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Beyond Europe and the United States: The Wide World of Judicial Review*

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A. INTRODUCTION: THE CURIOUS CASE OF BRAZIL AND PORTUGAL

Judicial review of legislation has been exercised in Brazil since the end of the 19th century. The 1891 Constitution established a model of judicial review clearly inspired by the US experience (i.e., a model in which all courts may set aside unconstitutional legislation within a concrete lawsuit). However, since 1965—and especially since 1988—there have also been ways to challenge the constitutionality of enacted legislation directly and abstractly (i.e., not within a concrete lawsuit) before the Brazilian Supreme Court. Thus, in Brazil, concrete and abstract review and centralized and diffused review coexist: however, while concrete review is diffusely exercised by all courts, abstract review is exercised only by the Supreme Court.

Portugal has had a constitutional court since 1982. But, just like the case of the Brazilian Supreme Court, the Portuguese Constitutional Court does not have a monopoly over declaring the unconstitutionality of ordinary legislation. All Portuguese courts may set aside unconstitutional legislation. In a nutshell, in Portugal, concrete and abstract review and centralized and diffused review also coexist: concrete review is diffusely exercised by all courts, abstract review is exercised only by the Constitutional Court.

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Paradoxically, however, Portugal is associated with the European model of judicial review (Ferreres Comella 2004, 463),[1] whereas the Brazilian system is usually classified as initially US-inspired or a hybrid (Rosenn 2000, 317). It is not clear as to why such similar systems have frequently been classified so differently.

The two most plausible explanations for this do not seem methodologically very inspiring. It seems that both the *geographic* location of a court (Europe or elsewhere)

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and its *name* ("supreme" or "constitutional") play a more important role than almost anything else. According to this logic, Portugal belongs to the European model because it is located in Europe and has a court called "Constitutional Court."[2] Brazil belongs to the US model or is a hybrid system because it is not located in Europe and its court is called "Supreme Court.".

In this chapter, I will argue that the curious example of Portugal and Brazil is not an exception. The classification of courts and of models of judicial review is still based on the dichotomy between the United States and Europe, as if we were still in the 1920s, after the creation of the Austrian Constitutional Court.[3] Although the dualism of the two models is widespread and rarely called into question (especially in the United States and in Europe), it nevertheless represents a very crude simplification; it is unable to accurately describe the majority of systems of judicial review of legislation in the world, and this holds true for at least two compelling reasons. First, because even if one limits the scope of the typology to the two questions presented above, many countries (including several European ones) simply do not follow such clear divisions between only one or all courts and between abstract or concrete review. Second, because a typology of constitutional and supreme courts need not be based solely on these two oppositions.

1 *See also* Stone Sweet (2003, 2766): "Kelsen's legacy was secured when constitutional reformers in Spain, Portugal, and post-Communist Europe all rejected American judicial review and adopted Kelsenian courts."; Gardbaum (2001, 714–5): Portugal adopted "the essentials of the polar opposite American model"; Ferejohn (2002, 49–50): "Other countries that have adopted constitutional review have taken great pains to exclude ordinary judges from having any part in it. This was true . . . in Spain and Portugal after the collapse of their authoritarian governments.".

2 It should be noted, however, that Portuguese scholars usually classify their own system as hybrid or complex (see, for instance, Canotilho 1998, 809). The excerpts quoted above in n.1 thus fall short of identifying the existence of a diffuse and concrete judicial review in Portugal. This is actually the Portuguese tradition in this realm, which began in the first half of the 20th century clearly influenced by the Brazilian model established in 1891. In this sense, see, for instance, Queiroz (2009, 291).

3 As a matter of fact, and as will be shown below, this dichotomy was already inaccurate in the 1920s, since much before Kelsen "invented" the European model, there had already been abstract review of legislation in other countries, such as Venezuela, Colombia, Haiti and Cuba. *See, e.g.*, Grant (1954).

In order to justify this line of reasoning, this chapter is organized as follows. I will first describe the contrast between the US and European models. Subsequently, I will present a critique of this dualism based on the two reasons I presented above. Then, in order to show that the world of judicial review is too complex to be grasped by the traditional classification, I will briefly present several variables that are ignored by this classification in order to argue that they may be at least as important as the variables usually taken into account. However, I do not claim that a sound typology must always take every imaginable variable into consideration; hence, I will also digress briefly into typology building in order to avoid some misunderstandings on this matter. I then conclude by arguing, among other things, that it is time to decisively abandon the labels "US model" and "European model."

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B. THE US AND EUROPEAN MODELS

The concept of judicial review of legislation is usually considered to have two fathers. The first is John Marshall, the fourth Chief Justice of the US Supreme Court, who in the decision *Marbury v. Madison*[4] laid down the main arguments that until now have been widely accepted as foundations for the power that courts should have to set aside ordinary legislation considered incompatible with the constitution. The second father is Hans Kelsen (see Kelsen 1929; Kelsen 1949), who was the author of one of the drafts for the 1920 Austrian Constitution[5] and later justice a judge on the newly created Constitutional Court of Austria.

This does not mean that the idea of judicial review of legislation did not exist before Marshall, nor does it mean that Kelsen was the first person to advocate creating a constitutional court, nor that the Constitutional Court of Austria was the first concrete experience of centralized review. In the United States, Alexander Hamilton had already advanced arguments in favor of some type of judicial review.[6] In Europe, the Austrian Constitution was not even the first providing for

4 5 U.S. 137 (1803).

