1. Constitutional Courts as Deliberative Institutions: Towards an Institutional Theory of Constitutional Justice

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The collapse of the communist empire coincided with a new wave of constitution making. All the Eastern European countries included in their new constitutions an organ in charge of constitutional adjudication that is modeled on what we define below as the Kelsenian type. This was neither surprising nor original. The same phenomenon occurred in Southern Europe about 20 years ago, after the collapse of fascist authoritarian regimes in Greece, Portugal and Spain. Likewise, after the Second World War, a similar process took place in Austria, Italy and Germany. For this reason the following discussion of constitutional justice in post-authoritarian regimes is pertinent to the recent developments in Eastern Europe.

This institutional revolution can be understood in terms of a simple and more or less unified model. The idea is straightforward: each of the European states is committed to maintaining parliamentary authority over the executive and judicial departments. And, as a matter of sociological fact, each of the post-authoritarian states exhibited distrust either of the judiciary (in the post fascist states) or the parliament (in France) or both. Each therefore chose to introduce a model in which constitutional review of parliamentary actions would take place in a specialized court, outside the judicial system. That model, because it puts some legislative policy making in the hands of constitutional courts (and not merely negative legislative authority as Kelsen himself was forced to admit), places the additional burden of legitimation on those courts. To some extent the burden of legitimation can be addressed by insulating the justices from political

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1 Greece has been familiar with judicial review since the 19th century; it is interesting though to note that only the constitution enacted in 1975 at the end of the military regime introduced (art. 100.1e) a Special [and specialized] Supreme Tribunal overarching the diffuse system of judicial review.

2 It may be useful, in making sense of the success of the Kelsenian model, to separate parliamentary sovereignty theory with its hierarchical doctrine of the separation of powers naturally hostile to any judicial review, from sociological expectations, like the distrust of the constitution makers towards judges educated in authoritarian regimes, or the distrust towards parliaments that have a record of complicity with fascism or communism.

pressure and by permitting them to craft procedures (such as holding sessions in private, issuing opinions on behalf of the court, etc) that produce impartiality or the appearance of impartiality. But, beyond these more or less structural assurances, constitutional courts need to provide reasoned justifications for their decisions. We argue, in short, that constitutional courts face special and demanding deliberative expectations. In fact, to some extent, these expectations are embodied in the constitutions that created these courts. For example, the organic law of the Fifth French Republic regulating its procedures requires that the Constitutional Council provides a reasoned justification for its holdings.4

In Political Liberalism, John Rawls described courts as exemplary deliberative institutions—forums in which reasons, explanations, and justifications are both expected and offered for coercive state policies.5 The authority of courts is supposed, on this view, to rest in large part on the qualities of judicial reasoning—reasons linking court decisions to legal or moral authority—especially since courts as institutions lack democratic credentials and often lack the means to implement their decisions. So, deliberation and reason-giving seem especially valuable (and familiar) aspects of adjudication. If, therefore, we are trying to locate the institutions where reasoning and deliberation play an important role in public life, it is apt to begin with courts and especially with courts dealing with constitutional issues.

In this chapter, therefore, we compare European and American constitutional courts as deliberative forums. We argue that constitutional courts are very differently situated in various political systems. They are asked different kinds of questions by different political actors, and are faced with different expectations, histories and cultural and political constraints. In view of this diversity of circumstances it is to be expected that constitutional courts adopt different kinds of deliberative practices even when treating quite similar issues. Still, despite the diversity, we think there is an important sense in which each of the constitutional courts we examine—the French, German, Italian, Spanish and U.S. courts—have retained the exemplary deliberative character that Rawls describes.

1. DELIBERATIVE EXPECTATIONS

What kind of deliberation are courts asked to undertake? Aristotle's conception of deliberation puts the main emphasis on the requirement that deliberation

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4 'The Constitutional Council shall give a reasoned decision' (Ordinance no. 58–1067 of 7 November 1958 incorporating an Institutional Act on the Constitutional Council, art. 20). See also, concerning Italy: Law no. 87 of March 11th 1953, The composition and procedures of the Constitutional Court, Art. 18: 'Judgements are issued "In the name of the Italian people", and set out the reasons for the decision...'.

aims at critically evaluating, and perhaps changing, goals or preferences. In deliberating, people come to recognize and embrace reasons for action that they may not have understood previously. In public deliberation, moreover, the kinds of goals or preferences that agents might be expected to bring to the forum are especially likely to be subject to revision insofar as, at least within a liberal legal system, private and public purposes must fit together in complex ways.

But whether goals or purposes actually change as a result of deliberation, or whether they merely remain open to revision, the way that deliberation changes or reinforces goals or purposes is by giving reasons or arguments. Deliberation in this sense is participating in the process of reasoning about public action. This entails being open to reasons— that is, being willing to alter your preferences, beliefs or actions if convincing reasons are offered to do so— and being willing to base attempts to persuade others on giving reasons rather than threatening coercion or duplicity. Rather than asking, like Aristotle, whether minds are changed, we would ask only whether public action is conducted through reasoning. Minds may rarely actually change as we suspect they seldom do on the American Supreme Court, at least not at the level of deep political commitments. Nevertheless, even if its members remain quite fixed in their general purposes, the Court is nonetheless a forum of reason and deliberation in another sense. The fact that court decisions have effects on real or hypothetical cases, and are aimed at deciding what can or should be done in concrete settings, permits judges who disagree about fundamental principles to find agreement on more concrete levels. While abstract ideas may not be open to revision, ideas about particular cases may be much more flexible and pragmatic.

Moreover, high courts, unlike other political institutions, do not simply publish orders or decisions. They are expected also to publish plausible rationales for their holdings: arguments that others can be expected to respect and embrace, whether or not their own interests have been vindicated. The expectation that courts explain their holdings can be seen as a deliberative expectation in two senses. The first, just given, is that reasons are given that can be understood and embraced as, in some normative sense, our own reasons for action. Courts offer, in Rawls’ idiom, public reasons for action— reasons of a kind each of us can be expected to embrace from our own moral vantage point. Secondly, since courts are collegial institutions, these reasons are arrived at through an internal process of deliberation, guided by the particular court’s decision-making norms. This process may or may not be regulated by a shared expectation that the court will publish a single opinion or that multiple opinions will be published as well. A court’s published reasoning is, in this sense, negotiated within a normative framework ranging from consensus seeking to majoritarian.6

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6 The changing practices of the U.S. Supreme Court regarding the (increasingly frequent) publication of dissents and concurring opinions is an example of the historical flexibility of these decision-making norms. Perhaps, in an increasingly pluralist culture, there are good reasons to offer multiple rationalizations for holdings and that is the best explanation for why the Court’s normative practices permit them.
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