Constitutional courts are institutions producing *judge-made-law*. [M. Cappelletti, *Giudici legislatori*, Giuffrè, 1984]. Prima facie this form of making law – *Rechtserzeugung*, in Kelsenian language – contradicts a classical basic tenet of any representative government (the political regime we call nowadays democracy), a system characterized by the ideology claiming that exclusively state organs appointed *pro tempore*, through popular elections and electorally accountable to the voters, are the only ones authorized and have henceforth the authority of imposing on citizens binding collective decisions, typically in the form of legal norms.

Members of these high courts are neither elected by the citizens nor accountable to them (in general, moreover, they cannot be reappointed - there are, as usual, some exceptions) [Czech Republic and ?]. Nonetheless, they make decisions that have to be obeyed by citizens and other state organs exactly like statutes passed by elected and accountable officials in parliaments – even though, which is a crucial point¹, the procedure of judicial law-making is deeply different from the one used by elected representative assemblies in *Parteienstaaten*, a political system dominated by political parties.

This law-making function is clear in the case of Supreme and Constitutional courts but also and more and more when we consider supra-national and international courts of justice.

Where does the legitimacy of these institutions and the obligatory force of their decisions come from?

I focus here on the national apex courts of some European countries – since as a general rule I believe that it is better for me to speak about what I know well. But I’m aware that there is some new work concerning the legitimacy of international courts. I think for instance of the book co-authored by Armin von Bogdandy [*In Whose Name? A Public Law Theory of International Adjudication*, Armin von Bogdandy and Ingo Venzke, Oxford University Press, 2014].

¹ See M. Cappelletti, *Giudici legislatori.*
This question of the legitimacy of national apex courts as co-legislators is certainly relevant from the perspective of my approach, which is the one typical of the theory of the state and constitutions -- a discipline that lived its most glorious days in Germany and in France at the time of the Weimarer Republik and the Third Republic and that is now threatened with extinction because of the increasing and possibly inevitable division of academic labor between political science and public law.

Be that as it may, rather than presenting the arguments that can demonstrate the legitimacy of judicial review inside constitutional democracies (– we may come back to that topic in the discussion if you want –) I will show the path that one should follow to answer this question, before and independently of somewhat abstract philosophical arguments (that I have presented in some previous papers: Straus papers/ and Russell Hardin Festschrift).

To begin with, one should notice that by legitimacy is not meant here just legality (the fact that judicial review is written down in the constitution or firmly established as a constitutional convention, as in America and in Israel) or even the sociological circumstance of acceptance by the citizens/public opinion, but instead the rational arguments one can offer to establish why we have good reasons to support this form of law making\(^2\). Now, in order to answer the question of the legitimacy of contemporary judge-made-law, we need to consider a set of relatively complex and connected questions in comparative perspective, something that cannot possibly be done by a single person, but needs international cooperation (in the research that I present here I focus essentially on the Constitutional Courts of three countries: France, Germany and Italy, which are stable democracies and for which I know their language, constitutional history and political life).

The questions one has to investigate are, so it seems to me, the following:

1. What the Constitutional/Supreme Courts do;
2. How they do what they do – how they produce binding legal norms, called in different languages: Entscheidungen, sentenze/ordinanze, décisions, opinions, etc.

But also:

\(^2\) In a stable democratic system. I need to draw attention to the fact that Constitutional/Supreme courts with the function of constitutional adjudication exist nowadays in almost every political system in the world. But their actual function in unstable democratic or in authoritarian regimes is a complex topic which is the subject of systematic investigation only recently. See: Tom Ginsburg & Alberto Simpser, *Constitutions in Authoritarian Regimes*, CUP, 2013 and Sam Issacharoff, *Fragile Democracies*, CUP, 2015. *Contested Power in the Era of Constitutional Courts*, CUP, 2015. [book on Russia and on Egypt]
3. How members of these Courts are appointed, for how long and with what qualifications\(^3\);
4. Why Constitutional/Supreme Courts have been established (or accepted, as in the United States and Israel) by the elected political actors\(^4\) and by public opinion; and last, but not least
5. The conditions for success of their actions (first of all: the existence of an independent judiciary).

Only if we have some clear ideas about this set of questions can we hope to answer in a satisfactory way the question of the **legitimacy** of constitutional adjudication.

In this text I’ll spell out some partial answers to these questions, drawing attention in particular to the first two points: **What these Courts do** and **How they do what they do**.

1. Constitutional Courts, so we are told, have the function to control the hierarchy of norms; to interpret the constitution; and, if they work, to be an obstacle to the exercise **ultra vires**, of the abuse of power by state organs.