5 On Kelsen's role in the drafting of the Austrian Constitution, see Paulson (2000) and Bongiovanni (2007). According to Paulson, Kelsen's suggestions were accepted "without exceptions," at least concerning the Constitutional Court.

6 *See* Hamilton, Madison, and Jay (1787, LXXVIII [Hamilton]): "It is far more rational to suppose, that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable

creating a constitutional court: the Constitution of Czechoslovakia had already done it some months before. Kelsen himself always declared that he was inspired by Georg Jellinek, who published a small book in the 19th Century—not very well known today—called *A Constitutional Court for Austria* (Jellinek 1885).[7] And almost a hundred years before Jellinek, Emmanuel Joseph Sieyès had already (unsuccessfully) argued for the creation of a kind of constitutional court—the *Jury Constitutionnaire*—during the French constituent assembly of 1795 (see Sieyès 2007; see also Burdeau 1969, 408–10; Bastid 1939, 416, 597). However, irrespective of these, and any other forerunners, what remained and inspired the introduction of judicial review of legislation in many jurisdictions were the ideas of Marshall and Kelsen.

The contrast between the US and European model of judicial review is not only—and not even mainly—based on organizational aspects of courts. What underlies the dichotomy above all is the way in which judicial review of legislation is performed in these jurisdictions. As already mentioned above, it is based on the answer to two questions: *who* may declare the unconstitutionality of ordinary legislation and in which

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context? The US model is grounded on the following answers: all courts (who) within a concrete lawsuit (context). In contrast, the European model is based on the following answers: only the constitutional court (who) and independent of a concrete judicial case (context).

This does not mean that there are no organizational differences between the US Supreme Court and constitutional courts in many European countries. Maybe the most important difference lies in the fact that the US Supreme Court is the apex court in its jurisdiction, whereas constitutional courts in some other countries—even when considered part of the judiciary branch—are specialized courts that do not belong to the ordinary system of justice. In other words, constitutional courts have always been served to perform a very specific task: judicial review of legislation, usually called constitutional review of legislation.[8] In contrast, supreme courts were

variance between the two, 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 agents."

7 On this subject, see also Noll (2000, 261) and Eisenmann (1928, 157).

8 For a slightly different use of these expressions, see Stone Sweet (2003, 2745). According to his use of these terms, *constitutional review* "refers to the authority of any governmental institution to declare statutes . . . unconstitutional." Therefore, *judicial review* should be considered "one mode of constitutional review, that

created in many countries even before the idea of judicial review of legislation was even introduced.

1. United States

The US Supreme Court is the paradigmatic example. Article III of the US Constitution defines the organization of the judicial power and provided for the creation of a supreme court.[9] Apart from some exceptional cases in which the US Supreme Court has original jurisdiction, the Court is mainly thought of as the ultimate *appellate* court of the country. Judicial review of legislation is not explicitly provided in the US Constitution. As is widely known, it was not until *Marbury v Madison*, discussed above, that the US Supreme Court decided that courts have the power to set aside legislation deemed incompatible with the constitution. According to this decision, "[t]hose who apply the rule to particular cases must, of necessity, expound and interpret that rule. If two laws conflict with each other, the Courts must decide on the operation of each."[10] Since "an act of the Legislature repugnant to the Constitution is void," it cannot bind the courts, which must disregard the ordinary law.[11] This power is shared by all judges and courts, and the Supreme Court exercises its function as the final arbiter of constitutionality.

The most important features of the US model are thus: (1) the US Supreme Court is the ultimate appellate court; (2) its appellate jurisdiction includes judicial review of legislation; (3) the constitutionality or unconstitutionality of a given statute is decided within a particular case;[12] and (4) the power to set aside legislation is shared by all judges and courts.

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2. Europe

In Europe, there are countries with supreme courts similar to the US Supreme Court. Judicial review of legislation has been performed, for instance, by the Norwegian Supreme Court since at least 1866. Further, there are supreme courts that analyze the constitutionality of ordinary legislation but have no power to declare it void, like the Supreme Court of the United Kingdom. Others have no power whatsoever to analyze

which is exercised by the judiciary in the course of processing litigation."

9 U.S. CONST. art. 3.

10 5 U.S. 137, 177.

11 *Id.*

12 Stone Sweet and Shapiro, however, claim that abstract review is also exercised in the United States (Stone Sweet and Shapiro 2002).

constitutional questions, like the Supreme Court of the Netherlands. Finally, there are countries where constitutional questions are decided mainly outside the judiciary, like France. However, it is true that the many European countries have eventually followed the Austrian example and, in the course of the 20th century, created a constitutional court and—at least to some extent—adopted an abstract and centralized review.

Even so, speaking of a European model is a simplification. Even if one focuses only on those countries that do have a constitutional court, the differences among them are glaring. Nevertheless, references to a general European model of constitutional review of legislation abound. When one refers to such a model, one has in mind above all else two features: centralization and abstract review (see, e.g., Ferreres Comella 2004, 463).

The most important features of the European model are thus: (1) constitutional courts have original jurisdiction and monopoly over the declaration of unconstitutionality of ordinary legislation; (2) deciding the constitutionality or unconstitutionality of a given statute in the abstract.

