

The 'American' (North American) Model of Constitutional Review: Historical Background and Early Development

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ABSTRACT

The paper explores the impact of the continental system exerted on the constitutional and political evolution of both the United States and individual states and tries to characterize the development of constitutional review phenomenon within the framework of the continental legal system and the Anglo-Saxon legal system. The research stands on the comparative legal analysis methodology within a diachronically featured paradigm. The paper explores the ways through which the continental system could exert relevant impact on the constitutional and political evolution of both the United States and individual states. Further on the article traces the development of the concepts of constitutional review within the framework of the continental legal system and the Anglo-Saxon legal system. The above stages of the analysis allowed the author to outline the specifics, nature of the essence of judicial review in the context of axiological analysis of public activities. The study concludes that judicial review is used to elucidate to what extent a rule of conduct complies with the safeguards of human and civil rights and liberties set out in a specific country.

KEYWORDS

Constitutional review, constitutional control, constitutionality of laws, North American model of judicial review, constitutionalism

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Introduction

Legal Theory views constitutional review is a unique institutional phenomenon of modern constitutionalism. When addressing the genesis of the above phenomenon we must recognize its inseparability from the processes of democratization and evolution of the core civil society elements. The above phenomenon is not only a historically predetermined, but also to a significant extent represents a natural phenomenon of societal development. The core

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societal elements foundations are rooted in socio-economic and politico-legal relations that drastically differed from the practice of West European medieval states.

It is universally known that the development of social revolutions – their completeness (e. g. in France) or incompleteness (e. g. in England) has produced two independent legal systems (or ‘families’ as some authors put it). These systems can be viewed, with some reserve, as a kind of ‘historical models’ of law and they can be used to classify legal systems of most modern states (Boshno, 2004; Petrazhitskiy, 2000). This, although quite simplified, classification will include two groups: first, legal systems of the continental Europe and nations that have later adopted them (Vasilyev, 2005), where law was divided into private and public, and, second, Anglo-Saxon legal systems shaped after the English common law system (Constitutions of Bourgeois States, 1982).

While giving credit to existing typologies of legal systems, that is, their differentiation into what is known as ‘legal families’ (e. g. historical, formation-, or civilization-based typologies), we still have to acknowledge that in recent years the typology produced several decades ago by French comparatist R. David (1988) has become the most widespread. It is based on a combination of two basic criteria: ideology (having as its individual elements religion, philosophy, political views and beliefs, and public values that law directly draws on) and actual legal parameters (law sources, structure, legal principles, concepts, and rights of authorities and public institutions that use and enforce legal prescriptions). David used these foundations to analyze four legal systems: Romano-Germanic, Anglo-Saxon, socialist, and religious. The modern political and legal theory recognizes, as a rule, such legal systems as: a) Romano-Germanic, b) Anglo-Saxon (or Anglo-American), c) socialist, d) religion- and tradition-based, and e) common law.

The research comprised a number of tasks as follows:

- to explore the ways through which the continental system could exert relevant impact on the constitutional and political evolution of both the United States and individual states,
- to trace the development of concepts of constitutional review within the framework of the continental legal system and the Anglo-Saxon legal system,
- to outline the specifics, nature of essence of judicial review in the context of axiological analysis of public activities.

Research Methodology

The research methodology rested on the assumption that it is quite natural that any differentiation of legal systems cannot be absolute as some researchers of the political and legal history interpret the above. Regarding the Anglo-Saxon and Romano-Germanic tradition it would be the more unreasonable to reduce the genesis of the latter exclusively to two or three models and their varieties.

The study relied on the statement that concepts of constitutional review were most often driven by the organic, institutional, natural law and some other theories (Brinton, 1933).

The research therefor comprised the empirical study of relevant literature and legislation (in its historical perspective) to trace the distinctive features of

North American model for constitutional review in its diachronically shaped tendencies.

Results and Discussion

The history of law had incomparably more aspects and variations – both in terms of nations and countries and in terms of regions, while existing differences, despite being quite substantial, do not affect the social essence of law (Zhidkov, 1971).

On the other hand, we cannot but agree that ‘methods used by each of these families have become closer to each other’, which means ‘that, in fact, all these systems produce similar decisions with respect to a number of matters, driven by the same idea of justice (Peces-Barba Martinez, 2001).

The above has been implemented in practice outside both the continental Europe and the criteria of ‘classic’ British constitutionalism. For example, each of the thirteen North American colonies (Blackstone, 1978; Ferrando Badia, 1995) applied English statutes and standards of ‘common law (Arnold-Baker, 2002), but with considerable restrictions imposed by local realities (Mishin, 1976). Most colonies issued codes (compilations) of legislative acts applicable in each of them. After gaining independence, the ‘overseas territories’ retained those English statutory sources that did not contradict the new constitutional legislation. At the same time, they actively applied common law provisions of the former metropole set out in decisions of British courts of ordinary jurisdiction (Bridwell & Whitten, 1977).