The spatial metaphor that was developed at the beginning of the 20\(^{th}\) century by the Austrian legal school, notably by Adolf Julius Merkl and Hans Kelsen – which is not identical to the American **supremacy clause**, the equivalent of the German principle of the Weimar Constitution **Reichsrecht bricht Landesrecht** – does not seem to say more than that in the rhetoric of judicial review, the concept of a hierarchy of norms is and has to be systematically used to justify constitutional adjudication. It would be much better and less misleading to connect judicial review of primary legislation with the rigidity of the constitution [See Bryce\(^5\) and my paper in Cardozo Law Review\(^6\) and\(^7\)], which represents the attempt to establish limited government in a

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\(^3\) J. Bryce, Flexible and Rigid Constitutions: [https://archive.org/details/constitutions00brycegoog](https://archive.org/details/constitutions00brycegoog)

\(^4\) «Classifying Constitutions»: [http://www.cardozolawreview.com/content/34-3/PASQUINO_34.3.pdf](http://www.cardozolawreview.com/content/34-3/PASQUINO_34.3.pdf)

modern legally equalitarian society. In any event, interpretation, and specifically constitutional interpretation, is more than making a practical syllogism, where the constitutional provision is the major, the statute law the minor and judicial opinion the logical/mechanical conclusion. Most scholars and many constitutional judges agree nowadays in saying that constitutional adjudication is law-making through interpretation of the constitution (data, now old, by Ch. Landfried concerning the BVerfG). Constitutional interpretation is, no matter what, law-making. In any event, to understand in which specific sense these apex courts are law-makers or co-legislators, we need to look from the outset at an essential procedural mechanism.\footnote{In his important article THE NATURE AND DEVELOPMENT OF CONSTITUTIONAL ADJUDICATION (1928), Engl. transl. in The Guardian of the Constitution. Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law, Edited and translated by Lars Vinx, CUP, 2015, p. 64, Kelsen wrote: “Of the greatest importance is the question: in what way can proceedings in the constitutional court be initiated? The extent to which the constitutional court will be able to fulfil its task as a guarantor of the constitution depends primarily on the regulation of this question.”} who can send referrals to a Constitutional Court, or to speak with Franz Kafka: who can open the closed door of those Courts (less literarily, in legal jargon, we say that the Constitutional Courts are passive organs; they cannot take initiative and have to be asked – which is, among others, an important difference from elected and accountable Parliaments).

Access

Typically, and simplifying, three different actors can open the door of a Constitutional Court (notably in the European countries, unlike in the United States):

<table>
<thead>
<tr>
<th>A) Institutional political (meaning elected) actors/officials</th>
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<tr>
<td>B) Ordinary judges</td>
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<tr>
<td>C) Litigants</td>
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</table>

A) The most common cases of referral by institutional-political actors are (1) the representatives of the Länder (in general the political sub-units of a federal system: regions, provinces, states) and (2) a minority of members of Parliament, notably, as in the French constitutional system. These are, clearly, two very different actors. [There are other political actors to be considered in an exhaustive classification, for instance: presidents of the republic, etc.] In the first case, the Constitutional Court is a federal judge, an institution, which exercises a
function that is inevitable in whatever federal system (there was already a court in charge of this type of litigation in the German Holy Roman Empire – the Heiliges Römisches Reich – the Reichskammergericht,9 and there is a federal court in Australia10 – notice that this type of federal adjudication was also at the origin of the role of the US Supreme Court – see J. Rakove11). Here the function of the courts is to prevent the federal system from collapsing into a unitary state, on one side, and, on the other, to ensure that the subunits are not become legally independent from the federal regime.

More interesting, because of its uniqueness in Europe12, is the case of the French so-called saisine parlementaire. This mechanism of referral, introduced in its minimalist form in the constitution of the 5th Republic, allows, starting from the constitutional amendment of 1974, a minimum of 60 senators or members of the National Assembly to ask the Constitutional Council to scrutinize a statute voted by the majority, before its promulgation. The uniqueness13 lies in the choice of a

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12 Article 61 of the French Constitution writes:

“Institutional Acts [lois organiques], before their promulgation, Private Members’ Bills mentioned in article 11 before they are submitted to referendum, and the rules of procedure of the Houses of Parliament shall, before coming into force, be referred to the Constitutional Council, which shall rule on their conformity with the Constitution. To the same end, Acts of Parliament may be referred to the Constitutional Council, before their promulgation, by the President of the Republic, the Prime Minister, the President of the National Assembly, the President of the Senate, sixty Members of the National Assembly or sixty Senators.”

