

Global Patterns of Constitutional Judicial Review Systems: Two Major Models of Constitutional Judicial Review in the World

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Abstract

Judicial constitutional review is an essential component of upholding constitutionalism, even though it is a relatively new concept outside the United States. The US Supreme Court set a precedent in 1803 in the Marbury v. Madison case by declaring legislative acts unconstitutional, which is widely regarded as the beginning of the principle or doctrine of judicial constitutional review. Since then, judicial constitutional review has become a widely accepted feature of most democratic legal systems. Comparative constitutional law recognizes two well-known models of judicial constitutional review: the American model of dispersed or decentralized review by ordinary courts and the constitutional Kelsen/European model of centralized review by a specialized constitutional court. Additionally, there are mixed or hybrid systems that combine elements of both models.

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1. Introduction

The normative supremacy of the constitution would be no more than declarations of intent were it not guaranteed by an institutional mechanism making it viable in practice. Professor Mauro Cappelletti's remark seems almost axiomatic to the effect that while the 19th century was the age of parliaments the 20th century was the age of constitutional justice.² Thus showing the acceptance of the idea of supremacy

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² Antonio La Pergola, *The Role of the Constitutional Court in the Consolidation of the Rule of Law*, European Commission for Democracy through Law (Venice Commission), Council of Europe Press, 1994, p. 27-28.

of constitutional norms, i.e. as "meta-norms"; *lex legum*, a law of laws,³ the norm of all norms; over all other forms of law within the given domestic legal order. The maintenance of the constitution's normative supremacy objectively requires the putative logical "natural necessity" of judicial constitutional review of the constitutionality of laws enacted by Parliament and the acts of governments, in order to uphold — guarantee and defend the principle of "constitutionality", i.e. the normative supremacy of the constitution and its efficacy in the national legal order.

Following Maartje de Visser, four main purposes of the constitutional adjudication are identifiable: 1) ensuring that the legislature does not transgress, or overstep constitutional boundaries of its prerogatives; 2) protecting the fundamental rights of individuals in specific cases; 3) resolving institutional disputes or deciding jurisdictional conflicts that have arisen between State organs (both horizontal — i.e. those located at the same level of central state power; and vertical i.e. those located at the different echelons of State power — central government and local governments); 4) ensuring the integrity of the performance of political offices and related processes.⁴

Justice William Paterson enunciated a theory of constitutional judicial review that clearly presents the principles upon which that power rested: "The Constitution fixes limits to the exercise of legislative authority, and prescribes the orbit within which it must move ... the Constitution is the sun of the political system, around which all Legislative, Executive and Judicial bodies must revolve. Whatever may be the case in other countries, yet in this there can be no doubt, that every act of the Legislature, repugnant to the Constitution, is absolutely void".⁵

In the Federalist Papers No. 78 (published on May 28, 1788), Alexander Hamilton noted both the significance of a written constitution as an act of the normative manifestation of popular sovereign will and fundamental governing principles, and characterized the judiciary as the instrument for its realization in law: If there should happen to be an irreconcilable variance between (the constitution and legislative act), that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their representative. Nor does this conclusion by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both, and that where the will of the legislature, declared in its statutes (the political will), stands in opposition to that of the people, declared in the Constitution (the constitutive will), the judges ought to be governed by the latter rather than the former. They ought to regulate their decisions by the fundamental laws (*leges fundamentalis*) rather than by those which are not fundamental.⁶ The general lesson of these observations, lay in the fact that

³ Eivind Smith, *Constitutional Justice Under Old Constitutions*, Kluwer Law International, 1995, p. 178.

⁴ Maartje de Visser, *Constitutional Review in Europe*, Hart Publishing, 2014, p. 153-154.

⁵ Eivind Smith, *op. cit.*, p. 28.

⁶ Alexander Hamilton, James Madison, John Jay, *The Federalist Papers* (edited by Clinton Rossiter), New York: Mentor, 1999, p. 435-436; Geoffrey Stone, Louis Michael Seidman, Cass Sunstein, Mark Tushnet, Pamela Karlan, *Constitutional Law*, 8th edition, Wolters Kluwer, 2017, p. 37-38; Donald P. Kommers, John E. Finn, Gary J. Jacobsohn, *American Constitutional Law: Essays, Cases, and Comparative Notes*, Rowman & Littlefield Publishers, Inc., 2010, p. 1125-1128.

Hamilton's point was that the judiciary should be subordinate to the legislature if it is responding to the will of the people, but the legislature should be subordinate to the judiciary when legislation stands in opposition to the Constitutional rights of the people (the principle of "Government of the people, by the people, for the people").⁷ Keeping the legislature in touch with the people and their fundamental rights and values — as articulated in their Constitution — is one of the stronger rationales for constitutional judicial review.⁸

The constitution took its authority as a sovereign act of the "people"⁹ thereby becoming legitimized by the unified constituent popular will, i.e., the sovereign will of the people as a unitary body (or unified political entity), having a unitary will that stood behind the constitution as a coherent whole. It follows from this that the "people" are the ultimate source of authority for a constitution.¹⁰ The legitimacy of the constitutional order is based on the power the people have in establishing the constitution. This is the basic idea of constituent power of the people.¹¹ Constituent power is normally understood as the people's capacity to enact a constitution, which gives rise to a novel legal order.¹² In fact, it means that the constituent power was used to argue that the supreme authority ultimately consisted in the people's capacity to establish a constitutional order.¹³

Furthermore, if a constitution is intended to be legally (*prescriptive*) binding¹⁴ there must be special and authoritative institutionalised implementing machinery, in making a constitution effective as enforceable law.^{15,16} Through constitutional judicial review process, constitutional justice assesses legislation and other government acts to ascertain that they are in compliance with the constitution. If the legislation or action contravenes the constitution, the constitutional judicial apparatus will rescind it from

⁷ Anthony Walsh, *The Gavel and Sickle: The Supreme Court, Cultural Marxism, and the Assault on Christianity*, Vernon Press, 2017, p. 62.

