AN ITALIAN OR A EUROPEAN STYLE OF JUDICIAL REVIEW? SETTING THE AGENDA FOR COMPARATIVE RESEARCH ON COURTS*

Patricia Popelier[**]

Abstract

The paper suggests that the book on *Italian Constitutional Justice* does not so much describe a typical 'Italian' style of constitutional adjudication, but a continental European one. In fact, the authors of the book identify an 'Italian style' of constitutional adjudication defined as 'relationality'. But similar characteristics can be found in other European jurisdictions.

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** Professor of Constitutional Law, University of Antwerp.

1. Introduction

With the rise of constitutional review world-wide, came scholarly attention to the position of constitutional courts in the institutional set-up. In Europe the institutional set-up is complicated by the presence of two supra-national courts, the European Court of Justice and the European Court of Human Rights. In attempts to analyze the complex relations that follow from the institutional context, scholars have focused in particular on the relations between courts under the denominator of 'judicial dialogue' or 'constitutional conversations'[1]. Nonetheless, the relationship of the Constitutional Court with other actors is precisely the angle under which the authors of the book *Italian Constitutional Justice in Global Context* claim the Italian's court uniqueness[2].

2. An 'Italian style' of constitutional adjudication

The authors identify an 'Italian style' of constitutional adjudication defined as 'relationality'. They distinguish its 'institutional' and its 'interpretative relationality'. The first is the 'ability to establish sound and vital two-ways relations with other institutional actors, both political and judicial, national and supranational'[3]. The authors explain how the Italian Constitutional Court, in difficult circumstances, managed to build smooth relations with Parliament, but how it also enters into dialogue with other national courts and with European and foreign courts. The latter refers to its method of constitutional adjudication. It is 'the ability to combine and balance all the different sources of constitutional regulation of rights and powers'[4], with focus on balancing, reasonableness and

[1] E.g. M. Claes, M. de Visser, P. Popelier & C. Van de Heyning (eds), *Constitutional Conversations in Europe* (2012); A. Rosas, *The European Court of Justice in Context: Forms and Patterns of Judicial Dialogue*, 1 Eur. J. Legal St. 121-136 (2007).

[2] V. Barsotti, P.G. Carozza, M. Cartabia & A. Simoncini A, *Italian Constitutional Justice in Global Context* (2016).

[3] *Ibidem*, p. 238.

[4] I quote from A. Simoncini, *The Success of a Constitutional Experiment: When History Matters. The Italian Constitutional Court in Global Context* in this issue as it is not clearly defined in the book.

proportionality and a systematic, holistic method of interpretation.[5]

While the authors maintain that all this makes for a typical 'Italian' style, at the same time, they admit that the Italian Court is not 'absolutely singular in this effort at relationality; any successful constitutional tribunal needs to attend to some degree to the political realities of its place in the constitutional order'.[6] Scholars have provided many examples of such institutional relationality. Vanberg research on the German Constitutional Court made clear that constitutional courts, when making judgments, take into account the 'tolerance threshold of governing majorities' and the broader political environment so as to secure implementation of their judgments.[7]

3. Constitutional adjudication in other European jurisdictions.

Similar findings can be found in other jurisdictions. For example in Belgium the Constitutional Court was established in the 1980s as a 'Court of Arbitration', with limited access and the sole power to solve conflicts of competences between central and subnational authorities in a context of a fragmenting federalization process. However, with its prudent performances it was able to gain Parliament's confidence which was crucial for its development into a full-fledged Constitutional Court.[8] At the same time it entered into a dialogue with domestic and European courts. Relations with the Supreme Court are sometimes strained, but various efforts, including a symposium co-organized by the courts' Presidents, were made to ease the tensions.[9] As to the European courts: the Belgian Constitutional Court sends the most preliminary references to the European Court of Justice compared

[5] V. Barsotti, P.G. Carozza, M. Cartabia & A. Simoncini A, *Italian Constitutional Justice in Global Context*, cit. at 2, 238.
[6] *Ibidem*, p. 235.
[7] G. Vanberg, *The Politics of Constitutional Review in Germany* (2005).
[8] See in more detail P. Popelier, K. Lemmens, *The Constitution of Belgium. A Constitutional Analysis*, 197-198 (2015).
[9] J. Velaers, *The Protection of Fundamental Rights by the Belgian Constitutional Court and the Melki-Abdeli Judgment of the European Court of Justice* in M. Claes M. et al. (eds), *Constitutional Conversations*, cit. at 1, 325-326.

