THE ORIGINS OF THE AMERICAN MODEL OF CONSTITUTIONAL REVIEW

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ABSTRACT:
I DECIDED TO APPROACH THE ORIGINS OF THE AMERICAN MODEL OF CONSTITUTIONAL REVIEW AS IT IS A MATTER OF INTENSE AND UNINTERRUPTED DISPUTE FOR PROFESSIONALS, AS WELL AS ONE OF THE MOST CONTROVERSIAL TOPICS STUDIED BY CONSTITUTIONAL LAW OR POLITICAL SCIENCE.
THE ANALYSIS OF THIS CONCEPT IS DIFFICULT BOTH BECAUSE OF THE NEED OF SEPARATION FROM OTHER RELATED CONCEPTS, BUT ALSO BECAUSE OF THE PARADOXES THEY INVOLVE. I BELIEVE THAT THE THEME IS EXCITING BECAUSE OF ITS IMPORTANCE AND EXPANSION, BUT ALSO ACTUAL, REQUIRING LABORIOUS RESEARCH AND DOCUMENTATION FOR COLLATING AND ASSEMBLING THE INFORMATION AND KNOWLEDGE NECESSARY FOR ITS DEVELOPMENT.

KEY WORDS: FUNDAMENTAL LAW, CONSTITUTIONAL REVIEW, CONSTITUTIONAL JUSTICE, MODEL, PROCEDURE

INTRODUCTION

The idea of constitutional review of the legislation originates in the United Kingdom where, in 1690, Sir Edward Coke – in his capacity as Chief – justice of a English superior court, pronounced in the so – called Bonham Business, the first judicial decision[2] of a court which stated the ability of the instance to control the acts of the parliament, considering that "when there is an act of the parliament which is against justice or common reason, or it is not executable, in this case the Common Law will be applicable and the act will be declared void."[3] Sir Edward Coke's ideas have found application in the United Kingdom only for a short period of time; not the same thing happened in North America,

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[2] Luis Favoreu, *et. al.*, *Droit constitutionnel*, 9e édition, (Paris: Dalloz, 2001), 191
[3] Jean Beaute, *Sir Edward Coke, 1552 – 1634: Ses ses idées politiques et constitutionnelles*, (Paris: P.U.F., 1975), 75

where its tenets have been fully exploited. Colonial courts did not apply the laws adopted by their legislative assemblies, where those rules came into conflict with the United Kingdom written charters or, later, with the constitutions adopted by the respective states in the XVIIIth century; this is how the review of constitutionality raised.

The lack of a written constitution, because of the customary tradition of the state, generated the incompleteness of the assertion of constitutional reasoning, but the affirmation of the principle of a right which is superior to the laws adopted by the parliament and of the principle of the jurisdiction of the court to make verifications of conformity of laws with the supreme law were similar positions with those which the American instance will have in a similar case later (we will further see that the British judge's decision will be invoked by the ideologists of the American Revolution). In a early phase, the constitutional review was introduces to the American continent by the British, still being exercised by a body of the King's Council, Judicial Committee of the Privy Council, who was responsible for checking the conformity of the colony laws with those coming United Kingdom. By this decision, the British imposed a normative practice of hierarchy control in the state, which will be based on constitutional review, required later by the Supreme Court of the United States of America.

In the United States of America, the constitutional review was not (and still it is not) expressly governed by the Constitution; James Madison (1751 - 1836), the 4th President of the United States (between 1809 and 1817), co – author with John Jay (1745 - 1829) and Alexander Hamilton (1755 - 1804) of the documents known as The Federalist Papers[4], and one of the founders of the American state, suggested that the right to veto the unconstitutional laws to be given to the legal power; the proposal was rejected by the Constitutional Convention of the United States of America, by multiple reasons: first of all, the text of the Constitution had to be vague, so the lack of detail to satisfy all parties involved in drafting it, the federalists and anti – federalists, the opponents of slavery or the followers, the adherents of the Anglo – Saxon legal model or of the Anglo – German like. Thus, because of contextual reason related to the need to ratify the Constitution, some aspects have been sacrificed, as happened in the case of constitutional review. Contrary to the expectations, this very slim character of the Constitution was the main reason that facilitated the imposition of the constitutional review, the absence of express provisions

[4] Represented by an assemble of 85 articles written by Alexander Hamilton, James Madison and John Jay, resulting from their rich political experience.

regarding the competences of reviewing, combined with the jurisprudential tradition of progressing of the American law allowed the United States to enforce the constitutional control. I support this because, despite the lack of an express constitutional text, constitutional review was ordered by the Supreme Court of the United States of America.