C. EXPANDING THE HORIZONS

As stressed above, speaking of a European model of judicial (or constitutional) review of legislation is a simplification. Not only because there are minor variations in the organisation of European constitutional courts or because review of legislation may be slightly less decentralised or slightly less abstract in some countries, but because the dichotomies centralisation x decentralisation and abstract x concrete review are not able to explain what characterizes the practice of constitutional review of legislation in many countries.

In addition to Portugal (mentioned above), the characterization of the European model of constitutional review as centralized and abstract also leads some authors to include France in this model (see Ferreres Comella 2009 and 2004, 462). Until the constitutional reform of 2008, the French Constitutional Council had a monopoly over striking down ordinary legislation and its decisions were (and still are) taken in the abstract. However, there are several reasons not to include the French experience under the label of the

"European model." These reasons will be analyzed below. Here it suffices to point out that the French Constitutional Council is not a court,[13] does not have judges (many of its members do not even have a law degree),

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barely justifies its decisions in articulated legal terms and decides upon the constitutionality of a given statute before its promulgation. Thus, it does not make much sense to consider the French Constitutional Council as belonging to the same category as, say, the Federal Constitutional Court of Germany simply because both have (or used to have) a monopoly over striking down ordinary legislation (centralization) and because both decide in the abstract.[14]

Perhaps the most important argument for looking beyond the US vs. European model dualism is the fact that the majority of constitutional democracies follow neither of them. It is therefore a mistake—or a vestige of colonialism—to try to explain every constitutional system in the world through US or European eyes. As demonstrated above, the European model is not even able to explain the review of legislation in the European countries, not to mention countries outside Europe.

I do not intend to deny that the experiences of US and Europe (especially Germany's model of judicial review) inspired the creation of similar courts all over the world. But this fact is not enough to justify reducing the myriad of experiences of other countries to these two cases.

Two main arguments may be advanced to justify looking beyond these two traditional models. The first is the fact that, even if one limits the analysis of supreme and constitutional courts to the two features presented in the beginning of this text—which may

[13] Some authors have classified the French Constitutional Council as a political institution—almost a third legislative body. *See, e.g.*, Stone (1992, 108–10, 209) and Avril and Gicquel (2005, 139): "[T]he review . . . is not a legal dispute, but an 'additional reading of the law.'". See, however, in a different sense, Favoreu (1988, 109, 138) and Vedel (1989).

[14] As a matter of fact, while the German Constitutional Court was created precisely with the goal of introducing a judicial review of legislation, the creation of the French Constitutional Council had precisely the opposite goal. As Dominique Rousseau argues, the creation of the French Constitutional Council was the association of two goals: a *positive* one—to check the parliament—and a *negative* one—to avoid the introduction of a truly judicial review of legislation. *See* Rousseau (1999, 24, 27).

be summed up by the dichotomies between decentralization/centralization and concrete/abstract review—it turns out that, as already mentioned, many countries do not clearly follow either the US or European models, especially because many countries simultaneously have both decentralized and centralized as well as concrete and abstract review.

The second reason for going further is the fact that, if one only considers these two features, many relevant characteristics that strongly define the meaning of judicial review of legislation in each constitutional system are simply ignored. For example, as mentioned above, the French and the German experiences are completely different, although both countries have constitutional review of legislation that is (or used to be) centralized and abstract. argue below that a series of additional factors should also be taken into consideration.

1. Two Variables, But More Than Two Combinations

A concrete/abstract binary classification of judicial review can have three categories: either the review is (1) performed within a concrete judicial controversy, (2) is done in the abstract or (3) both. In contrast, it could be argued that a classification of judicial review based on the dichotomy between centralization and decentralization can have only two categories. If the question to be answered is, "is there an institution which has a monopoly over declaring the unconstitutionality of ordinary legislation?" then the possible answers may only be "yes" or "no." In other words, either there is an

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institution with such a monopoly—and thus judicial review of legislation is centralized—or there is no such institution and the system is decentralized.

But institutional design tends to be a complex matter. A third path is not only possible, it is indeed the case of many jurisdictions in which centralization and decentralization (as well as concrete and abstract review) coexist.[15] In Latin America, for

[15] John Ferejohn, for instance, seems to assume that both possibilities (centralization and decentralization) are mutually exclusive when he argues that "[t]he United States is virtually unique in having judicial review, if judicial review means a system in which ordinary judges can review and strike down legislation" (Ferejohn

instance, many countries adopt systems that combine these four features. This is the case in Brazil, already mentioned in the introduction. In these countries, although no institution has a monopoly over declaring the unconstitutionality of ordinary legislation, since every court and every judge may do so within an actual judicial controversy, there is nevertheless an institution with original (i.e., not appellate) jurisdiction for reviewing legislation in the abstract. This institution—a supreme or constitutional court—has thus a monopoly over abstract review.

In a nutshell, it can be said that in these countries there is a centralized abstract review as well as a decentralized concrete review. Trying to classify these models as either US or European is thus pointless. As Navia and Ríos-Figueroa argue, "innovations tried in Latin America test the limits of any previously existing categorization" (Navia and Ríos-Figueroa 2005, 191).[16] And it also makes no sense to label them as mixed or hybrid, because this label seems to assume, deliberately or not, that everything that does not follow the US or the European models is simply a mixture of both, not a model on its own.[17] This assumption—deliberately or not, colonialist or not—stems from the fact that too few variables are taken into account in the definition of these two, supposedly ideal types of courts.[18]

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2002, 49). However, as the examples of Brazil and Portugal (and many others) show, systems in which ordinary judges can review and strike down legislation are actually quite common. This feature may simply be not readily noticed from outside when, in the same system, statutes may also be challenged directly before a constitutional or supreme court.

