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The *Void Ab Initio* Theory in Comparative Perspective: J Marshall, H Kelsen, and Beyond

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Abstract: The *void ab initio* theory is traditionally associated with the retroactive effect of the unconstitutionality of a statute, in diffused systems of judicial review; as opposed to the prospective effect of unconstitutionality, in Austria, the archetype of centralized judicial review. The paper argues that the *void ab initio* theory goes far beyond the time-factor of judicial review, having two complementary aspects: 1) The *void ab initio* theory is tied to a robust theory of negative liberty; and substantive criminal law is its privileged field of application. The *void ab initio* theory goes back to Marbury v Madison (1803). 2) The *void ab initio* theory was strongly criticized by Kelsen, whose criticism is accurate, when the theory is unduly extended to the unconstitutionality of laws curtailing positive rights of the welfare state, eg, salaries and pensions, as happened recently in Greece. The act which abolishes the unconstitutional statute retroactively, has 'the character of a legislative act.' Indeed, the *void ab initio* theory in the field of positive social rights encroaches on legislative competence. The paper cocludes that the *void ab initio* theory is a strong expression of the ethos of legality; The *void ab initio* is most adequate for (cases involving) legal sanctions, on legal grounds, over adjudicative facts.

Keywords: *void ab initio*; Kelsen; judicial review; effect of unconstitutionality; positive rights; validity; judicial supremacy

1 Introduction

The *void ab initio* theory is traditionally associated with the retroactive effect of an unconstitutional statute in diffused systems of judicial review; as opposed to the prospective effect of unconstitutionality in Austria, the archetype model of centralized judicial review. Two of the most important recent judgments in Europe illustrate

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the significance of the matter. The UK Supreme Court ruled in *R* (*Miller) v The Prime Minister Cherry v Advocate General for Scotland*[1] that the prorogation of Parliament, in the course of Brexit, was founded on 'unlawful advice,' which was 'outside the powers of the Prime Minister':

> 69. […] This led to the actual prorogation, which was *as if* the Commissioners had walked into Parliament with *a blank piece of paper*. It too *was unlawful, null and of no effect*. 70. *It follows that Parliament has not been prorogued* and that this court should *make declarations* to that effect. […] [I]t appears to us that, *as Parliament is not prorogued, it is for Parliament to decide what to do next*.

The 'prorogation' was *void ab initio*, and, for legal purposes, it *is as if it had never existed.* By contrast, notwithstanding the general rule of *void ab initio* in German law,[2] the Federal Constitutional Court of Germany ruled in the European Central Bank *ultra vires* case on the PSPP, that '[the] judgment [of the CJEU] constitutes an ultra vires act that is not binding upon the Federal Constitutional Court' [para 154], which 'must conduct its own review to decide' whether the Eurosystem's decisions on the adoption and implementation of the PSPP remain within the competences conferred upon it under EU primary law [para 164]. As these decisions lack sufficient proportionality considerations, they amount to an exceeding of the ECB's competences [paras 232, 234].

Accordingly, the Court set the time of the effects of its decisions for the future as following:

> 6. […] Following a transitional period of no more than three months allowing for the necessary coordination with the ESCB, the Bundesbank may thus no longer participate in the implementation and execution of the Decisions [at issue], […] unless the ECB Governing Council adopts a new decision that demonstrates in a comprehensible and substantiated manner that the monetary policy objectives pursued by the ECB are not disproportionate to the economic and fiscal policy effects resulting from the programme. […] [para 235][3]

The contrast between the *void ab initio* doctrine and the effects of unconstitutionality for the future is not a narrow technical matter concerning the temporal aspect of judicial review. Rather, it is associated with deeper issues regarding the role and the nature of judicial review of the constitutionality of legislation. Section 2 of this paper discusses these differences as explicated in the decision of Chief Justice J Marshall, in

1 [2019] UKSC 41 emphasis mine.

2 Christoph Böckenförde, *Die sogenannte Nichtigkeit verfassungswidriger Gesetze* (Duncker & Humblot 1966) 44; Klaus Schlaich and Stefan Korioth, *Das Bundesverfassungsgericht* (11th edn, Beck 2018) 313.

3 Judgment of 05 May 2020, 2 BvR 859/15, 2 BvR 980/16, 2 BvR 2006/15, 2 BvR 1651/15.

Marbury v Madison,[4] and in the writings of H Kelsen, the father of the Austrian (centralized) system of judicial review. The American system embraced the *void ab initio* doctrine, or the *ex tunc* effect of unconstitutionality, while the Austrian one, the *pro futuro*, or *ex nunc* effect of unconstitutionality. Despite this theoretically imbued discussion, Cappelletti and Cohen[5, 6] note that both systems tend to converge on the basis of practical considerations.

Section 3 enquires into the factors that explain why the temporal effect of judicial decisions, retroactive or retrospective, is left to the control of the courts. These considerations are associated with the question whether the *void ab initio* doctrine is constitutionally mandated, or not. The answer is negative; however, although prospectivity is allowed, the retrospective effect of *void ab initio* is founded on strong constitutional principles, associated with the protection of rights and effective judicial relief; and it can also be mandatory, eg in the context of substantive criminal law.

In order to organize the discussion, this paper introduces the distinction of the effect of unconstitutionality in terms of:

i. the *type* of the effect, as being primarily one of 'legal sanction' or rather one of 'policy dictates;'
ii. the *grounds* for the effect, depending on the degree of 'legality' of the court's ruling, on the basis of *prior* law;[7] and
iii. the *scope* of the effect, depending on the 'adjudicative' or 'polycentric'[8] nature of the problems tackled. So, though both the English and the German court find violations of the rules of competence, the former sanctions a specific past incident, while the latter refers to future action concerning participation in the implementation and execution of ECB decisions, ie, complex issues of public

4 5 US 137 (1803).

5 Mauro Cappelletti and William Cohen, *Comparative Constitutional Law* (Bobbs-Merrill 1979) 96, who distinguish two methods of reviewing a constitutional question: the decentralized review 'incidenter' and the centralized review 'principaliter,' ibid 84; Guillaume Tusseau, *Contentieux constitutionnel comparé* (LGDJ 2021) 1235.

