ABSTRACT

JUDGE-MADE LAW

COMPARISON BETWEEN THE COURT OF JUSTICE OF THE EUROPEAN UNION AND THE SUPREME COURT OF THE UNITED STATES

Keywords: judge-made law; the European Union; the Court of Justice of the European Union; the Supreme Court of the United States; judicialization of governance; Kelsenian court; European constitutional space; European constitution; normativity; constitutional pluralism; sovereignty; federalism; post-communist states; new Member States of the European Union.

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The Ph.D. thesis offers a complex reconceptualization of the constitutional system in the European Union. The constitutional systems of the Member States have been substantially transformed during the 20th century. Meanwhile a new constitutional system functioning in the Member States alongside their own systems has emerged – the constitutional system of the European Union. These two fundamental changes are difficult to grasp through an existing theoretical framework. That is because the framework is based on a set of outdated concepts: (i) Rousseau's concept of *volonté générale* that forms the basis of the parliamentary supremacy in a constitutional system; (ii) Montesquieu's theory of three separate powers (legislative, executive, and judicial) that is on the one hand unable to deal with new phenomena such as bureaucracy and independent agencies, and on the other hand to grasp a possibility of checks and balances within the individual powers; (iii) Westphalian national state paradigm characterized by sovereignty, which does not tolerate plurality of authorities both within the system and in external relations; (iv) hierarchically built legal order, which prevents coexistence of autonomous norms; (v) legalistic view of law, where law is to be found only in written, officially promulgated sources of law, which were adopted by a legislator (law in books); and (vi) understanding the role of courts as independent institutions of conflict solving (and occasionally endowed with

other tasks) that merely applies the law as contained in the books using established methods of interpretation to reach the *only* right decision.

To be sure, such theoretical framework has been subjected to fragmentary changes. However, such changes face the limits posed by other parts of the theoretical framework, which is rather holistic with all parts being interconnected and mutually supportive. For this reason, the theoretical framework has to be refuted at once and a new framework that would reflect the transformation of the constitutional systems in Europe needs to be built up, so that further development of the European constitutional system is possible.

The thesis has two parts. The first part deals with the decline of the French constitutional model caused by increased influence of courts after the constitutional judiciary was established and endowed with concrete constitutionality review alongside with the rapid development of human rights after the Second World War. This process is known as *judicialization* of constitutional systems. It denotes a process, in which parliamentary supremacy and judicial subordination (explicated in the concept of *juge-automate*) has been replaced by structural supremacy of the highest judicial institutions.

Subsequently, we focus on the specific case of the European Union. Its constitutional system was not designed as one of the parliamentary supremacy and so the judicialization occurred in a different way. An analysis of the discourse on the role of the Court of Justice in the European integration revealed that at the onset of 1990s there were two models of the Court's role in the integration process – the Moravcsik-Garrett's liberal intergovernmental model denying autonomous role to the Court of Justice in the integration process, and the Stein-Stone-Sweet's neofunctional model claiming structural supremacy of the Court of Justice both within the European Union constitutional system and in the relationship between the Union and its Member States (that is in the wider area called European constitutional space). During the last twenty years the European constitutional system has profoundly changed and neither of the two models were anymore viable. The constitutional courts of the Member States have formed a powerful counterweight to the Court of Justice. Therefore we must consider a third, synthetic model that stems from the theory of constitutional pluralism. Fundamental principles of the European constitutional system are formulated in a discourse among highest interpreters of the Union and Member States

constitutions; that is in a discourse held among the Court of Justice and Member States constitutional courts.

Based on these observations, we formulate a model that explains the interactions of constitutional practices of the highest judicial institutions of the Union and the Member States in the European constitutional space. Through this interaction a set of fundamental norms regulating the relationship among the constitutional organs as well as between these organs and individuals has been established. The model is theoretically grounded in current positivist theories of law developing further Hart's views on law, which explain how this constitutional practices gain normativity. We may call the set of fundamental norms thus created a *common European constitution*.