control *ex ante*, which was able to rescue the French myth of the *loi expression de la volonté générale*.\(^{14}\)

Notice that in this case the Constitutional Council (the French politicians still resist calling this institution a 'Court') functions as an *intermediary body* (the expression was used by Montesquieu speaking of the Parliaments of the ancien regime, actually the high courts of justice\(^{15}\), and was repeated by Alexander Hamilton in Paper 78 of the *Federalist Papers*) between the majority and the minority in parliament at the very moment of the making of statute laws, when the bill is passed by the majority, but not yet promulgated by the President of the Republic and published in the *Bulletin officiel*. The *Conseil Constitutionnel* plays in that case the role of a balancing mechanism between the party or coalition that wins the election and the loser(s), avoiding a case where the relationship among them becomes one of *all or nothing*: all the power to the majority, no power to the minorities.\(^{16}\)

Very important also in this first category of referrals is the one that occurs in the case of what we can call conflict among the high state organs (*Organstreit* in German, *conflitti di attribuzione* in Italian). Constitutional democracy (better *état de droit constitutionnel*, *verfassungsmässiger Rechtstaat*) is a system of shared/divided power, not only vertically as in federal regimes, but also horizontally among the different branches exercising political authority at the central level\(^{17}\); if a conflict emerges among them as to their respective competences (likewise in the case of conflicts between regions, *Länder*, and the national government) meaning between the legislative and the executive branches, etc., the only or at least the most sensible way to resolve the conflict is to bring it to a Court. In these cases, the Constitutional Court works as the organ that has to keep the balance among the different branches of political authority and protect the polyarchic/pluralistic

\(^{14}\) Since the constitution was, like the *loi*, an expression of the general will, the only possibility of controlling the *loi*, the decision of the parliamentary majority, was to do it before it existed in the statute book, before its legal birth!

\(^{15}\) See the entry Parlement/Parlements by Rebecca Kingston:


\(^{16}\) The argument that moderation could be produced *simply* by competitive elections and rotation in power is not persuasive for a variety of reasons. First, the rotation in power in a democracy is only a possibility, sometimes one has to wait 70 years (Norway) or 45 years (Italy, Japan, Sweden) check (with Adam Przeworski) [https://en.wikipedia.org/wiki/Labour_Party_(Norway)][https://en.wikipedia.org/wiki/Swedish_Social_Democratic_Party]. Second, abuses can take place at any moment, for instance at the beginning of the legislature, and waiting for, say, four years, the deadline of the next election, does not seem a very attractive perspective. In the UK, governments can be very radical and not particularly moderate in their policies – one can think of Thatcher's government.

\(^{17}\) This distribution of political authority among different state organs is not the equivalent of the distinction of functions (legislative, executive, judiciary), as in the classic but often misunderstood Montesquieu doctrine.
structure of the constitutional order (clearly this balance depends also on the structure that the constitution gives to the classical doctrine of the separation of powers – which is not the same in Germany or in Italy as the one established in the constitution of the French 5th Republic).18

B) When the referral comes from ordinary judges, as is the case from the Italian ricorso incidentale, the German konkrete Normenkontrolle, and since 2010 the French QPC (French acronyms for question prioritaire de constitutionnalité), the role of the Court is to be a counter-power, or more exactly to exercise a control independent of popular accountability, vis-à-vis the elected law-makers19, both present and past, something that is not possible through control ex ante like the one performed by the saisine parlementaire.20 In Italy, this form of referral has been since the beginning (1956), statistically and even substantially until recently, as the essential one. The ordinary courts ask preliminary questions, before making any decision in the case that they have to adjudicate. This procedure produces something like a commonality between the ordinary courts and the Corte Costituzionale – which in Italy, as in France, according to the constitution is not part of the judiciary as such – a solidarity which represents the real check inside a parliamentary system, where there is no presidential veto and where, as in Italy, bicameralism had no function as counter-power, since the two Houses of Parliament have been controlled almost always by the same political majority and “divided government” in a parliamentary system, where both Houses have the vote of confidence, is not possible.

C) The epitome of the last case – the referral by litigants and exceptionally by simple individuals – is the German Verfassungbeschwerde,21 the constitutional complaint (existing also in other European countries, notably in Spain as recurso de amparo), which allows a citizen to appeal to the German Federal Constitutional Court against a legal decision or any other action of

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18 One cannot underestimate the relationship between constitutional adjudication and the content of a given constitution. If it is true as I believe that constitutional interpretation is creative law-making, it is not true, on the other hand, that a Constitutional Court can say whatever it wants (Troper) and claim for instance that a system based on bicameralism has to be unicameral or that if a constitution clearly establishes that it is forbidden for women to cover their head with a scarf, it would be constitutionally permissible to do it. If the judges decide openly against a clear constitutional provision, it is clear that they take the risk to be suicidal.

