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CONSTITUTIONAL ASSEMBLY

30 January 1996

To: Members of the Constitutional Committee Sub-Committee  
From: Hassen Ebrahim  
Re: Abstract Review: A Survey of European Constitutions

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Please find attached for your information additional documentation prepared by the Constitutional Assembly's Research Department on Abstract Review.

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**THE NEW CONSTITUTION**

**TO: The Directorate**  
**FROM: The Research Department**  
**DATE: 24 January 1996**  
**RE: ABSTRACT REVIEW: A SURVEY OF EUROPEAN CONSTITUTIONS**

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## **1. INTRODUCTION**

The constitutional committee has yet to decide whether or not there should be a constitutional provision allowing ordinary members of parliament to refer bills to the constitutional court for a decision on their constitutionality. A number of European countries have experimented with similar mechanisms. In many of these countries jurists and scholars continue to debate the merits and operation of this type of system. In Europe, however, the issue is usually discussed within the context of a much broader debate about the role of the constitutional court and, in particular, its abstract review jurisdiction over legislation.

## **2. GENERAL COMMENTS ABOUT ABSTRACT REVIEW**

2.1 A constitutional court with the jurisdiction to review legislation in the abstract is required to consider and rule on the constitutional validity of legislation without there being an actual dispute about the application of a law in a particular case (cf concrete review jurisdiction, discussed below in 2.2).

2.2 Abstract review must be distinguished from concrete review. In the case of concrete review, a judge, faced with the obligation of applying an allegedly

unconstitutional law to the facts of a case has to decide whether or not the law concerned is unconstitutional. (cf the following works generally for a discussion of the two different models of review: J Nowak, R Rotunda, J Nelson Young, Constitutional Law (3ed) 1986; South African Law Commission: Report on Constitutional Models, Projects 77; Brewer-Carias Judicial Review in Comparative Law 1989; M Capelletti Judicial Review in the Contemporary World 1971.)

- 2.3 There is however more than one species of abstract review. Abstract review of legislation is a broad concept which encompasses two qualitatively distinct types of review procedures, broadly distinguishable according to whether the subject matter of the court's jurisdiction is 'law in making' (Bills) or 'law in force (Acts).' Where Bills are the object of such review the procedure is commonly referred to as 'prior control' or 'preventive review'; where it is legislation in force, it is called 'suppressive' or 'posteriori' review.

## **2. RATIONALE FOR "ABSTRACT REVIEW"**

- 2.1 The difference between abstract and concrete review is a conceptual one. Whereas concrete review is closely associated with the protection of particular interests, abstract control is primarily intended for the protection of the general interest which a community has in the observance of the legal or constitutional order. (cf Prof. Helmut "Decisions of the Constitutional Court and Their Effects, in the European Commission for Democracy through

Law publication" (1994) 84 The Role of the Constitutional Court in the Consolidation of the Rule of law.)

2.2 Two arguments are usually raised in support of abstract review, both of which are critically examined in the sections that follow:

- (i) The first argument is premised on the principle of constitutional supremacy and a particular understanding of the role played by the constitutional court in regard to legislation.
  
- (ii) The second argument is that abstract review protects minority parties against oppression by the majority. (cf. Brewer-Carias Judicial Review in Comparative Law 1989 at 256, for the view that this was the basis for the referral mechanism introduced into the French Constitution in 1974.)

2.3 The first argument requires some elaboration; it runs like this. The Constitution is the highest law, to which all laws and official acts must conform. It articulates the basic norms and values upon which state and society are based. For this reason it follows that all laws must conform to the Constitution. The legislature is required to make laws which conform to the constitution, and a failure to do so, resulting in an unconstitutional law, can be challenged without the necessity of a concrete challenge to the application of that law in a particular case. It is the task of the constitutional court to defend the constitution, and one aspect of that task is to ensure

that legislative norms are constitutional. (cf Lopez Guerra, "The Role and Competence of the Constitutional Court", in European Commission for Democracy through Law, (1994) 84 The Role of the Constitutional Court in the Consolidation of the Rule of Law at 20.)

