Editorial

A *Verfassungsbeschwerde* for the European Union?

In contemporary systems of human rights protection the right to an effective remedy is acquiring a prominent place. It is, indeed, the right of the rights, as no right can be qualified as such unless it is assisted by an effective remedy. The effectiveness of the remedy is thus the indispensable instrument which complements every right, regardless of its nature and rank.

Quite surprisingly, however, the right to an effective remedy enters into relational dialectics with the multifarious models of constitutional review (for a classification of these models, see the classic study of M Cappelletti, *Judicial Review in the Contemporary World* (Bobbs-Merrill 1971); more recently M Rosenfeld, 'Constitutional adjudication in Europe and the United States: paradoxes and contrasts' (2004) ICON 635 ff.).

Neither the Kelsenian model of abstract review by an *ad hoc* Constitutional Court, requested by institutional organs, nor the Marshallian model of concrete review, carried out by judges in their daily administration of justice, nor even hybrid models, hinging upon a mechanism of preliminary ruling referred to a Constitutional Court by ordinary judges, are immune from criticism. To safeguard the democratic legitimacy of Parliament, and to maintain a sense of deference for the custodian of popular sovereignty, they exclude direct access of individuals to the constitutional review of legislation.

Is that a violation of the right to an effective remedy? Can we consider that this right entails, as a corollary, that individuals must be directly empowered to challenge before a Court a Parliamentary Statute that allegedly undermines their rights? Can we assume that the systems of constitutional review, which were regarded as a revolutionary innovation just a few decades ago, must now be updated in correspondence with the growing relevance acquired by that principle?

The problem of the effectiveness of a constitutional review of legislation also arose in the EU legal order, which, in turn, has idiosyncratic features. The Treaties set up an indirect mechanism of indirect review – the celebrated mechanism of preliminary ruling under art. 267 – and a direct mechanism under art. 263(4) whereby individuals are entitled to bring a complaint against "an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures".

European Papers
Vol. 8, 2023, No 1, pp. 239-241
www.europeanpapers.eu
ISSN 2499-8249
doi: 10.15166/2499-8249/649

In *Inuit* (case C-583/11 P *Inuit Tapiriit Kanatami and Others v Parliament and Council* ECLI:EU:C:2013:625) the CJEU famously interpreted the notion of "regulatory act" as including non-legislative acts only. In response to the arguments put forward by the complainants that such an interpretation would violate the right to an effective remedy, the Court reasserted that the actual system of remedies enshrined in the Treaties is fully compliant with the requirements of art. 47. In its view, the protection conferred by this provision "does not require that an individual should have an unconditional entitlement to bring an action for annulment of European Union legislative acts directly before the Courts of the European Union" (point 104).

This interpretation is far from obvious with regard to both the method used – a subjective method, hardly consistent with the Constitutional nature of the Treaties –, and its systemic implication. The preliminary ruling mechanism does not fill the gap of the absence of a direct remedy against legislative acts for two reasons. First, it is incomparably more burdensome than a direct challenge, also considering that only last instance national judges have the duty to refer to the Court and that the effectiveness of this duty is rather controversial. Second, and perhaps more importantly, this mechanism is weighed down by a serious flaw. More often than not, it requires individuals to breach the law to be entitled to challenge it: the original sin of the systems of preliminary ruling.

In *Posti and Rahko* (ECtHR *Posti and Rahko v Finland* App n. 27824/95 [24 September 2002] para. 64) the European Court of Human Rights found that "no one can be required to breach the law so as to be able to have a 'civil right' determined in accordance with Article 6 § 1". A somewhat similar principle was raised by the CJEU. In particular, in *Unibet* (case C-432/05 ECLI:EU:C:2007:163), the Court admitted that if an individual "was forced to be subject to administrative or criminal proceedings and to any penalties that may result as the sole form of legal remedy for disputing the compatibility of the national provision at issue with Community law, that would not be sufficient to secure for it such effective judicial protection".

These sparse holdings, quite generic indeed, can hardly amount to a full-fledged judicial doctrine. But they pave the way for a more effective protection of fundamental rights: namely to set up, besides the indirect systems of constitutional review, a mechanism that entitles individuals to lodge a constitutional complaint against the acts of public authorities allegedly violating their fundamental rights, including the right to an effective remedy. Famous examples include the *Verfassungsbeschwerde* initially based on § 90 BVerfGG and later codified in art. 93 (1,4a) of the *Grundgesetz* (see, for a thorough assessment of the role of the *Verfassungsbeschwerde* in the German legal order, C Gusy, *Die Verfassungsbeschwerde*, in RC Van Ooyen and MHW Möllers (eds), *Handbuch Bundesverfassungsgericht im politischen System* (2nd ed Springer 2015) 344 ff.).

But how could the old and revered individual action for annulment, established by art. 263(4), be converted into a constitutional or a quasi-constitutional direct remedy?

This transformation would require two re-interpretations of art. 263(4). The first relates to the notion of "regulatory act", which should be construed in accordance with its most obvious sense, namely a measure which, regardless of its denomination and rank, imposes individual conducts and sanctions their violations. The second, relates to the notion of "act [...] which does not entail implementing measures". This notion should include not only the measures which do not need to be implemented, under *T & L Sugars Ltd* (case C-456/13 P ECLI:EU:C:2015:284); but also those which, regardless of their denomination and rank, entail implementation measures, but only in case of a breach.

The first category covers cases in which there is no other remedy, in accordance with the reform of art. 263(4) by the Treaty of Lisbon. An act that does not need implementing measures cannot be challenged if not by means of a direct action. The second includes general measures that direct the conduct of individuals and require them to behave unlawfully in order to assert their allegedly breached rights.

The reinterpretation of art. 263(4) TFEU would set up a mechanism similar to a direct constitutional complaint but quite different in nature and object. In a sense, it even goes beyond it, as it ensures the right to an effective judicial protection irrespectively from the qualification of the underlying substantive rights claimed by the complainant. In so doing, it would bring the system of remedies of the Treaties more in line with the constitutional requirements of the Charter and would lend more credibility and legitimacy to the entire system of judicial protection of the Union.

To do so, the CJEU should repudiate its firm stance stating that nothing in the Charter requires an updating of the system of remedies as enshrined in the Treaties. Once this defensive approach has been abandoned, the CJEU will be on the frontline in the development of the right to an effective remedy. This development will auspiciously dispel the dangerous idea that deference to Parliament justifies a system whereby individuals have to behave unlawfully to assert their rights, in particular their fundamental rights. In these currently difficult times for Europe, this does not seem to be the best way forward.

E.C.