6 See characteristically the discussion in Niamh Connolly, 'The Prospective and Retrospective Effect of Judicial Decisions in Ireland' in Eva Steiner (ed) *Comparing the Prospective Effect of Judicial Rulings Across Jurisdictions* (Springer 2015) 27.

7 Judith Shklar, *Legalism, Law, Morals, and Political Trials* (Harvard UP 1986) 156: 'It is practically of great importance to see legalism as a matter of degree.'; ibid at 157: 'The principle of legality, the existence of prior law, alone can justify a criminal trial'.

8 Lon Fuller, 'The Forms and Limits of Adjudication' (1978) 92 HarvLRev 353, 395 ('A "polycentric" situation […] is "many centered" – each crossing of strands is a distinct center for distributing tensions'); ibid 400 ('problems in the allocation of economic resources present too strong a polycentric aspect to be suitable for adjudication').

> policy. The former is devoted to a discussion of core problems of constitutional law, eg, prerogatives, sovereignty of parliament, prorogation, accountability. The latter is immersed in highly technical issues over the distinction and preponderance of economic, fiscal and monetary aspects, reviewing ECB's actions. Finally, the issue in the English case was clearly justiciable, while in the German one it was polycentric *par excellence*, implicating 'complex repercussions'[9] of ECB's decisions. The *void ab initio* theory is most adequate for *legal sanctions*, on *legal grounds*, over *adjudicative facts.*[10]

Section 4 discusses the practically very important consequence of the *void ab initio* theory of revival or not of preexisting law, as if the latter had never lost its validity, once the unconstitutional statute is declared null and void. This matter is particularly important depending whether the theory is applied to individual, negative, rights or to social, positive, rights. Application of the *void ab initio* theory in the context of positive rights encroaches on legislative competence and violates the separation of powers (Section 5).

The discussion of the *void ab initio* rule shows its concern for the fidelity to law, the supremacy of the Constitution and the rule of law.[6] It reveals, however, the risks for abuse of the rule in violation of the separation of powers, particularly in the field of social rights, in favor of judicial supremacy.

2 Marshall and Kelsen on the Temporal Effects of Unconstitutionality

The *void ab initio* theory goes back to *Marbury v Madison* (1803). Chief Justice Marshall wrote[11] that:

> *[A] legislative act contrary to the Constitution is not law*; […] *an act of the Legislature repugnant to the Constitution is void. […] If two laws conflict with each other, the Courts must decide on the operation of each. […]* Those, then, who controvert the principle that the Constitution is to be considered in court as a paramount law are reduced to the necessity of maintaining that courts must close their eyes on the Constitution, and see only the law. This doctrine would subvert the very foundation of all written Constitutions. It would declare that *an act which, according to the principles and theory of our government, is entirely void, is yet, in practice, completely obligatory*.

9 ibid 394.

10 On the cautious use of the distinction between adjudicative and legislative facts, Allison Orr Larsen, 'Constitutional Law in an Age of Alternative Facts' (2018) 93 NYULRev 175, 232.

11 5 US 177–178 emphasis mine.

Another well-known formulation of the *void ab initio* rule is found in *Norton v Shelby County*:[12] 'an unconstitutional act is not a law; it confers no right; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed.' As Oliver Field wrote, in 1935, the 'theory that an unconstitutional statute is *void ab initio* is the traditional doctrine of American courts as to the effect of an unconstitutional statute.'[13]

The *void ab initio* theory is the result of the *logic of validity*. An invalid law is *null* and this means that as a matter of logic it is *as if* it never existed. As Kelsen clarifies, 'An act that is null lacks any legal character from the beginning, so that there is no need for another legal act to strip it of its pretended legal quality. If such a second legal act is required, we are faced with annullability, and not with nullity.'[14]

In its turn, the logic of validity presupposes the existence of superior law over subordinate law, so that the former takes precedence and sets aside the latter, if they are in conflict. This is the relationship of the Constitution to the statute. From this flows the nature of the judicial duty: not to 'pronounce a new law, but to maintain and expound the old one,' according to Blackstone, who stated the rule of common law. 'The judge, rather than being the creator of the law, was but its discoverer.'[15] The Constitution is preexisting fundamental law and binds the judge who upholds it over the statute.

Marshall airs the same view, echoing the Madisonian model of checks and balances:

> It is emphatically the province and duty of the Judicial Department to say what the law is. […] If two laws conflict with each other, the Courts must decide on the operation of each. […] This is of the very essence of judicial duty.[16]

When *Marbury v Madison* was decided, the notion of firm and solid constitutional law, ie, the idea of the constitution as 'hard law,'[17] was embedded. As Field noted, 'the emphasis laid at that time upon guarantees against arbitrary action on the part of government contributed much to this idea, both as those guarantees related to property rights and as they related to personal rights closely associated with the idea

12 118 US 425, 442 (1886).

13 Oliver Field, *The Effect of an Unconstitutional Statute* (Beard Books 1999) 2.

14 Hans Kelsen, 'The Nature and Development of Constitutional Adjudication' (1929) in Lars Vinx (tr, ed) *The Guardian of the Constitution: Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law* (CUP 2015) 37.

15 J Clarck, citing Blackstone and J Ch Gray, The Nature and Sources of the Law 222 (1st ed 1909) in *Linkletter v Walker* 381 US 618, 622–623 (1965).

16 5 US 177–178.

17 William Van Alstyne, 'The Idea of the Constitution as Hard Law' (1987) 37 JL Education 174–183.

of freedom: political and legal freedom.'[18] The common law offered the background for the constitutional interpretation of concepts like liberty and contract.[19] The contract clause was violated when legislation interfered with contractual relations prior to its enactment;[20] such legislation was considered to be retroactive, and the *void ab initio* rule was the adequate remedy to undo this retroactivity, by holding the law null and invalid, leaving thus private contracts unimpaired.

