***Shota Kobalia***

*Tbilisi Free University, School of Law*
*BA Student*

# COMPARATIVE ANALYSIS OF CENTRALIZED AND DECENTRALIZED MODELS OF CONSTITUTIONAL REVIEW: AN ANALYSIS OF MODERN CONSTITUTION STUDIES

**ABSTRACT**

This paper examines the basic characteristics of centralized and decentralized constitutional review in the lens of a modern constitution and public power. Based on the "spontaneous order" doctrine and "framework originalism" - the type of constitutional interpretation, the opinion of Professor Stone Sweet regarding the strictly legal nature of the constitutional review in decentralized models has been criticized. *Erga omnes* effect that is characterizable to the centralized models and the monopoly on constitutional interpretation has been regarded, as institutes harmoniously complying with the semantic system stemming from modern constitutions. Decentralized models are represented, as an appeal to the fragile nature of legal systems and the transcendence from a set of characteristics of a modern constitution. The leitmotif of the paper is the idea that the independent assessment of constitutional review models is not relevant and the absence of destructive effects due to an existence of the social contract does not render the model perfect.

## 1. INTRODUCTION

Law is an exclusive form of the exercise of public power, whereas a modern constitution in its normative meaning can be defined as a framework of the legislation in a state. Since the normative dimension is an essentially fictional fact, in which the events need to be accommodated to notions and not *vice versa*, any social construct requires systematic, logical and semantic arrangement. This paper aims to examine and evaluate the key distinctive features of centralized and decentralized models of constitutional review in the lens of major characteristics of a modern constitution and determine the model that is more appropriate to the nature of public power, interpretation of the constitution and a general systemic logic. The developed argumentation does not serve the purpose of positively or negatively evaluating the models of constitutional review (by any criterion), but to present them in a common argument and to provide a contextual classification of the topics and sub-topics.

## 2. A MODERN CONSTITUTION

The existence of a modern constitution is impossible when the factual constitution[1] does not comprehend the principle of the rule of law in the social or government institutions. The principle of rule of law is a meta-legal ideal - rarely given explicitly in national constitutions or organic legislation.[2] It is not an accident, since the legislation and the nature thereof is dependent on the doctrine of rule of law, accordingly, inclusion in legislation would resemble the definition of general by specific (or inclusion in itself) that would be principally invalid. In the rule of law, public governance needs to be based on, exercised and limited by law, however, the rule of law does not exclusively mean governance based on laws. Effective execution of a particular norm is necessary, yet insufficient criteria for the rule of law. The governance is required to be exercised not only in compliance with the law but to be deontologically justifiable, since, in a strictly formal sense, an authoritarian ruler could subordinate its own tyrannical power to legal norms and thus, limit own actions with the law. This does not *a priori* mean the limitation (that is one of the criteria), it is necessary to introduce certain moral criteria into a legal system. The modern constitution characteristics described by Professor Grimm constitute the extent of such criteria:

1. The constitution is a set of legal norms, not a philosophical construct. The norms emanate from a political decision;
2. The purpose of constitutional norms is to regulate the exercise of public power;
3. The constitutional regulation is comprehensive, as no extra-legal or supra-legal regulations are recognized;
4. Constitutional law is the higher law;
5. The legitimate source of power for the constitution is the people.[3]

Thus, the modern constitution, contrary to the pre-modern one, should be understood not as a descriptive, but a prescriptive category, while the fifth criterion suggested by Professor Dieter Grimm unequivocally indicates that a modern constitution rendered the law reflective.[4] On the one hand, it emanates from the government and addresses the people, and on the other hand, stems from the people and addresses the government. I believe, that from the perspective of the centralized constitutional review, the above-mentioned interrelation has a third dimension - emanating from an individual and addressing the people, however, the more detailed reasoning will be given in the following chapters.

The modern constitution has become an organic part of a democratic state, accompanied by semantic rather than only practical-functional effects in the academic circles. An illustration

[1] Factual constitution - a set of real public relations that define the basis of public order (See Z. Rukhadze; Georgian Constitutional Law, Chapter 4).
[2] J Hart, *Safeguard of Individual Liberty*, (Texas University Press, 2002) 313.
[3] D Grimm, *Types of Constitutions, The Oxford Handbook of Comparative Constitutional Law* (2012) 104.
[4] ibid 174.

could be a definition of democracy adopted by Professor Walter Murphy: "democracy is a balance between the majority rule and the fundamental human rights."[5]

Any normatively justifiable political or legal process and the exercise of power by democratic institutions need to be a consistent attempt of achieving the abovementioned "balance". However, an institute that exercises constitutional review is an avant-garde of the events. Hence, the counter-majoritarian dilemma does not really constitute a "dilemma" in a sense that, it is necessary to be overcome, on the contrary, in terms of the modern constitution, the counter-majoritarian projection of a judicial power is irreversible and overcoming it would amount to the rejection of balance.

