POSTULADOS
REVISTA SOCIOJURÍDICA

Original Article Doi: https://doi.org/10.22463/29816866.4257

¿El Control de Constitucionalidad del Poder Judicial sobre el Poder Legislativo es un control (in)directo sobre el Poder Ejecutivo? Una aproximación desde la teoría de Habermas.

¿Does the Constitucional Control by the judicial brunch over the legislative brunch is an (in)direct control over the executive brunch? An approach from Haberma´s theory

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Cómo citar: La Rosa, S. (2023). ¿El Control de Constitucionalidad del Poder Judicial sobre el Poder Legislativo es un control (in)directo sobre el Poder Ejecutivo? Una aproximación desde la teoría de Habermas. *POSTULADOS Revista Sociojurídica,* 1(1), 30–36. Recuperado a partir de https://revistas.ufps.edu.co/index.php/rsl/article/view/4257

Fecha de recibido: 21 de julio 2022
Fecha aprobación: 16 de diciembre de 2022

RESUMEN

Palabras clave:

Control de poderes – Poder Legislativo – Poder Judicial – Poder Ejecutivo – Corte Suprema – Control de Constitucionalidad – Jurgen Habermas

El artículo explora una temática poco usual sobre la relación entre los tres poderes de gobierno en la República Argentina. Particularmente se centra en los controles y contrapesos que hay entre ellos y como directa o indirectamente se pueden relacionar cuando uno controla a otro.

La novedad es que se basa dentro de la teoría de Habermas en su obra Facticidad y Validez y través de ella se despierta la reflexión de si cuando el Poder Judicial declara inconstitucional una norma del Poder Legislativo, no está al mismo tiempo haciéndolo sobre el Poder Ejecutivo que pudo haberla reglamentado y, por ende, dando el visto bueno a la norma en cuestión.

Nuestro interés es mostrar cómo las acciones declarativas de inconstitucionalidad no solamente accionan sobre el Poder Legislativo, sino también sobre el Poder Ejecutivo en sus facultades parlamentarias (según la Constitución Argentina), que son desde la validación mediante la promulgación de una Ley (a través de un decreto generalmente), como facultades excepcionales de legislar delegadas por el propio Poder Legislativo o por la propia iniciativa de presentar proyectos que podrán devenir en una nueva norma. Para esto nos valemos del caso argentino y su sistema presidencialista.

ABSTRACT

Keywords:

Control of branches/ Checks and Balances – Legislative Branch – Judicial Branch – Executive Branch- Supreme Court – Constitutional Control – Jurgen Habermas.

The article explores an unusual theme concerning the relationship between the three branches of government in the Argentine Republic. Particularly, it focuses on the checks and balances between them, and how directly and indirectly they interact when one controls the other.

The singularity of this article is that it is based on Habermas's "Theory of Facticity and Value". Through it, the question arose of whether when the Judicial Branch declares unconstitutional a law from the Legislative Branch, it is not also affecting the Executive Branch at the same time, taking into account that the Executive Branch could have regulated that law, thereby giving its "approval".

Our interest is to show how declarations of unconstitutionality by the Judicial Branch not only affect the Legislative Branch, but also the Executive Branch in their parliamentarian faculties (according to theArgentine Constitution) which go from validating a law by its promulgation (generally though a regulatory decree) to the exceptional faculties to legislate that the Legislative Branch has delegated, or to the initiative to present bills to Congress that might become laws. To this purpose, we make use of the Argentine case and its presidential system.

1. Introduction

The control of constitutionality by judges, or institutions of the judiciary, over laws passed by the legislative body is the focus of analysis and conclusions in Habermas' work. From there, several analysts base their analysis on this relationship between the two powers and the certain endorsement that the author gives to this control (regardless of certain objections and limitations raised). This essay analyses Habermas's view, from "Facticity and Validity" (1992), on the issue and tentatively outlines the possibility of the judiciary's meddling indirectly over the executive branch in presidentialism democratic systems. For the latter, we will bring up the Argentinean case.