- 2.4 The view that the defence of the constitution is the primary responsibility of the constitutional court is widely accepted. The constitutional court is a court in the formal sense but, unlike ordinary courts of law, its primary concern is not the adjudication of disputes between litigants. The constitutional court's main role is to ensure that all public power is exercised in terms of the Constitution. A core aspect of this role is ensuring that the policy norms contained in legislation conform to the norms in the constitution, and to strike them down where they do not. Abstract control of legislation then is, at least arguably, one manifestation of the constitutional court's principle duty.
- 2.5 In general, it would seem that abstract review procedures have a restricted scope of operation - abstract review is designed to remove immediately apparent unconstitutionality in legislation. For this reason, many constitutions impose restrictions on the type of legislative instrument which can be taken on review, set time limits for review, or limit standing to invoke the jurisdiction of the constitutional court to important state offices. (cf Guerra op cit para 2.3 at 25.)

2.6 The practises of the European constitutional courts show however that abstract control over legislation is only one of the constitutional courts functions. Constitutional courts not only defend, but also readily interpret the constitution, a role which is often specifically provided for in the constitution. Their interpretative role requires constitutional courts to develop constitutional principles and guidelines for resolving disputes between public institutions and to assist state organs in the exercise of their powers and functions. Overall, the largest portion of their work load consists of adjudicating real disputes on constitutional matters, which much of the time concern challenges to legislation. (Guerra op cit para 2.3 at 26.)

2.7 The second argument, to the effect that abstract control of legislation is a means of protecting minorities from possible tyranny by the majority, has proved to be a more controversial basis upon which to found support for a system of abstract review. The main point of concern is that this procedure can be used to frustrate the passage of laws. The result of which would be general political instability and the creation of a partisan political climate. Critics of abstract review therefore stress the potential for conflict between a system of abstract review and the principle of representative democracy.

2.8 In addition to this concern, a number of other points are often raised as counters arguments:

- (a) Preventive review is not consistent with the doctrine of the separation of powers between the legislative, executive and judicial branches of

government. If control exists over draft laws, then the court is sharing in the exercise of legislative power.

- (b) Abstract review requires a court to pronounce upon the viability of policy considerations in legislation. There is thus the risk of the Court being exposed to the claim that it is usurping the legislatures constitutional function.
- (c) The court might be required to choose between conflicting political positions when reviewing draft legislation, its decision will thus always be politically controversial.
- (d) Abstract review is not the most effective means of protecting minorities. The overall system of political participation and the safeguards afforded to fundamental rights offer adequate protection to minority parties and interests.
- (e) Deciding the Constitutional validity of a Bill on the basis of a hypothetical case is not sound judicial process. Judges are better able to reach a correct decision on the constitutional validity of a statute if they have before them a real complaint concerning the actual effect of a statute in practice.(cf "European Commission for Democracy through Law" (1990) Meeting with the presidents of constitutional courts and other equivalent bodies at 28)

### 3. **ABSTRACT REVIEW IN COMPARATIVE PERSPECTIVE**

3.1 European constitutions variously provide for concrete and abstract review (both species). It would be beyond the scope of this study to provide a thorough assessment of the concrete review jurisdiction of European courts. This section deals with examples of preventive and abstract review in foreign constitutions. In regard to the former, emphasis has been given to countries which give standing to ordinary politicians.

3.1.1 **Preventive review:** Of the European Constitutions which provide for abstract review comparatively few give standing to ordinary politicians to petition the Constitutional Court to review the constitutionality of Bills. Notable amongst the countries which do are France, Hungary, Portugal and Rumania. The procedures in these countries are discussed below under the headings of (a) the type of legislative instrument subject to abstract review, (b) standing, (c) the stage in a bills life during which referral is possible, (d) what happens to the bill on review, (e) procedures for review, and (f) the consequences of a declaration of unconstitutionality.

**(a) The type of legislative instrument subject to abstract review**

(i) Different countries have different types of legislative instruments, not all of them familiar to our legal system. The French constitution for instance draws a distinction between the referral of organic laws and



other laws. Organic laws must be submitted to the constitutional council by the Prime Minister for a ruling on their constitutionality after they have been passed but before they have been promulgated, whereas other laws may be so submitted. Organic laws are, 'laws, as determined by their object, dealing with the status of particular bodies which the constitution has provided for or which are necessary to implement constitutional provision' (South African Law Commission: Constitutional Models Project 77 at 1187.)