19 It is possible to speak of horizontal accountability, in contrast to the vertical one exercised by popular vote; see P. Pasquino, THE NEW SEPARATION OF POWERS: HORIZONTAL ACCOUNTABILITY, ITALIAN JOURNAL OF PUBLIC LAW, VOL. 7, ISSUE 1/2015, p. 157-169.

20 Which by the way gives the monopoly over the activation of judicial review to the elected politicians.

21 Articles by G. Lübke Wolff in German and in English.
the state organs that is supposed to be in violation of the fundamental rights that the Grundgesetz assigns to the citizens (and to any human being whose rights are possibly violated by organs of the German state). In this case the Court acts as the guardian in the last instance of constitutionally protected rights — a defense that became paramount and pretty much an exemplar in Germany after World War Two.

Two remarks can be added at this point. First: considering what has been said so far we can see that the European Courts, meaning the Court of Justice of the European Union in Luxembourg and the European Court of Human Rights in Strasbourg, have mechanisms of referral similar the ones just analyzed. The third type: the referral to ask protection of the rights guaranteed by the European Convention is the one that can be sent to the Court in Strasbourg (always as a form of appeal after the exhaustion of all internal legal remedies); the 1st and the 2nd mechanisms of referral give access to the Court in Luxembourg.

Second remark. Some of these national or supranational courts – notably those with “direct referral” – get a large, sometimes extremely large number of referrals, famously the ECHR, 22 but also the German federal constitutional court 23 (and the Brazilian Tribunal Supremo 24). To avoid being overrun, these courts have been establishing over time internal filtering mechanisms. It is important to draw attention to the situation where we can distinguish between internal and external filtering rules (but also formal and informal rules). A classical formal internal one is the so-called “rule of four” [fewer than the majority of the nine members], which was established at some point as, at the US Supreme Court, certiorari 25, in English, to pick up and to select the cases to decide. It is well known that the Supreme Court is an appellate court (with very few exceptions) and that if it decides not to hear a case, there is no “denial of justice” because judicial review is not concentrated in or monopolized by the Supreme Court. The Constitutional Courts in

22 “In 2015 40,650 applications were allocated to a judicial formation, an overall decrease of 28% compared with 2014 (56,200)” Analysis of statistics 2015, p. 4: http://echr.coe.int/Documents/Stats_analysis_2015_ENG.pdf
25 “The rule of four is not required by the Constitution, any law, or even the Supreme Court's own published rules. Rather, it is a custom that has been observed since the Court was given discretion over which appeals to hear by the Judiciary Act of 1891, Judiciary Act of 1925 and the Supreme Court Case Selections Act of 1988.” [Wiki, sub voce]
European states have to adjudicate all the cases or questions presented to them, but notably those with a large caseload have established an internal division of labor (though not yet the French and the Italian ones) and internal informal mechanisms to avoid being “killed by their success”. The importance of the caseload has a relevant impact on the decision-making of the Courts from two points of view: division of labor among the judges and the role of the assistants to the judges. The French constitutional reform of 2008/2010 chose a different preemptive strategy to select cases to decide; in the French legal system, questions of constitutionality asked by the party of a trial are filtered both by the juge du fond (the judge of the trial where the question can be raised by the litigants) and by the members of what are called Hautes Juridictions, that means the supreme court of the ordre judiciaire and of the ordre administratif, respectively Cour de Cassation and Conseil d’Etat. The reasons for this choice – let us call it the external filter – are the object of speculation, but there is a significant consensus among scholars on the thesis that this choice had the double function first of giving a role to the two oldest and most powerful courts of the French Republic and second to avoid making the Conseil Constitutionnel too powerful in the sense of giving it entire control over its docket.

This last commentary works as a sort of gangway to my second set of remarks:

2 Mode of production - How Constitutional Courts do what they do – how they produce their legal norms, which are called in different languages: Entscheidungen, sentenze, décisions, opinions, etc.

Once we know who can open the door of the court and it is opened, we start to have an idea of what the Court does. Then the next question is: what does happen behind the closed doors of these institutions? How do they produce the decisions that exit after an internal procedure from the same door? Cases or questions are sent to the guardian of the constitutional order and decisions exit from the building of the court. But what happens inside, how are these decisions produced? This is the main topic of investigation that is important to elaborate. Legal scholars

26 FN on the BVerfG - Kammer
have to make a greater effort than in the past, I believe, to look inside what the French sociologist Bruno Latour called some years ago, speaking of the Conseil d’État, La fabrique du droit. In this tentative essay I can touch only upon a few aspects of this investigation, but I think that to understand the procedure, the protocol of the Courts’ decision-making process, we need to distinguish a panel/pluralist from a collegial Court in charge of constitutional adjudication. This is not a standard distinction, so I need to say a few words about it.