⁸ Ethan Leib, *Deliberative Democracy in America: A Proposal for a Popular Branch of Government*, Penn State University Press, 2004, p. 70.

⁹ Richard Kay, *American Constitutionalism*: in Larry Alexander, *Constitutionalism: Philosophical Foundations*, Cambridge University Press, 2001, p. 30.

¹⁰ Conrado Hubner Mendes, Roberto Gargarella, Sebastian Guidi, *The Oxford Handbook of Constitutional Law in Latin America*, Oxford University Press, 2021, p. 37.

¹¹ Mikael Spang, *Constituent Power and Constitutional Order: Above, Within and Beside the Constitution*, Palgrave Macmillan, 2014, p. 1.

¹² Ngoc Son Bui, *Constitutional Change in the Contemporary Socialist World*, Oxford University Press, 2020, p. 45.

¹³ Lucia Rubinelli, *Constituent Power: A History*, Cambridge University Press, 2020, p. 22.

¹⁴ Andrew Harding, *The Fundamentals of Constitutional Courts*, International Institute for Democracy and Electoral Assistance, 2017, p. 1.

¹⁵ Markus Böckenförde, Nora Hedling Winluck Wahi, *A Practical Guide to Constitution Building*, International Institute for Democracy and Electoral Assistance, 2011, p. 227.

¹⁶ One can say that constitutionalism has made great progress in countries that have established constitutional courts. Because of their decisions, constitutional courts have engendered respect for constitutions and for fundamental rights that did not exist previously and that are still absent in countries that lack an efficient system of constitutional review (e.g., the Scandinavian countries), even though these countries proclaim the supremacy of their constitutions – Vicky Jackson, Mark Tushnet, *Comparative Constitutional Law*, New York: Foundation Press: Thomson/West, 2006, p. 475-476.

the domestic legal order. Constitutional judicial review is one proper and competent institutional mechanism and a juridical process that enables the preservation and implementation of the constitution in practice. It is a means of giving applicative legal force to constitutional provisions and preventing acts that infringe them.¹⁷ Only in this way does the constitution gain its pragmatic valuable meaning as positive (applicative) binding law and becomes a real-factual shield (barrier) to arbitrariness in relation to the political power of the state. Generally, every contemporary liberal democratic constitution, as a rule, erects an objective axiological system through which it inaugurates and guarantees a certain array of founding constitutional values or principles arising from the very normative “substratum” (or “matrix”) of the constitution. More precisely, they are constitutional legal values or principles that stem from the liberal democratic constitutional orders of the occidental European type such as the separation of powers, the rule of law, the human dignity, representative self-government, legal protection of fundamental rights of citizens, legal certainty, and so on. Additionally, the constitutional principles form the kernel of certain state’s constitutional identity. At the same time, constitutional principles or values serve as bedrock and framework and legally binding guidelines for interpretation and implementation of the constitutional provisions by constitutional justice during the process of constitutional adjudication (i.e., the judicial interpretation and application of the Constitution)¹⁸ on certain constitutional issues. By adjudicating constitutional issues and enforcing constitutional principles, constitutional justice legitimate system of government making the constitution a living document that shapes and directs the exercise of political power, rather than a merely symbolic or aspirational collection of fine phrases.¹⁹ The aforementioned cardinal constitutional principles of a democratic rule of law state under a constitution may take the form of founding provisions embodied in the normative text of the constitution or its preamble; or of directive principles, which set out the fundamental “intentions” of the state.²⁰ Also, they provide the foundation for the internal peace and constitutional legal and political stability and consistency of the certain country.²¹

By its very nature and function, constitutional justice is essentially judicial because it implies resolving a legal issue according to legal principles, and not an assessment of political expediency (appropriateness).²² Relatedly, the constitutional justice protects the constitutional legal order from any policy by deciding on

¹⁷ Markus Böckenförde, Nora Hedling, Winluck Wahiu, *op. cit.*, p. 227.

¹⁸ Adjudication in matters of state is constitutional adjudication and, as such, a judicial guarantee of the constitution. By constitutional adjudication or decision making is meant the process of determining the meaning of a given constitutional provision (or set of provisions) in order to resolve a dispute about the constitutionality of a public act, including statutes and the exercise of public authority – Lars Vinx, *The Guardian of the Constitution*, Cambridge University Press, 2015, p. 22; Alec Stone Sweet, Mark Thatcher, *The Politics of Delegation*, Routledge, 2003, p. 93.

¹⁹ Donald Horowitz, *On Constitutional Courts*, Journal of Democracy, Volume 17/Number 4, Johns Hopkins University Press for the National Endowment for Democracy, 2006, p. 126.

²⁰ Markus Böckenförde, Nora Hedling Winluck Wahiu, *op. cit.*, p. 51.

²¹ <https://www.satv.tiesa.gov.lv/other/2019-ST-Referati-2018-atverumos.pdf>, consulted on 1.10.2023.