to other courts,[10] and the European Convention of Human Rights including the Strasbourg case law is read in the constitutional clauses on fundamental rights.[11] The same applies with regard to the idea of 'interpretative relationality'. The Belgian Constitutional Court's jurisprudence is characterized by its efforts to find compromises, to uphold legislation through constitutional interpretation, to afford the lawmaker time for adjustments and give instructions for those adjustments, and by its broad consideration of political bottlenecks, balances and compromises.[12]

What is true for the Belgian Constitutional Court, undoubtedly applies to certain other courts as well. For example, with regard to the relationship with other domestic courts, Garlicky came to the following conclusions based upon a comparative analysis: (1) 'tensions among the courts constitutes a necessary component of every system of centralized review'; (2) this seems to be a 'more general structural problem' apart from context (such as the transition from authoritarian history), and (3) constitutional courts are often the weaker participants in this process and therefore turn to 'dialogue and persuasion' as a more effective method than open conflicts and confrontations.[13]

Even supranational courts such as the European Court of Human Rights show a 'relational' attitude. Keeping good relations with the Contracting States is crucial for the Court's viability, and particularly delicate, given the diversity of the Contracting States in terms of political and legal culture and history. To this end, the Strasbourg Court seeks a difficult balance between deference and fundamental rights control. Despite the storm of criticism the Court had to go through in recent years and with a few exceptions, it seems to have succeeded in building good relations. Even where political communication is critical, most countries in practice are compliant when it comes to the execution of the

[10] See the statistics for 1952-2015 in Court of Justice, *Annual Report 2015. Judicial* Activity, Luxembourg 2016, 97-99.

[11] On the references to Strasbourg case law as a judicial strategy, see P. Popelier *Belgium: Faithful, Obedient, and Just a Little Irritated,* in P. Popelier, S. Lambrecht & K. Lemmens (eds), *Criticism of the European Court of Human Rights. Shifting the Convention System: Counter-Dynamics at the National and EU Level*, 123-127 (2016).

[12] See P. Popelier P, K. Lemmens, *The Constitution of Belgium*, cit. at 8, 203-212.

[13] L. Garlicki, *Constitutional Courts versus Supreme Courts*, 5 I*CON 63-68 (2007).

ECtHR's judgments.[14] To this purpose, the Court is prudent where matters touch upon a Contracting Party's 'constitutional identity' or national feeling.[15] For example, the first *Lautsi* judgment, where the Court stated that the compulsory display of a crucifix in classrooms violated the Convention, was met with much resistance and public indignation.[16] The Grand Chamber, having become aware how sensitive the matter was in Italian society, changed position and decided that the authorities had 'acted within the limits of the margin of appreciation'.[17] Judicial techniques to uphold the balance, are the proportionality test, the notions of subsidiarity and the margin of appreciation, and procedural rationality review. The latter allows the Court to keep control where it is unable to execute a substantive examination, for example when a broad margin of appreciation applies. In that case it can examine whether the national decision making process contained guarantees to secure a balanced decision.[18] When the Court, in *Animals Defenders International*, used this type of review to uphold a broad restriction of freedom of public interest speech, which falls within a narrow margin of appreciation, this raised the suspicion that the Strasbourg Court, confronted with growing hostility in the UK, tried to appease the United Kingdom.[19]

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[14] P. Popelier, S. Lambrecht & K. Lemmens, *Introduction: Purpose and Structure, Categorisation of States and Hypotheses*, in P. Popelier, S. Lambrecht & K. Lemmens (eds) *Criticism of the European Court of Human Rights*, cit. at 11, 9.

[15] F. De Londras, D. Kanstantsin, *Managing Judicial Innovation in the European Court of Human Rights*, 15 Hum. Rts. L. Rev., 537 (2015).

[16] *Lautsi v* Italy [App No 30814/06] Decision of 3 November 2009. See G. Martinico, *Italy: Between Constitutional Openness and Resistance*, in Popelier, Lambrecht & Lemmens (eds), *Criticism of the European Court of Human Rights,* cit. at 11, 178.

[17] *Lautsi v.* Italy [App No 30814/06] Grand Chamber Decision of 18 March 2011, para 78.

[18] E.g. *Hatton v. the United Kingdom*, Decision of 2 October 2001, [App. No. 36022/97] and Grand Chamber decision of 8 July 2003, [2003] ECHR VIII.