The first argument in favor of the constitutional review did not belong to the Supreme Court, but of Alexander Hamilton, in The Federalist Papers; Hamilton argues in his articles the character of fundamental law of the constitution, and then the obligation of the judge to determine its meaning and therefore to apply it above any contrary law, given the superiority of the peoples will over the will of the parliament. Thus, Hamilton argues that "A Constitution is, in fact, and so the judges must consider it, a fundamental law. Consequently, they constitute the task of determining the meaning of any act originated from the legislative body. In case of irreconciliable conflict between the two acts, it is clear that the Constitution has to prevail over all laws in the same way that the intention of people should prevail over its representants."[5] A first observation would be that the sovereignty of Parliament, a long claimed and typical principle for the United Kingdom, but also by the European continent as a whole, is negated by Alexander Hamilton, being substituted by the sovereignty of the people. Thus occurs at a conceptual level, a shift in the principle of the separation of powers, the father of the United States Constitution recalling in his paper that any act of superiority of judges in relation to the organs of the state it is not acceptable. "The only required thing is that peoples power to be superior to both of them, and that where the will of the legislature declared in law is in opposition to the will of the people, declared in the Constitution, judges must obey rather last than the first."[6]

Regarded in this way, asserting the existence of a normative hierarchy was based on the hierarchy of the peoples will, desires which represents the base of the laws; considering the social and historical conditions of the young American state, it seemed more likely for it to establish democratic freedom and to affirm the principle of superiority of the peoples will over the will of the state. But the situation was different in Europe, where the lawmaker institutions had as a main goal the protection against the monarch abuse, the protection of rights and freedom – rather than aim to legislate; this function of

[5] Dan Claudiu Dănişor, *Modele de justiţie constituţională: de la divergenţă la o relativă convergenţă*, *Revista de Ştiinţe Juridice* 3-4 (33): 2005, 110
[6] Dănişor, *Modele de justiţie constituţională: de la divergenţă la o relativă convergenţă.*, 110

protection of the people against the anti – popular monarch measures does not allow the collective mind to consider possible that the legislature itself can act precisely against those who elected him to represent their interests. Speaking about an early ruling principle of the hierarchy of normative acts, Alexander Hamilton considered that "any act contrary to the constitution is not valid; to deny this is to declare that the inferior is more important than the principal, the servant is above his masters and the representatives of the people are superior to the people themselves".[7]

The attempts of establishing the constitutional review in the American space were likely to create a precedent in this area, dating back to the second half of the XVIII[th] century. Thus, a 1772 decision of judge George Wythe stated that "If - deplorable case, a legislature would be tempted to overthrow the limitations that are imposed by the people, I myself in my chair, serving the public justice in this country, I will speak to the legislative power and I will show the Constitution and say: <<Here is the limit of your authority, you can go far, but not further.>>"[8] A few years later, in a separate case – *Holmes v. Walton*[9] (also known as The Precedent in New Jersey), the Supreme Court of the U.S. State of New Jersey refused to recognize the validity of an act of the legislature, arguing that it is contrary to the Constitution of New Jersey (referring to the trial by jury). Given the existence of these legal precedents of constitutional review, it is very important the opinion[10] of the Italian jurist Mauro Cappelletti (1927 - 2004), which considers that it took more than a century of history of law that, in 1803, judge James Marshall, President of the Supreme Court, by its decision, to proclaim the principle that a law is incompatible with the U.S. Constitution is void. Supreme Court of the United States of America, stated above, was given in the case *Marbury v. Madison*[11], considered to be the one that marked the emergence of the American model of constitutional justice, ranking among the most important theoretical foundations of the constitutional review and the concept of constitutional supremacy of the Constitution, the reason given by judge John Marshall being relatively the same as those supported by Alexander Hamilton when he proposed the