The most demanding conditions of legality being satisfied, the legal sanction in the form of judicial review of legislation was beyond question, because the material unconstitutionality was naturally merged into the formal one. Far from being merely a linguistic trick, the understanding of material unconstitutionality in terms of violation of the limited powers of government, in terms of exceeding legislative competence,[21] was inherently connected with the need of judicial review to stand on safe ground in order to consolidate its legitimacy.[22] In the American system of separation of powers, none of the three departments should 'overstep those limits that had been placed upon all government to protect individual rights;' 'excesses of power should not take place under this system,' and so the *void ab initio* doctrine assured that 'legislative excesses were to leave no effect on the law.'[23] As already said, the *void ab initio* rule is most adequate for *legal sanctions*, on *legal grounds*, over *adjudicative facts*.

Expressing material unconstitutionality in terms of violation of formal rules of competence is a move of judicial prudence, a sign of self-restraint, and a declaration of respect for legality. It is not accidental that in the historical evolution of the petition for the annulment of administrative acts, in France, the lack of competence developed first.[24] A most severe case of lack of competence is *ultra vires;* and it is, therefore, not hard to understand why the German Constitutional Court invokes *ultra vires* in order to question the legality of ECB's actions. But *ultra vires* is only half

18 Field (n 13) 10.

19 Duncan Kennedy, *The Rise and Fall of Classical Legal Thought* (Beard Books 2006) 242.

20 James Kainen, 'Historical Framework for Reviving Constitutional Protection for Property and Contract Rights' (1993) 79 Cornell LRev 87, 103.

21 Kelsen, 'The nature and development' (n 14) 29.

22 William Nelson, 'The Eighteenth-Century Background of John Marshall's Constitutional Jurisprudence' (1978) 76 MichLRev 893, 953.

23 Field (n 13) 11.

24 Georges Vedel, 'Excès de pouvoir administratif et excès de pouvoir législatif (I)' Cahiers du Conseil Constitutionnel n 2 [1997] <https://www.conseil-constitutionnel.fr/nouveaux-cahiers-du-conseil-constitutionnel/exces-de-pouvoir-administratif-et-exces-de-pouvoir-legislatif-ii> accessed 26 September 2022. 'L'ouverture de l'incompétence, largement entendue était la plus ancienne et a abrité au début XIXème siècle ce qui devait être plus tard identifié comme le vice de force et même le détournement de pouvoir' (para 34).

of the equation; what is missing from the German decision is the other critical part, ie, firm legal judgment on adjudicative facts.[25]

The *void ab initio* theory has its own presuppositions and assumptions. It is not merely a theory on the temporal effect of the judgment of unconstitutionality. It is part of a broader *judicial ethos*.[26] Moving away from the *void ab initio* rule marks a similar change of the prevailing judicial ethos. The following is one of my favorite phrases, because it captures powerfully this gradual shift:

> The process by which the limits of constitutional authority have come to be made more and more to depend on proof of facts has gone forward so gradually that only recently has it attracted attention. It is probably not too much to say that such a yard-stick of constitutional power would have been abhorrent to Marshall and his contemporaries. For them authority in a governmental organ existed or did not exist.[27]

But, of course, the *void ab initio* theory is not the only game in town. In the USA, *Linkletter v Walker* (1965) was the first case to limit the effect of unconstitutionality, prospectively. The Supreme Court stated in *Linkletter*[28] that:

> Austin maintained that judges do, in fact, do something more than discover law; they make it interstitially by filling in with judicial interpretation the vague, indefinite, or generic statutory or common law terms that alone are but the empty crevices of the law. Implicit in such an approach is the admission when a case is overruled that the earlier decision was wrongly decided. However, rather than being erased by the later overruling decision, it is considered as an existing juridical fact until overruled, and intermediate cases finally decided under it are not to be disturbed.

Like Austin, Kelsen subscribed to legal positivism and espoused similar doctrines. Kelsen rejected the *void ab initio* interpretation regarding the effect of the Supreme Court's decision on the unconstitutional statute. That would mean that the decision 'annuls the statute generally and with retroactive force so that all the legal effects which the statute had before are abolished.'[29] As a consequence, in his view, the *void ab initio* rule violates the prohibition of *ex post facto* laws of the American

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25 Miguel Maduro, 'Some Preliminary Remaks on the PSPP Decision of the German Constitutional Court' Verfassungsblog 6 May 2020 <https://verfassungsblog.de/some-preliminary-remarks-on-the-pspp-decision-of-the-german-constitutional-court/> accessed 26 September 2022.

26 Ernst-Wolfgang Böckenförde, *Vom Ethos der Juristen* (Duncker & Humbolt 2011) 12.

27 John Dickinson, 'Crowell v Benson: Judicial Review of Administrative Determinations of Questions of "Constitutional Fact"' (1932) 80 UPennLR 1055, 1067.

28 381 US 623–624; John Austin, *Lectures on Jurisprudence Determined* (1st ed, John Murray 1832) 22–23 (laws declaratory in name establish new law under guise of expounding the old).

29 Hans Kelsen, 'Judicial Review of Legislation: A Comparative Study of the Austrian and the American Constitution' (1942) 4 The J of Politics 183, 189–190.

Constitution.[30] Kelsen argued that a legal act 'is *not void*, it is *only voidable*'. 'Within a system of positive law there is no absolute nullity. It is not possible to characterize an act which presents itself as a legal act as null *a priori* (*void ab initio*).'[31] The reason is because 'before this declaration the act is not null, for being "null" means *legally* non-existent. And the act must legally exist, if it can be the object of a judgment by an authority.' 'The act is "null" only if the competent authority declares it null'.[32] This is reflected in the Austrian Constitution of 1920 (as amended, art 140 para 7).