The most important difference between the American legal system that has formed over time and the English legal system consists in the decisive role of the Constitution as the key political and legal source (Law systems of world countries. Reference book, 2000). Legal scholarship agrees that English colonists of the 17th century brought with them many legal institutions, including those that served as the basis for criminal procedure law. Before the adoption of the Constitution of 1787 and the Bill of Rights of 1791, the Americans defended their rights and freedoms mostly by recurring to legislative acts and the ‘common law’ of England (Reynolds, 1980), and by recurring to colonial charters that contained provisions guaranteeing the rights of British subjects. The continuity of English legal institutions ensued from those well-known circumstances that led to the creation of the U.S.A. (Makhov & Peshkov, 1998).

The first Constitutions of individual American states, unlike the Anglo-British (including colonial) legislative and judicial procedure traditions (Zhidkov, 1985) attempted to put the independence won through the war of liberation into the clearest possible legal form. The states, went quite a long way along the path of declaring institutions of bourgeois democracy. The texts of eight of them included what is known as ‘Bills of Rights’ reflecting the doctrine of natural and inalienable rights. For instance, the ‘Bill of Rights’ of the State of Virginia, which later served as a model for developing similar acts by legislators of other states, included the following ‘natural and inalienable’ rights: to life, liberty, property, and the pursuit of happiness. They were directly complemented by the freedom of the press and religion promulgated in the Bill.

In a number of regional (state) Constitutions – that were under the influence of ideas promoted by English and French humanists – the list of rights and freedoms was expanded to include the freedom of word and petition, while



the Declaration of Rights of Vermont incorporated a provision prohibiting slavery (Feinman, 2000). Massachusetts' Constitution of 1780 contains very typical language: it declared on a statutory level that private property is a 'primary absolute right', which cannot be changed or restricted by society or the state (Thorpe, 1909).

Moreover, the trend whose general parameters were shaped during the first years of constitutional and political development was maintained in the constituent documents of those states that entered the federation much later. Article I of the Constitution of California reads as follows: 'All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy. ... Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press. ... Slavery is prohibited. Involuntary servitude is prohibited except to punish crime. ... A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws. ... Habeas corpus may not be suspended unless required by public safety in cases of rebellion or invasion. ... Private property may be taken or damaged for a public use and only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner. ... Noncitizens have the same property rights as citizens (The Constitution of the State of California, 1879).

The idea of this form of setting out principal civil rights and freedoms in such statutory acts as a Bill of Rights was not per se a purely American legislative novelty, but was actually borrowed by colonists from the Anglo-British legal theory and law enforcement practices of their former metropole. The principal distinction, which was most clearly manifested in the process of adaptation and gradual 'Americanization' of such phenomena as 'common law', habeas corpus and 'equity law', mainly consisted in the following.

The English doctrine has historically provided that the Bill of Rights of 1689 and later statutes of identical nature (such as the Act respecting the Issue of Writs of Habeas Corpus out of England into Her Majesty's Possessions abroad of 1862) are to safeguard the human rights against any tyrannical action of the King as the sole ruler. In the United States, the concept of the Bill of Rights was construed much wider, not only from the perspective of law-enforcing entities, but also from the perspective of regulated persons. The population of colonies and constitutive authorities perceived the adoption of 'Bills' as constitutional safeguards of their personal rights and freedoms and protection against acts and actions of any government or other public agency (Makhov & Peshkov, 1998).

One of the most significant places in the emerging North American constitutional framework of civil rights and liberties was given to judicial and procedural forms of their protection and jurisdictional support. We believe that this reflects a certain natural continuity: the common law of the former metropole, mainly retained by legislation of American states (with such continuity set out in most first constitutional acts) (Burgoa, 1988), primarily served as law that emerged directly from legal proceedings and within the legal procedure.

For this very reason, local political and legal realities were to be introduced into constitutional acts that would later serve as the basis for making changes in the traditional provisions of 'common law' (Moral Soriano, 2002).

From the institutional standpoint, judicial protection was viewed by the legislator as the principal safeguard of civil constitutional rights against illegal offences and unlawful acts by the government or its representatives (Vasilyev, 2005). The remedy, in case of restraint of liberty, 'to inquire into the lawfulness thereof, and to remove the restraint if unlawful' was provided, for example, in the Constitution of Northern Carolina. This provision was first in the history of constitutionalism to lay the foundations – on the conceptual level – for the idea of judicial constitutional review, as the court was granted the authority to establish the lawfulness of actions taken by executive (government) authorities in terms of their compliance with the Constitution (Zhidkov, 1985).