[7] Dănişor, *Modele de justiţie constituţională: de la divergenţă la o relativă convergenţă*, 110
[8] Ferdinand F. Stone, *Institutions Fondamentales du droit des Etats – Unis*, (Paris: f.e., 1965), 47 *apud* Dănişor, *Modele de justiţie constituţională: de la divergenţă la o relativă convergenţă*, 110
[9] Details about the case I obtained from the website: http://www.jstor.org/stable/1833432, accesed March 17, 2013
[10] Mauro Cappelletti, *Cours constitutionelle europeens et droits fundamentaux, sous la direction de L. Favoreu*, (Marseille: Economica, 1982), 37
[11] Details about the case I obtained from the website: http://www.ourdocuments.gov/doc.php?flash=true&doc=19, accessed March 17, 2013

introduction of the constitutional review in the Constitution of the United States of America; judge John Marshall analyzed at the right of the courts to control the constitutionality of laws in a decision that is required under the authority of precedent, but that does not prevent the intervention of the executive to bring it to achievement, and thus to know a negative answer.

However, given that the parents of the Constitution of the United States, but also anyone who drafted a constitution have developed them as being the supreme and fundamental law of the nation, the will of the sovereign people, concluding that the second assertion is wrong, any act of the legislature declared unconstitutional being ineffective.

In *Marbury v. Madison* case, the arguments of the Supreme Court of Justice of the United States of America for a constitutional review were mainly related to the assertion of the necessity of a judicial interpretation of legal norms, the affirmation of the normative character of the Constitution (as opposed to a possible political character of it) and also asserting a normative hierarchy (identified in the opera of the Austrian jurist Hans Kelsen), in which the Constitution is located at the top of the hierarchy; also, it was stated the requirement of the seized judge to settle any conflict of norms by prioritizing the Constitution, laws contrary to it being considered null and void. By this manner, the judge is grated with the right to apply constitutional provisions, and where a law that has to apply in a case contrary to these provisions, not to apply, but in this way his decision will not affect the existence of the contrary law, it still remains in force. Creating further legal effects and regulating social relations. Regarded in this manner, from this perspective, the decision of the judge is of little importance; The rule of binding precedent that makes the law declared inconsistent with the Constitution should not be applied to any other court, since it is declared as such by the Supreme Court of the United States of America; in this way, law is virtually abrogated, because it cannot be applied by any court. This is the main reason why the American system could not be adapted in Europe; in the absence of the judicial precedent, the European solution was to entrust control of courts, its decisions having erga omnes applicability. Analyzing the above, we can identify the main features of the American model of constitutional justice:

a. The existence of a diffuse control, by all ordinary courts under the authority of the Supreme Court;

b. An actual inspection, conducted by law enforcement in connection with a particular case, pending before a court;
c. The control is performed *a posteriori*, by way of exception;
d. Decision after the control has relative authority of res judicata.

The first defining feature of the American model of constitutional justice is that, regardless of its position in the judicial hierarchy, control is effected by ordinary judges, the option to award this type of competence belonging to the founders of the American system; judge John Marshall raised the question "Where to seek protection against a breach of the Constitution, unless to the power of the judicial authority?". [12] Georges Bourdeau said in this regard that "by his duty, the judge has to be impartial by nature. However, a fair solution is guaranteed by the judicial proceedings, the debates, and the requirement of reasoning sentence".[13] Another reason behind the adoption of such a practice was that it could create a relative balance of the role of the three powers in the state; once assigned this task to control the judiciary, it receives a considerable force. In the American system, the first seised judge has jurisdiction to pronounce on any type of problems: civil, administrative, constitutional etc the role of the Supreme Court being the one to provide a final interpretation, authorized and uniform of the fundamental law. Supreme Court of the United States of America has the capacity to reform all the decisions from the United States territory. However, the Supreme Court of Justice may reform on appeal all decisions of the Federal States Supreme Courts, and all judgments of specialized Federal Courts. Except this role, the institution may also be seized directly, via a *writ of certiorari*, this means allowing those who lost at the lower court level to require reformulation of the judgment after previously exposed why it considers necessary. Enjoying the right to sort the applications and to choose only those that are considered important, the Supreme Court of the United States of America judges such appeals rarely[14], today holding less than 2% of the cases, 40% of them being of constitutional manner.[15] Causes that may lead the Court to grant the benefits of a *writ of certiorari* are: issues discussed are important in connection with the federal law and the Court has not previously ruled on them, or in a case of conflicting interpretations of federal laws made by the lower