Kelsen insisted on the creative aspect of the judgment of unconstitutionality, which produced legal effects: 'From a legal point of view only the opinion of the court is decisive. Therefore the statute must be considered valid so long as it is not declared unconstitutional by the competent court. Such a declaration has, therefore, always a constitutive and not a declaratory character.'[33] Kelsen accepted the legislative nature of the decision of unconstitutionality, being *actus contrarius.*[34]

By contrast, the *void ab initio* theory can be analyzed into a legal fiction (the statute is void, *as if not* passed), combined with a temporal legal effect (*ab initio*). The legal fiction is a counterfactual, which is nevertheless assumed and accepted as true, because it serves important principles or purposes of the law. As Kelsen noted, 'The juridic fiction can only involve a fictitious *legal* claim, and not a fictitious *actual* claim.'[35] 'The application of law, just as the creation of law, does not really intend the cognition of law, but its realisation, it is about *acts of the will*.'[36] The purpose of the legal fiction served by the *void ab initio* theory is the supremacy of the Constitution. Kelsen's argument that the *void ab initio* temporal effect runs against the prohibition of *ex post facto* legislation can be refuted. Allegedly, the *void ab initio* effect does not present a case of strong retroactivity, but of a weak one, to the extent that it operates *retrospectively*,[37] having the character of judicial relief – of a legal

30 ibid 191.

31 ibid 190 emphasis mine.

32 ibid emphasis mine.

33 ibid.

34 Kelsen, 'The nature and development' (n 14) 46. Hans Kelsen, 'Who Ought to be the Guardian of the Constitution?' (1931), in Lars Vinx, (tr, ed) *The Guardian* (n 14) 174, 188.

35 Hans Kelsen and Christoph Kletzer, 'On the Theory of Juridic Fictions. With Special Consideration of Vaihinger's Philosophy of the As-If' in (tr Christoph Kletzer) Maksymilian Del Mar, William Twining (eds) *Legal Fictions in Theory and Practice* (Springer 2015) 3, 13.

36 ibid 14.

37 According to Jeremy Waldron, 'Retroactive Law: How Dodgy was Duynhoven?' [2004] 10 Otago LR 631 'Retrospective legislation is legislation that attaches some legal consequence now and for the future to an event or transaction that took place in the past.' Elmer Driedger, 'Statutes: Retroactive Retrospective Reflections' (1978) The Canadian Bar Rev LVI 264, 276 '2(1) A retrospective statute is one that attaches new consequences to an event that occurred prior to its enactment'.

remedy[38] – being beneficial[39] for the citizen. This is consistent with the principle emphasized in *Marbury v Madison* that there can be no legal right without a remedy.[40]

Relevant to the previous discussion is the relationship between *validity* and *authority*. Defending the declaratory character of the judgment of unconstitutionality tends to efface authority and have it absorbed by validity. Accepting the constitutive character of the judgment in question reveals the reverse tendency. But as already said, it is not on the ground of logic that this issue is to be decided. The issue is rather one of purposive interpretation of substantive law. The relationship between validity and authority in the exercise of judicial review depends on the existence of *legal sanctions*, on *legal grounds*, over *adjudicative facts*. The question of retroactivity is intertwined with that of the nature of judicial decision-making, and the opposition between old law (retroactive) v new law (prospective). However, one must not exaggerate the practical difference between Marshall and Kelsen. After all, Marshall is the author of the emblematic invitation and reminder, that 'it is a *Constitution* we are expounding.'[41] In an age when a great part of constitutional law is case law, the interpretive role of the judge is well embedded, and inescapably many cases are the outcome of authority, rather than of preexisting validity. This is certainly a matter of legitimacy, but not a straightforward one. It is not always easy to say when a new rule falls into the one category or the other; a new *rule* does not necessarily mean new *law*; it may reinterpret an old, but imperviously applied legal principle, correcting that misapplication. *Brown v Board of Education*,[42] which overruled *Plessy v Ferguson*,[43] declaring the unconstitutionality of the 'separate but equal' doctrine is emblematic. *Brown* is certainly new law, seen flatly; but, in the light of Justice Harlan's famous dissent in *Plessy v Ferguson* ('Our constitution is color-blind, and neither knows nor tolerates classes among citizens'),[44] if one thinks in terms of validity, pondering the gap between the normative and the descriptive, the

38 The notion of remedy, here, is broader than that found in constitutional torts, eg, Walter Dellinger, 'Of Rights and Remedies: The Constitution as a Sword' (1972) 85 HarvLR 1532, 1542–1543. Richard Fallon, 'Bidding Farewell to Constitutional Torts' 107 CalLRev 933, 974 (2019) ('remedies other than tort damages are available to those who suffer harm from the enactment of unconstitutional statutes and from erroneous judicial rulings on constitutional issues').

39 But see Driedger (n 37) 267.

40 John Jeffries, 'The Right-Remedy Gap in Constitutional Law' (1999) 109 Yale LJ 87, 89 'The result is an attitudinal presumption against any gap between right and remedy in constitutional law'.

41 *McCulloch v Maryland*, 17 US 316, 407 (1819).

42 347 US 483 (1954).

43 163 US 537 (1896).

44 ibid 559.

first impression may look deceptive, because the old law was simply wrong law, while the new law is old principle correctly applied.

3 Between Retrospective and Prospective Effect of Unconstitutionality

O Field has underlined since 1935 the impact of pragmatic considerations in avoiding inflexible dogmatic solutions to the problem of temporal effect (*ex tunc* or *ex nunc*) of the judicial decision declaring a statute unconstitutional. The *void ab initio* rule is not universal, because 'there are several rules or views, not just one, as to the effect of an unconstitutional statute. All courts have applied them all at various times and in differing situations.'[45] Field discussed the presumption of constitutionality of the law, according to which 'a statute is valid until it is declared by a court to be invalid,'[46] and case-to-case judicial review, which holds that the unconstitutional statute 'is neither wholly valid nor wholly invalid,'[47] depending on the circumstances, and as a result 'no sweeping law-making effect is attributed by this view to judicial decisions.'[48] The advantage of this approach is that 'it permits of great elasticity in the law,' but the great disadvantage is that 'it does not lend itself to the formulation of rules of law. Prediction becomes well-nigh impossible.'[49]

The judicial discretion to apply one or another of the aforementioned views is founded on the assumption that the *void ab initio* rule is not constitutionally required. Indeed, in *Great Northern Railway Co v Sunburst Oil & Refining Co*,[50] J Cardozo, who favored the *pro futuro* effect, accepted for the Court that the American Constitution has no voice upon the subject and as a result, a state can define the limits of adherence to precedent either way (*ex tunc,* or *ex nunc*).