16 They argue further: "Because Latin American countries have been very creative in the way their constitutional adjudication systems have evolved, researchers must avoid gross generalizations when they study the advantages, constraints, and challenges faced by Latin American constitutional adjudication systems" (Navia and Ríos-Figueroa 2005, 213). In the same sense, see Frosini and Pegoraro (2009) and Fernández Segado (2004, 496). For a detailed account of all Latin American courts, see Ferrer Mac-Gregor (2009).

17 *See* Brewer-Carías (2006, 442), who suggests that this type of system should be called the "Latin American model of judicial review".

18 To be sure, there are several authors who pay attention to more variables than those summed up by the two dichotomies mentioned here (abstract-concrete, centralized-decentralized). Interestingly enough, these authors are usually political scientists rather than legal scholars. See, for instance, Epstein and Knight (2004). Among legal scholars, see for instance Ginsburg (2003, 34–53).

2. Further Variables

If one adds more variables into the classification of courts and judicial review of legislation, the shortcomings of the binary classification become immediately apparent. In the following sections I will analyze only the most important of these variables: (a) timing, (b) appointment of judges, (c) composition of the bench, (d) term, (e) access to the court, (f) deliberation and decision-making process and (g) effects of court decisions.[19]

i. Timing

The most obvious, and indeed frequently mentioned, variable is timing. Besides answering the "who" and "in which context" questions, it could be argued that the 'when' question also be taken into account. The constitutionality of ordinary legislation may be challenged either before or after a given statute is promulgated. Although review of legislation usually occurs after promulgation, some countries admit preventive control. The most well-known system of preventive control is that performed by the French Constitutional Council (although there are other European countries that also incorporate it, like Portugal, Poland and Romania, as well as several Latin American countries, like Chile and Costa Rica, and African countries, like Algeria and Morocco). Until 2008, ordinary legislation in France could only be declared unconstitutional before its promulgation. This fact—in addition to those previously mentioned—makes it impossible to include France as part of the so-called European model.[20]

ii. Appointment of Judges

Appointment of judges to supreme and constitutional courts may follow a variety of different procedures. However, despite this diversity, a common feature is almost always

[19] Some of these variables are rather related to the dichotomy between supreme and constitutional courts. Still, since the contrast between US and European models of judicial review to a great extent assumes this dichotomy, it is adequate to analyze these variables here.

[20] Ginsburg and Versteeg argue that, after the constitutional reform of 2008, "the version of constitutional review in France has evolved to become much closer to the German variant," because the French system includes post-promulgation as well as pre-promulgation review (Ginsburg and Versteeg 2014, 592). In light of what has been argued throughout this text, Ginsburg and Versteeg's reasoning is unsound. The German and French models have always had almost nothing in common. The introduction of post-promulgation review does not change this diagnosis, especially if one bears in mind that the post-promulgation review in French is not exercised by the Constitutional Council, but by ordinary judges (unlike the case in Germany, where ordinary judges are not allowed to perform judicial review).

present: unlike the selection of judges in lower courts, the appointment of judges to supreme and constitutional courts generally entails a political element, especially because the political branches—legislative and executive—are usually key players in this selection process.

Members of the US Supreme Court are appointed by the president after confirmation by the Senate. This process has been reproduced in several Latin American countries, but almost all of them eventually abandoned it (with exceptions such as Argentina and Brazil). In

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some European countries, judges of constitutional courts are appointed by the legislative branch (like the Federal Constitutional Court of Germany and the Constitutional Court of Croatia, for instance). This model is also adopted by some supreme courts (like the Supreme Court of Justice of Costa Rica and the Supreme Court of Uruguay).

The appointment of judges to a given supreme or constitutional court may also be conducted by different persons or institutions. For example, there are courts whose members are selected partly by the legislative branch, partly by the executive branch, partly by the court itself, other courts or by other institutions (like the Constitutional Court of Indonesia, the Constitutional Court of Italy, the Constitutional Court of Chile and the Constitutional Court of Angola). Additionally, there are courts whose members are selected by commissions especially designed for this task, which are usually composed of members from different institutions (like the Supreme Court of Israel and the Supreme Court of the United Kingdom). Finally, there is at least one constitutional court whose members are elected by universal suffrage, namely the Plurinational Constitutional Tribunal of Bolivia.

With few exceptions, when the nomination of a judge has to be confirmed by the legislature, a qualified majority—usually two-thirds—is required. The most well-known exception is surely the United States: confirmation of justices within the Senate requires only an ordinary majority.

iii. Composition of the Bench

Judges in constitutional and supreme courts usually have a law degree (the French Constitutional Council is again the most notable exception,[21] as already mentioned above).[22] However, one should not assume that the profile of these courts are similar simply because their members have a legal background. A further important variable must be taken into account. Some courts—especially supreme courts—usually recruit their members from a pool of lower court judges. The US Supreme Court is maybe the

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best example. Constitutional courts, in contrast, are usually composed of members coming from different legal professions: judges from lower courts, lawyers, state attorneys, university professors, politicians with law degrees, among others.