[12] *Marbury v. Madison*, http://www.ourdocuments.gov/doc.php?flash=true&doc=19, accessed on March 20, 2013
[13] Georges Burdeau, *Droit constitutionel et institutions politiques*, (Paris: L.G.D.J., 1966), p. 97
[14] Allan R. Brewer – Carias, *La justice constitutionelle et le pouvoir judiciaire*, in *Études de droit public comparée*, (Bruxelles: Bruylant, 2001), p. 976 – 977
[15] Favoreu, *Droit constitutionnel*,. 195

Courts; or if a decision of the lower court is at odds with previously rendered by the Supreme Court so the Court may proceed to review and depending on other grounds, or, of course, to refuse despite the existence of one to several reasons shown above.[16]

As stated above, the constitutionality control under the American model is a concrete one, meaning that is performed after the producing of the legal dispute caused by the appliance of the law. So, the law can be analyzed in terms of its conformity with the constitution, if but it did not rise to a legal dispute. In the exercise if the constitutional control, the general principle is that the Supreme Court does not rule on any disputes (where disputes may occur), or in abstract disputes. Thus, the demand for review of constitutionality to be declared admissible the claimant has to be able to justify that he has an interest to make the claim and also it has to be proven the importance of the issue for the American society (the produced prejudice or its effects have to be certain) and the actuality of the dispute. In this manner, the constitutionality of the law can be judged only if the decision is absolutely necessary for solving a concrete case.[17] The effects of this characteristic of the control are visible in the fact that the Supreme Court refused to judge political affairs, to give advisory opinions to other state powers regarding the correct way to interpret the Constitution or the synchronization between law and the Constitution.

The absence of an *a priori* control in the American model of constitutional justice determines its applicability only to the laws promulgated and published; the control can be *a posteriori* but to take place before the actual implementation of the law, so that this characteristic is related, but not identified with the concrete character. In the United States of America, citizens cannot ask the judgment of constitutionality of a law in the interest of the whole society, the Supreme Court of Justice expressly stating that it is not sufficient that a law to be invalid, but that person complaining (so that part of the trial) had to suffer, or be about to suffer a direct injury as a result of law enforcement, and not only that it consists in an alleged victim, jointly with the whole community.[18] There is a possibility to encounter in practice a degree of abstraction of control, especially if declaratory judgment, that leads the judge to rule on the rights of the parties and, if the situation requires so, about

[16] Allan R. Brewer – Carias, *La justice constitutionelle et le pouvoir judiciaire*, 977 – 978

[17] Details about I obtained from the *Burton v. United States of America* case, from the website http://supreme.justia.com/cases/federal/us/202/344/, accessed March 321, 2013; citat după Allan R. Brewer – Carias, *La justice constitutionelle et le pouvoir judiciair*,. 987

[18] An good example is the *Frothinaham v. Mellon* case, http://www.lectlaw.com/files/case29.htm, accessed on March 22, 2013

the constitutionality or unconstitutionality of a possible law on which those rights depends; still, the control remains always *a posteriori*, despite not having the same degree of concreteness (as in trial procedure objection of unconstitutionality). The most used type of control in the American model of constitutional justice is done via the unconstitutionality exception; this exception can be raised by any of the parties to a specific dispute pending before a court, the procedure being intended as a defense of rights of the parties in the process, not as an act against the law. Thus, considering the legal text that would be applicable in this case to be contrary to the fundamental law, one party can ask the judge not to apply – it in that case, it does not mean that the law is disabled, only that the law will not be applicable in that case, but the superior law in hierarchy, the fundamental law. In the American system of constitutional review, the unconstitutionality of a law cannot be claimed from the office, so the court cannot invoke the unconstitutionality of the law; it is necessary that one side of a process to raise the plea of unconstitutionality.[19]