One of the substantial arguments to justify the constitutional review, aside from the protection of rights of an individual (or minorities), is that the constitution is a "fundamental view" of the society, whereas there is a reasonable presumption towards the everyday politics that they serve relatively short-term goals. In that sense, the Bruce Ackerman's doctrine "dualism and the higher lawmaking" is relevant.[6] He draws a distinction between (1) normal politics and (2) constitutional politics. Normal politics that is a part of daily routine politics are governed by government leaders, bureaucrats, who act in their own self-confined interests, while constitutional (same as higher) politics revive periodically, in short periods of the history, for instance: mobilization of the society during the change of a constitutional regime, adopting crucial constitutional amendments, holding referendums on significant issues. At that time, every action of the both - electorate and the government are a subject of public discussions, a well-considered action, and the society evaluates itself "fundamentally" in the lens of constitutional values. Ackerman assumes that the deficiency arising from the periodic character of the "higher politics" can be "remedied" by the institution in charge of the constitutional review that will apply the "fundamental views" to the daily political decisions.

## 3. CENTRALIZED AND DECENTRALIZED MODELS

Decentralized model of the constitutional review is characterized by the specific form of control - by regular courts, in the process of judicial review. The judiciary has the capacity to suspend the application of certain legal provisions if they contradict with the constitutional rights. In a centralized model, where the constitutional court is separated from regular ones, the constitutional court provides for abstract judicial review of the disputed norms. The abstract review can be referred to as the review of legal norms or a preventive review. It has a textual dimension - litigation is a necessary precondition for a constitutional challenge. Furthermore, the decision will be incorporated in the judicial system and is binding for everyone - due to the *erga omnes* effect. In decentralized models, the lack of *erga omnes* princi-

[5] W Murphy, *Constitutions, constitutionalism and democracy* (American Council of Learned Societies, 1988).
[6] B Ackerman, *Abstract Democracy: A review of Ackerman's 'We the People'* (Harvard University Press, 1991) 312.

ple is balanced by the principle of precedent case law.[7] Although the existence of a different doctrinal framework is not directly correlated to such evident effects, such as democratic development of a state or the degree of protection of fundamental human rights, both models successfully serve their purposes in a number of countries. However, it is crucial to analyze the doctrinal frameworks of each model to decide which one complies with the essence and the scope of a modern constitution and the systematic logic behind it.

According to the third principle of Professor Grimm: "[t]he constitutional regulation is comprehensive, it does not recognize extra-constitutional or supra-constitutional regulations".

When the judge John Marshall delivered the historic judgment in Marbury vs. Madison[8] and established the constitutional review of the legal acts in the United States of America, the Constitution did not include any indication regarding the institute of a constitutional review. I believe that although the decision is a cornerstone of various positive political and legal processes, it constitutes an extra-legal projection of the governmental power. A spontaneous criticism of this opinion could be based on the argument that the decision of Judge John Marshall did not contradict the Constitution and the aims of a democratic state; on the contrary, it served the purpose of a stable social-political system and the breach of the political deadlock. We could absolutely agree with the discussion regarding the worth of outcome, however, I assume that such set of ideas would be a rigid consequentialism,[9] contradicting with the systematic logic of normative reality. The fact that the decision of the government does not harm anyone (or even improves the conditions), could not be a legitimate ground for justifying it, as in terms of the rule of law, each action of the government is determined with the following principle: "everything that is not prohibited is permitted". Accordingly, the constitutional review in the US was exercised extra-legally, circumventing the principle of the rule of law. Hence, the third criterion suggested by Professor Grimm has been violated. In the US case, the constitutional regulation of the state did not turn out to be absolute, since in Marbury v. Madison Judge John Marshal found an extra-legal "gap". However, it does not undermine the constitutional system of the US for two reasons: (1) although while discussing a modern constitution, that scholarly work is the very model and limit, the criteria suggested by Professor Grimm is not an axiom and conceptually the existence of a different opinion is possible; (2) the emergence of constitutional review could be justified by a different systematic argument - based on the doctrine of "spontaneous order".