²² Svetislava Bulajić, *Čuvar Francuskog Ustava*, Službeni Glasnik, 2006, p. 21.

constitutional disputes through a court judgement on the basis of legal postulates (*sine ira et studio*) and not on the basis of political reasons.²³ For such reasons, constitutional justice plays a major role in building and successfully developing a constitutional democracy,²⁴ as well as in strengthening the constitutional identity of a certain state. Without it we are closer to an authoritarian or even totalitarian state and thus constitutional supremacy is a myth. With it we live under the constitutional governance.²⁵ Beyond these considerations, it should be noted however that prominent public law scholar Yaniv Roznai has made a remarkably comprehensive definition of constitutional judicial review “as a procedure for examining the conformity of legislation with the constitution and its provisions, and the judicial determination that legislation that is inconsistent with the provisions of the constitution is unconstitutional and null and void. That is, constitutional judicial review is an instrument that limits the discretion and scope of action of political decision-makers, especially with regard to the fundamental rights and freedoms protected by the Constitution. The constitutional judicial review extends the idea of constitutionality—according to which the supremacy of the constitution limits government beyond the realms of public law towards the realms of criminal, civil, and administrative law, and in these senses constitutional review is central to the idea of neo-constitutionalism”.²⁶

2. Two major models of constitutional judicial review in the world

The institution of constitutional judicial review belongs undoubtedly to the heritage of American legal tradition and constitutionalism, and in Europe it has been implemented in a different legal context.²⁷ Indeed, the idea of reviewing legislation to determine whether it conforms to a constitution is undoubtedly American, but the implementation of that idea in Europe has followed different paths. The United States of America, then, contributed to the theory of European constitutional law the idea of written constitution and a bill of rights obtained by the people’s representatives, the idea of constitutional review, and the idea that the supremacy of constitutional rules is genuine only if it is guaranteed by an institution that is independent of the political authorities whose acts are being reviewed. But for a long time, constitutional review was not established in Europe, whether for reasons of fundamental principle, the incongruity of such review with the sovereignty of parliaments, or for a “technical

²³ Hana Šarkinović-Köse, *Vijek Ustavnog Sudstva u Evropi*, Zbornik Radova Pravnog Fakulteta u Splitu, god. 58, 4/2021, p. 1124.

²⁴ Constitutional democracy means that the sovereignty of parliament is juridically limited by the constitution – Iwan Satriawan, Khairil Azmin Mokhtar, *Democratic Transition and Constitutional Justice*, IIUM Press, 2020, p. 53.

²⁵ See Donald W. Jackson, Michael C. Tolley, Mary L. Volcansek, *Globalizing Justice*, Suny Press, 2010, p. 183. Janos Kis, *Constitutional Democracy*, University of Washington Continuing Education, 2003.

²⁶ Yaniv Roznai, *Introduction: Constitutional Courts in a 100-Years Perspective and a Proposal for a Hybrid Model of Judicial Review*, „Vienna Journal on International Constitutional Law” (*ICL Journal*) 2020; 14(4) 355.

²⁷ Enver Hasani, Peter Paczolay, Michael Riegner, *Constitutional justice in Southeast Europe*, Baden, 2012, p. 176.

reason”, the unacceptability of entrusting such review to the courts. In his conclusion to an international colloquium on European constitutional courts, Jean Rivero suggested that “at that time (before World War II) constitutional review was for public law like Western and American comedy for movies – an American specialty”.²⁸ Nevertheless, according to Gustavo Fernandes de Andr  , four main factors influenced the creation of the so-called “Constitutional Courts” in Europe rather than the adoption of a diffuse system of review. The legal education of the career judges,²⁹ the role of judges in deciding policy issues, the merger of executive and legislative powers into the hands of a prime minister, and the importance of protecting individual liberties led Europeans to recognize the need for a separate branch to review legislation.³⁰

The development of constitutional justice is certainly the most striking or memorable event in European constitutional law during the second half of the twentieth century.³¹ As argued by Luis Lopez Guerra, the establishment of constitutional justice is linked with the desire to guarantee democratic constitutional stability in the light of past and present dangers and to prevent constitutional mandates from being eroded and eventually suppressed by a parliamentary majority which disregards the Constitution. The objective of constitutional justice is to defend the Constitution from possible situations which might threaten its integrity.³²

The Constitutional Court is the cornerstone of constitutional democracy just as Parliament is the hallmark of parliamentary-representative democracy.³³ A Constitutional Court is a constitutionally-established, independent organ of the State whose central purpose is to defend the normative superiority of the constitutional law within the framework of the juridical order of certain state.³⁴ Its role is to review laws, and to decide whether they are constitutionally valid whereby this function is exclusively reserved only for the Constitutional Court: no other court or state body can engage in constitutional review.³⁵ Thus, Louis Favoreu argued that the constitutional court does not frustrate the will of the people when it checks statutes: it merely indicates whether the ordinary legislative track or the constitutional track must be followed to enact a particular norm. The court acts as a “switchman” (*aiguilleur*)

²⁸ Vicky Jackson, Mark Tushnet, *op. cit.*, p. 460.

²⁹ As Mauro Cappelletti has argued: continental judges usually are “career judges” who enter the judiciary at a very early age and are “promoted” to the higher courts largely on the basis of seniority. Their professional training tends to develop skills in technical (in “merely interpretative”), rather than policy-oriented application of statutes. The exercise of judicial review, however, is rather different from the usual judicial function of applying the law - Mauro Cappelletti, *The Judicial Process in Comparative Perspective*, Clarendon Press Oxford, 1989, p. 51.

³⁰ Gustavo Fernandes de Andr  , *Essay Comparative Constitutional Law: Judicial Review*, „Journal of Constitutional Law”, University of Pennsylvania Law School, Volume 3/Number 3, 2011, p. 977.

³¹ Louis Favoreu, *Constitutional Courts*, Center of Civil Law Studies, 2001, p. 1.

³² Francesco Biagi, *European Constitutional Courts and Transitions to Democracy*, Cambridge University Press, 2020, p. 24.

³³ Antonio La Pergola, *op. cit.*, p. 10.

³⁴ Alec Stone Sweet, *Constitutional Courts*, in Michel Rosenfeld and Andr  s Saj   (eds.), *The Oxford Handbook on Comparative Constitutional Law*, Oxford University Press, 2012, p. 817-818.