Our research methodology is based on the following aspects: an applied purpose, the main aim of which is the practical application of the topic addressed. A diachronic temporal scope. An expository depth, where the variables studied are analysed in terms of their mutual influences. A micro-sociological breadth, given the geographical scope of the study. A qualitative methodological character, due to the actors analysed. Finally, its sources are both primary and secondary. Furthermore, the data was obtained through existing documentation (set out in the bibliographical references) and the author's personal experience of having worked in the Argentine Legislative Branch and in the legislative and executive branches of the Autonomous City of

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Examining chapters VI and VII of the work cited, we analyse the framework that the author observes for understanding judicial constitutional control over the deliberative body; and thus develop his position as to whether constitutionalism can, by means of a body of law, intervene on a democratic body as a positive complement. In a way, as Prono sees it, complementing law with democracy; or the intellectual (elitist) with the representative, not without first seeing the problems or risks that sometimes come with taking one side or the other.

2. Reflection. Division of powers and legislative function .
3. From Habermasian sociology, we see deliberative politics as a procedural concept of democracy. It is aimed at the legitimate production of law and rule-making reason. This obviously takes place within a framework of the division of powers where the
... democratic formation of the will of self-interested citizens (...) constitutes only one element within a constitution which aims to discipline state power by means of normative devices (such as fundamental rights, the division of powers, the binding of law, etc.)

But the division of democratic powers has at its genesis the possibility of conflicts when the competences of each (depending on the stipulations of the Magna Carta) clash with those of an equal one.

Regarding a certain conflict of powers, he states that the disconnection of political regulation or control from the parliamentary complex and the migration of the corresponding issues from the spaces and spheres of public opinion is not something that occurs without resistance (p. 399). He goes on to add:
...the rationality of the administration of justice depends on the legitimacy of the law in force. This in turn depends on the rationality of a legislative process, which, in a situation of division of powers (...) is not at the disposal of the law enforcement bodies.

When speaking of parliamentary bodies, Habermas emphasises the importance of the genesis of deliberative politics, following Bobbio, when the political participation of the largest possible number of interested citizens, the majority rule for political decisions, is guaranteed (p. 380).

Or when he later says that The generation of legitimate power through deliberative politics represents (...) a problem-solving procedure (...) in order to program the regulation of conflicts and the pursuit of collective ends (p 96).

4. Constitutional review .
5. Habermas begins by analysing this control with the understanding that with the procedural concept of democracy this idea, however, takes on the form of a self-organising legal community (p. 405). More broadly, he explains that:

6. ...the institutions of the rule of law (...) have the sense of a complexity-maintaining counter-regulation. For then the question arises to what extent the normative counter-regulation represented by rule of law institutions can compensate for those communicative, cognitive and motivational constraints to which deliberative politics and the transformation of communicative power into administrative power are subject. The question arises as to what extent the social facticity of these unavoidable moments of inertia, even if already taken into account in the constitutional structure and institutions of the rule of law, represents a crystallisation point for illegitimate power complexes, autonomised from the democratic process . In particular, the question arises to what extent the power that is concentrated in large social functional subsystems, in large organisations and in state administrations, also nests in the systemic infrastructure of normatively regulated power circuits, without awareness of this, and how effectively the unofficial circulation of this non-legitimised power penetrates the circulation of power regulated in terms of the social state.

7. It is particularly in Chapter VI that Habermas methodologically observes, from different approaches to social science, the development and analysis of the question and from there criticises, sustains, and tries to conclude propositionally. He himself plays a game of pros and cons in order to determine which path to take in order to achieve a synthesis.

The problematic relationship between the administration of justice and the legislative process has an institutionally apprehensible methodological point in constitutional jurisdiction, where we see the presence of a theory of the Constitution. Habermas points to three aspects of this problematic relationship of competences: The first one where he brings the dispute of paradigms and here he uses the case of the German Constitutional Court whose functions compete with legislative activity, resulting in a kind of judicial interventionism. The second goes hand in hand with methodological discussions that will focus critically on value theory with respect to the indeterminacy of law. As for the third, using the American case, through a republican understanding (in need of renewal) of the protection of the democratic process, he paves the way for the understanding of political processes in an articulated form in discourse theory and later in the theory of democracy.

8. Aspects
4.1 First aspect
In the first aspect, from the affirmation that the judicial power has an interventionist character on the legislative power, the main example is the control of the constitutionality of laws by the Constitutional Court in Germany. In analysing this, Habermas timidly begins to doubt whether this intervention is positive. Here he sees a collision of powers, as the judiciary takes over functions from the legislature, which has democratic legitimacy. He speaks of an abstract control of norms that results in a review of them to determine whether what has been approved by Parliament is in accordance with the principles of the Constitution and therefore does not collide with the primary system of rights.