Turning to the Austrian centralized system of judicial review, in *X v Austria*,[51] in a case alleging the violation of art 1 of the First Protocol (private property) because the Constitutional Court of Austria restricted the effects of the annulment 'to matters subsequent to the entry into force of the annulment,' the European Commission of

45 Field (n 13) 2–3.
46 ibid 4.
47 ibid 6.
48 ibid 7.
49 ibid 8.
50 287 US 358, 364 (1932).
51 Decision of February 5, 1971.

Human Rights held that: 'There is no provision in the Convention forbidding the High Contracting Parties to annul a statute *ex nunc* and nevertheless to continue to apply it to matters prior to the annulment.'[52]

In American constitutional law, Thayer's classic argument[53] in favor of the presumption of constitutionality of statutes has several common elements with Kelsen's thought. Thayer argued that the mistake of the legislature must be 'a very clear one,-so clear that it is not open to rational question,'[54] because 'much which will seem unconstitutional to one man, or body of men, may reasonably not seem so to another.'[55] Here is found the element of discretion looming in the interpretation and application of norms, and as a result the constitutive character of the judicial decision declaring the unconstitutionality of the law. 'The judges were allowed, indirectly and in a degree, the power to revise the action of other departments and to pronounce it null.'[56] Implicit here is a conception of unconstitutionality whose focus is on the notion of competence: 'The judicial function is merely that of fixing the outside border of reasonable legislative action, the boundary beyond which […] legislative power in general, cannot go without violating the prohibitions of the constitution or crossing the line of its grants.'[57]

An important problem concerns the prospectivity of the judgment of the highest courts in a system of case-to-case judicial review, where there is no doctrine of binding precedent, as in the USA, and jurisprudence is not recognized as a formal source of law. This is the case of Greece, a country in the Civil Law tradition. One could argue[58] that in a true system of decentralized review *incidenter*, 'it is inconceivable' to talk about limiting the effects of unconstitutionality, because the consequences of the judgment are exhausted, by definition, to the litigants of the specific case, and to no other person, or court of law. The effect of the decision binds the parties (*res iudicata facit ius inter partes*) and in the specific case it is necessarily retroactive; this has been also accepted in the Austrian model since 1929, as an incentive and reward to bring the case to the court. Further debate over the retrospective or prospective effect is redundant.

However, the decision of unconstitutionality of the Greek Council of State (the supreme administrative court) clearly exerts an interpretive influence and plays a

52 Cappelletti and Cohen (n 2) 103, 104.

53 James Thayer, 'The Origin and Scope of the American Doctrine of Constitutional Law' (1893) 7 HarvLRev 129.

54 ibid 144.

55 ibid.

56 ibid 152.

57 ibid 148.

58 See the minority position of two judges in CS (in plenum) 1880/2019 para 31.

guiding role[59] which differs from *res iudicata* because it concerns different future legislation with similar, however, defects to the previous one. Here the crucial questions are: the similarity of the future case to that already decided; and the level of abstraction and inclusiveness in the previous decision of the Council of State, regarding the interpretation and the application of the Constitution to the litigated facts.[60]

In a recent judgment the Auditor's Court[61] (one of the three supreme courts of Greece) ruled that the Plenary Session of the Court, when deciding (according to art 100 para 5 of the Greek Constitution) over a preliminary question of constitutionality, is 'free from procedural constraints to hear all crucial argumentation, as well as legislation and case law, even if subsequent' to the applicable law in the litigated case. Otherwise, the Plenary Session would run the risk to render an 'unpersuasive decision,' instead of one 'binding, not for its formal authority, but on substantial grounds.' Therefore, the decision-time of the court is controlling, not the time of the litigated acts, or of the transactions.

Regarding the Austrian model, Kelsen argued that: 'Out of consideration for the ideal of legal security, one should, in general, make the cassation of a general legal norm on the ground of legal defectiveness effective only *pro futuro*.'[62] Judicial discretion in setting the time of the effect of unconstitutionality is today more or less generally recognized, either in principle as a matter of inherent judicial power, or for practical purposes in order to remove unpalatable consequences of the decision. This power is more or less equivalent to that exercised by the courts in the course of interim relief, ordering injunctions or *mesures conservatoires*.

If the practical limit to the implementation of the *void ab initio* theory is set by the legal maxims *lex non cogit ad impossibilia, ad impossibilia nemo tenetur,* then, balancing the interests at stake seems advisable in deciding the *ex tunc* or *ex nunc*

59 See Ioannis Tassopoulos, 'Res Judicata and Interpretive Power of the Judicial Decision on the Unconstitutionality of Statute' (2022) in *Sustainable State, Essays in Honor of Katerina Sakellaropoulou* (Sakkoulas 2022) 151, 157, 160 (in Greek). Given that the Greek Constitution does not have a provision specifying the legal effect of the judgment of unconstitutionality (such as art 62, s 2 of the French Constitution), an interesting question is whether the interpretive effect and the guiding role of the decisions of the Greek Council of State are founded, as a matter of positive law, on the legal obligation of public administration to comply with the decisions of annulment of administrative acts by the Council of State (art 95 para 5 GrCon), or on the general provision guaranteeing judicial review of legislation (art 93 para 4 GrCon) in connection with the judicial obligation of consistency, and the principle of treating like cases alike, in the interpretation and application of the Constitution; see herein below discussion in s 4.

60 Kermit Roosevelt, 'A Little Theory is a Dangerous Thing: The Myth of Adjudicative Retroactivity' (1999) 31 ConnLawR 1075, 1077, 1080.

61 Auditor Court 2020/2020 para 5.

62 Kelsen, 'The nature and development' (n 14) 40.

factor. Relevant criteria[63] for the exercise of such discretionary power may include the protection of legal rights and interests of the immediate parties to the dispute, prudential considerations facilitating the effectiveness of the judicial decision, the avoidance of a flow of litigation which could unduly burden the courts, or the prevention of significant costs to the public purse with negative macroeconomic consequences etc.