The U.S. Supreme Court is the most revealing example of what can be classified as a panel court. But since all these high courts are panel courts in contrast to courts characterized by monocratic judges, it is necessary to define what I mean by this conceptual distinction: panel/pluralist vs. collegial court. The easiest way to explain this dichotomy is to say that it is important to distinguish courts that speak with one voice, thanks to the undisclosed votes of its members, from courts where the justices have a clear public persona – and who “teach from the bench”, addressing as specific individuals to an external public, thanks to dissenting and concurring opinions.

The Austrian, Italian, French and Belgian Constitutional Courts, likewise the ECJ in Luxembourg, are instantiations of what I call a collegial court, whereas most of the courts of the ex-British Commonwealth are simply panel courts. Germany, and many other countries that follow the German model of Verfassungsgericht could be classified as mixed systems since the use of dissent is quite limited and the Court as such is prominent upon its members.

Coming back to the previous question (how Constitutional Courts make decisions), the main steps of a protocol to investigate can be summarized in the following way:

1. the mechanism of access to the court
2. screening/selection of cases (formal and informal)
3. the rule for assigning the cases among the judges
4. The role of the greffe and/or of the law clerks
5. the collective decision-making procedure [deliberation]
6. and as a result: the written decisions of the Court: the authoritative text of the law.

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Now I shall consider different protocols or modes of production of constitutional opinions comparing an archetypal panel court with collegial courts.

U.S. Supreme Court.
The steps of the decision-making procedure in the USSC are the following 8 (I simplify considering only the appellate jurisdiction of the SC):

1. The appeal is sent to the SC by the litigant (the looser) of a trial that took place in a circuit court (which is already an appellate court)\textsuperscript{29}; the litigant – or more likely her counsel or the ACLU, who hope for a revision and reversal of the judicial decision. We see immediately that the USSC is a judge of the judges and not only of the statute law (as it is also often the case when the German Constitutional Court decides a constitutional complaint - Verfassungsbeschwerde).

2. The appeal is selected/picked up or not by four judges (at least) in the meetings that take place for the certiorari – the selection mechanism of the cases to be adjudicated.

It is worth noticing that at this early stage of the procedure, the role of the clerks is crucial. Many thousands of appeals are received by the SC each year. Now only about 100 or fewer, roughly speaking\textsuperscript{30}, are selected for a judicial decision by the SC. The clerks (four for each Justice) read all the appeals and prepare for each of them a memo for the Justices who on the basis of these memos select the cases for certiorari. Notice that such a mechanism of screening is justified in the context of the American system of judicial review, where lower courts can decide – as already mentioned – about the constitutionality of a statute, so that if the case is not reviewed by the SC, there is no “denial of justice”.\textsuperscript{31} (A comparison with the screening mechanism for the VB in the BVerfG would be interesting in this perspective).

3. A schedule is established for oral arguments, the adversarial discussion between the parties (i.e. their counsels) and the Justices. During the hearing, the Justices ask questions to the counsels and these ones and the public start to have an idea of what at least some of the Justices individually think about the case. Because of the rules and procedure for the collective decision,

\textsuperscript{29} In a sense the USSC is comparable with the French Cour de Cassation, a point that has been made by Mitchel Lasser, Judicial Deliberations. A Comparative Analysis of Transparency and Legitimacy, Oxford UP, 2004.

\textsuperscript{30} In 2015, the Court decided 69 cases. The number of petitions received each year has been recently around 7000.

\textsuperscript{31} Such a type of selection is not possible, at least explicitly, if constitutional adjudication is a function centralized and monopolized by a single court. In that case the filtering of the petitions has to take, as we will see, a different form.
the American Justices are public personae and the public has an opinion and expectations concerning their leaning in cases’ decisions. There are, as is well known, conservative, liberal and moderate Justices, in each American SC (in each American court actually), largely because of the explicitly partisan appointment mechanism.

4. After the oral arguments the judges get together under closed door meetings, call conferences, for a few hours on Friday morning where they vote on the disposition of the case: affirmed, reversed (or vacated), remanded – again similarly to a Cassation court of the French type.