The author wonders whether the Court's consideration of the normative outcome of the parliamentary process is worthy of consideration, considering whether it is not the legislative branch itself that should impose self-control through internal institutional mechanisms such as a special legislative commission to be created, made up of experts. This would be an advantage since such self-monitoring would ensure that the deliberation and production of laws takes into account the system of rights and does not go against constitutional principles, which would perhaps contribute to increasing the rationality of the legislative production process (p. 314).

He later expands on this concept: The logic of the division of powers (...) in terms of discourse theory, suggests self-reflexively configuring the legislative power, as well as the judiciary, and endowing it with the competence to control its own activity (p. 314-315). He immediately speaks of a certain difference that is established in the form of a hierarchy, given that:

The legislator in turn does not have the power to check whether the courts in their business of applying the law have used exactly the normative reasons that once formed part of the presumably rational basis of a law .

In a way, it seems to conclude that any kind of control of the norm belongs to the legislator.

However, he then begins to take sides in favour of the instance of constitutional control by a Court, and quotes Kelsen (in his controversy with Schmitt) who was in favour of its institutionalization, both for political reasons and for reasons of the theory of law, because the meaning of this Court is not the content of the norm but the constitutionality of its production. And it gives the judiciary the status of an impartial external actor that sorts out the political and/or partisan issues to which the other two branches of government are permeable:

Since it is precisely in the most important cases of violations of the Constitution that the Parliament and the government are opposing parties, it is advisable to have recourse to a third party that is outside this opposition and that is in no way involved in the exercise of the power that the Constitution essentially distributes between Parliament and the government.

Habermas himself continues to see this assessment of such control as optimal when he expresses in a general way :
Whatever position one takes on the question of the proper institutionalisation of this interpretation of the Constitution, which directly concerns the activity of the legislature, there is no doubt that the concretisation of constitutional law by a constitutional jurisdiction charged with deciding in the last instance serves the clarification of the law and the maintenance of a coherent legal order.

Positivism itself, he says, speaks of the linear linking of justice to what has been previously established by the political legislator (p. 319).

However, he takes up his fears, making it clear that the laws passed show the evolution of societies and the world's view of life and values at that time :
... within the legal system means an increase in the power of the judiciary and a widening of the scope of judicial decisions (...) it has to apply to present and future problems a view that should properly be directed at the past, i.e. at the institutional history of the legal order (...).) is what Ingeborg Maus also fears: the judiciary interferes in legislative competences for which it has no democratic legitimation; on the other hand, it promotes and confirms a flexible structure of law that favours the autonomy of the state apparatus, so that the democratic legitimisation of law is also undermined on this side.

But to quote Bockenforde , who, in analysing the law-making capacity of both powers and its correlation with the legitimisation of both to do so, states that :
Anyone who wishes to maintain the decisive role of Parliament in the formation of law and who wishes to avoid the gradual restructuring of the constitutional edifice in favour of a State with jurisdiction over the Constitutional Court must also take into account the fact that fundamental rights (...) are only subjective rights of freedom from State power and not simultaneously objective (binding) rules of principle for all areas of law.

Although Habermas, continuing this game of pros and cons, takes up Sustein's fear that :
… the question of whether the inevitable recourse to such substantive rules does not open the door for the Constitutional Court to politically inspired law-making, which, according to the logic of the division of powers, should be reserved to the democratic legislator.

4.2 Second aspect .
Regarding the second aspect, following the German case, he emphasises the presence of a theory of values developed by the Court itself when speaking of the legitimacy of its jurisprudence; as a concrete order of values (p. 327) beyond a system of rules. Taking Bockenforde again, he again criticises the Schmittian conception of "tyranny of values" and asserts that the assimilation of legal principles to values is the problem (deontological order versus teleological order). Thus, this jurisprudence of values throws the problem of legitimacy of the decisions of the legislative power elected by the majority of the people into the hands of the judiciary; which is endorsed by Perry when he refers to the fact that: judicial review is deliberately a counter-majoritarian institution (p. 332). And he goes on to substantiate this view when reading Maus notes that the legislator is legitimised by the procedural mandates of the Constitution as well as by the effective popular will that precedes him, but not by the simple laws that he himself puts in place (p. 335).
However, to quote Ely , is when it observes a paternalistic conception of the judiciary since it :
(…) a widespread distrust among jurists against the irrationality of a legislator dependent on power struggles and majority opinions determined by emotions and mood swings. According to this conception, the law-creating jurisdiction exercised by the Constitutional Court would be justified both by its distance from

politics and by the superior professionalism of its professional discourse.