- (ii) In general, these countries provide for the preventive review of Bills as we know them.

**(b) Standing**

Standing is generally limited to the important organs of state and a percentage of ordinary politicians:

**France:** The President, the Premier, the President of the National Assembly, the President of the Senate or 60 deputies or 60 senators. The number of members of each house is provided for by organic law. (cf Art 25.)

**Hungary:** The Constitutional Court's jurisdiction is invoked 'by motion of Parliament, its standing committee or at least 50 members of Parliament. (cf Art 33(1) ACC.)

**Portugal:** The President, the Prime Minister or 1/5 of the members of the Assembly of the Republic 'in active duty,' may request the Constitutional Court to assess preventively the constitutionality of 'any decree submitted to the President for the purpose of being promulgated as an organic law' (Art 278(4)). This request must be made 8 days from the date on which the decree to be promulgated was received by the President (Art 278(3) read with Art 278(6)).

**Rumania:** The jurisdiction of the Constitutional Court may be invoked upon notification by the President, the President of either chamber of parliament (Chamber of Deputies and the Senate), by the government, the Supreme Court of Justice, by a number of at least 50 deputies or at least 25 senators (Art 144). The Constitution provides that the number of Deputies and senators must be established by an electoral law (Art 59(3)).

**(c) The stage in a Bill's life during which referral is possible**

- (i) In most countries, referral is only possible once a Bill is passed but before it is signed and promulgated. (Article 61 French Constitution; Article 278 Portuguese Constitution; Art 144a Rumanian Constitution.)
- (ii) The Hungarian Constitution would appear to permit review even before the final vote has been taken on a Bill. (Art 32/A of the Constitution read with Section 33(1) of the Act on the Constitutional

Court of 1989.) However, the Hungarian Constitutional Court has imposed limitations on the justiciability of Bills. The court has held that a Bill must be exempt from further modifications before it is ripe for pre-enactment review. The rationale for this approach would appear to be that until then the issues under dispute will not have crystallised sufficiently to allow a comparison to be made with the constitution. (cf Klingsberg "Judicial Review and Hungary's Transition from Communism to Democracy: The Constitutional Court, the Continuity of Law, and the Redefinition of Property Rights" (1992) 41 Brigham Young University Law Review at 55; 61.)

**(d) What happens to the Bill while on review?**

- (i) The main consequence is that the promulgation of the Bill is suspended until such time as the Court has decided the question of its constitutionality. (Arts 10, 46 and 61 of the French Constitution.)
- (ii) The legislative process on the Bill however need not be terminated.

**(e) Procedures for review**

A Constitution may require the Constitutional Court to decide the matter on an expedited process, which may take the form of either routine or urgent procedures. The French Constitutional Council for instance must make its ruling within a time limit of one month, which period may be reduced to eight days, at the request of the government, in the case of an emergency. (Art 61 of the French Constitution). The Portuguese Constitution requires

the Constitutional Court to hand down its ruling within 25 days of hearing the case. This time-limit may be shortened by the President for urgent reasons. (Art 278(8) of the Portuguese Constitution.)

**(f) The consequences of a declaration of unconstitutionality**

- (i) A provision declared unconstitutional may not be promulgated. (Art 61 French Constitution; Art 279(1) of the Portuguese Constitution).
  
- (ii) An exception to the rule against promulgation is where the Constitution permits the enactment of an incomplete text and the unconstitutional portions are severable. (Brewer-Carias *op cit* para 2.2 at 256-257.)
  
- (iii) In most cases, a Bill must be returned to the appropriate legislative chamber for reconsideration or to remove the unconstitutionality. (Art 33(2) of the Hungarian Constitution; Art 279(1) of the Portuguese Constitution; Article 145(1) of the Romanian Constitution.)
  
- (iv) In some cases, the legislative body can override the Courts decision on the basis of a 2/3 majority vote. (Art 279(2) of the Portuguese Constitution; Art 145(1) of the Romanian Constitution.)

**3.1.2 Suppressive Review:** The suppressive variant of abstract review is found in Germany, Hungary, Italy, Portugal, Spain

**Germany:** The Federal Constitutional Court can review the formal and material compatibility of federal or Land legislation with the Constitution or on the compatibility of Land legislation with other federal legislation at the request of the Federal Government, a Land government or 1/3 of the members of the Bundestag. (Art 93(2).)