5. It is only after this vote that a sort of deliberation starts; arguments are exchanged essentially in written form (so there is nothing like a face to face deliberation as to the reasons given by the Court) but only some written exchanges on the draft prepared by the Justice charged to write the majority opinion. Notice that the judge who has to write the opinion of the Court is designated by the Chief Justice, if this one agrees with the majority that voted on the disposition. The juge rédacteur is instead picked up by the senior Justice, if the Chief is in the minority in the vote on the disposition. Since the assignment of the case is important, the Chief may vote strategically to be able to assign the case, for instance to himself, as Roberts did in the case of the so-called Obamacare opinion.

6. The Justices in the minority at the moment of the vote on the disposition write usually one or more dissenting opinions – and even in this case, the exchange of arguments is a written one.

7. The members of the majority (on the disposition) may produce concurring opinions – meaning alternative arguments vis-à-vis those presented by the judge writing the court’s majority opinion, but supporting the same disposition of the case – or supporting a partial agreement with the reasons given for the decision (which the American courts call ‘opinion’).

8. Lastly, it is possible that the disposition is not supported by a majoritarian or coherent set of arguments – because of a too large number of (partial) concurring and (partial) dissenting opinions; in that possible situation, the court’s opinion decides the case, but it doesn’t represent a precedent – this is why the judge who writes the draft of the majority has to make an effort to rally the legal opinions of the members of the majority around the arguments of her reasoning; and she may sometimes integrate objections or amendments. It is even possible, even though not usual, that the majority on the disposition doesn’t survive the process of the exchange of drafts, plus concurring and dissenting opinions.
One has to consider that the precedential value of a legal decision is the most important aim of the USSC, because opinions of Supreme and Constitutional Courts have to be read in sequences not just as isolated acts.

It seems plausible - this is in any event my claim - to characterize this set of steps as a protocol by which the massive presence of dissenting and concurring opinions and the limited role of a face to face deliberation qualifies such a court not exactly as a collegial body – whereby I mean a court that has to speak with one voice (as in the classical French legal tradition) – but rather as a pluralist court typical of the English judicial institutions, which knew in the past decisions seriatim. [add FN]

French Constitutional Council
If we turn now to the French Conseil Constitutionnel, we realize that the type of protocol for the working of the Court is deeply different. We need to distinguish, starting from 2010, between, on one side, the saisine parlementaire (since 1974 the classical mechanism of referral by at least 60 members of one of the two Houses concerning a statute passed by the Parliament before its promulgation) and, on the other, the QPC (question prioritaire de constitutionnalité) – the French version of the konkrete Normenkontrolle (the Italian eccezione di incostituzionalità).

The origin of the question that the Court has to decide, the actors authorized to send the referral, the time assigned to the Council for the decisions and even different elements of the decision-making process, are essentially not the same ones. I’ll touch upon them briefly.

First, it is important to highlight the fact that notwithstanding its name (Conseil) the French organ in charge of constitutional adjudication in France is the epitome of a collegial court, which has to speak with one voice as it was established already in the very important ordonnances royales by François Ier and Louis the XIV 32.

Here is the path of the decision process in the two cases (saisine parlementaire and QPC).

First the common elements:

32 On the origin of the procedure of French collegial courts see P. Pasquino in Come decidono le corti costituzionali...
A) the French Constitutional Council, unlike the American SC, cannot choose the cases, actually the questions, to adjudicate; it has to answer all the questions of constitutionality that it gets: 92 in 2014, 87 in 2015, most of which are QPC (consider that half of the questions sent by the judges a quo are “filtered” - rejected - by the Cassation Court and the Conseil d’État and never get to the Constitutional Council).

B) The President of the CC has a discretionary power in assigning the question of constitutionality to one of the members of the court. This one, the juge rapporteur, plays, at least may play, an important role in the solution of the question, if he is competent - drafts of the decisions are prepared regularly by the lawyers of the service juridique. His/her name, by the way, is not known to the public, since the decisions of the Council are all of them per curiam, decisions of the Court, anonymous and collegial.

The procedure follows, nonetheless, slightly different paths in the process of decision-making, depending on the actor who initiates the procedure. When there is a saisine parlementaire – the question is sent before the promulgation of the statute by the senators or the members of the Assemblée Nationale – the president of the Conseil Constitutionnel is normally informed by the leader of the parliamentary opposition that it has the intention of referring the statute, once approved by the Parliament. So the president has already the possibility to pick up a rapporteur in pectore, who will follow the parliamentary debates and be ready to prepare, with the service juridique, for the preliminary report that she will have to present to the Court’s deliberation.