She goes on to explain that legal discourses have a greater rationality than legislative discourses, but that they should not replace them because they underpin the rules and require the inclusion of those affected by the contextual political process.
4.3 Third aspect .

Finally, the third aspect takes the case of the United States and the republican vision of the founding fathers which is reflected in the protection of law by judges established at the genesis of that society, which sees in the self-determination of the people its sovereignty, and it is there that only the Court can act against the legislative process: (…) It follows that constitutional judges serve this possibility by assisting in the maintenance of this iuris-generative popular engagement. (p. 340) and following this logic he uses Michelman to start a further debate. This republican view clashes with the liberal one when republican rights are nothing but determinations of the prevailing political will, whereas for liberals some rights are founded on a higher right based on a trans political reason or on revelation... (p. 345) as the former author already quoted in another work explains.

9. Habermas' conclusions.
With all this game of pros and cons, Habermas begins to find lines of empathy between the two visions that on the one hand reinforce the judicial or constitutional figure (rule of law) against the importance of deliberative politics in supremacy of the legislature (popular sovereignty and democracy) and on the other seek to identify more individual rights (preferences) than community (values).

Following the line of seeking reciprocity between the two, the author reinforces the importance of deliberation in the democratic process and, in turn, the need to care for and direct it, in the manner of a renewed republicanism. And it is here that he proposes a solution to the conflict generated by the control of the judiciary over the legislature and the administration.

Deliberation refers to a certain attitude towards social cooperation, namely the attitude that consists in the openness to be persuaded by reasons concerning the rights of others as well as one's own rights (p. 347). Here we see, says the author, the legitimising force of deliberation that generates a healthy dispute of opinions that will lead to the exercise of political power (p. 347). There, the Court's action will be to protect normative production from the absence of a deliberative politics that is the source of all legitimacy and which in many cases stems from public opinion. The Court is not an ideological critic, it is, according to Ackerman , mediator between ideal and reality (p.351).

In "Time of Transitions" (2001), Habermas will insist in saying: I fear that it is pragmatic foundations and historical circumstances that provide a criterion for how the task of normative control should be articulated in a given context. In this way, the author finds empirical and normative foundations to give coexistence to the factuality and validity of the problem developed in this essay.

10. Is constitutional control of the legislative branch also an intrusion into the executive branch, the Argentinean case?:
Although Habermas in "Facticity and Validity" refers to the problem of constitutional control by the judiciary over the legislature (and, one might say, the executive), the cases are confined to the German Constitutional Court and the US Supreme Court . But taking into account the latter's doctrinal relationship with the Argentine Republic in terms of the normative system and the sharing of the democratic presidential system , opens the door to finding correlates for understanding and expanding the conflict of constitutional control of law-making .

We understand by presidential system, represented in this case by the US model, what Sartori (1994) shows by quoting Neustadt: The Founding Fathers did not create a government of separate powers but, instead, -a government of separate institutions sharing power-. But Jones corrects him: -we have a government of separate institutions competing for shared power- .

We add with Schleiter and Morgan Jones (2007): "But to change policy and legislation, presidential constitutions require bargaining between the assembly, which controls some legislative branch processes, and the president, who has some constitutional legislative powers".

Much of the American legal basis is a product of "The Federalist" (Hamilton, Madison, and Jay), particularly Article 78, although several authors emphasise that it is rooted in the English tradition in this respect. There it is seen that no legislative sanction (or executive decree) can go against the superior power of the people, and if this is the case, judicial intervention is necessary to control the powers.

"It is not admissible to suppose that the Constitution was intended to empower the representatives of the people to substitute their will for that of their constituents. It is more rational to suppose that the courts have been conceived as an intermediate body between the people and the legislature (...) The interpretation of laws is properly and peculiarly the province of the courts (...) therefore to determine their meaning, as well as that of any law which comes from the legislature. And if it should happen that there is a discrepancy between the two, the one which has superior binding force and validity must naturally be preferred; in other words, the Constitution must be preferred to the ordinary law, the intention of the people to the law of the mandataries."
In the case of Argentina , The Constitution explicitly expresses the supremacy of the Constitution in Art. 31 and the powers of the judiciary in Art. 116°: "The Supreme Court and the lower courts of the Nation are responsible for hearing and deciding all cases that deal with matters governed by the Constitution and by the laws of the Nation". It will then delegate to its procedural codes the mechanisms to achieve a declaration of unconstitutionality through the intermediary of any judge.