In an important article on the issue of retroactivity, Samuel Beswick[64] analyzes five frameworks used by the US Supreme Court in the effort to grapple with the problem of retroactivity (the philosophical one regarding the nature of the judicial duty between lawmaking and law-applying; balancing of interests, in the light of the legitimate expectations of the parties; the choice of law as in conflict of laws; the availability of remedies depending on the predictability of the new law; or the application of prospectivity as an exception). The author develops a sixth framework, that of the 'right of action,' whose focus is on the justiciability of claims founded on the newly introduced law.

Beswick's model has a strong procedural aspect and depends on specific arrangements regarding the discretion allowed by procedural law to the judge of constitutionality, among the possibilities of: a) retroactivity, b) prospectivity from the time of publication of the judgment of unconstitutionality, and c) postponement of the effects of the judgment further away from the decision. The *procedural approach* focusing on issues of justiciability and on conditions for legal actions is the most adequate to tackle the problem of retroactivity, confirming Cappelletti and Cohen[65] who noted some time ago that both systems, the American and the Austrian, tend to converge on the basis of practical considerations. The *void ab initio* theory is at the *intersection of substance and procedure*; the *void* is a matter of substantive law, the *ab initio* depends on existing procedures.

Indeed, the notion of the *effects* of the decision is multifaceted. The effect of unconstitutionality must be synchronized temporally, harmonized systematically, and unified spatially.[66] These dimensions are naturally under the immediate control of the court, being effects of the court's decision; thus, the court itself should assess them. So, the French Constitution (art 62, s 2), regarding the 'priority question of constitutionality' submitted by the courts to the Constitutional Council in the course of litigation,[67] allows for immediate or future effect, while the main trial is ordered to stay. Furthermore, there are also hard structural aspects diversifying the effects of

63 Roosevelt (n 60) 1107.

64 Samuel Beswick, 'Retroactive Adjudication' (2020) 130 Yale LJ 276, 298, 340–345.

65 Cappelletti and Cohen (n 2) 96.

66 Regarding the *other courts*, the *legal system*, and the *jurisdiction*, respectively.

67 Guillaume Drago, *Contentieux constitutionnel français* (4th edn, puf 2016) 549–556.

the decision. Between the litigants the doctrine of *res judicata* hampers reopening the issues; and if the court adopts a strictly narrow holding, limited among the parties, then, the *void ab initio* rule is more or less inescapable; because it would seem contrary to justice and fairness, and also absurd, to insist on the *ex nunc* effect and not to recognize the retroactivity of the decision for the immediate parties to the dispute, who brought the case to court, asking for judicial protection. But it is difficult to limit the effects of the decision to the parties only. As already said, the range of interests in the processes of balancing may include the coherence of the legal order, guidance to the lower courts, legal certainty, prevention of a flood of trials etc. *The complexity of the effects explains why the judicial control over the effects of the decision is an inherent power of the courts* and is recognized to be so across the various systems of judicial review. This is particularly true of the highest courts, which usually exercise control over their own procedure.

4 The Consequence of the *Void Ab Initio* Theory: The 'Awakening' of Old Law

The main consequence of the *ex nunc* unconstitutionality of the law is in Kelsen's system simple and straightforward. 'The legal effect of the invalidation of conflicting norms [is] in accordance with the principle *lex posterior* derogat *priori*.' 'This means that it is not at all the case that the legal situation which existed before the annulled statute entered into force automatically comes to life again with the cassation of a statute on the part of the constitutional court.'[68] As Kelsen believed,[69] a constitutional court can be empowered to either fill the legal vacuum created by the annulment, or to defer to the legislature.[70] This happens in France.[71] According to Kelsen: 'It is advisable to leave it to the discretion of the constitutional court to decide in which cases it wants to make use of this authorization to resurrect the old legal situation.'[72]

68 Kelsen, 'The nature and development' (n 14) 62.

69 ibid 43.

70 Decision CCon no 2010-14/22 QPC of 30 July 2010 *Mr Daniel W et al [Police detention]*

'With respect to the effects of the finding of unconstitutionality: 30. Firstly, the Conseil Constitutional does not have any power of appraisal similar to that vested in Parliament. […] Secondly […] The repeal of said provisions must therefore be postponed until July 1st 2011 in order to allow Parliament to remedy the unconstitutional nature thereof'.

71 Nicolas Tilli, 'La modulation dans le temps des effets des décisions d'inconstitutionnalité *a posteriori*' RDP n 6-2011, 1593, 1613 (nothing impairs the Constitutional Council to revive the law abolished by the unconstitutional statute, Decision no 89-269 of 22 January 1990). For the Austrian Constitutional Court see art 140 para 6 B-VG.

72 Kelsen, 'The nature and development' (n 14) 63.

The wisdom of Kelsen's advice over the risk of reviving old law wholly inadequate for changing circumstances is confirmed by recent Greek developments in the field of judicial review. The *void ab initio* theory requires by inexorable logic to 'undo' the effect of the unconstitutional statute and to turn back the clock. The old law does not become dead letter by an unconstitutional statute; rather, it is in a state of hibernation, waiting to awake as soon as the winter of unconstitutionality is set aside by the spring of judicial review.

The *void ab initio* theory is *firmly* established in Greek constitutional tradition. Its canonical expression is given by N N Saripolos in his *System of Constitutional Law of Greece* (1923). Saripolos, a major scholar learned in French and German law, with significant role in the osmosis of German legal science with the French tradition, wages a war on two fronts: on the one hand, he is adamant that an unconstitutional law 'is not law, in any sense of the word,'[73] and the courts have 'the right and the duty to interpret and apply the Constitution, which is the fundamental law, not the unconstitutional law;'[74] on the other hand, in contrast to current attitudes, which highlight the convergence of the models of judicial review,[75] he argues vehemently that Greek *incidenter* review is 'completely different'[76] from Austria's centralized system, because the Austrian Constitutional Court has the power to abolish the law by undertaking the authentic interpretation of the Constitution;[77] on that occasion, it exercises in essence constituent power.[78] Saripolos defends the supremacy of the Constitution, which depends on the distinction of constituent from constituted power, and, by the same token, the separation of powers, which is violated if the court imposes the principle of *judicial supremacy*.[79] Saripolos, therefore, agrees with Kelsen's defense of judicial review, but he disagrees with the judicial power to abolish the unconstitutional law, because Saripolos accepts, like Carl Schmitt,[80] that the power to abolish the law involves the *authentic interpretation* of the Constitution by the judiciary.