But a sharp distinction between US and European courts is not possible when it comes to composition of the bench, since there are many courts traditionally categorized as US model courts whose composition are as diversified as most constitutional courts.

iv. Term

Judges in the US Supreme Court have life tenure. This feature is found in almost no other supreme court in the world. In Latin America, for instance, where the US model was very influential, it was lastly abandoned in Argentina.[23] Almost all supreme and

[21] Ginsburg and Versteeg try to mitigate this fact by arguing that "the majority of the members of the Conseil have judicial or legal experience' and that 'only one of the 11 current members, Jacques Barrot, lacks any prior legal experience" (Ginsburg and Versteeg 2014, 602). However, the simple fact that it is not necessary to have legal experience is enough to mitigate the supposed similarities between the composition of the French Council and that of other European courts. Additionally, the "only one non-jurist among ten jurists" argument is context-dependent. Ginsburg and Versteeg wrote in 2014—only two years later, the scenario is quite different. In September 2016, of the ten members, three have no legal background. And among those who have some kind of legal background, some have no law degree (a good example is Claire Bazy Maleurie, who actually studied Russian, but has a *maîtrise* in law). But much more important, even among those who have some kind of legal background or even a law degree, almost no one had a legal career before having been appointed to the Constitutional Council.

[22] The case of the Constitutional Court of Thailand is even more interesting than the case of the French Constitutional Council. As mentioned in the preceding footnote, the presence and the number of members without a legal background in the French Council vary from year to year. In the case of Thailand, Section 204(1)(4) of the Constitution itself that provides that two of the nine justices of the Constitutional Court must be "qualified persons in political science, public administration, or other social sciences with thorough knowledge and expertise in public administration." For more details on the judicial system of Thailand, see Satayanurug and Nakornin (2014).

constitutional courts have judges that serve for fixed terms, usually between eight and twelve years. In some courts, justices enjoy renewable terms (like in the Constitutional Court of South Korea and in the Constitutional Court of the Czech Republic). Some courts, like the Brazilian Supreme Court, the Supreme Court of India, the Supreme Court of Canada and the Supreme Court of Japan adopt a third, intermediate approach: mandatory retirement. Judges in these courts have no fixed term, but must retire when they reach a given age.

v. Access to the Court

In countries where all courts may set aside ordinary legislation incompatible with the constitution, the question of who can bring about constitutional challenges before the court (standing) does not seem to be relevant. Since constitutional disputes may arise within any concrete case, it is possible to assume that anyone involved in a case before a court may challenge the constitutionality of a given statute.

In contrast, in those countries where there is a specialized court with a monopoly over the declaration of unconstitutionality of ordinary legislation—as well as in those countries without such a court but where there is nevertheless a higher court which decides constitutional questions in the abstract—a relevant issue is the decision of who may file constitutional questions before the court. This question has possibly as many answers as the number of countries with abstract review. It may be only one person or institution, but it is usually a mixture of governmental and non-governmental actors and sometimes individual citizens. Additionally, judges themselves may be important actors who initiate constitutional questions before constitutional and supreme courts, especially in those countries where these courts have a monopoly over the declaration of unconstitutionality of ordinary legislation. In such countries (Austria and Germany are perhaps the most well-know

[23] Actually, life tenure had already been mitigated in Argentina by a constitutional revision in 1994, but this change was challenged before the Supreme Court by Carlos Fayt, a member of the Court appointed before the constitutional revision. The court firstly declared the constitutional amendment void, thus maintaining life tenure for its justices (see *Fayt, Carlos Santiago v. Estado Nacional* [1999]). However, the court overruled this decision in March 2017 (see *Schiffrin, Leopoldo Héctor v. Poder Ejecutivo Nacional* [2017]).

examples), when a judge believes that a certain statute, applicable to a concrete case, is unconstitutional, she must refer a constitutional question to the constitutional court.

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vi. Deliberation and Decision-Making Process

Courts decide cases and controversies. This is their most important task. And yet, typologies of courts and of judicial review almost never take into account how courts deliberate and decide.[24] Judges may deliberate behind closed doors, in front of an audience or live on TV. Courts may decide *seriatim* (through the aggregation of the opinions of each judge) or *per curiam* (through only one institutional decision). Concurring and dissenting opinions may be allowed or not.

In this realm, the contrast between common law and civil law traditions tends to explain more than the contrast between the US and European models. Courts of several common law countries adopt the *seriatim* model. By contrast, courts in civil law countries usually decide *per curiam*, typically after secret deliberation. Concurring and dissenting opinions are thus usual in common law courts and rarer, or even forbidden, in courts of civil law countries.

However, because supreme and constitutional courts of countries of civil law tradition —especially outside Europe—may have been created for different reasons, in different contexts and inspired by different ideals, it is not rare that these courts follow the common law practices of deliberation and decision-making. Therefore, many countries, especially in Latin America (although belonging to the civil law tradition), have—or have had—courts that adopt deliberation and decision-making processes typically from common law courts: *seriatim*, with concurring and dissenting opinions and not behind closed doors.