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33 The French Constitutional council unlike the USSC or a Cassation Court has not to decide legal cases, but answer questions asked by litigants concerning the constitutionality of a statute that the judge of a trial has to enforce in order to adjudicate the legal conflict.

34 There is no requirement of legal expertise to be appointed in France to the Conseil Constitutionnel; sociologists and politicians have been sitting in this institution. Again, this is a difference vis-à-vis the other European constitutional courts that have its raison d’être in the origins of the Council.

35 Composed by the Secretary General (in general a member of the Conseil d’État) and, now, of four high qualified legal experts it has a major function in the making of the legal decisions of the Council. It prepares drafts for all the questions sent to the court and discusses them with the juge rapporteur – who is not necessarily an expert on constitutional law – each single question. The members of the Council, unlike the judges of the German, the Italian, and the Spanish Constitutional Courts have no personal law clerks. The service juridique works for the Council and its members somehow depend on it.

An interesting unsigned text by the service juridique on its role can be read at the following link: [http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mn/pdf/Conseil/20050930.pdf](http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mn/pdf/Conseil/20050930.pdf)
The reason for this prima facie strange procedure is perfectly understandable if we take into account that the French statutes to be scrutinized may be long and complex and that the Council has only 1 month to produce a decision from the day of the referral.

We have to think that the draft of the decision will be discussed in the conference (the délibéré), which usually takes place the day before the deadline for the publication of the decision. This imperative time constraint has a very relevant impact on the deliberative process. When the face to face deliberation starts, there are only a few hours to get to a final decision. Under the stringency of these deliberative conditions, the judge rapporteur cannot run the risk of entering the conference of the court without the quasi certainty that at least half of the members of the court agree with his basic draft. A serious disagreement among the members of the collegial body would produce a gridlock -- something that has to be avoided no matter what. What can she do?

She has in general to ask the help from the judicial office of the Court. Actually, as mentioned, the draft of the decision is prepared in general by the legal office and at that point discussed with the juge rapporteur before the beginning of the deliberation. Moreover, she can see her colleagues before the conference and have informal conversations with them, face to face (the members of the Constitutional Council have their offices on the same corridor in the small building of the Court, next to the building of the Conseil d’Etat, in the Palais Royal). So before the short collegial deliberations, which have to put an end to the decision-making process, the juge rapporteur may discuss with his colleagues and look for the consensus needed for the Court’s decision. It can be added that in the absence of any adversarial procedure, the juge rapporteur, sometimes in the presence of some of her colleagues, if they wish, may discuss the question of constitutionality with the representatives of the government and that an exchange of written arguments can take place among the parties of the constitutional conflict.

These are some of the immerged, invisible parts of the iceberg that we call by a shortcut “deliberation,” since the only part of it that we can see is the published decision and its arguments – in French the so called considérants.

It is moreover worth noticing that the relatively short and mostly cryptic opinions of the French Constitutional Council are published already some years now on the website of the Court with a
commentary written by the *service juridique*; occasionally this one may be longer than the opinion itself and is mostly much easier to understand by non-specialists.\(^{36}\)

If we turn now to the QPC, the protocol followed for the decision is a bit different. In this case there are adversarial oral arguments (pretty short and without cross examination\(^{37}\)) between the plaintiff and the lawyer of the government, who will present, it appears, two different interpretations of the constitution. After that step, the procedure is the same described concerning the *saisine parlementaire*, although in the case of the QPC the Court has three months to produce its decision.

Another difference has to be considered. By the *saisine parlementaire*, the statute law is the object of scrutiny *ex ante*, before the promulgation of the law – which until 2010, allowed the survival of the ideology pretending that the statute law is the expression of the general will, which is a French way to say that it is right and by the same token compatible with the constitution. The control is moreover *abstract*, meaning that the scrutiny by the Constitutional Council concerns a statute, independently from its enforcement in a concrete trial. In reality, the Council has to try to *anticipate the effects of the statute in its concrete enforcement*, since it is in general unlikely that the statute will be *facially* contrary to the constitution.\(^{38}\)

In the case of the QPC, the control is exercised *ex post*. It concerns promulgated statutes, the Court as a college has the possibility of observing closely the effects of the enforcement of the statute and realizing its concrete consequences, which may have been unforeseeable to the elected officials exercising their law-making power under a sort of veil of ignorance as to the specific applications of the statute. The character of generality al the statute law (Locke) makes somehow inevitable this aspect of parliamentary legislation, that the Court can correct.


\(^{37}\) The opinion of the Court being *per curiam* and anonymous, one understands why during the oral arguments (in France likewise in Italy) the judges do not manifest their opinions and in general refrain from asking question to the counsels of the parties.

