

NEW MODELS OF CONSTITUTIONAL REVIEW

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Recently, in Commonwealth countries such as Canada, UK, New Zealand and Australia (at state level), is emerging a new, distinctive, model of constitutional review, in which courts have broad authority to interpret Bill of Rights provisions, but national legislatures can override courts' interpretations of rights by ordinary majority vote. In the UK, New Zealand and Australia (at state level), where it is not possible for a court to read and give effect to legislation in a way which is compatible with a bill of rights norms, a court may make a formal «declaration of incompatibility». Such a declaration, however, does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given, and is not binding on the parties to the proceedings in which it is made, following the traditional principle of sovereignty of Parliament. The net effect is that the legislature has powers to suspend the effect of courts' interpretation of particular rights, simply by the use of sufficiently clear language. In Canada – in a different constitutional setting – the key provision that ensures this is sect. 33 of the Canadian Charter, or the so-called «notwithstanding clause», with the consequential overriding power conferred on federal Parliament and to the legislature of a province. Also in the Nordic countries (especially in Finland and Sweden), various type of well-established ex ante parliamentary preview and restrained ex post judicial review clearly fit with weak-form model of judicial review of legislation. This essay considers how this new model functions, in constitutional theory and practice of the chosen countries.

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I. INTRODUCTION

After the end of the 20th century – significantly defined as the century of constitutional justice¹ – at the dawn of the 21st century new perspectives open up for the protection of fundamental rights and for a different balance of powers within the constitutional State, in the framework of which unknown forms of constitutional review are being implemented in

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¹ G. ZAGREBELSKY, V. MARCENÒ, *Giustizia costituzionale*, Il Mulino, Bologna, 2012, 545.

the various contemporary legal systems².

The traditional models of judicial review (the American one and the European) both, in fact, appear to be related to a single macro-model of judicial review – adequately defined as *strong-form judicial review*³ – which is characterized by the ultimate primacy of the interpretation of the Constitution carried out by the judicial bodies entrusted with the exercise of the constitutional review of legislation (*judicial supremacy*), provided that the Parliament, in order to override a judicial interpretation of the Constitution issuing the annulment or the disapplication of the reviewed statute, can only resort to the complex procedure of constitutional amendment.

In order to reconcile the traditional institutional principle of parliamentary sovereignty with the need to provide effective guarantee of the fundamental rights, the new model implemented in several legal systems based on Anglo-Saxon matrix⁴ identifies, instead, a different form of balance featuring a sort of “dialogue” between the Courts and the Parliament, according to which the Bill of Rights is laid down in a primary legal source which does not, therefore, enable the judges to set aside any statutory norm deemed to be conflicting with the Bill itself, but compels them to always adopt that interpretation of the legislation which might be the most consistent with the rights in question.

² F. FERNÁNDEZ SEGADO, *La evolución de la justicia constitucional*, Dykinson, Madrid, 2013; L. PEGORARO, A. RINELLA, *Diritto costituzionale comparato. Aspetti metodologici*, Cedam, Padova, 2013; M. DE VISSER, *Constitutional Review in Europe. A Comparative Analysis*, Hart publishing, Oxford, 2013; A. STONE SWEET, *Constitutional Courts*, in M. ROSENFELD, A. SAJÓ (eds.), *The Oxford Handbook of Comparative Constitutional Law*, OUP, Oxford, 2012, 816.

³ M. TUSHNET, *The Relation Between Political Constitutionalism and Weak-form Judicial Review*, in *German Law Journal*, (2013), vol. 14, no. 12, 2249; M. TUSHNET, *The Rise of Weak-Form Judicial Review*, in T. GINSBURG, R. DIXON (eds.), *Comparative Constitutional Law*, Edward Elgar publishing, Cheltenham, 2011, 321.

⁴ S. GARDBAUM, *The New Commonwealth Model of Constitutionalism. Theory and Practice*, CUP, Cambridge, 2013; F. DURANTI, *Ordinamenti costituzionali di matrice anglosassone. Circolazione dei modelli costituzionali e comparazione tra le esperienze di Australia, Canada, Nuova Zelanda e Regno Unito*, Aracne, Roma, 2012.

This is something similar to the need for an «interpretation consistent with the Constitution», often advocated also by the Italian Constitutional Court⁵.

