are factors of erosion of the foundations of the democratic constitutional State. Constitutional justice also arises in consequence of the profound functional crisis of identity that involves law and parliaments in contemporary democracies and from the will of the constituents to preserve democracy and justice beyond the transient contingencies which acquire the forms of a precarious law.

Thank you!