³⁵ Andrew Harding, *op. cit.*, p. 1.

that directs the normative train to one track or another.³⁶ On the other hand, Georges Vedel: the constitutional judge ... is not a censor (of legislative activity) but a switchman (*un aiguilleur*) on a train. He does not forbid the moving of the train: he limits himself, by virtue of the rules which he is charged with applying, to directing it on the "good route".³⁷

While this system emerged more than a century after the United States system of diffused review, it has developed — particularly in Europe — into a widely accepted version of constitutional protection and control. Thus, the emergence of a separate constitutional court may be regarded as one of the most typical features of Continental constitutionalism. It may also be regarded as one of the most successful improvements on the traditional European, parliament-oriented concepts of democracy and rule of law. It is no wonder that countries elsewhere in the world, particularly in Latin America, also became attracted to the Kelsenian model of judicial review.³⁸ A centralized constitutional review system, generally known as the Austrian Constitutional Court model established in 1920 by Hans Kelsen, has spread globally after World War II and is now the most active constitutional tribunal in Europe.³⁹

The Austrian model of 1920, deeply influenced by the thought of Hans Kelsen, represented a system of constitutional control that was centralized in a single, special and specialized body or institution of the State. Conceived of as a "negative legislator", the Court is in an important sense not understood to be part of the Judiciary at all and is therefore composed of special judges all named by the Parliament. Certain designated institutional actors may raise questions of constitutionality directly in the Court on an abstract basis—that is, independently of the application of the law in question to a concrete case—and consequently a judgement of unconstitutionality has an *erga omnes* effect by nullifying the offending legislation and rendering it generally inapplicable.⁴⁰

The typological features of Kelsen's model of monitoring the constitutionality of the law are as follows: the assumption of a hierarchical structure of the legal system; the assumption of the superior legal force of the constitution as the most important normative act of a given system; a centralized model of hierarchical control of the conformity of norms (granting exclusive competence in this respect to the constitutional court); coherence of the system guaranteed by the determination of the defectiveness of a norm by the constitutional court and its derogation from the legal system.⁴¹

³⁶ Víctor Ferreres Comella, *Constitutional Courts and Democratic Values: A European Perspective*, Yale University Press, 2009, p. 105.

³⁷ Alec Stone, *The Birth of Judicial Politics in France: The Constitutional Council in Comparative Perspective*, Oxford University Press, 1992, p. 112.

³⁸ Lech Garlicki, *Constitutional Courts versus Supreme Courts*, „International Journal of Constitutional Law”, Volume 5/Issue 1, 2007, p. 44–45.

³⁹ Jeong-In Yun, *Constitutional Review Complaint as an Evolution of the Kelsenian Model*, „Vienna Journal on International Constitutional Law” (ICL Journal) Volume 14/Issue 4 2020, p. 423.

⁴⁰ Vittoria Barsotti, Paolo Carozza, Marta Cartabia, Andrea Simoncini, *Italian Constitutional Justice in Global Context*, Oxford University Press, 2017, p. 16.

⁴¹ Aleksandra Kustra-Rogatka, *The Kelsenian Model of Constitutional Review in Times of European*

It is 102 years since the creation of the Austrian Constitutional Court (1920), which gave rise to the “Austrian Model” of constitutional judicial review of a concentrated and specialized Constitutional Court that spread across Europe with its adaptations and migrated to other continents.⁴² During the twentieth century, and mainly after World War Two, European democracies have set up constitutional courts to promote emerging constitutionalism, to help frame a new legal system and to replace the former authoritarian ones (e.g. Austria, Germany, Italy, Spain, Portugal, and more recently further east in Europe). These European constitutional courts, unlike the Supreme Court in the United States of America, represent the centralized type of constitutional judicial review, where one single judicial state organ has the jurisdiction to adjudicate on the constitutionality of laws.⁴³

The archetype of the “decentralized” model is American-style “judicial review”, which is performed by the judiciary in the context of litigation. The second – the “centralised” or “European” model – grants review powers to a special organ – a constitutional court – while ordinary (that is, non-constitutional) courts are denied the authority to invalidate statutes.⁴⁴ The first model is a strong judicial review, sometimes known as the American model (also known as the “American” or “diffuse” model involving “incidental” review). It is interesting and important to note that the US Constitution did not explicitly establish judicial constitutional review,⁴⁵ but this was established in the Supreme Court ruling of 1803 in the famous landmark *William Marbury versus James Madison* case, in which the U.S. Supreme Court created the practice of judicial review,⁴⁶ i.e., set a vital precedent for the exercise of judicial review in the United States under Article III of the Constitution,⁴⁷ and that was consequently regarded as a historical foundation of the institution of judicial review in constitutional democracies.⁴⁸ Namely, in the seminal decision rendered in the 1803 case of *Marbury v. Madison*,⁴⁹ Chief Justice John Marshall established the Court’s

Integration – Reconsidering the Basic Features, „International and Comparative Law Review”, 2019, vol. 19, no. 1, Palacký University Olomouc, p. 8.

⁴² <http://www.iconnectblog.com/2020/11/the-colombian-model-of-judicial-review-of-legislation-a-precursor-to-the-austrian-constitutional-court-of-1920/>, consulted on 1.10.2023.

⁴³ Enver Hasani, Peter Paczolay, Michael Riegner, *op. cit.*, p. 176.

⁴⁴ Alec Stone Sweet, Jud Mathews, *Proportionality Balancing and Constitutional Governance*, Oxford University Press, 2019, p. 13-14.

⁴⁵ Curiously enough, the power of constitutional judicial review does not derive from any explicit constitutional command, i.e. is not expressly conferred in the Constitution. The authority to determine the meaning and application of a written constitution is nowhere defined or even mentioned in the document itself. This is not to say that the power of constitutional judicial review cannot be placed in the Constitution; merely that it cannot be found there – Alexander M. Bickel, *The Least Dangerous Branch*, Vail-Ballou Press, 1986, p. 1.