The claimed law in the trial is considered constitutional by the Court (i.e. the law is presumed to be constitutional), the appellant's duty being to prove why the law is unconstitutional. A presumed validity of any law approved by the legislative body is just a manifestation of respect for wisdom, integrity and patriotism of the legislative body.[20] The procedure of judging the unconstitutionality is the common legal procedure; so there are no special procedural rules for any special rules. The jury responsible for ruling on the unconstitutionality review pronounces itself regarding the exception rule applicable in this case, not regarding the cancellation of the contrary law. Even if the constitutional control decides that the law is unconstitutional, and the law is declared null and void, the solution refers only to the settlement of the case, not to any abstract conflict of laws. That's the reason why if there is a possibility of solving a case that do not necessarily appeal to the constitutional character of a law, the Supreme Court of Justice of the United States of America should avoid judging the constitutionality claim, which has an exceptional nature, as shown in the case *Ashwander v. Tennesse Valley Authority*[21], 1936: "The Supreme Court of the United States of America will not rule in that case when there another law or legal basis allows solving the case". Thus, if a case can be judged on the basis of the two approaches: that of constitutional status and that of the interpretation of the law or common

[19] Dănișor, *Modele de justiție constituțională: de la divergență la o relativă convergență*, 114
[20] Allan R. Brewer – Carias, *La justice constitutionelle et le pouvoir judiciair,* 994
[21] Details about the case I obtained from the website http://www.law.cornell.edu/supct/html/historics/USSC_CR_0297_0288_ZS.html, accessed on March 23, 2013

law, the Supreme Court will decide only regarding the last one." On this basis, we can conclude that in the American model of constitutional justice we are dealing with *a posteriori* control, usually conducted via the *plea of unconstitutionality*, objection raised by one of the parties to a legal dispute brought before the court. If there is no other way to solve the case, the decision will be that of non – application of the law, but regarding strictly on the parties of the process and strictly to the case.

As above, the decisions' regarding a constitutional review pronounced in the American system of control enjoys the *rex judicata* authority, i.e. they produce effects *in casus* and inter *partes*. Unlike decisions made by a specialized court, these have a distinct value in relation to others, because it cannot bring any benefits or disadvantages to any other person or other rules than those involves in that case. The decision does not affect the existence of the law or its applicability in other causes, other than those who determined the decision of unconstitutionality. The relative effect (relative to a single decision) of the decisions taken in a case about the constitutionality of a state law is doubled by the *stare decisis* doctrine or by the rule of precedent, which is absent in the European system. In this manner, the precedent is created by the fact that a decision may have authority in similar cases. In the Anglo – Saxon doctrine, if in a domain there is a legal matter, that decision has a *res judicata* value.[22] The precedent has in this case a value of interpretative source of law, being *erga omnes* appliable.[23] However, if the law does not exist or is insufficient, the authority of the decision is general, being applicable *erga omnes*. In this case, the judge has no duty to apply the rule of law, but to develop the rule of law[24], as a consequence of the previous rule, which assumes that once the decision is binding on lower courts in rank, or the same, with the one wich issued it. The decision of a judge must be in accordance with the totality of the past decisions.[25]

Considering the doctrine in the constitutional control matter, the decision of unconstitutionality imposes to all the courts when it is adopted by the Supreme Court of Justice. The law becomes inapplicable, since any request made under it shall be declared admissible by the court. Regarding the administrative acts, since they are controlled by the

[22] Dănișor, *Modele de justiție constituțională: de la divergență la o relativă convergență*, 116
[23] Henry Brun și Guy Tremblay, *Droit constitutionnel*, (Quebec: Cowanville, 1990), p. 24
[24] René David, Camille Jauffret-Spinosi, *Les grands systèmes de droits contemporains*, (Paris: Dalloz, 1992), p. 306
[25] John Anthony Jolowicz, *Droit anglais*, (Paris: Dalloz, 1992), p. 42

ordinary courts, it will get a inapplicability decision of the unconstitutional law. Somehow, the *inter partes* effect is somehow misleading in the American constitutional system.[26]

CONCLUSION

The American model of constitutionality control spread firstly because of the historical and geographical reasons from North America to Latin America. After that, the model has been adopted by the Australian continent, in Japan and in some european countries, among them being also Romania. This process of diffusion has been the subject of adaptation to the realities states, sometimes the essential features if it being modified and altered, thus leading to some other mixed systems. As shown, not all states not in all states does the legally precedent exists, so that European states needed centralize the control to a single instance.

[26] Dănişor, *Modele de justiţie constituţională: de la divergenţă la o relativă convergenţă*, 117

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