In case of unresolvable conflict between the statute and the rights, the model features – subsequent to the assessment of the Courts of all the possible interpretations of the provision under scrutiny – the ultimate primacy of the legislative intent, while the Courts are exclusively empowered to adopt specific «declarations of incompatibility» through which they warn the Parliament of the existing conflict and of the need to amend the incompatible provisions: the amendment may, however, be discretionally issued only by the legislator, who holds the unaltered constitutional prerogative to having the right to the “last word” on this topic.

In the legal systems of Nordic countries likewise (particularly in Sweden and Finland) a new model of judicial review is being developed.

This is grounded on a dynamic connection between the *ex-ante* constitutional control entrusted to the Parliament and the diffuse control conferred to the Courts, although the latter – due also to a consolidated constitutional customary law – are bound to hold in due consideration the interpretation of the Constitution adopted by the Parliament, before they might possibly rule invalid any statutory provision⁶.

Either the variant of legal systems based on Anglo-Saxon matrix and Nordic countries ultimately appear to be both likewise related to a single new judicial review classificatory type, which can be adequately defined as – in line with the mentioned US literature – *weak-form judicial review*, and which, due to its peculiar characteristics, deserves an adequate in-depth comparative analysis.

⁵ See, recently, Italian Constitutional Court, decision no. 1/2014.

⁶ R. HIRSCHL, *The Nordic Counternarrative: Democracy, Human Development, and Judicial Review*, in *Int'l. Journ. Const. L. (ICON)*, 2011, 451; F. DURANTI, *Gli ordinamenti costituzionali nordici. Profili di diritto pubblico comparato*, Giappichelli, Torino, 2009, 149.

II. THE CHARACTERISTICS OF THE NEW MODEL

As known, the global expansion of constitutional review, particularly after the second world war, has been followed by the proliferation of the models of judicial review, and by their mutual hybridization, so as to induce many scholars to constantly discover new classificatory schemes and new categories, which have not proven to be flexible enough in order to include the newly emerged experiences⁷.

This is due to the fact that the topic of constitutional justice proves to be one the most controversial, for the very reason that the increase in role has caused its unusual expansion and transpositions hardly ever a-critical, yet always related to the requirements of the different legal systems.

When faced with such phenomena, the comparative literature has the task of putting in order the experiences of the various legal systems, not only identifying the elements of novelty as they show up but also suggesting more effective methodologies of investigation and classification.

As for the national scholars, they cannot read their own legal systems only through hindsight, but by putting them in classificatory frameworks adequate to the evolution of the subject matter and to the legislative and practice innovations, concerning the changes in the single legal systems and in the concrete models of judicial review⁸.

In this perspective, as it has already been remarked in the past, the traditional bipartition of the models of judicial review in the American model and the European/Kelsenian seems to be outdated, due to the process of their progressive and uninterrupted convergence, which has rendered obsolete the traditional bipolarism, making it necessary to identify

⁷ L. MEZZETTI, *Introduzione*, in L. MEZZETTI (cur.), *Sistemi e modelli di giustizia costituzionale*, vol. II, Cedam, Padova, 2012, 8.

⁸ L. PEGORARO, *Elementi determinanti ed elementi fungibili nella costruzione di modelli di giustizia costituzionale*, in R. BALDUZZI, M. CAVINO, J. LUTHER (cur.), *La Corte costituzionale vent'anni dopo la svolta*, Giappichelli, Torino, 2011, 291.

a new typology which might offer a higher analytical capability of the judicial review systems⁹.

Along this line, having ascertained the convergence of the two traditional models, when approaching the study of the judicial review systems, it seems more appropriate to adopt a unitary reference framework, within characterized by the exercise of functions for the protection of the Constitution, whereof the nature and aiming are mainly objective and of functions for the protection of the Constitution, whereof the nature and aiming are mainly subjective.

A rejection of the traditional dichotomy, then, and a reversal in the method of analysis: start not with the United States and Austria, in order to match with them the various experiences (possibly shaping mixed or hybrid classes), but start with the extraordinary variety of the positive law wherefrom to possibly re-construct the classes¹⁰.

Within this framework, it is thus possible to observe an interesting form of evolution, on this topic, featuring the British legal system and legal systems based on Anglo-Saxon matrix, more closely pertaining to this constitutional tradition (e.g.: Australia, Canada and New Zealand): in these it is evidencing a progressive – and relentless – manner to the override of the traditional principle of absolute supremacy of the Parliament, which has for very long inhibited any form of constitutional review of the statutes¹¹.