⁴⁶ Corey Brettschneider, *Governmental Powers: Cases and Readings in Constitutional Law and American Democracy*, Wolters Kluwer, 2014, p. 16.

⁴⁷ Yaniv Roznai, *op. cit.*, p. 360-361; Georg Vanberg, *The Politics of Constitutional Review in Germany*, Cambridge University Press, 2009, p. 9; Christopher Wolfe, *The Rise of Modern Judicial Review*, Rowman & Littlefield Publishers, 1994, p. 141.

⁴⁸ Boško Tripković, *The Metaethics of Constitutional Adjudication*, Oxford University Press, 2017, p. 35.

⁴⁹ The US Constitution nowhere specifically grants the Supreme Court the power to overturn legislation, but the Court asserted that such authority is implied in the text of the Constitution, in Article VI, where it

authority to invalidate laws that conflict with the Constitution through a judicial tour de force. Marshall wrote the Hamiltonian theory of judicial review into law. And in doing so, he overcame major institutional and political obstacles.⁵⁰

According to this model, every court of law has the power to carry out judicial review, with the Supreme Court standing at the top of the pyramid of justice. In this model the review is exercised only as part of a concrete legal dispute. A decision of a lower court in a constitutional matter will apply to the parties to the hearing only (*inter partes*), and if following the appeals to the lower courts the decision on the question arrives to the Supreme Court, its decision in the constitutional question will apply to everyone by virtue of the binding precedent principle (*stare decisis*).⁵¹ In the 19th century this model was adopted in several countries in Latin America. After the Spanish colonies gained independence they examined constitutional models, and following the prestige of the United States in the region, its constitutional model, with judicial review, became the example for constitutional model across the continent. As a result, the American decentralized model was very successful in Latin America, and in the early 20th century it became the dominant model of constitutional review. This model remains accepted today and more than 30% of the world's constitutions stipulate that judicial review be conducted in the Supreme Court within the ordinary court system.⁵²

The second model is the centralization of a constitutional court (also called the "Austrian" or the "Continental European" model), which exercises strong judicial review. According to this model, the constitutional review authority is concentrated in a special court. That is, the Constitutional Court has a monopoly on the power of judicial review and other ordinary courts cannot exercise constitutional review. The model originated in the work of the well-known legal theorist Hans Kelsen, who designed it about a century ago for the First Austrian Republic in its 1920 Constitution,⁵³ where he served on Austria's Constitutional Court as a judge from

states that the Constitution is the supreme law. If that is the case, reasoned the Court, then acts of Congress or other institutions established by the Constitution that conflict with the supreme law must be invalid. Numerous constitutions drafted in the nearly two centuries since *Marbury v. Madison* have explicitly incorporated constitutional judicial review, by establishing that a supreme court or other institution is responsible for ensuring that legislation be in conformity to the constitution. – Steven L. Taylor, Matthew Soberg Shugart, Arend Lijphart, Bernard Grofman, *A Different Democracy: American Government in a 31-Country Perspective*, Yale University Press, 2014, p. 297.

⁵⁰ Stephen Breyer, *America's Supreme Court: Making Democracy Work*, Oxford University Press, 2010, p. 12; Thomas Winston Simons, *Law and Philosophy*, McGraw-Hill, 2001, pp. 179-182; Kermit Hall, *The Oxford Companion to the Supreme Court of the United States*, Oxford University Press, 2005, p. 47, 57, 536; John Scheb, John Scheb II, *An Introduction to the American Legal System*, Delmar Cengage Learning, 2001, p. 18-19.

⁵¹ *Stare decisis et quia non movere* – to fix on what is decided and not set in motion what rests; *stare decisis* a Latin phrase meaning "stand by preceding decisions": principle that courts must abide by precedents set by judgements made in higher courts. The doctrine of binding precedent within a hierarchy of courts in a common law system. – Peter Hodgson Collin, *Dictionary of Law*, Bloomsbury Pub Ltd, 2004, p. 282.

⁵² Yaniv Roznai, *op. cit.*, p. 360-361.

⁵³ *Ibid.*, p. 360-361.

1921 to 1930.⁵⁴

Centralized constitutional courts are, in a sense, “specialists” in constitutional decision-making, which sit outside of, rather than on top of, the normal structure of judicial jurisdiction. Centralized constitutional review is closely associated, philosophically, with notions of parliamentary supremacy⁵⁵ and a corresponding suspicion of permitting judges to set aside laws. To the extent this philosophical tradition is strongly held in the legal culture, even proponents of constitutional review may think it better to limit the number and visibility of judges authorized to set aside legislative decisions, rather than to permit every judge in every court to exercise such power.⁵⁶ “Ordinary” judges, according to Kelsen, should not be given the authority to examine the constitutionality of legislation, but only to implement it. This view is in line with the tradition of civil law based on Montesquieu’s writing, according to which the governing authorities are completely separate from each other and do not cooperate with each other or supervise each other while maintaining a system of checks and balances. To preserve as much as possible the sovereignty of the legislature and the traditional conception of the separation of powers, Kelsen designed a “Constitutional Court” – a special body with political characteristics, designed to decide constitutional issues. This body, Kelsen believed, would be separate from the legislature and independent of it, and would act as a kind of “negative legislator” and could even repeal legislation that was unconstitutional. That is, the Constitutional Court will serve as the “guardian of the Constitution”.⁵⁷