The constitutional-pluralist model is compared to the constitutional system of the United States. We observe a similar process of judicialization. The U.S. Constitution originally intended the Congress to be supreme. This supremacy was gradually erased. First, the U.S. Supreme Court under the long tenure of John Marshall established itself as an equal power and later the rise of the Presidency followed. All three institutions claimed to be the supreme interpreter of the U.S. Constitution. A system of institutional or interpretative pluralism thus emerged. Such system is similar in the way it operates to the system of constitutional pluralism established in the European Union. A comparison with the constitutional system in the United States with an emphasis on the role of the U.S. Supreme Court is repeatedly used throughout the thesis in order to identify unique features of the European case. For instance so called doctrines of interposition, which were developed by the Czech Constitutional Court or the Polish Constitutional Tribunal among others, can be found in a very similar wording in the antebellum United States, despite the fact that the U.S. Constitution contains a provision that the federal Constitution and federal laws are the law of the land.

The second part of the thesis analyzes processes that affect courts' interaction after the Eastern Enlargement of the European Union. It inquires into changes at both sides of such interaction – the Court of Justice and its adaptation on the enlargement of the Union externally as well as internally, and the Member States' constitutional courts, where especially an influence of the German Federal Constitutional Court, whose case law laid the bases of the constitutional-pluralist model, is of our interest,

as well as the case law of the Czech Constitutional Court that represents current challenges to the further development of this model.

A role of courts in the formulation of fundamental principles of the common constitution is also analyzed from the viewpoint of democratic legitimacy. Given the paradoxical combination of judicialization of constitutional systems on the one hand and outdated perception of courts by general public in line with the so-called *juge-automate* thesis on the other hand, courts pertain high legitimacy; that is particularly true for constitutional courts. Legitimacy of the European Union is often an object of analysis of the Member States constitutional courts in their case law on the relationship between the EU law and their national legal order. Courts deal with legitimacy in three ways – they participate in a debate on legitimacy and its sources, direct the debate and shape its contents, and finally they are themselves able to generate legitimacy for the European integration project. That is true especially for the new Member States constitutional courts, whose legitimizing role is heightened due to their special position within the constitutional system that they achieved during a period of reconstitutionalization that followed after the fall of the undemocratic regimes. Although the "European" doctrines of these courts are criticized in this thesis for they are grounded in the outdated theoretical framework described above, they reflect an opinion of the general public in the new Member States. The ability of constitutional courts to aggregate via their "European" doctrines these opinions, to communicate them to other constitutional actors in the European constitutional space, and eventually to put them partially through, increases the legitimacy of the European integration and therefore also the legitimacy of the European Union itself.

The last two chapters focus on the case law of the Czech Constitutional Court, which, as a consequence of the outdated theoretical framework described above, shows certain misunderstanding of the nature of Union law. The Constitutional Court must realize that in the Czech republic two legal orders operate, an that these orders are, despite their autonomous grounds, deeply interconnected and creates a dense network of mutual relations. Though the Constitutional Court lacks the jurisdiction towards Union law, which is reserved to the Court of Justice, it cannot abandon one of its two fundamental tasks – to ensure smooth functioning of the constitutional system (besides providing justice by resolving individual cases). While the latter task can be left, within the sphere of Union law, to the Court of Justice (as the standard of

fundamental rights protection in the European Union is comparable to the standard ensured in the Czech Republic), the former task requires the Czech Constitutional Court from time to time to review and adjust the relationship between the two legal orders. The Constitutional Court thus operates "between two legal orders". As the Court of Justice must from time to time adjust the relationship between the Union legal order and the Member States' legal orders, also the Czech Constitutional Court must step in the relationship between the Czech constitutional order and the Union law when a serious (structural) conflict emerges. In order to weight the seriousness of the conflict and find an adequate solution that allows both the Czech Constitutional Court and the Court of Justice to continue fulfilling their tasks, a new doctrine is offered for the Czech Constitutional Court to replace its current one. Call it a relativist doctrine. It contains several filter mechanisms that provide for sufficiently differentiating approach towards conflict resolution between the Union law and the Czech constitutional order. With such an approach the conflict with the Court of Justice can be avoided, while the Czech constitutional provisions receive its *effet utile.*