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73 Nikolaos N Saripolos, *System of the Constitutional Law of Greece* vol B' (Ant N Sakkoulas Publisher 1987) 335 (in Greek).

74 ibid.

75 Cappelletti and Cohen (n 2) 95.

76 Saripolos (n 73) 345.

77 ibid 349.

78 ibid 350.

79 William Van Alstyne, 'A Critical Guide to Marbury v Madison' 1969 Duke LJ 1 38 citing *Cooper v Aaron*, 358 US 1, 17–19 (1958): 'This decision [Marbury v Madison] declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution'.

80 Kelsen, 'Who Ought to be the Guardian' (n 34) 186, 190, disagreed on this point with Schmitt.

The void *ab initio theory* was reaffirmed in Greece in the 1960s: *Quod nullum est, nullum producit effectum*.[81] But since 2016, it has become the catalyst for the transformation of judicial review in the country to the point of changing league, from 'weak type' to 'strong type,' characterized by 'normative finality,'[82] to use Tushnet's terminology. In 2012, in the course of the Greek sovereign debt crisis, as part of the obligations of the second Memorandum of Understanding between Greece and its creditors, further cuts of salaries for special categories of civil servants (eg army personnel, university professors, etc) were legislated, implementing severe austerity measures. In 2014, the CS found them unconstitutional. The executive was under strict obligation, imposed by GRCon art 95 para 5, to comply with the judgment of the CS annulling the administrative acts, which implemented the cuts. As a result of the *void ab initio* theory, the law prior to the cuts of 2012 (antecedent to the economic crisis), was resurrected.[83] As compliance was pending, the legislature passed a new law, with retroactive effect, to return only half of the cuts of the previously given pensions, on the grounds of public interest and budgetary limitations.

In the decision 14/2013 the Special Supreme Court (which is a Court for the resolution of conflicts resulting out of opposite judgments over the constitutionality of a provision rendered by any two of the three supreme courts of Greece) ruled that the doctrine of *res judicata* and the principle of separation of powers did not impede the legislator from regulating with general and abstract laws issues which had been litigated and decided by the courts. Greek public law did not recognize a strong protection of vested rights. However, the CS, following the *void ab initio* logic, ruled that *the legislature circumvented the constitutional obligation of the executive* to comply with the Court's judgments, because *the judgment of unconstitutionality had the automatic effect of resurrecting the previous law*, which had never been lawfully abrogated: the unconstitutional statute never existed, for legal purposes.[84] The *void ab initio* theory turned the constitutional obligation of the *executive* to comply with the CS's judgment of unconstitutionality into an obligation of the *legislature*! Partial compliance was equal to legislative abuse, dodging the constitutional obligations of the executive. As a result of the *void ab initio* theory, the problem of applicable law to

81 Aristovoulos Manessis, 'Issues with the Invalidity of Unconstitutional Law' in Ar Manessis, *Constitutional Theory and Practice* (Sakkoulas 1980) 288, 301 (in Greek).

82 Mark Tushnet, *Weak Courts, Strong Rights – judicial review and social welfare rights in comparative constitutional law* (Princeton UP 2008) 34 ('strong-form systems differ from weak-form ones in the normative finality they give to judicial interpretations').

83 It is as if a single judicial decision brought about legally what the Greek Government failed to achieve politically in July 2015, when the people voted in the referendum overwhelmingly against austerity.

84 CS (in plenum) 1125/2016 (para 15).

replace the unconstitutional statute disappears 'as if by magic;' a mirage for those who do not understand the logic of legal validity. The fact that the legislature had twice made clear its intention to abolish the resurrected law, first by the statute found unconstitutional and next by the statute enacted following the unconstitutionality, which returned half of the cuts, proved legally irrelevant for the *void ab initio* theory. But dogmatic automations do not solve complex legal problems, generated by hard economic facts.[85]

The CS backed off from the rigid view of the *void ab initio* effect, allowing for greater flexibility of the legislature in modifying the resurrected legislation, after the judgment of unconstitutionality.[86] But the leniency of the approach is less important than the asserted constitutional basis: the Court reviewed such cases as falling under the judicially created *novel obligation* of the legislature *to comply*[87] (by not circumventing the main obligation of the executive), instead of applying the basic provision of judicial review *incidenter*. One can hardly exaggerate the distance between the two positions. The latter subjects the new law to judicial review, as any other piece of legislation, as long as the rule of *res judicata* is respected, without any violation of the impartiality and generality of the law. By contrast, the invocation of the constitutional *obligation of the legislature to comply with the judgment of the CS* on the unconstitutionality of the statute introduces a novel principle in Greek judicial review, similar to the French *autorité de la chose interprétée.*[88] This principle, *when applied to a substantially different statute from the one previously held unconstitutional,* amounts to a judicial claim addressed to the legislature *to comply* (art 95 para 5 GRCon) with the constitutional interpretation of the CS, instead of merely legislating in *conformity with the Constitution* (art 94 para 3 GRCon)! But the former is the gist of judicial supremacy in as much as the court becomes the Constitution's authoritative[89] interpreter, whose word binds the other branches of government. At the root of these developments is the *void ab initio* doctrine, which verifies Field's statement that: 'Most of the bad law in the decisions in this branch of the law has come from the

85 Ioannis Tassopoulos, 'The Rearrangement of the Relations between the Legislature and the Judge in the Greek System of Judicial Review: From Administrative Compliance to Legislative Compliance?' (2019) 12 Theory and Practice of Administrative Law 1085, 1107 (in Greek).