According to Kelsen, the constitutional court was not a court strictly speaking because it was not responsible for adjudicating on specific situations or events, but exercised an „abstract” control of legislation, striking down laws that were deemed to be incompatible with the constitution, with *ex nunc effects*, or in certain cases, with *pro futuro effects*. In Kelsen’s scheme, a constitutional court is considered negative legislator: whereas the positive legislator enacts new laws, the negative legislator is responsible for striking down laws that are in contrast with the constitution. The model outlined by Kelsen was intended precisely to avoid the risk of a government of judges, by requiring them to be subject to the laws and granting the constitutional court the exclusive right to strike down laws in contrast with the constitution. The willingness to prevent a system of constitutional review based on the USA model clearly emerged from Article 89 of the 1920 Constitution (the so-called *Oktober verfassung*), which explicitly prohibited ordinary judiciary from exercising a constitutional review of legislation.^{58,59} Strictly speaking, Kelsenian-type

⁵⁴ Víctor Ferreres Comella, *op. cit.*, p. 3; Lars Vinx, *op. cit.*, p. 7; Nicholas Theodore Aroney, John Kincaid, *Courts in Federal Countries*, University of Toronto Press, 2017, p. 8.

⁵⁵ Parliamentary supremacy had as its corollary the unreviewability of parliamentary legislation – the “omnipotence” of positive (statutory) law and the judicial powerlessness to control the “validity” of that law – the doctrine of the judicially uncontrollable supremacy of the legislative wil. – Mauro Cappelletti, *Repudiating Montesquieu? The Expansion and Legitimacy of “Constitutional Justice”*, „Catholic University Law Review”, Columbus School of Law, Volume 35/Issue 1, 1985, p. 19.

⁵⁶ Vicky Jackson, Mark Tushnet, *op. cit.*, p. 457.

⁵⁷ Yaniv Roznai, *op. cit.*, p. 360-361.

⁵⁸ Francesco Biagi, *op. cit.*, p. 17-18.

constitutional review institutions must meet three cumulative criteria. First, the institution must be a separate body that is independent from the ordinary judicial system. Second, the institution must specialize only in disputes over the constitution and must not share this function with other judicial institutions. Third, the institution's decision must be final (not subject to appeal) and bind the entire polity (rather than just the parties to the dispute).⁶⁰

Kelsen highlighted three arguments that supported the idea of constitutional judicial review as negative legislation. First, the precondition of a constitutional legal order is its logical unity, ensured by the correspondence of legal rules to the constitution as the supreme law. A constitution that is missing the guarantee of nullification of unconstitutional acts is not, in a theoretical sense, completely binding. It would be a desire without obligatory force. Note that constitutional judicial review is intimately related to the idea of a legally binding constitution. Second, in Kelsen's opinion, disputes are to be decided by the constitutional court, a body complementing the legislature's constitutional function. As the guardian of the constitution the constitutional court had the power to initiate proceedings *ex officio* to review legislation. This is to ensure that the Constitution is the supreme foundation of the State. The third argument is related to Kelsen's concept of democracy. The constitution is intended to protect minorities: If one does not take the essence of democracy to consist in unfettered majority rule, but rather in the continuing compromise between the different parts of the people that are represented in parliament by the majority and the minority, then one should acknowledge that constitutional adjudication is a particularly suitable means to realize that idea. This can be realized only if there is a legal forum restricting the parliamentary majority's dictatorship.⁶¹

The Austrian Constitutional Court (*Verfassungsgerichtshof* or *VfGH*) has risen to global prominence due to its pioneering role. Hans Kelsen would even refer to

⁵⁹ Whereas Kelsen's model may be seen as symptomatic of a lack of trust in the judiciary, the origins of the USA system of constitutional judicial review reflect the aim of establishing the judiciary above the other branches of government, in particular the legislature. More specifically, the historical and ideological motivations for this approach are rooted in the intention of wealthy American bourgeois families to obtain protection from the courts for their constitutional and, above all, property rights against the risk of abuses and expropriation by the legislative assemblies. From this point of view, nineteenth-century European liberal ideology was markedly different from USA liberalism. In Europe, the guiding principle was the reorganization and stabilization of legal systems, for example through the introduction of codes, to reduce the margin of discretion of the judges, and to limit as much as possible the activities of the courts (and in fact, as noted in the preceding text, constitutional review of legislation was entrusted to an special state institution, a negative legislator). In the United States of America, on the contrary, while carrying out constitutional judicial review of legislation, the courts were required to interpret constitutional provisions that were often extremely vague and elastic, with the consequence that they had to incorporate into their reasoning elements of evaluation that were by their very nature discretionary and (in the most noble sense of the world) "political". As a result, the trust placed in the judiciary was much greater than in Europe. - Francesco Biagi, *op. cit.*, p. 18.

⁶⁰ Markus Böckenförde, Babacar Kante, Yuhniwo Ngenge, H. Kwasi Prempeh, *Judicial Review Systems in West Africa*, the International Institute for Democracy and Electoral Assistance, 2016, p. 49.

⁶¹ Andras Sajó, Renata Uitz, *The Constitution of Freedom: An Introduction to Legal Constitutionalism*, Oxford University Press, 2017, p. 333.

