

Alternative approaches of the „American model-European model” dichotomy

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Abstract:

This paper endeavours to briefly present European scholars’ reflections upon the models of constitutional review and to propose a possible new model registered at European level, which is focused on individuals and their legal protection. This means it is necessary to rethink the classical approach of the constitutional justice in light of legal traditions, positive law within legal systems and comparative methodologies.

The criteria used for the distinction “American model-European model” have lost their topicality and relevance concerning the effective protection of human rights. As we can all agree, there are no differences in terms of results between the American and the European system of constitutional justice. In a globalized context of human rights, we meet a certain merger, a transformation of the legal world’s diversity into a great unity.

Keywords: *constitutional justice, constitutional review, American model, European model, human rights*

Introduction

Clearly, the thesis’ model did not occur neither spontaneously, nor fortuitous. At the same time, it is essential for us to understand how and under which circumstances did this method of thinking constitutional justice appear and to what extent and for what reasons it is anchored in the legal debates.

Despite its elegance, the thesis’ model shows two series of difficulties. It fails to satisfy the given objective, namely constitutional justice as practiced law of the various states. This problem is added immediately to the empirical theoretical difficulties, related to the very methodology of building two models of constitutional justice.[1]

It appears frequently in constitutional doctrine that justice is divided into two main models: the American model on the one hand, and on the other, the European model. If the opposition itself presents obvious teaching advantages, its pertinence is not absolute.

The American system works from the early nineteenth century and may seem curious why it was not adopted in most states. Some European countries, such as Norway or Greece, have adopted similar systems. However, for the most states, it was excluded for the ordinary judges to verify the laws' constitutionality. Attempts in this regard have failed in France, Germany or Italy between the two world wars. The reasons may be various, but all can be summarized in a different understanding of the separation of powers' principle and a contrasting judicial framework. The American model has proved to be challenging in terms of transposing it outside the United States, which is why European countries have adopted a different system that was based on the constitutional justice accomplished by a court especially constituted for this purpose. [2]

Without resuming the distant origins of the American constitutional context or its descriptive features, the fundamental study of this type of judicial review implies highlighting the transposing ways and any other deterioration suffered while the adaptation process took place in some states, as well as its continuous influence.

Therefore, the American system, the first model available, experienced widespread under different legal orders, as well as severe harm of the initial model's pureness. Sometimes, transformations were so obvious that those states, especially European and Latin American countries, can no longer be assigned to the European model and, in consequence, we can talk about mixed systems.

Section I: Encountered difficulties during national transpositions of the two traditional models

Any transposition of the American system definitely presents some alterations, the pure system of judicial review being intimately connected to the American context and therefore difficult to implement quickly and effectively in a different institutional framework. This may explain the limited influence that it has shown in the Central and Eastern Europe's states. With rare exceptions, such as

Estonia, which established a system of diffuse control, most countries have preferred to adopt the European model of constitutional justice.[3]

In order to easily distinguish the European model, the following must be mentioned: it is a concentrated control, entrusted to a specific constitutional jurisdiction, which has monopoly over constitutional interpretation; it is an abstract control, which often coexists with concrete control, achieved through ordinary court's notifications to Constitutional Courts, in concrete proceedings; the abstract control can be both *a priori*, before the promulgation and *a posteriori*, triggered by representatives of the executive, parliament and various organs of the autonomous communities (in Austria, Germany, Italy, Portugal, Spain, Belgium); the absolute authority of judgments, with two exceptions, Portugal, which applies concrete review, as well as Belgium, in the case of preliminary rulings, which will benefit from the relative authority of *res judicata*. However, in the interest of legal certainty and equality before the law, the mechanisms allow accepting the same solution in similar disputes (strengthened relative authority in Belgium) or pursuing the abstract control (in Portugal). [4]

Among the many contributions brought by Mauro Cappelletti to the contentious constitutional study, his thesis explains the Constituent's leaning in favor of the American model or the European model of constitutional justice. According to it, in a Romano-Germanic system of law, which ignores the principle of *stare decisis* and is based on a concept of judicial function inherited from Montesquieu and Rousseau, it becomes impossible for European states to decentralize the constitutional control as successfully as in the United States. The various presentations offered by his thesis include two categories of explanatory factors: firstly, the constitutional uniformity of interpretation, and secondly, the legal culture of countries and especially the judges' mentality. In *common law* systems, judges are perfectly accustomed to the idea that they exert regulatory power distinct from the legislature, a relatively autonomous power in relation to the latter. [5]