⁹ F. FERNÁNDEZ SEGADO, *La giustizia costituzionale nel XXI secolo. Il progressivo avvicinamento dei sistemi americano ed europeo-kelseniano*, Bonomo, Bologna, 2003, 11. Cfr. anche R. SCARCIGLIA, *La giustizia costituzionale oltre i "modelli storici". Ipotesi di un approccio cognitivo*, in L. ANTONIOLLI, G.A. BENACCHIO, R. TONIATTI (cur.), *Le nuove frontiere della comparazione*, UniTn Press, Trento, 2012, 107.

¹⁰ See also L. PEGORARO, cit., 283.

¹¹ P. LEYLAND, *The Constitution of the United Kingdom. A Contextual Analysis*, Hart Publishing, Oxford, IInd ed., 2012; H.P. GLENN, *Legal Traditions of the World. Sustainable Diversity in Law*, OUP, Oxford, IVth ed, 2010, 450; T. GROPPI, *La genesi della giustizia costituzionale negli ordinamenti di matrice britannica*, in R. ORRÙ, F. BONINI, A. CIAMMARICONI (eds.), *Le origini della giustizia costituzionale in prospettiva storica: matrici, esperienze, modelli*, ESI, Napoli, 2012, 47.

The diffusion of the models among the legal systems based on Anglo-Saxon matrix, in fact, determines, along with the enactment of the new Bills of Rights, also the introduction of original interpretative and declaratory tools in favour of the Courts.

A new role – which was precluded in the past – is conferred upon them.

This responsibility entails a deeper control over the legislator, who traditionally stands in a position of unassailable institutional primacy within the legal system, due to the traditional (and for long times unquestioned) principle of British derivation of the *sovereignty of Parliament*¹².

These new tools now available to the Courts are being implemented thanks to specific legal provisions (United Kingdom¹³; Australia¹⁴), and via judicial practice (New Zealand¹⁵).

They substantially aim at enabling the Courts, to experiment new interpretation techniques concerning the subject matter of the protection of rights.

And, furthermore, at enabling the Courts to have the power to issue, in case of ascertained antinomy between the Bill of Rights and the parliamentary legislation, specific «declarations of incompatibility»: these, however, do not have the effect to set aside or declare void the provisions conflicting with the rights, but have the purpose to render the Parliament aware of the existence of the aforesaid conflict and, as a consequence, to suggest their repeal through express abrogation (or amendment), which can be carried out only by the Parliament itself.

¹² J. GOLDSWORTHY, *Parliamentary Sovereignty. Contemporary Debates*, CUP, Cambridge, 2010; A.L. YOUNG, *Parliamentary Sovereignty and the Human Rights Act*, Hart, Oxford, 2009.

¹³ *Human Rights Act 1998*, section 4.

¹⁴ *Australian Capital Territory's Human Rights Act 2004*, section 32; *Victorian Charter of Human Rights and Responsibilities 2006*, section 36.

¹⁵ New Zealand Court of Appeal, *Moonen v. Film and Literature Board of Review* (2000) 2 NZLR 9 (CA).

What ensues is the creation of a new model of constitutional protection of rights and of judicial review, which differs from the traditional ones and develops in original directions – with comparable contexts also in the experiences of several Nordic legal systems – worthy of thorough comparative analysis¹⁶.

Following to the application of the methodological proposal aimed at the selection of the «determinant elements»¹⁷ in order to identify the models of judicial review, the new classification is grounded, thence, on the joint analysis of two distinct features to be held «determinant», that is the mechanisms for the protection of the constitutional rights, which are offered by the legal system and, conversely, how the relationship among the powers of the State – particularly between the legislative and the judiciary – is structured.