[19] T. Lewis, *Reasserting the Primacy of Broadcast Political Speech after Animals Defenders International? – Rogaland Pensioners Party v Norway*, 1 J. Media Law, 474 (2009); F. De Londras, D. Kanstantsin, *Managing Judicial Innovation in the European Court of Human Rights*, cit. at 15, 538; P. Popelier, C. Van De Heyning, *Subsidiarity Post-Brighton: Procedural Rationality as Answer?*, Leiden J. Int'l Law (2016) (forthcoming). For other examples: H. Fenwick, *An Appeasement Approach in the European Court of Human Rights?*, UK Constitutional Law Blog, https://ukconstitutionallaw.org/2012/04/05/helen-fenwick-an-appeasement-approach-in-the-european-court-of-human-rights/ (last accessed: 14/09/2016).

Obviously, each court shows specific features as to attitude and judicial techniques, subject to institutional design, political context and societal cleavages. The question, however, is what is so specific in the Italian operationalization of 'relationality' to distinguish it from that of other courts and whether it is scientifically useful to present it as a singular type of judicial review rather than a particular case within a broader category of 'styles' or 'methods' of constitutional review. The first turns the Italian Constitutional Court into a court *sui generis*, which is a nuisance for academic purposes – '*le supreme refuge des jurists dans l'embarras*'[20] - as it hinders the development of a broader theory, the possibility of comparative study, and the gaining of insights into the functioning of courts in general.

4. Conclusions

It can be hypothesized that the book on *Italian Constitutional Justice* does not so much describe a typical 'Italian' style of constitutional adjudication, but a continental European one.

The hypothesis, in the first place, does not include the constitutional adjudication of all courts on the European continent, but only centralized constitutional courts. There are two reason to expect that a central court's style of adjudication differs from supreme courts' methods. One reason is that the constitutional mandate of constitutional courts is more pronounced, more specialized and more visible than that of other courts, especially if the court has the power to annul parliamentary acts after a procedure of abstract review. The second reason lies in their specific composition. After a comparative overview of European courts, de Visser established that the procedure for selection and appointment of constitutional judges as well as their qualifications point to the desire to endow the court with a specific form of legitimacy, considering the political impact that undeniably follows from the power to censure parliamentary acts.[21]

[20] M. Mouskhély, *La Théorie du Fédéralisme*, in *La Technique et les principes du droit public. Etudes en l'honneur de Georges Scille*, 400 (1950).

[21] M. De Visser, *Constitutional Review in Europe. A Comparative Analysis*, 223 (2014).

Secondly, the hypothesis does not cover all constitutional courts, but is limited to constitutional courts within the European Union. We can expect that embedment within the European legal space facilitates the development of a specific type of constitutional adjudication. Judicial dialogue develops between the domestic courts and the European Court of Justice, between the domestic courts and the European Court of Justice, between both European courts, and between national courts, for example in the development of strategies to protect constitutional values against EU supremacy. This has intensified dialogue and networks, resulting in a two-way relation, with on the one hand the internationalization of fundamental rights and principles to what the authors of the book call a 'European common law',[22] and on the other the constitutionalisation of European fundamental rights.

All this sets the agenda for future research. More case-studies like the one in the book on *Constitutional Justice in Global Context* is needed in order to establish whether there is a 'European' style of constitutional adjudication and what exactly it involves. This should amount into a broad comparative study where indicators and criteria that characterize this specific style are examined for each country. On the basis thereof we should be able to define and explain commonalities but also to comprehend national adjudication and discover what is actually country-specific and what not find; to establish what are the contextual, institutional, organizational and functional aspects that shape, encourage or discourage this European style; and to find whether this specific method of judicial review is able to overcome the counter-majoritarian obstacle so often debated in (mostly Anglo-Saxon) scholarship. This, however, requires a broad comparative research network, with local experts writing reports on the basis of uniform questionnaires, and the building of databases of judgments coded in similar ways, so as to test hypotheses and distinguish defining aspects and explanatory factors in a statistically significant way.[23]

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[22] V. Barsotti et al., *Italian Constitutional Justice in Global Context*, cit. at 2, 230.

[23] Such database was built at the University of Antwerp for the Belgian Constitutional Court, for a project funded by the FWO (Flemish Scientific Fund), supervised by Popelier and Beyers, and executed by Josephine De Jaegere.