the constitutional court as his favourite child.⁶² According to Christoph Bezemek, an eminent Austrian academic constitutional lawyer, the Austrian Constitutional Court has been a highly active court from the very outset: between June 1921 and May 1932 it repealed three federal statutes and nine state laws, thereby exceeding all other European Courts assigned with the task of constitutional adjudication in their entirety. The fact that the Austrian Constitutional Court has to be considered as the most active constitutional Court all over Europe may not have changed; the numbers have: in 2009 the Court ruled on more than 5,400 applications. Among these where motions for judicial review 56 statutes were at least partially repealed by the Constitutional Court in 2009.⁶³ In this vein, the constitutional courts they have all tended to share certain common features that distinguish them from the U.S. Supreme Court. First, the justices are not appointed for life but serve for fairly long, fixed terms (from nine to twelve years) and are not eligible for reappointment. Second, the European constitutional courts have a monopoly on applying constitutional norms: ordinary courts are not empowered to review legislation, nor to review other governmental actions for congruence with the constitution. Third, issues come before the constitutional courts mostly on paper, as references or petitions, and are not normally heard by justices in oral argument. Fourth, all of the courts meet and deliberate in closed or secret sessions and either require or encourage a single decision for the whole court. Fifth, the justices on the constitutional courts are not drawn solely from the judiciary but from a wider population including lawyers and prominent legal scholars. Sixth, appointment to the courts is made mostly through super majoritarian procedures, which have the effect of requiring that all of the major parties approve any justice appointed to the court. And seventh, the constitutional courts primarily decide questions rather than cases.⁶⁴

The contrast with the American system of judicial review is sharp: American federal judges have lifetime tenure, while state judges may have fixed terms but are eligible for reappointment. The Supreme Court has no monopoly on judicial review but sits as the highest court of appeals with respect to constitutional as well as other issues. Multiple opinions are common with American courts and *per curiam* opinions are relatively rare. Supreme Court Justices nearly always are drawn solely from the state or federal judiciaries, and appointment requires only a bare majority of the Senate. Although American courts make decisions in closed sessions, many of their processes are fairly open to view from the outside. The Supreme Court and other courts of appeals generally hear oral arguments and commonly respond to the lawyers who present them, and the multiple opinions common in American courts at all levels expose variations in legal reasoning to public view and comment.⁶⁵

⁶² Stephan Hinghofer-Szalkay, *The Austrian Constitutional Court*, Journal Federalism-Regionalism, Université de Liège, 2017, p. 1.

⁶³ Christoph Bezemek, *A Kelsenian Model of Constitutional Adjudication - The Austrian Constitutional Court*, „Austrian Journal of Public Law”, Springer, 2012, p. 3-4.

⁶⁴ John Ferejohn; Pasquale Pasquino, *Constitutional Adjudication: Lessons from Europe*, 82 „Texas Law Review”, 1671 (2004) 1677-678.

⁶⁵ Ibid, p. 1678-1679.

Nevertheless, Alec Stone Sweet gives a most elegant and condensed depiction of the most important varied features between a centralized model and a decentralized model of constitutional justice. First, constitutional courts enjoy exclusive constitutional jurisdiction. Constitutional judges alone may invalidate a statute as unconstitutional, while all other courts remain formally prohibited from doing so. In the United States of America, review authority inheres in judicial power, and thus all judges possess it. Second, constitutional courts settle constitutional disputes. In contrast, the jurisdiction of the USA Supreme Court reaches both constitutional and non-constitutional disputes. Constitutional Courts do not preside over ordinary litigation, which remains the function of the ordinary courts. Instead, their central task is to give authoritative answer to the constitutional questions that are referred to them. Third, constitutional courts are connected to, but detached from, the judiciary and legislature. They typically occupy their own “constitutional” space, which is neither clearly “judicial” nor “political” in traditional separation of power terms. Fourth, some constitutional courts are empowered to review legislation before it has been enforced, that is, before it, has actually affected any person negatively, as a means of eliminating unconstitutional norms before they can do harm. Thus, in the centralized model of review, the judges that staff the ordinary courts directly enforce statutes (and other sub-constitutional legal norms), while constitutional judges directly enforce the constitution.⁶⁶

From a comparative standpoint, one of the most instructive features of any system of judicial review is the state's choice of either a centralized or a decentralized system. The decentralized or American system gives all the judicial organs within it power to determine the constitutionality of legislation. In contrast, the centralized or Austrian system confines this power to a single judicial organ. Both of these systems have been introduced, even very recently, in several countries, and thus have served as models outside their countries of origin.⁶⁷

According to Constitute, an online database of the current constitutions of over 194 countries, 80 per cent of constitutions include a formal constitutional review mechanism (predominantly judicial) for checking the compliance of political authorities' actions and decisions with the constitution.⁶⁸ The process of scrutinizing the laws and acts of public authorities to ensure compliance with a higher normative order—the constitution—is no longer what Alexis de Tocqueville once viewed as just another feature of American exceptionalism. The institutionalization of constitutional judicial review has expanded in recent decades around the world. Beginning in the United States, Western Europe and Japan, it has now become a regular feature of constitutional design in Asia as well as Africa.⁶⁹

Constitutional judicial review is a growing institution. Originating in the

⁶⁶ Alec Stone Sweet, *Constitutional Courts and Parliamentary Democracy*, West European Politics, Volume 25, 2002 - Issue 1, Routledge, p. 79-80.

⁶⁷ Mauro Cappelletti, *Judicial Review in Comparative Perspective*, California Law Review Vol. 58/No. 5, 1970, University of California, Berkeley, School of Law, p. 1033-1034

⁶⁸ Markus Böckenförde, Babacar Kante, Yuhniwo Ngege, H. Kwasi Prempeh, *op. cit.*, p. 17.

⁶⁹ Markus Böckenförde, Babacar Kante, Yuhniwo Ngege, H. Kwasi Prempeh, *op. cit.*, p. 145.