\(^{38}\) Guy Canivet, first president of the *Cour de Cassation* and then member of the Constitutional Council, made me aware of that.
The Italian *Corte Costituzionale* follows essentially the same protocol we saw concerning the QPC in France. It is nonetheless important to highlight the common procedural elements and some crucial differences.

Common aspects:
1. The president of the ItCC (chosen by the members of the court typically for a short period of time and not by the President of the Republic as in France) assigns the questions to a *juge rapporteur*.  
2. In the ~20% of the cases there is a public adversarial procedure (expensive because of the counsels to be paid, but not at all necessary for the success of the plaintiff)
3. The court always decides *per curiam*, in English, one voice, but the name of the rapporteur (actually the name of the judge who writes the opinion of the Court) is disclosed. But in France, likewise in Italy, publishing dissenting and concurring opinions is forbidden.

The differences have to do with three aspects:
1. The caseload of the ItCC has been traditionally much more important than the one of the French Constitutional Council (see Appendix). The judges, even being all of them legal experts, could not manage the work necessary to produce such a number of decisions (592 in 2000, but many fewer more recently: 276 in 2015) without the help of their clerks. In Italy, unlike in the French *Conseil Constitutionnel*, each judge of the Court has three clerks that she chooses freely among young judges and academics, who help her to prepare the draft of the opinion, looking notably at the previous jurisdiction and at similar decisions of other constitutional courts of democratic countries.

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39 This is a discretionary power, but the President has to consider in assigning the questions the specific expertise of the individual members of the Court.
40 Actually in the text of the opinions of the ItCC, two terms are used nominatively: the judge *relatore* and the judge *redattore* (the first one presents the question of constitutionality to his colleagues and the latter writes the opinion for the court; in general the terms are followed by the same name. Exceptionally (once or twice each year), the name of the *redattore* is different from the one of the *relatore* – a sign that this one could not persuade the Court and is unpersuaded by the results of the collective deliberation, is asked of the president to designate another judge to write down the opinion of the Court. Such resistance is not possible in the German Constitutional Court.
41 And in Austria, in Belgium and in the ECJ of Luxembourg.
42 Art. 135 It. constitution:
“The judges of the Constitutional Courts shall be chosen from among judges, including those retired, of the ordinary and administrative higher Courts, university professors of law and lawyers with at least twenty years practice”.
The role of law clerks and/or judicial services in apex courts is certainly a topic worth more investigation than what has been done so far.

2. The absence of time constraints concerning the decisions (except for the admissibility of referendums cancelling statute laws passed by the parliament) has the consequence that face to face deliberation in the Italian Court is much more developed, notably for all the relevant cases. In a text written by the Court and accessible on its website, the formal and informal procedure of the decision-making is clearly described. It is characterized by the attempt to find a consensual decision among the members of the Court as a collegial body. The absence of dissenting and concurring opinions, following the French tradition of a court speaking with one voice, represents an incentive to find a median ground argument for the decision in case of disagreement among the judges. The absence of time constraints gives room for working in order to reach an agreement, since the same question can be discussed in more than one meeting, which is usual for any important decision.

As to the types of referrals, it is easier to open the door of the ItCC than that of the corresponding French institution. Since the beginning (1956), both the referral coming from the ordinary judges and the one concerning conflicts of the competencies of high state organs were allowed. With the progressive devolution of legislative power to the regions, the possibility emerged of conflicts between the central legislator and the regional ones. So the Court started to exercise the function of federal judge. A function that became paramount in the last years because of a constitutional reform passed in 2001 that expanded in an unclear way the legislative competences of the regions. (FN on corte dei conflitti). There is by the way no filter between the ordinary judge and the CC, unlike in France, and no equivalent of the saisine parlementaire. (what could change at least concerning the electoral law if the constitutional reform is approved by the citizens – see supra FN 12).

43 The constitutional law on March 11th 1953, n. 2 established the competence of the CC in checking the admissibility of referendums ex art. 75 of the constitution.

44 Following the French constitutional lawyer Louis Favoreu, it is expedient to distinguish between micro- and macro-constitutionality. Only the second type of decisions are the subject of developed deliberation, as to the simple cases as well as the prepared opinion of the rapporteur is easily accepted by his colleagues (this is not clear).

45 http://www.cortecostituzionale.it/documenti/download/pdf/Cc_Checosa_2013_UK.pdf see notably the section 6: How the Court Works, p. 40-51. The text was written for the Court by the judge Valerio Onida and revised by judge Stefano Silvestri.
Germany.

*Bundesverfassungsgericht*/Federal Constitutional Court