The use of these distinction criteria thus allows to identify three different typologies of constitutional review systems:

a) the strong-form (or judicial supremacy) model, wherein the protection of the fundamental rights is entrusted to the Courts (ordinary or constitutional), which are empowered to set aside or declare void the statute conflicting with the constitutional rights, consequently conferring to the same Courts the ultimate primacy with regard to the interpretation of the Constitution, which the legislator can possibly override – if deemed unacceptable – only by applying the complex procedure of constitutional amendment;

b) the traditional model of sovereignty of Parliament (or legislative supremacy), wherein the protection of the fundamental rights essentially falls within the

¹⁶ «Par l'action conjointe des juges et du législateur [...] ces pays sont passés de la souveraineté parlementaire à une nouvelle forme de garantie des droits qui ne copient pas les modèles des justice constitutionnelle existante»: M.C. PONTTHOREAU, *Droit(s) constitutionnel(s) comparé(s)*, Economica, Paris, 2010, 375.

¹⁷ J.L. CONSTANTINESCO, *Einführung in die Rechtsvergleichung, Band I: Rechtsvergleichung*, Carl Heymanns-Verlag, Köln, 1971.

competence of the Parliament, so that the Courts are not enabled to carry out any control over the constitutional legitimacy of the statutes;

c) the new model, termed *weak-form judicial review*, that is intermediate and is characterized by an *ex-ante* political control concerning the compatibility of statutes with the fundamental rights, followed by an *ex-post* judicial review concerning the conformity of the statutes to these rights.

In the variant of legal systems based on Anglo-Saxon matrix, the Courts are not empowered to set aside or rule invalid any statute conflicting with them; they are only enabled to issue specific «declarations of incompatibility», through which they may warn to the Parliament the existence of the aforesaid conflict. The final decision concerning the possible amendment (or abrogation) of the statute declared incompatible is, thus, only up to the Parliament.

In the Nordic variant, conversely, the Courts, although empowered with the judicial review of legislation, can exercise it only in cases of manifest unconstitutionality or, more often, when it was not possible to exercise the *ex-ante* parliamentary control.

III. THE VARIANT OF LEGAL SYSTEMS BASED ON ANGLO-SAXON MATRIX

In recent years, within the experience of some of the major Commonwealth countries (e.g., Australia, Canada and New Zealand), it is possible to observe an intense constitutional “work-in-progress”, which is gradually building a new model of constitutionalism, different from the US and Europe, particularly with regard to the constitutional relations between the legislative and the judiciary.

This model consequently has a deep influence, in this discipline, on the institutional structure of the former mother country¹⁸.

¹⁸ S. GARDBAUM, *The New Commonwealth Model of Constitutionalism*, in *Am. Journ. Comp. Law*, 2001, 707.

The diffusion of the models among the legal systems based on Anglo-Saxon matrix has developed steadily, in particular, since the end of the last century, whence, beginning with the *Canadian Charter of Rights and Freedoms* laid down in the new Canadian Constitution in 1982, has featured an intense phenomenon of “constitutional migration”¹⁹.

This has favoured the introduction of new and authentic Bill of Rights in the legal systems of New Zealand, United Kingdom and – only at the sub-federal level – Australia²⁰.

Therefore more effective forms of protection of the fundamental rights can be experimented through these means.

Along with the new Bill of Rights, furthermore Courts are, as aforesaid, now granted new interpretative and declaratory mandates in the domain of fundamental rights, consequently giving rise to the new model of judicial review under scrutiny.

As Gardbaum has finely summarized, in fact, «the new Commonwealth model of constitutionalism consists in the combination of two novel techniques for protecting rights; these are mandatory pre-enactment political rights review and weak-form judicial review. The first technique requires both of the elective branches of government to engage in rights review of a proposed statute before and during the bill's legislative process. [...] The second techniques of rights protection that is constitutive of the new model is weak-form judicial review. It is this technique that decouples judicial review from judicial supremacy, meaning that although courts have powers of constitutional review, they do not necessarily or automatically have final authority on what the law of the land is. This is because one of the defining features of the technique (and so of the new

¹⁹ S. CHOUDHRY (ed.), *The Migration of Constitutional Ideas*, CUP, Cambridge, 2006.

²⁰ S. STEPHENSON, *Constitutional reengineering: Dialogue's migration from Canada to Australia*, in *Int'l. Journ. Const. L. (ICON)*, 2013, 870.

model) is that it grants the legal power – but not the duty – of the final word to the legislature»²¹.