But above all, Article 43 should be highlighted, as far as we are concerned.

Any person may bring a prompt and expeditious action for amparo, provided that there is no other more suitable legal remedy, against any act or omission of public authorities or private individuals that actually or imminently injures, restricts, alters or threatens, with manifest arbitrariness or illegality, rights and guarantees recognised by this Constitution, a treaty or a law. In such a case, the judge may declare the unconstitutionality of the norm on which the injurious act or omission is based.

It should be clarified that it was jurisprudence that created this normative provision, taking as its antecedent the American system, which stems from the well-known American ruling of 1803, "Marbury v. Madison", where the supremacy of the constitution over the law is clearly established. The Argentine constitutionalist Bidart Campos (2004) explains it as a skilful tool to ensure that all lower legal norms are in line with what is prescribed by the Constitution. In short, he recognises it as the inexorable basis of the entire normative structure that is built on it and must be integrated harmoniously.

In the Argentine Republic, the system of control is diffuse jurisdictional, as opposed to the European-continental control of constitutionality, which is characterised by the existence of a single court or body created for such purposes, which fulfils the function of resolving all questions relating to unconstitutionality, with an erga omnes effect of its decision.

When the judiciary intervenes through its constitutional control of the norms approved by the legislative branch, what it does is to become a validator. But indirectly, it also indirectly controls the executive branch in charge of government administration, not only the legislature, since the law passed has a strong final validation by the executive branch, since it has the constitutional power to veto (totally or partially) the law passed by the legislature) or endorse it through its enactment and subsequent regulation . And no matter how much the legislature may insist on a vetoed law, it must have a majority in the chamber(s) that is rarely possible to achieve.

Following this reasoning, if an executive branch endorses a law, but does not veto and promulgate it, the constitutional control of the judiciary also falls indirectly on the executive branch, which participated in the (final) validation of the law. And even more so if the bill that became law was authored by the executive branch itself .

The author points out in a general way, when speaking of the division of powers, the relationship between the administration (Executive Branch) and legislation (not strictly in its compliance, but in its creation) and it is here that our hypothesis begins to echo:

"The question remained open as to how an interpretative practice that proceeds in such reconstructive terms can opt within the limits of the division of powers inherent in the rule of law without the administration of justice encroaching on legislative powers (and thereby also burying the strict linkage of the administration to the law)" .

Then, as we have already discussed above, in the controversy cited by the author of Kelsen v. Schmitt, we understand how the judiciary moves away from the politics permeating the other two branches and thus takes the constitutional determinations to control.

The judiciary, we must bear in mind, also directly controls the executive when it intervenes using the same control of constitutionality in the Commenting on this controversy Farrel says: "The debate between Carl Schmitt and Hans Kelsen during the brief, dramatic and troubled life of the Weimar Republic has yielded significant theoretical contributions to the general theory of law. Kelsen's normativist theory resolves normal situations, those that constitute the rule; while Schmitt's decisionist theory resolves abnormal situations, those that constitute the exception." Farrel M. D. (2015) Carl Schmitt, Hans Kelsen and the Supreme Court, Revista Jurídica de la Universidad de San Andrés, N°2 validation of government acts or decree.

11. Conclusions

12. Our interest is to show how the actions of declaration of unconstitutionality not only act on the Legislative Power, but also on the Executive Power in its parliamentary powers (according to the particular Constitution), which range from validation through the enactment of a Law (generally by decree), to exceptional powers to legislate delegated by the Legislative Power itself or by their own initiative to present projects that could become a new norm. For this purpose, we use the Argentinean case with its presidential system.

We consider the executive branch to be another key player in the adoption of legislation, due to the capacities we have mentioned above.

On the other hand, adding to the discussion, taking the case that if the Executive were to have a strong ruling party that would allow it to control the chamber(s), it would be understood that the sanctioning of a norm had the approval of the ruling party beforehand for its approval .

This allows us to conclude that in the division of powers, and in the conflicts generated in the dynamics between them (checks and balances), when it comes to the constitutionality of rules enacted by Parliament, it is not an interference or positioning on one power but on the whole spectrum of powers in a democratic system.

We reason that the same validation that Habermas develops for the control of constitutionality over the Legislative Power seems to us to be of equal use for the Executive Power.

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Agradecimientos

El autor agradece a Tomás Ainchil, M. Justina Boustani y Eugenia Capalbo por la colaboración en la confección del resumen en inglés.