**Italy:** The constitution of Italy entrenches both direct and indirect review. The right of direct access is limited: to the State in the case of a challenge to regional legislation, the regional governments in the case of a challenge either to state legislation or the legislation of the regions. (K Asmal "Constitutional courts- a comparative survey" in (1991) 24 CILSA 330.)

**Hungary:** Anyone, including individuals who wish to remain anonymous, can file petitions for review of enacted law. (Art 32/A(3) read with Art 1 ACC).

**Portugal:** The unconstitutionality of any provision of enacted law can be the object of a request formulated before the constitutional court by the President of the Republic, the President of the Assembly of the Republic, the Prime Minister, the Ombudsman, the Attorney-General, or 1/5 of the members of the Assembly of the Republic. (South African Law Commission: Constitutional Models, Project 77 at 1186.)

**Spain:** The Constitutional Court is competent to hear appeals on the grounds of unconstitutionality against laws and regulations having the force of law.

(Art 161). The following are eligible to lodge an appeal of unconstitutionality: The President, the Public Defender, fifty Deputies, fifty Senators, the executive corporate bodies of the Self-Governing Communities and their Assemblies. (Art 162.) The decisions of the Constitutional Court are published in the State Gazette, together with the dissenting votes, if any. Such decisions are binding from the day following their publication, and no appeal may be brought against them. Unless otherwise stipulated, that part of the law not affected by the unconstitutionality remains in force. (Art 164.)

## 7. **ABSTRACT REVIEW IN SA INTERIM CONSTITUTION AND DRAFT TEXT**

7.1 The interim Constitution and the draft text as it stands both provide for forms of abstract review.

**7.1.1 Section 98(2)(d) read with section 98(9) of the interim Constitution:** conferring jurisdiction on the constitutional court to test the constitutionality of national and provincial Bills upon request by specified officers of the relevant legislative body acting on petition by 1/3 or more of all members of that legislative body.

**7.1.2 Section 71 of the interim Constitution:** Requiring the constitutional court to certify the draft Constitution for compliance with the Constitutional Principles before the Constitution can have force or

effect is a form of abstract review.

**7.1.3 Section 54(2) of the Draft Constitution:** Confers on the President the power to refer a Bill to the constitutional court prior to assenting to it where he has reservations about the constitutionality of the Bill but only after Parliament has first considered these reservations without accommodating them.

7.2 In a recent decision by the South African constitutional court, Zantsi v The Council of State and Others CCT/24/94 Chaskalson JP expressed certain reservations about courts considering an issue in the abstract. He said, 'it is not ordinarily desirable for a court to give rulings in the abstract on issues which are not the subject of controversy and are only of academic interest.' These views did not relate to abstract review procedures of the kind discussed here, but to section 102(8) of the interim constitution, which allows a division of the supreme court to refer a constitutional matter raised in a proceeding before it to the constitutional court even though the case has been disposed of. These views nevertheless provide an interesting insight into the courts impression of abstract review generally.

## 8. OBSERVATIONS

8.1 A Constitution need not confer abstract review jurisdiction on a court in order to secure the supremacy of the constitution over legislation. Many

vibrant constitutional democracies only confer concrete review jurisdiction on their courts. In Europe abstract review, where it exists, is on the whole used less than concrete review.

- 8.2** Proponents of abstract review generally justify their position on the basis that abstract review is an extension of the constitutional court's role as defender of the constitution and constitutional supremacy. The argument is subject to qualifications, the most important of which is the principle of democracy: abstract review should not frustrate democratic decision-making.
- 8.3** Assuming it is agreed that the constitutional court should have abstract review jurisdiction, two questions must then be answered:
- 8.3.1** At what stage of a legislative instruments' life should testing be permitted.
- 8.3.2** What kind of mechanism should be included in the constitution?
- 8.4** The first question involves a decision about which of the variants of abstract review should be adopted. The second question relates to the actual formulation of the mechanism. International practise shows that a broad range of mechanisms are available, including expedited procedures and legislative overrides. Foreign constitutions also provide different review procedures for different types of legislative instruments.