According to an epistemological argument of Friedrich Hayek, "knowledge is distributed in a society, whereas the legal norm needs to be general in order to guarantee an individual an opportunity to determine life."[10]

Hayek does not only apply the idea of "distributed knowledge" the requirement of being "general", but links it with the idea of spontaneous order and considers the judges to be such

[7] G Fernandes, 'Comparative Constitutional Law: Judicial Review', University of Pennsylvania Journal of Constitutional Law, p. 979.
[8] The US Supreme Court case *Marbury v. Madison*, N137, "Marbury v. Madison", 1803.
[9] S Armstrong, 'Consequentialism', Stanford Encyclopedia of Philosophy, 2015.
[10] F Hayek, *Law, Commands and Order* (Routledge & Kegane, 2010) 218.

an institution of spontaneous order. According to his arguments, factual circumstances are ever-evolving, and a lawmaker is unable to define a particular norm that would rightly and legally apply to every situation. Under those circumstances, a judge has a function of a "stabilizing" power, i.e. a function of realizing the spontaneous order. According to Hayek, a judge is not a public servant or a supervisor, who oversees the execution of legal norms, but the primary function is to focus on spontaneous order and exercise the principles that underlie this norm.[11] According to this perspective, a legal norm is not a prerequisite that leads to a court decision because it lacks the established precedential "*Ratio Decidendi*".[12] While developing *Ratio Decidendi*, a judge becomes a lawmaker, or, at least a law perfector. We can assume that it was the case in the decision delivered by Judge John Marshall.

In a centralized constitutional review, justification of this instrument by indirect or far-reaching arguments is not necessary. Establishment of such institution is inherently related to an explicit (generally, written) will of a political power, that assigns an exclusive constitutional space for the court and hence, aside from the third criterion, the first criterion is also present: *The constitution is a set of legal norms, not a philosophical construct. The norms emanate from a political decision.*

On the other hand, for the justification of the US decentralized constitutional review model, it is more appropriate to represent the constitution as a "philosophical construct", rather than just as "a set of legal norms". As it has been noted above, none of the legal norms indicated to the institute of constitutional review.

## 4. *ERGA OMNES* EFFECT AND A NEGATIVE LEGISLATOR

In a centralized model of constitutional review, constitutional courts enjoy a monopoly over the ultimate interpretation of the constitution. Here, the *erga omnes* effect implies that a decision is final and binding within the entire legal system.[13] Kelsen, who is regarded as a founder of centralized model of constitutional review, rightly referred to this institution as a "negative legislator". *Erga omnes* effect constitutes a guarantee of the legitimacy of the constitutional court's "surgical interference". Constitutional review which is allowed by the constitution, and is at the same time final and binding, is also a legal act, superior within the hierarchy of legal norms, given that such a review is the reason why the constitution becomes a "living instrument". Institutional regulation of this sort fully meets the third criterion of a "modern constitution" model, elaborated by Professor Grimm, - "the constitutional regulation is comprehensive" – constitutional interpretation is also a form of constitutional regulation, which characterizes not only centralized, but also decentralized models [of constitutional review]. It is undeniable, that in decentralized models of constitutional review, the act of conducting concrete review by a judge, interpretation of the constitution represents a

[11] Hayek (n 10) 95.
[12] D Lambert, 'Ratio Decidendi' (Kentucky State Law Review, 1963) 689.
[13] GF Andrade, 'Judicial Review' (University of Pennsylvania Journal of Constitutional Law, 2011) 980.

declared form of constitutional regulation. This is due to the fact that it is binding upon the parties to the dispute; however, it does not amount to a "comprehensive regulation". Although it can be given the effect of a "comprehensive regulation" by the doctrine of case-law, this would be a unity of numerous acts, as opposed the constitutional interpretation, as a legal norm. Hence, in decentralized modes, "surgical intervention" is not to be deemed as a matter of comprehensive regulation, because "surgical interventions" of this sort are necessary to be conducted irreversibly, in order to preserve the uniform standards. This points towards the fragility of the system, and to the necessity of its constant "artificial" preservation.