The deliberation and decision-making process in the French Constitutional Council is again an exception. Even if its members engage in some form of deliberation, the fact that

[24] Among those whose do emphasize the importance of the deliberation processes see, for instance, Ferejohn and Pasquino (2002), Lasser (2004) and Mendes (2013). *See also* da Silva (2013b).

they have only one month to decide (a period sometimes even reduced to only eight days[25]) indicates that the discussion that takes place within the Council is different from the deliberation that takes place in supreme and constitutional courts: it does not aim to produce a decision with a robust legal reasoning. Its short decisions can hardly be compared with decisions from other courts.[26]

vii. Effects

The role of a court that exercises judicial review of legislation may be strongly determined by the effects of its decisions. It is possible to subsume a wide variety of variables under the category of "effects." Traditionally, effects have been understood both as "the moment from which the declaration of unconstitutionality is effective" (*ex tunc/ex nunc*) and "the extent of these effects" (*erga omnes/inter partes*). Lately, however, other dimensions also fall under "effects," such as: the degree of binding force of a court's decision upon the legislative branch, described by some scholars "strong" or "weak" judicial review (see Tushnet 2003 and Sinnott-Armstrong 2003); the nature of governmental action that is demanded by the court's decision (positive/negative); and

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whether the court monitors or not the implementation of its decision, especially in the field of socioeconomic rights.[27]

In this realm, the European and US model dichotomy can point to some tendencies at most, but does not explain much. Although it is true, for instance, that decisions of constitutional courts usually have general effects, this is not necessarily so. The decisions of the Constitutional Court of Luxembourg, for instance, only bind the judges who raise the constitutional questions at issue. On the other hand, even if the decisions of the US

[25] See FRENCH CONST. art. 61 as well as Article 25 of the rules of procedure of the French Constitutional Council.

[26] It is thus not easy to understand what Ginsburg and Versteeg (2014, 602) have in mind when they argue that the French Council "uses court-like procedures."

[27] *See* Colombian Constitutional Court, Decision T-025 of 2004. *See also* Rodríguez Garavito and Rodríguez Franco (2015).

Supreme Court are directly applicable only to the concrete cases brought before the court, the doctrine of stare decisis indirectly expands these effects to all similar cases.[28]

The other kinds of effects mentioned above are even less related to the dualism between US and European models. They may be found across an array of constitutional systems, irrespective of legal tradition. Furthermore, in the case of the degree of binding force of the court's decision upon the legislative branch, some argue that weak judicial review defines a category of its own—sometimes called the "commonwealth model" (Gardbaum 2001; Gardbaum 2010; Gardbaum 2013). But this should not be simply considered a third model in addition to the US and the European ones. Rather than demanding the creation of a new category, the dichotomy of strong vs. weak judicial review puts into question the previous categorization.

If weak judicial review is characterized by the weak binding effect of judicial review on the legislature—by the possibility of legislative override (see Goldsworthy 2003), or by a potential (even though sometimes not actual) dialogue between legislature and court (see Hogg and Bushell 1997; Hogg, Rhonton, and Wright 2007; Webber 2002)[29]—then the judicial review exercised in many European countries and in the US should be seen as belonging to the same category: strong judicial review. In those countries, the legislature cannot override the court's decision unless the constitution itself is amended, which is usually neither easy nor common. Additionally, it could be even argued that there are courts that exercise an extra-strong form of judicial review. This is the case, for instance, of Brazil's Supreme Court and Supreme Court of Indian, for they also exercise judicial review of constitutional amendments, thus blocking even this form of institutional dialogue.[30]

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[28] For a comprehensive account of the value of stare decisis, see Fallon Jr. (2001).

[29] In the realm of socioeconomic rights, see Dixon (2007).

[30] Thus, in Brazil and India, in many cases their respective supreme courts could not even tell the legislature to try a different path (e.g., constitutional amendment instead of ordinary legislation). As Favoreu used to argue, this "switchman role" has frequently been played by the French Constitutional Council. According to him, the Council, "placed at a crucial switch, is a kind of switchman . . . that indicates the path a given reform should take in order to be adopted: decree, ordinary law, organic law or constitutional amendment" (Favoreu 1982, 419). *See also* Troper (2003, 111). For a comprehensive analysis of the judicial review of constitutional amendments, see Roznai (2017, 179–225).

viii. Other variables

There are several other, less formal variables that may be taken into account in a typology of judicial review and of constitutional and supreme courts. Many of these variables are not determined by the institutional design of these courts (even though they may be influenced by institutional design). Some examples include judicial independence and degree of compliance of their decisions. Unlike the variables presented in the previous sections, it is usually difficult, or even impossible, to assess the variables mentioned here simply by reading the constitution or the legislation of each country. Still, the study of these variables may be relevant in the context of typology building insofar as it may show that two (or more) courts that are formally identical may play completely different roles within the constitutional and political system of their respective countries.

D. A SHORT DIGRESSION ON TYPOLOGIES

Typologies may be a very powerful tool for understanding the world and, as a consequence, also our research objects. The objections I presented so far against the dualist typology of models of judicial review should thus not be understood as objections against the attempt of building typologies in this realm.[31]

Typologies, just as any other method of making classifications, are simplifications. They aim precisely at reducing complexity. Therefore, when I argue, in the beginning of this chapter, that the Europe and US model dualism is a "very crude simplification," this should be understood as "a crude simplification *even for the purposes of typology building*." In other words, while it is perfectly acceptable to speak of a US system and of an Austrian system of judicial review of legislation as a simply descriptive enterprise, it is nevertheless unsound to take the description of two concrete models, without further qualification, as if the typology must necessarily be constructed upon them.