86 CS (in plenum) 1439/2020 (paras 18, 19).

87 CS (in plenum) 813/2019 (para 24).

88 Mathieu Disant, *L'autorité de la chose interprétée par le Conseil constitutionnel* (LGDJ 2010) 371.

89 Decision CCon no 2016-744 of 29 December 2016 Law on finances for 2017 para 14 ('If the authority attached to a decision of the Constitutional Council, which declares the provisions of a law unconstitutional, cannot in principle be usefully invoked against another law that has been distinctly conceived, the same does not apply when the provisions of this law, even though they are written in different terms, in substance have a similar objective to that of the legislative provisions that have been declared unconstitutional').

inability of some courts to free themselves from the overpowering force of the logic evidenced in the *void ab initio* rule, once its premises are assumed.'[90]

5 The *Void Ab Initio* Theory Between Positive and Negative Rights

The most problematic aspect of the *void ab initio* theory is not the *ex tunc* effect of the unconstitutional law, but the resurrection of the previous legislation to replace the invalid one. However, these two questions are different and distinct. The latter is one step further away from the temporal effect of the invalidity and concerns the applicable law, following the judgment of unconstitutionality. Why, then, do they tend to be assimilated? Because the *void ab initio* theory, in both prongs, is fine and fully consistent with the separation of powers and the judicial role in the context of individual rights and negative liberty. *Operating as a shield against the state, individual rights render illegal a statute from the time of its enactment*. Besides, no drastic intervention of the legislator is required. The court declares the law invalid and inapplicable to the litigated legal dispute and sets the accused free.[91] The case of *individual rights against the state* is most likely to involve *legal sanctions*, on *legal grounds*, over *adjudicative facts*; and the issue of resurrecting old law is secondary.

Substantive criminal law is the privileged field of application of the *void ab initio* rule. 'An unconstitutional law is void, and is as no law. An offence created by it is not a crime. A conviction under it is not merely erroneous, but is illegal and void […].'[92] Recently, J Kennedy wrote for the US Supreme Court, in *Montgomery v Louisiana*,[93] a case involving mandatory life-sentence without parole for convicted juveniles, that 'when a new substantive rule of constitutional law controls the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule.' In Europe this is reflected in *Scoppola v Italy* (No 2),[94] where the ECtHR held that 'Article 7 para 1 of the Convention guarantees […] the principle of retrospectiveness of the more lenient criminal law.'

90 Field (n 13) 9.

91 On the protection of individual liberties under the Austrian Constitution of 1920, Charles Eisenmann, *La justice constitutionnelle et la Haute Cour constitutionnelle d'Autriche* (first published 1928, Economica 1986) 242.

92 J Bradley in *Ex parte Siebold*, 100 US 371, 376 (1879).

93 577 US __ (2016) part II.

94 App no 10249/03 (ECtHR [GC], 17 September 2009) para 109.

The *void ab initio* theory is tied to the robust protection of *negative* liberty. However, *conflicts between individual rights* (eg, freedom of speech and privacy), of equal legal status and protection, lack clear rules and are decided through balancing.[95] In the age of *ad hoc* balancing, predominant in the jurisprudence of the ECtHR, the system of case-to-case adjudication renders the *void ab initio* rule virtually inoperative, to the extent that it merges into the traditional retrospective application of the judgment solely in the litigated case. But in the *void ab initio* theory the 'emphasis [is] upon universal rule;'[96] it requires clear and steadfast general rules, not malleable standards whose application depends on the totality of circumstances.

By contrast, the assimilation of the *void ab initio* rule with the resurrection of previous legislation is erroneous in the case of *social rights*. The *status positivus* of social rights requires legislative action to specify the corresponding legal entitlements. The fact that the cuts of pensions by the austerity measures have been found unconstitutional does not sustain the conclusion that the previous higher pensions are constitutionally mandated. The *void ab initio* theory preempts legislative action to regulate by subsequent legislation the preexisting pensions. Conversely, in France the *Conseil Constitutionnel* gave time to the legislature to pass a new law on pensions free from constitutional vice.[97] For this reason, *public law in the welfare state allows for the non-retroactivity of unconstitutionality*.

Equating positive with negative rights leads to an impasse, when the public purse is drained. It is quite questionable whether the judge can invoke the previous social legislation, despite the fact that the legislature had clearly chosen to replace or amend it. The replacement of a statutory scheme can be analyzed into two distinct parts: a) the decision to supersede the legislation existing at that time, and b) the decision to introduce new regulations. Assuming the nullification of part b) as a result of the judgment of unconstitutionality, this does not render necessarily invalid part a) as well. *It is for the legislature to fill the legal vacuum regarding the applicable law.* In the field of social rights, the *void ab initio* theory raises serious questions of separation of powers, by preempting legislative power.

6 Conclusion

The *void ab initio* theory is a strong expression of the supremacy of the Constitution and is tied to the ideal of the rule of law. It is a theory of fidelity to pre-existing law,

95 George Christie, *Philosopher Kings?* (OUP 2011) 110.

96 Field (n 13) 8.

97 Decision CCon no 2010-1 QPC of 28 May 2010, Mr and Mrs L [Pension freeze for war veterans of former French colonies] para 12.

implemented through a strict view of legal validity; but it can also operate as a vehicle for judicial supremacy. Its privileged field of application is negative individual rights against the state, which may satisfy the best conditions for the theory: *legal sanctions*, on *legal grounds*, over *adjudicative facts*.

By contrast, in the welfare state, application of the *void ab initio* rule to social rights is problematic, because it can result into serious dysfunction and encroachments on legislative power.

The *void ab initio* theory, being a strong guarantee of legality, is placed under considerable pressure in a legal environment where consistency in the interpretation and application of the law is gradually but steadily eroded, because of *ad hoc* balancing. Of course, different systems of judicial review can influence significantly the aforementioned conclusions; but the *void ab initio* theory, being a strong expression of the judicial ethos of legality, has its own independent value.