United States two centuries ago, the power to declare governmental action, whether legislative or executive, unconstitutional has spread around the world in the last half century. As of 2005, more than three-quarters of the world's states had some form of judicial review for constitutionality enshrined in their constitutions. While a growing number of new constitutions provide for judicial review in a supreme court, the stronger trend in new democracies has been to create separate constitutional courts. In 1978, only 26 percent of constitutions provided for a constitutional court, while approximately 45 percent did by 2005. There are regional variations in the relative popularity of the two types. For example, supreme-court review is more common than constitutional-court review in Latin America. Worldwide, however, only about 32 percent of constitutions locate judicial review in a supreme court or other ordinary court.⁷⁰ The power of constitutional judicial review, which Alexis de Tocqueville termed “the only power peculiar to an American judge”, is now found in about 83 per cent of the world's constitutions.⁷¹

The Comparative Constitutions Project, which has developed a cross-national historical dataset of all written constitutions since 1789, has found that, as of 2013, 154 countries had adopted the judicial model of constitutional review. Of the global total, 34 per cent (52 countries) have a decentralized or supreme court system, 61 per cent (94 countries) use a constitutional court/council model, and 5 per cent (eight countries) have a hybrid system.^{72,73}

European and American models of constitutional judicial review differ principally in how the system of constitutional judicial review is organized. In the American system, constitutional judicial review is lodged in the judicial system as a whole and is not distinct from the administration of justice generally. All disputes, whatever their nature, are decided by the same courts, by the same procedures, in essentially similar circumstances. Constitutional matters may be found in any case and do not receive special treatment. At bottom, then, there is no particular “constitutional litigation”, any more than there is administrative litigation; there is no reason to

⁷⁰ Donald Horowitz, *op. cit.*, p. 125-126.

⁷¹ Nicholas Theodore Aroney, John Kincaid, *op. cit.*, p. 8.

⁷² Markus Böckenförde, Babacar Kante, Yuhniwo Ngege, H. Kwasi Prempeh, *op. cit.*, p. 47.

⁷³ The constitutional jurisdiction in Latin America is characterized by hybrid model, built under the influence of the United States of America (classic diffuse model) and continental Europe (concentrated model). On the one hand, all judges have the jurisdiction to declare a norm unconstitutional in a specific case; on the other hand, there is a court or specialized chamber that exercises abstract control of constitutionality and is the ultimate interpreter of the Constitution. Furthermore, the hybrid model, which is prevalent in Latin America, has two key characteristics that reflect aspects of both the concentrated and diffused models. One is the existence of a specialized chamber within the ordinary judiciary that has exclusive jurisdiction over constitutional review, specifically in the Supreme Court. The other is that ordinary courts may have the power to review and refuse to apply an unconstitutional statute, much like their counterparts in the decentralized review model. However, since they lack the power to declare the law invalid or unconstitutional, the effect of the decision is limited to the parties to the specific dispute. The power to strike down the statute mostly belongs to one court—usually a supreme court, or in systems with a concentrated model of review, a constitutional court or council. — Manuel Eduardo Gongora Mera, *Inter-American Judicial Constitutionalism*, Inter-American Institute of Human Rights, 2011, footnote 293, p. 60; Markus Böckenförde, Babacar Kante, Yuhniwo Ngege, H. Kwasi Prempeh, *op. cit.*, p. 46-47.

distinguish among cases or controversies raised before the same court. Moreover, in de Tocqueville's words, "An American court can only adjudicate when there is litigation; it deals only with a particular case, and it cannot act until its jurisdiction is invoked". Review by the court, therefore, leads to a judgement limited in principle to the case decided, although a decision by the Supreme Court has general authority for the lower courts. In the European system, constitutional judicial review is organized differently. It is common in Europe to differentiate among categories of litigation (administrative, civil, commercial, social, or criminal) and to have them decided by different courts. Constitutional litigation, too, is distinguished from other litigation and is dealt with separately. Constitutional issues are decided by a court specially established for this purpose and enjoying a monopoly on constitutional litigation. That means that, unlike United States of America courts, the ordinary courts in North Macedonia cannot decide constitutional issues.

At most they can refer an issue to the constitutional court for a decision; the decision of the constitutional court will be binding on the ordinary courts. In Europe, moreover, in general, the constitutionality of a law is examined in the abstract, not, as in the United States of America, in the context of a specific case; therefore, the lawfulness of legislation is considered in general, without taking into account the precise circumstances of any particular case. This is because in Europe constitutional issues are generally raised by a certain subject that are determined and foreseen by the Constitution. As a corollary, the effect of the decision is *erga omnes*, i.e., applicable to all, absolute. When a European constitutional judge declares an act unconstitutional, his declaration has the legal effect of annulling the legal act, of making it disappear from the legal order. It is no longer in force; it has no further legal effect for anybody, and sometimes the ruling unconstitutionality operates retroactively. Kelsen characterised the constitutional court as a "negative legislator", as distinguished from the "positive legislator", the parliament.⁷⁴

3. Conclusion

Constitutional justice as an important feature of modern liberal democracies is a widespread phenomenon, and as such constitutes a significant dimension of any legal system operating under the rule of law. The process of examining the laws and general normative acts of public authorities to assure compatibility with a supreme normative order — the Constitution — is no longer what Alexis de Tocqueville once observed as just another feature of American exceptionalism. The institutionalization of constitutional judicial review has expanded in recent decades around the world. Most major models or systems of constitutional judicial review include national constitutional judicial systems from many countries that constitute a concrete typology of the constitutional judicial review family. A major constitutional judicial review system can only exist when it has exceeded its origins, i.e. expanded beyond its homeland, and simultaneously exercised an enormous influence, from a

⁷⁴ Vicky Jackson, Mark Tushnet, *op. cit.*, p. 461.

comparative constitutional law perspective, over different state constitutional judicial review systems worldwide. Two major systems have consolidated as the prototypes of constitutional scrutiny adopted by modern legal systems worldwide. They are specific legal systems that became models for other countries. Due to their geographical origins, they are usually referred to as the “American” and the “continental European”. Although there are exceptions (with Switzerland, Greece, Estonia, and the Nordic countries), a continental European constitutional judicial review system is mostly associated with countries of civil law tradition, while the American judicial constitutional review system is most prevalent in countries of common law or Anglo-American legal tradition.

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