However, the theory presents certain limitations, so the following remarks appear to be necessary. First of all, we have examples of countries that can be attached to the Romano-Germanic law family and which have developed forms of judicial review closer to the American model. In Greece, the power to control the constitutionality of laws develops mid nineteenth-century. In the same period, courts in Portugal assert the power to eliminate the unconstitutional law. Switzerland has organized a diffuse constitutional review of the cantonal laws since 1848, the sovereign federal law remaining intact. Another example is given by the Romanian judges who self-empowered themselves to review the constitutionality of a law, without that power being expressly enshrined by the Constitution. By decision no. 261 of 16 March 1912, the judges of the High Court of Cassation and Justice uphold the decision of the ordinary judges, restoring in this way the judge's faculty to declare laws contrary to the Constitution in case of violation of their provisions. Through the power of these examples, it is possible to relativize the idea that European judges are not able to exercise judicial review as a result of cultural aspects. Secondly, the question regarding the effects of the constitutional decision and the concentration of the constitutional review in the hands of a single organ or, on the contrary, the control's division within a plurality of jurisdictions, are totally independent of each other. It is perfectly possible that a decentralized constitutional review would result in decisions with *erga omnes* effects, as well as a concentrated review could lead to a decision with *inter partes* effects. Thirdly, the existence of *ad hoc* jurisdictions does not guarantee the uniformity of the Constitutions' interpretation. It is always possible for certain ordinary jurisdictions to keep some faculties in interpreting the Constitution which may leave room for differences or even conflicts. These various elements weaken Mauro Cappelletti's thesis concerning the reason why the European states are moving towards one or another model of constitutional justice. [6]

As we can all agree, there are no differences in terms of results between the American and the European system of constitutional justice. These systems have also common features in their application: similarities in aspects like

composition or organization of the courts, comparable responsibilities regarding the protection of individual rights, similar control techniques and common requirements of the institutional and social legitimacy.

The entry into force of the priority preliminary rulings on the issues of constitutionality (question prioritaire de constitutionnalité -QPC), which does not fit within the models of constitutional justice, doubled by the example of the Supreme Court of the United Kingdom created by the Constitutional Reform Act in 2005, are questioning the opposition "American model"- "European model" of constitutional justice. The QPC mechanism illustrates the truly hybrid nature of certain forms that can be taken by the constitutional justice because it remains a post and concrete control of constitutionality (American model), while its decisions of unconstitutionality are still having *erga omnes* effects (European model). With regard to the Supreme Court of the United Kingdom, it has no power in suspending the application of any Parliament's Act, to the contrary of the American Supreme Court, much less to determine its disappearance (on the grounds of the Parliament's sovereignty), as the constitutional courts do. On the other hand, the Supreme Court is closer to the American model by judging particular cases without being placed outside the judicial framework. [7]

Section II: Different perspectives in analyzing constitutional justice

This opposition supported by Charles Eisenmann, Mauro Cappelletti or even Allan Brewer Carias, has apparently reached the limits of its explanatory and descriptive capacities. The great evolution of constitutional review including its mutations, demonstrates the limits of the legal research on a concept that is not exhausted in the courtroom. Constitutional Court must decide between what legislators can logically do, what is legally acceptable, without excluding the important factor of what should be appropriate to do.

Alternatives approaches to this "dichotomy" have been proposed. Some of these were reviewed in the *International treaty of constitutional law*: the distinction founded on concrete and abstract procedures of constitutional control

(Fromont M.), the distinction between models centered on law and models centered on the human rights protection (Lorente R.F.), the distinction between the constitutional control of the law and the constitutional control of the law enforcement (Fernandez-Segado F.), as well as the distinction based on the structure of conflicting rules (Pfersmann O.). [8]

There are others to be added like the one who finds its origins in the shaped relationship between the constitutional court and the other jurisdictions (Jouanjan O.) [9] or even the one that generates degrees of democratic legitimacy on different forms of the constitutional justice. [10]

Observing that some states located mainly in the South America, mix the features of both American and European models, Favoreu finds it necessary to consider that there is a third model. He even wrote that "in matters of constitutional justice, the Latin American countries are not choosing between American and European model, they are simply making possible the coexistence of concentrated and diffuse control". Indeed, he believed that besides the American and the European model there is also a South American model [11] But at the same time, he proposes a new model of constitutional justice, characterized primarily by a chamber of the Supreme Court specialized on constitutional litigation. Present mostly in Africa, it is an original system that cannot be found elsewhere.