Still, we need to clarify that any mentioning of constitutional review as a rights protection function of regional (state) judicial power should not include the organization of a special framework of public institutions, as 'review functions' were assigned to courts of ordinary jurisdiction, primarily to the state's Supreme Court.

In general, the issue of organization, political and legal status and areas of competence of judicial structures was viewed by the founding fathers of the United States as a major issue (primarily from the standpoint of addressing the 'defects' of the federal system that were 'inherited' from the period of confederative structure of the state).

The above was conceptually substantiated by A. Hamilton (1999a, 1999b) who wrote in an article in *The Federalist* of 14 December 1787: 'In addition to the defects already enumerated in the existing federal system, there are others of not less importance, which concur in rendering it altogether unfit for the administration of the affairs of the Union. ... A circumstance, which crowns the defects of the Confederation remains yet to be mentioned, the want of a judiciary power. Laws are a dead letter without courts to expound and define their true meaning and operation. The treaties of the United States, to have any force at all, must be considered as part of the law of the land. Their true import, as far as respects individuals, must like all other laws be ascertained by judicial determinations. To produce uniformity in these determinations, they ought to be submitted, in the last resort, to one supreme tribunal. ... If there is in each State a court of final jurisdiction, there may be as many different final determinations on the same point as there are courts. ... To avoid the confusion which would unavoidably result from the contradictory decisions of a number of independent judicatories, all nations have found it necessary to establish one court paramount to the rest, possessing a general superintendence, and authorized to settle and declare in the last resort a uniform rule of civil justice (Hamilton, 1999a).

It should be noted that by the mid-19th century, due to the activities of North American legislators (Chirkin, 1994), the country had already accumulated sufficiently vast practical experience in organizing public administration driven by the division of powers principle while strictly meeting the limits of powers issued to the relevant authority in the context of implementing the *inter vires* doctrine). Therefore, it was quite natural that within the political and legal doctrine a combination of philosophical and legal



ideas, doctrines and concepts associated with the analysis of the entire sophisticated system of theory, ideological and political movement and the government law enforcement practices took a considerable part. The above practices development was initially related to the early evolution of the state of bourgeois democracy known as constitutionalism.

Among other things, there was an ongoing process of direct and 'latent' interaction between legal theory approaches associated with the formation of the modern legal system of the United States in general and a hierarchy of sources, which, specifically, have their 'ideological roots' in the colonial past and the period of transition from a confederative state to a full-fledged federation. The 19th century may be viewed as a breakpoint in this respect (but without diminishing the significance of both preceding and subsequent decades of constitutional and political evolution).

Apparently, it was exactly during this period of the history of North American constitutionalism – with its consequences also felt throughout the 20th century – that common law (or case law) becomes the major source, with statutes, let alone executive acts, becoming on its back a subordinate and optional (auxiliary) tool. This can be supported at the very least by the fact that in the last third of the 19th century over 40% of court awards were delivered based on case law.

Still, to understand the decisive impact that the common law had exerted on the genesis and evolution of the U.S. legal system in general and mechanisms of judicial constitutional review in particular, we deem it extremely important to state that, from the formal perspective, there is no federal 'common law' (as a consistent framework) in the United States. The language of the Constitution currently in effect provides clear evidence of this as it does not provide for setting up any similar framework nationwide. It was the very evolution of the political and legal systems of the country that 'led to the predominance of federal law over the laws of individual states. This was to great extent facilitated by decisions of the Supreme Court' (Zhidkov, 1985), which provided that state courts 'were not to decide merely according to the laws or Constitution of the State, but according to the laws and treaties of the United States – "the supreme law of the land" (Martin v. Hunter's Lessee 1 Wheat. (14 U.S.), 304, 335, 1816).

Conclusion

The continental system objectively could not but exert relevant impact on the constitutional and political evolution of both the United States and individual states, and not only those that due to their historical background were more inclined towards the Roman-Germanic tradition and codified legislation. The concepts of constitutional review that developed over time within the framework of the continental legal system and the Anglo-Saxon legal system were most often driven by the organic, institutional, natural law and some other theories (Brinton, 1933).

To a greater or lesser extent, their impact could not but facilitate the creation of basic elements of the judicial review system that is known in the international political and legal history as the 'American' (North American) model of constitutional justice. Originally created to ensure formal 'lawfulness' and 'equity' (Hamilton, 1999b) when adopting and subsequently implementing legislative and executive acts, judicial review currently combines both its

inherent formal elements and the substantive element. The latter – in the context of an axiological analysis of public activities – is somewhat predominant, for it is used to elucidate to what extent a rule of conduct complies with the safeguards of human and civil rights and liberties set out in a specific country.

Disclosure statement

No potential conflict of interest was reported by the authors.

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