In practice, then, the *ex-ante* control of conformity to the rights is conferred to a political authority, that is to the Minister of Justice (in Canada²²), the Attorney-General (in New Zealand²³ and the two Australian states²⁴) or to the Minister alternatively responsible (in the United Kingdom²⁵), who has the duty to make a formal preventive statement to the Parliament concerning the specific compatibility of the new legislation with the Bill of Rights, thus resulting in the accomplishment of a higher overall awareness of the Government and the Parliament on the question of respect of fundamental rights²⁶.

Courts are, instead, empowered to exercise an *ex-post* control on the conformity to the rights in question, that cannot however go so far as – Canada excluded – to set aside the statute conflicting with the provisions of the Bill of Rights.

Although it enables the same Courts to adopt specific «declarations of incompatibility», that do not imply *per se* the invalidity of the statute concerned, as rather having the purpose of “notifying” to the Parliament the existence of the aforesaid conflict²⁷.

Consequently it stays with the Parliament alone to decide the possible measures to be adopted. However, practice has so far evidenced a scrupulous respect on the part of the Parliament towards the judicial

²¹ S. GARDBAUM, *The New Commonwealth Model of Constitutionalism. Theory and Practice*, cit., 26-27.

²² *Department of Justice Act 1985*, section 4.1.

²³ *New Zealand Bill of Rights Act 1990*, section 7.

²⁴ *Australian Capital Territory's Human Rights Act 2004*, section 37; *Victorian Charter of Human Rights and Responsibilities 2006*, section 28.

²⁵ *Human Rights Act 1998*, section 19.

²⁶ J. HIEBERT, *Constitutional Experimentation: Rethinking How a Bill of Rights Function*, in in T. GINSBURG, R. DIXON (eds.), *Comparative Constitutional Law*, cit., 298.

²⁷ R. WEILL, *The New Commonwealth Model of Constitutionalism Notwithstanding: On Judicial Review and Constitution-Making*, in *Am. Jour. Comp. Law*, 2014, 127.

indications, this almost always resulting in the amendment by the legislator of the provisions declared incompatible by the Courts.

In this sense, the Canadian experience appears to differ in part since, from the patriation of the Constitution onwards, the Courts can, as known, exercise the traditional diffuse control of constitutionality, enabling them to set aside the legal provisions deemed to be in contrast with the Constitution.

However, also the Canadian experience is worth being put on the same level as the other legal systems based on Anglo-Saxon matrix herein analysed, as also within this legal system it is being experienced an original, totally specific, institutional structure in the relationship between the legislative and the judiciary within the domain of the protection of rights, due to a notorious provision of the Charter, better known as «notwithstanding clause» (sect. 33)²⁸.

Consequently this allows to include also Canada in the framework of the new model of judicial review currently being developed in the legal systems under scrutiny²⁹.

IV. THE VARIANT OF NORDIC LEGAL SYSTEMS

On comparative grounds, the legal systems of Nordic countries have likewise featured a progressive evolution in the traditional constitutional principle of the supremacy of the Parliament, that has inhibited the true implementation of any, albeit fledgling, form of judicial review for quite a long time.

²⁸ J.B. KELLY, M.A. HENNIGAR, *The Canadian Charter of Rights and the Minister of Justice: Weak-Form Review within a Constitutional Charter of Rights*, in *Int'l. Journ. Const. L. (ICON)*, 2012, 35.

²⁹ «The strongest of the weak-form mechanisms gives the Courts power to suspend the legal effect of a statute pending a legislative response through ordinary legislation rather than constitutional amendment. Canada's so called 'notwithstanding clause', section 33 of the Charter of Rights, is the primary example of such a mechanism»: M. TUSHNET, *The Rise of Weak-Form Judicial Review*, cit., 325.

This led to the consolidation of the present institutional structure, which is experimenting forms – though “cautious” – of diffused constitutional review of the statutes carried out by the Courts.

From this point of view and in line with the scopes of this essay, the constitutional legal systems of Sweden and Finland are a case point.

In these countries, in fact, more than in any others belonging to the same Nordic legal-cultural tradition, it is possible to observe, an interesting dynamic coordination between the *ex-ante* and the *ex-post* constitutional control in the domain of fundamental rights.

In Sweden, the diffuse constitutional review was, as known, introduced only following to the constitutional amendment of 1979, which has empowered the Courts to set aside the statutes conflicting with the Constitution although in the only case of «manifest» contrast (chapter XI, article 14, Const.).