A. Weber distinguishes between diffuse control, concentrated control, mixed or hybrid models (present in Europe and Latin America) and atypical patterns (especially in France). [12] The author insists that "the growing trend towards mixed or hybrid models do not justify the dissolution or removal of two traditional models that can still serve as a starting point for a systematic classification". [13] Despite an obvious gain on explanatory side, this way of reasoning is not entirely conclusive. The new "models" are not a logical independent alternative, but a combination of the previous. Thus, it appears that adding new models to the existing ones is simply another indication of the failure

registered by this method. According to some scholars, organizing the positive law happens not by adding new models to the traditional doctrine, but by developing new methods of analyzing the contentious constitutional law. [14]

Francisco Rubio Llorente, a member of the Spanish Constitutional Court from 1980 to 1989, the vice-president of this institution until 1992 and then to become president of the State Council, made an original proposal in one of his articles. According to him, there are two arguments to abandon the antagonism between the European and American system. "The opposition of these models is a method of reasoning or study that would be better to abandon to an approach on the grounds of similarity between the two of them, but also on the ground of the European diversity. Nowadays, speaking about the European model, it loses any interest if we take into account that the differences between some European systems are perhaps more important than the differences between the traditional models. Therefore, instead of these models of constitutional jurisdiction, he will use other models whose opposition is based on specific features of each of them, depending on their own purpose, which offer to the constitutional jurisdiction the very reason for being: models that tend to guarantee the constitutionality of the law, and by this, the effectiveness of the fundamental rights. [15]

According to M. Fromont, the model theory has "little explanatory value", mainly because the features of the two models blend in the positive law. This author is determined to "propose another classification that provides, in a more logical manner, different organizational types of the constitutional justice. This classification is based, on the one hand, on the procedure whereby the judge is seized with a matter of constitutional law, and on the other hand, on the object or nature of the decisions that are likely to be pronounced. If the decision which settles a matter of constitutional law is taken at the request of a subjective rights' owner and bears on the specific situation of the person, the judge gives to the provided matter of constitutional law a response for which he necessarily takes into account the specific situation of the person. On the contrary, if the decision that settles the question of constitutional law was given at the request of a

political actor and carries on conflicting rules or official state's matters, it will result in an objective and abstract constitutional justice because it mainly aims to resolve an issue related to the proper functioning of the state, that has been placed by a person with the purpose of speaking on behalf of general interest. Starting from this point, the author reaches to these two logics: protection of the individual, on the one hand, and defending the state's interest, on the other. [16]

Highlighting the complexity of the situation, Constance Grewe finds a state of confusion especially in German law, because certain issues (connected or not to the division of powers) are not subjected to constitutional judge through the procedures already discussed, but through the individual appeal. For this reason, the superposition suggested by Michel Fromont is challenged. [17]

Rejecting the models' idea, Vlad Constantionescu and S. Pierre- Caps outlines a form of orientation towards the general theory of law. They manage to identify three forms of control in Europe: (1) the specific control, based on the notification of the constitutional judge by the ordinary judge; (2) individual appeal for protecting the fundamental rights; (3) the abstract control, triggered by the state's institutions. [18]

After establishing in detail the "bankruptcy of the bipolarity American model-European model", Segado F. Fernandez draws a replacement solution. He does not pretend to settle a new classification of the constitutional review's models, but, in order to achieve a greater analytical applicability, he finds it is necessary to differentiate a full set of variables, by which different explanatory ways of the constitutional review can be rendered. [19]

As it was already presented, the purpose is common, regardless of the adopted instrument in order to protect human rights, and the law's unification is an essential step in this process. Although a universally accepted solution was not found, it can easily be observed that at the center is placed the individual, aiming at his optimal protection. Given this fact, we can recognize at European level, the aspiration to create a model of human rights' protection, which implies imposing a certain standard of general use.

Indeed, there is such a model at ideological level, but the European Union is subjected to constant challenges like the economic crisis, the refugees' crisis, the possibility for Great Britain to leave the Union etc., challenges that threaten the very existence of the European organization and therefore, the existence of such a model. However, the accession to the European Union, with all the entailed consequences, allows us to preserve also a national degree of protection as effective as or perhaps even more effective than the European one, a theory supported by the complementary character of the European law too.

Conclusions

A matter of great importance is given by the fact that a model is a representation of the reality, describing it in accessible ways. This provides clarity to the perceived reality, retaining only relevant issues in treating a problem and establishing a framework for interpreting it. It does not claim to assert the absolute truth or to make the problem disappear, producing in this way its own success or the failure conditions. From this perspective, models prove to be useful, but their pertinence is not absolute.

While models involve two inseparable aspects: what it is and what it should be, the classification consists in dividing and distributing various types of control forms. Whether it is based on an empirical or theoretical approach, on inductive or deductive reasoning, a classification has teaching vocation. The fact that the models of constitutional justice are often presented as being extremely pedagogical demonstrates the double nature of a semi-invention. Therefore, the following consequences can be identified: the confusion between American and *common law* system or the European model and the Romano-Germanic legal system; the perception of constitutional justice as constitutional review; the model is not really a model, but a category, variety, defined by a set of characters.