Kelsen has also rightly foreseen that considering natural rights in the process of judicial review would turn a constitutional court into the "positive legislator".[14] This can be demonstrated by an example of the 1975 decision of the Constitutional Court of Germany.[15] This decision indicated not only that the laws favoring liberalization of abortion laws were unconstitutional (negative legislation), but it also referred to certain legislative actions, which were needed to be taken in order to regulate this action in a manner compatible with the requirements of the Constitution: "As a last resort, if the constitutional right to life cannot be protected by other means, the legislature is obliged to protect the right to the development of life by the means of criminal law".[16]

Many scholars support the view that using the jurisdiction of bodies conducting constitutional review in either a positive or a negative manner would amount to the violation of the principle of separation of powers. The principle of separation of powers is an immanent attribute of the rule of law, while the rule of law, in its turn, is a cornerstone of modern constitutions. Therefore, following questions might arise: whether a chain of actions has occurred; whether using constitutional review in a manner of negative/positive legislation is in breach of the requirements of modern constitution.

The doctrine of separation of powers has two primary grounds: (1) functional specialization; and (2) mechanisms of restraint and balancing.[17] As noted in previous chapters, bodies conducting constitutional review can be perceived as "stabilizing" institutions. They are fixing a natural dissonance, arising from the projection of political power in the legal sphere. Besides, it would not be exactly correct to assume that constitutional courts are only interfering with the legislature's autonomy, since the power of lawmaking might as well be delegated to the executive branch (bylaws). Hence, a presumption might be that constitutional courts interfere not only within the autonomy of the legislature, but also within that of the executive branch; can such a presumption be reasonably justified? Certainly not: violation of the requirement of functional specialization does not amount *a priori* to derivation from the principle of separation of powers. Functional overlaps among different branches and institutions

[14] A Stone Sweet, *Constitutional Courts* (New York, 2010) 6.
[15] Federal Constitutional Court of Germany, N39, 'Does the reformed abortion statute violate the right to life of life developing in the mother's womb?' 1975.
[16] ibid, Chapt. 3, para. 2.
[17] JS Martinez, Horizontal Structuring, Oxford Handbook of Comparative Constitutional Law (2012) 547-575.

are necessary, in order for the restraining and balancing mechanisms to be implemented in the system. The efficiency of restraining and balancing mechanisms does not mean that the branches of government should be isolated from one another; rather, - it means that, whenever necessary, they should overlap with each other to ensure the proper functioning of the entire system. Accordingly, constitutional review does not represent the delimitation of the doctrine of separation of powers, but – rather its realization. At this stage, the nature of the arguments presented in this paper render it necessary to consider these questions, which I will try to answer in the following chapter: under which status does the constitutional court have "stabilizing" functions? Does it represent any of the branches of government? What happens in cases of decentralized models? Is it possible to conduct constitutional review in a purely legal dimension?

## 5. THE STATUS OF CONSTITUTIONAL REVIEW

According to Professor Stone Sweet, decentralized model of constitutional review is indistinguishable from carrying out regular judicial functions. It implies the subsumption of the norms existing in a legal system, with a reference to factual circumstances and ensures their enforcement.[18] At the same time, a centralized model of constitutional review is defined as a transitional stage between the legal and political dimensions.

Such a definition of decentralized models undermines the aforementioned doctrine of a "spontaneous order" and deliminates the law-making functions of a judge. In addition, it limits the interpretation of a constitution to a narrow category of "skyscraper originalism". "Skyscraper originalism" is one of the methods of constitutional interpretation, according to which constitution is an unfinished product, which envisages the power to amend constitutions to the legislatures only; however, it does not allow constitutional construction by judges, or filling gaps of the system with a new normative content. According to this method of interpretation, a judge cannot say anything new with respect to existing constitutional norms, even in the process of subsumption of factual circumstances.[19]

Today, the "skyscraper originalism" merely bears theoretical categorical functions and is not used in any legal system adhering to constitutional democracy. So called "framework originalism" can be deemed the leading model of constitutional interpretation. According to this model, a constitution can be constructed by a body or a branch conducting constitutional review.[20] Constitutional construction means the perfection of a constitution, and implies the process of making it compatible with the changing circumstances, as well as incorporation of the political will and principles within the legal system. Two instances of constitutional construction are being distinguished: "[1] When the terms of the Constitution are vague or silent on a question and to apply them we must develop doctrines or pass laws to make its

[18] Stone Sweet (n 14) 6.
[19] Jack M. Balkin, *Framework Originalism and the Living Constitution* (Yale Law School Faculty Scholarship Series, 2009) 550.
[20] See German Constitutional Court (n 15).

words concrete or fill in gaps; [2. When it is necessary to] to create laws or build institutions to fulfill constitutional purposes".[21]

This was the case in *Marbury v. Madison*. Justice Marshall has "constructed" the Constitution by its interpretation, which does in no way equate to performance of regular judicial functions, or a subsumption of legal norm and a subsequent syllogistic relation between, on one hand, predicament and, the result, - on the other.