[31] Neither should they be understood as objections against all dualist typologies as such. As a matter of fact, in other research fields, my work is heavily based on dualist typologies. When I write on electoral systems, I assume a dualist classification of proportional and majoritarian systems (see, for instance, da Silva (2013a)) When I write on balancing and proportionality, I assume a dichotomy between rules and principles (see da Silva (2003) and (2011)). In both cases, however, as well as in the case of models of judicial review, I reject a category labelled "mixed" or "hybrid" and argue that the need of such a category is usually the symptom of flaws in the typology building (see da Silva (2013a, 249, and 2016, 103)).

However, I am not claiming that a typology of systems of judicial review of legislation should take into account all variables presented in this text. A typology based on so many variables, even if it would be able to better capture the many variations across the systems, would be as good as unintelligible. Besides the variables expressed by the two main dichotomies (abstract vs. concrete review and centralized vs. diffuse review), I mentioned seven further variables.[32] For the sake of simplification, assuming that each

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of these variables were dichotomous, a typology based on all these nine variables would encompass 512 (i.e., 2^9) different types of judicial review.[33] Such a typology would clearly fall short of one of the main goals of typologies: namely, reducing complexity. Several cells (types) in such a typology would have only one or two empirical examples and for most types there would be no empirical examples at all.

Therefore, even if it is still a golden rule in conceptual typology building that types must be mutually exclusive and exhaustive, these requirements must be often mitigated in empirical typologies.[34] In this case, Kenneth Bailey argues for a different rule, which he calls the "Min-Max Rule": "The goal of typology construction is to construct a minimum number of types, each of which displays maximum homogeneity" (Bailey 1973, 291).

However, just as the typology should not have too many types, neither should it have too few. In the former case, it would not be able to reduce complexity; in the latter, it would

[32] Timing, appointment of judges, composition of the bench, term, access to the court, deliberation and decision-making process and effects of the court's decisions.

[33] Actually, the number of single types may be much higher than 512. The typology would have 512 types if the variables were mutually exclusive (e.g., a system may adopt either abstract or concrete review, but not both). Since most of the variables are not mutually exclusive, "dichotomous variable" cannot be understand as either abstract or concrete, but rather "abstract: yes or no?" and "concrete: yes or no?" The number of single types will therefore be much higher than 512.

[34] This is what characterizes the contrast between monothetic and polythetic typologies. *See, e.g.*, Bailey (1973). Although this methodological discussion is beyond the scope of this text, the following excerpt may illustrate well what is central to the goals of this chapter: "One can form a monothetic typology and then search for specimens fitting each cell. However, the typology quickly becomes overly large and thus unmanageable if it contains many variables with many categories for each. . . . Some form of reduction to polytheticism is necessary to insure parsimony. . . . Further, there is so much variation in the empirical world that if a typology contains many dimensions, few specimens will be identical on all. The researcher must be practical and group the most similar specimens into a single type, even if they are not identical. Otherwise no real grouping will occur" (Bailey 1973, 295).

not be helpful to grasp some relevant variations in the real world.[35] Having said that, I would like to stress again the first part of my argument: a dualist typology that has to be constantly complemented by a third (and rather amorphous[36]) type labelled *mixed* or *hybrid* —which, in turn, is the type that explains virtually all real experiences of judicial review— seems to be rather useless (see also Fernández Segado 2004, 491).

In addition, this short digression on methodological issues concerning typology construction also sheds more light on the second part of my argument, which is related to the demand of taking other dimensions of judicial review into account. If it does not make sense to construct an enormous typology taking every possible dimension of judicial review into consideration, because such a typology would have hundreds or

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thousands of types, the alternatives to this could be: (i) ignore some of these dimensions; (ii) group similar specimens into a single type (slightly sacrificing homogeneity for the sake of parsimony); (iii) construct several partial typologies and, most importantly, abandon the idea that one of them is the most important no matter what is at stake.

I argue that (i) and (ii) are not promising alternatives for two reasons. First, all dimensions are (or may in many cases be) relevant. Second, such dimensions are completely independent from each other and do not realize only one or a few overarching principles

[35] In the realm of judicial review, see Frosini and Pegoraro, who state: "on the one hand, the need to avoid oversimplified classifications as these would not meet the aim of providing a precise picture of the legal institutions that are object of study, on the other, the necessity of also avoiding classifications that are too detailed as these would risk thwarting the very aim of classifying" (Frosini and Pegoraro 2009, 39).

[36] In this sense, a typology based on the US vs. Europe model dualism, complemented by a third (hybrid) type, does not even fulfil the min-max rule, since the hybrid type may be defined as everything that does not fit into the two other types and therefore displays exactly the opposite of maximum homogeneity.

(or goals) that could justify grouping different but nevertheless similar types.[37] I will analyze the strengths of the third alternative in the following section.

1. Partial Typologies

The construction of several partial typologies is nothing new and has already been done in the realm of judicial review. For instance, if one aims to analyze and classify supreme and constitutional courts based on their decision-making process, the relevant dimension is not whether these courts decide in abstract or within a concrete case, but rather, among other things, if they decide *seriatim* or *per curiam*. And if what is at stake is the degree of binding force of the court's decision upon the legislative branch, the relevant dimension is whether and how the legislature may override a judicial decision that had struck down a piece of legislation, irrespective of whether this decision had been taken within a concrete lawsuit or in abstract.[38] What I have been arguing is, therefore, that research goals should define how a given typology should be constructed, not the other way around. After all, a typology based on dimensions irrelevant to my research goals is irrelevant to my research, even if it is a sound typology.