In a globalized context of human rights, we meet a certain merger, a transformation of the legal world's diversity into a great unity. The criteria used for the distinction "American model-European model" have lost their topicality and

relevance regarding the effective protection of human rights. But time is a crucial factor in the development and lasting foundation of a model. Therefore, despite a considerable period of human rights protection at European level, it is still early to rule on the viability of this thesis. At the same time, a model can be descriptive and representative for a specific era and consequently it should be continuously updated in order to maintain its identity.

References:

- [1] Tusseau G.(2009). Contre les "modèles" de justice constitutionnelle- essay de critique methodologique (Against the models of constitutional justice essay of methodological criticism), Bononya Univeristy Press, Bologna, p.25.
- [2] Favoreu L., Gaïa P., Ghevoantian R., Mestre J.L., Pfersmann O., Roux A., Scoffoni G. (2015) Droit constitutionnel (Constitutional law), Dalloz, Paris, p.239.
- [3] Idem, p.250.
- [4] Idem, pp.257-258.
- [5] Cappelletti M., Adams J.K. (1966), Judicial Review of Legislation: European Antecedents and Adaptations, Harvard LR., vol.79 pp. 1214-1215.
- [6] SeeTusseau G.(2014). Les causes du choix d'un modèle de contrôle de constitutionnalité (The reasons for choosing a model of constitutional review), in Jus Politicum, nr. 13, pp.10-15, available online at <http://juspoliticum.com/article/Les-causes-du-choix-d-un-modele-de-contrôle-de-constitutionnalité-911.html> (last accessed on 10 April 2016).
- [7] See Duffy-Meunier A.(2013), La Cour Sûpreme au Royaume-Uni après le Constitutional Reform Act 2005: une juridiction hors norme (The United Kingdom's Supreme Court after the Constitutional Reform Act 2005: an unconventional jurisdiction), in Jus Politicum, nr.9, available online at <http://juspoliticum.com/article/La-Cour-supreme-au-Royaume-Uni-apres-le-Constitutional-Reform-Act-2005-une-jurisdiction-hors-norme-641.html> (last accessed on 9 April 2016).
- [8] Troper M., Chagnollaud D., Traité international de droit constitutionnel (International treaty of constitutional law), T.3, Dalloz, Paris, pp.108-146.
- [9] Oliver Jouanjan O.(2009), Modèles et représentations de la justice constitutionnelle en France: un bilan critique (The models and representations of constitutional review in France: a critical review), Jus Politicum, no 2, pp.20-23, available online at <http://juspoliticum.com/article/Modeles-et-representations-de-la-justice-constitutionnelle-en-France-un-bilan-critique-72.html> (last accessed on 10 April 2016).
- [10] Dominique Rousseau D.(2013), Droit du contentieux constitutionnel (Contentious constitutional law), Paris, LGDJ, pp.535-561.
- [11] Favoreu L.(1996), Les cours constitutionnelles (The constitutional courts), Paris, PUF "Que-sais-je?", p.123.
- [12] Weber A.(2003), Notes sur la justice constitutionnelle comparée: convergences et divergences (Notes upon the compared constitutional justice: convergences and divergences), in AIJC, Vol.19, pp.29-41.
- [13] Idem, p.41.
- [14] Tusseau G., Contre les "modèles" de justice constitutionnelle- essay de critique methodologique, p.73.
- [15] Rubio Llorente F.(1996), Tendances actuelles de la juridiction constitutionnelle en Europe (New tendencies of the constitutional jurisdiction in Europe), AIJC, pp.11-29.

[16] Fromont M.(1997), La justice constitutionnelle dans le monde (The constitutional justice in the world), Dalloz, Paris, pp.41-42.

[17] Grewe C.(2008), A propos de la diversité de la justice constitutionnelle en Europe (About the diversity of the constitutional justice in Europe), in Dignidad de la persona, derechos fundamentales, justicia constitucional y otros estudios de derecho público, Francisco Fernández Segado (coord.), Dykinson, Spain, p.206.

[18] Constatinesco V., Pierré-Caps S.(2013), Droit constitutionnel (Constitutional law), Thémis, Paris, pp.233-240.

[19] FERNANDEZ SEGADO F.(2004), La faillite de la bipolarité `modèle américain-modèle européen` en tant que critère analytique du contrôle de la constitutionnalité et la recherche d'une nouvelle typologie explicative (The bankruptcy of the bipolarity `American model- European model` as a critical analysis of the constitutional control and the research of a new explicative typology), in Mélanges F. MODERNE, Dalloz, p.1112.