This, however, coexists with an *ex-ante* control of conformity to the Constitution of the statutes under discussion in Parliament, conferred to a specific body (*Lagrådet*, Council on Legislation).

This organ is composed of judges (also retired) from the Supreme Court and Supreme Administrative Court and is called on to give opinions on proposed statutes, when these are requested by the Government or by a Parliamentary Committee.

In the range of possible hypotheses, such pronouncements are always required if the proposed statutes pertain to the domain of fundamental rights (chapter VIII, article 21, Const.).

Constitutional practice has so far evidenced a substantial respect on the part of the Government and Parliament towards the opinions expressed *ex-ante* by the Council on Legislation.

It has likewise evidenced that, when the Council on Legislation has not raised any objections to the constitutionality of statutes, hardly unlikely

have the Courts, during the *ex-post* control, set aside the same statutes due to unconstitutionality³⁰.

In Finland, the diffuse constitutional control exercised by the Courts was, instead, totally precluded until 2000³¹.

Subsequent to the enforcement of the new Constitution, it has been expressly stipulated that the Courts are empowered to set aside the statutes on grounds of unconstitutionality in the only case of «manifest» contrast with the Constitution (art. 106), as in the case of Sweden.

However, also for this legal system a preeminent role of the *ex-ante* constitutional control is emphasized.

In this instance, the latter is conferred to the Parliamentary Constitutional Law Committee (*Perustuslakivaliokunta*).

Although this is composed of only members of the Parliament, in case of review of constitutionality it is used to hearing the opinion of distinguished constitutional law scholars (e.g., mainly academics/university professors), due to a consolidated constitutional practice.

These opinions are almost always faithfully observed by the Committee in question.

As a consequence – also confirmed by the *travaux préparatoires* of the Constitution – the *ex-post* constitutional review conferred to the Courts cannot, in practice, go as far as to declare any «manifest» conflict with the Constitution, if the Constitutional Law Committee has not *ex-ante* ascertained the existence of the aforesaid conflict³².

³⁰ T. BULL, *Judges without a Court – Judicial Preview in Sweden*, in T. CAMPBELL, K.D. EWING, A. TOMKINS (eds.), *The Legal Protection of Human Rights: Sceptical Essays*, OUP, Oxford, 2011, 392.

³¹ J. HUSA, *The Constitution of Finland. A Contextual Analysis*, Hart Publishing, Oxford, 2011.

³² J. LAVAPURO, T. OJANEN, M. SCHEININ, *Rights-Based Constitutionalism in Finland and the Development of Pluralist Constitutional Review*, in *Int'l. Journ. Const. L. (ICON)*, 2011, 505; K. TUORI, *Judicial Constitutional Review as a Last Resort*, in T. CAMPBELL, K.D. EWING, A. TOMKINS (eds.), *The Legal Protection of Human Rights: Sceptical Essays*, cit., 365.

The Swedish and Finnish legal systems confirm, thence, the existence of the new model of judicial review.

In fact, in these experiences it is likewise possible to observe new techniques for the protection of the fundamental rights. These innovative techniques are based on an increased awareness and involvement of the Government and the Parliament.

When drafting and subsequently approving the statutes, these are thus supported by the significant role played by the *ex-ante* control, which further determines major effects on the *ex-post* constitutional control exercised by the judiciary.

The Courts show, in fact, a deep deference towards Parliament and thence confine the cases of declaration of unconstitutionality to rare hypothesis, limited to the only instances when the *ex-ante* control has not been exercised³³.

The last Swedish constitutional amendment, in force as of January 2011, in any case deleted the requirement of the «manifest» contrast versus the Constitution for the purpose of the diffuse control conferred to the Courts (chapter XI, article 14, new text): we shall see how it works in the future constitutional practice.

³³ «The criterion of an evident conflict with the Constitution as a presupposition of the courts' power to set aside a parliamentary law fulfils even other important functions than just establishing the primacy of the *ex ante* review exercised by the Constitutional Law Committee. Thus, with this criterion explicitly spelled out, the Finnish and Swedish Constitutions have, as it were, positivised the plea for judicial restraint. Related to the general requirement of judicial restraint, the criterion of an evident conflict entails the primacy of interpretive means for avoiding contradictions with the Constitution. Accordingly, the *travaux préparatoires* to the Bill of Rights of the 1995 and the new Constitution of 2000 stressed the courts' obligation to construe statutes consistently with the Constitution. This obligation connects the Finnish model to such examples of the New Commonwealth Model of Constitutionalism, as the New Zealand Bill of Rights and the UK Human Rights Act 1998, which also are premised on the primacy of interpretive tools»: K. TUORI, *Combining abstract ex ante and concrete ex post review: the Finnish model*, in European Commission for Democracy Through Law (Venice Commission), CDL-JU(2010)-011.