As a corollary, a typology should not be considered more relevant than others simply because we are more accustomed to it than to others. We need a more robust and substantive reason. And this is exactly what is frequently lacking in the debate on models of judicial review. My argument against the US and Europe model dualism may

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[37] It is thus not the quantity of variables as such that prevents such a grouping (or at least makes it more difficult). When there is an overarching principle or goal, grouping may occur despite the presence of several variables. An example from the realm electoral studies may again be useful to understand this. There is an enormous variation of electoral formulas, constituency magnitudes, ballot structure, types of lists, etc., but it is nevertheless possible to group electoral systems into only two types (proportional and majority systems) without sacrificing type homogeneity, because it is possible to refer to any (conceptual or empirical) system to only two principles of representation: proportional or majoritarian. The maximum of homogeneity is thus related not to the technical details but to the principles of representation (see Nohlen (1984)).

[38] In his recent attempt at developing a typology based on the dichotomy strong versus weak review, Colón-Ríos is explicit: "Although I make some brief references to the distinction between decentralized and centralized systems of judicial review (as well as to the distinction between abstract and concrete review), this distinction is not relevant for the typology presented in this article" (Colón-Ríos 2014, 149).

thus have two versions: the first, and softer, one is based on what I have just argued—i.e., on the assumption that no dimension is more important than others in and of itself. There is, therefore, no overarching typology.

But one could push my reasoning further and assume a stronger version of the objection against the US vs. Europe model dualism. There may be variables that, in the current debate on courts and judicial review, may have a stronger general explanatory power than the traditional dichotomies of abstract vs. concrete review and centralized vs. diffuse review. The contrast between US and Europe (based exactly on these variables) may be considered less relevant than is usually assumed, because it barely addresses the political role of courts within a given constitutional democracy. It is a very formalistic classification, which may make sense from the perspective of the organization of the judicial process of a country, but explains almost nothing else.[39]

Almost everywhere, the debate on judicial review evolved from a formalistic one—within which some of the main issues were: who is legitimate to set aside legislation; within which type of action; what is the status of an unconstitutional law and from which moment does a declaration of unconstitutionality become effective[40]—to a more substantive one which assumes supreme and constitutional courts as major players in constitutional democracies and tries to understand which features are relevant to define how this role is performed. But, oddly enough, it seems that the classification of courts and types of judicial review of legislation did not evolve at the same pace.

E. CONCLUSION

It has been stressed throughout this text that a dualist classification based on the contrast between a US and a European model of judicial review of legislation can hardly explain the diversity of courts in the world. A third category—mixed or hybrid systems—does not help either. One could of course argue that the US and European models are *ideal*

[39] Unless it could be argued, for example, that centralization and abstract review foster (or hinder) a given political profile of the courts, or that the relationship between courts and political powers are strongly determined by these variables (or at least stronger than by other variables).

[40] These were the types of questions that underlay Kelsen's comparison between the Austrian and the US models, because these were the questions that mattered most at that time. *See* Kelsen (1942).

types in the Weberian sense. Ideal types are constructed from a one-sided accentuation of one or a few features of the object being examined. They are therefore abstractions, made for analytical purposes. In their conceptual purity, they "cannot be found anywhere" (Weber 1968, 191). Real systems are always more complex and may combine elements from different models. But they usually lean towards one ideal type. It is possible to assume that Favoreu had a similar idea in mind when he argued that "mixed systems . . . evolve toward one or the other of the two principal models" (Favoreu 1990, 106; see also Stone Sweet 2012, 818). This, however,

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is an empirical and analytical assumption that demands robust demonstration, which is never done.

In conclusion, one could ask if a typology is possible in this realm at all. As I argued in previous sections, the answer can only be affirmative. Classifications and typologies are always possible and it would be odd if this were not true in relation to supreme and constitutional courts. However, the simple fact that a given typology is possible does not mean that it is necessarily useful. Thus, some conclusions may be drawn from what has been argued throughout this chapter:

> (i) A dualist classification seems to have low explanatory power when almost every concrete experience does not seem to fit into either of the categories, thus demanding the creation of a third, loosely defined category called "hybrid systems."
>
> (ii) There are more variables to be taken into consideration than the degree of centralization and the context in which review of legislation is performed. This finding can lead to two different methodological strategies: (a) abandoning the idea of an overarching typology based on one or two dimensions that are supposedly more important than the others;[41] or (b) maintaining the idea of an overarching typology, but not based on the traditional dichotomies.

In any case, it is perhaps time to decisively abandon the labels "US model" and "European model." Thus, I agree with Stone Sweet and argue that the distinction between US and European models no longer matters (see Stone Sweet 2003). However, as I have

[41] Choosing a dimension (or multiple dimensions) as a basis for a typology under this strategy depends solely on research goals.

argued throughout this text, this irrelevance does not lie in the fact that both models are becoming increasingly similar, as Stone Sweet argues, but because the world of judicial review of legislation is too complex to be grasped by such a simple dichotomy.

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