Constitutional construction, its expansion and completion definitely goes beyond the scope of a purely legal frame, and is linked to the projection of a political power by the virtue of its characteristics. A normative constitution (not a nominal or a semantic one)[22] implies the act of organizing political will and public power, and every attempt of constitutional "regulation" inevitably touches upon the political power. Therefore, from the point of view of systemic logic, there are no convincing arguments which would demonstrate that the decentralized model of constitutional review is only limited to ordinary judicial functions in its scope. References to institutions of concrete review do not prove that decentralized models are politically neutral. The latter might formally meet the criteria of regular judicial functions; however, constitutional construction can never be a purely legal action.

On the other hand, there is no ambiguity surrounding the institutional status of centralized models of constitutional review: constitutions do create political legal spheres for their functioning.

While interpretation of the constitution is uniformly binding in centralized models of constitutional review, there is much ambiguity with respect to interpretation of the constitution by the courts of lower instances as to the substance of a given constitutional norm when it comes to decentralized models, – federal Supreme Courts can affect the validity of the lower courts' argumentation. Hence, decentralized models of constitutional review do not fill the "gaps" in a legal system, but rather periodically create even more empty spaces. Such kind of an institutionalized systematic interruption is not to be deemed compatible with the aforesaid characteristics of a modern constitution.

## 6. INDIVIDUAL COMPLAINT

In the majority of decentralized models of constitutional review, the basis for determining the issue of a provision's compatibility with the constitution is an individual complaint (limited or full). While some systems allow *actio popularis*,[23] in others it is for the applicant to argue that a disputed provision is infringing or will infringe upon his or her constitutional right(s). This possibility reflects the nature of modern public administration and meets Pro-

[21] Balkin (n 19) 560.
[22] Grimm (n 3) 107.
[23] Stone Sweet (n 14) 15.

fessor Grimm's fifth criterion: *the legitimate source of power for the constitution is the people.*

Clearly, the paradigm of popular legitimacy is much broader than solely constitutional review; however, as noted above, the purpose of this paper is to provide a systematized picture of the issues related to constitutional review.

In the first chapter, we referred to Professor Grimm's opinion, that modern constitutions have made the law more reflective. The phrase - "emanates from the people and addresses the government," - refers to the results deriving from the implementation of direct democracy. However, results stemming from individual constitutional complaint can be put into a different, third category. The applicant is directly participating in the construction of the constitution, - she or he provides arguments, demonstrates the normative content of a specific norm, which was hardly noticeable before and this process is followed by a uniformly binding decision of the Constitutional Court. Nevertheless, in a number of systems, it is only the ruling section, that has a binding nature, as opposed to the reasoning. In effect, constitutional courts are trying to follow the standards enshrined in reasoning sections.[24] Hence in most cases, applicants contribute to the process of constitutional construction, regardless of whether their claim is upheld.

## 7. CONCLUSION

In normative reality, all types of institutional development are based on the inductive method of systemic reasoning, which refers to the process of drawing generalized conclusions from previous experience, *i.e.* separate events, as well as standardization of a scale of the events' value. In contrast to a decentralized model, creation and development of a centralized model resulted from a long process of reflection and that of learning on institutional mistakes. A social construction cannot be deemed perfect merely due to the fact that it does not bring upon negative consequences in a socio-political sphere; in order for it to be complete, it is necessary that the issues considered therein meet the criteria of semantic exactitude, as well as their relation with deontological reality. In the last century, the pathos of defending fundamental human rights was a reaction to the projection of tyrannical political power. From the perspective of modern constitutions, in terms of systemic-semantic realization of this pathos, centralized model of constitutional review constitutes a better operating mechanism.

[24] This derives from an attempt to preserve foreseeability and institutional authority of the court. A practical example is provided in Article $21^1$ of the Law of Georgia "On the Constitutional Court of Georgia", which sets forth a high standard for changing the position of the Court by subjecting a case to a review by the Plenum.