V. CONCLUSIONS

The most recent developments in constitutionalism and the «migration» of ideas, precedents³⁴ and institutes in the domain of judicial review, offer, at last, the opportunity for a significant re-consideration of the by now traditional models implemented over time within diverse comparative experiences.

This occurs also in legal systems of consolidated democracy, with institutional structures traditionally considered to be stable.

The legal systems based on Anglo-Saxon matrix and the Nordic ones feature, as a matter of facts, new interesting elements concerning the tools for the protection of the fundamental rights.

In order to avoid what Kelsen had traditionally indicated as the danger of the «transfer of power»³⁵ – that is the possibility that the constitutional control, by introducing constitutional legal contents not ascribable to the Constitution, might discretionally expand, jeopardizing the prerogatives of the legislator and menacing democracy – in these legal systems new forms of judicial review are being experimented.

They are premised on the attempt to implement a more harmonious correlation between the Courts and the Parliament with regard to the effective protection of the fundamental rights.

This is subsequent to the changeover from an institutional structure, which conferred this guarantee exclusively upon the legislator (in compliance with the classic principle of *sovereignty of Parliament*), to another, whereof the constitutional core idea is to ensure an *ex-ante* control on the

³⁴ T. GROPPi, M.C. PONTTHOREAU (eds.), *The Use of Foreign Precedents by Constitutional Judges*, Hart Publishing, Oxford, 2013.

³⁵ H. KELSEN, *La garantie juridictionnelle de la Constitution (la justice constitutionnelle)*, Paris, 1928.

compatibility of every proposed statute to the fundamental rights, carried out in Parliament and through bodies in any case referring to the Parliament.

And furthermore to entrust the Courts with the task of ruling over the possible conflicts between the statute and those rights, through the application of new interpretative and declaratory tools.

In the Anglo-Saxon variant of this model, the Courts are only empowered to make formal «declarations of incompatibility», subsequent to the assessment of all the possible interpretations consistent with the rights in question.

These do not have the effect of declare void or setting aside the contrasting statute, but only of warning the Parliament of the existence of this conflict, thus enabling it to amend through legislation.

The practice so far carried out evidences, altogether, a scrupulous respect on the part of the Parliament towards the aforesaid pronouncements: the Parliament has consequently amended through legislation the inconsistent provisions.

In the Nordic variant, conversely, the Courts – although empowered with the diffuse constitutional control – can set aside the unconstitutional provision in the only cases of manifest contrast with the Constitution.

It is thus stipulated in the Constitution the judicial restraint in the domain of judicial review, since the disapplication of statutes is limited to very few hypotheses and, in any case, when it was not possible to exercise the *ex-ante* control.

The new model discussed here has, therefore, the merit of implementing an innovative and original model concerning the relationship between the legislative and the judiciary in the domain of constitutional review³⁶.

³⁶ R. HIRSCHL, *How Consequential is the Commonwealth Constitutional Model?*, in *Int'l. Journ. Const. L. (ICON)*, 2013, 1092.

It thus ensures a balance of powers and an effective protection of the constitutional rights, as such resulting from the institutional cooperation – otherwise defined as “dialogue”³⁷ – between the Parliament and the Courts, aimed at preventing the institutional predominance of one power over the other (*judicial supremacy* vs. *legislative supremacy*).

As a consequence «its mechanism for reducing the tension between parliamentary supremacy and constitutional limitations on that supremacy provides the ground for serious reflection on fundamental features of constitutional design in modern democracies»³⁸.

³⁷ P. HOGG, A. BUSHELL, *The Charter Dialogue Between Court and Legislatures (Or Perhaps The Charter of Rights Isn't Such A Bad Thing After All)*, in *Osgoode Hall L. Jour.*, 1997, 75.

³⁸ M. TUSHNET, *The Rise of Weak-Form Judicial Review*, cit., 331.